



Human Resources Information Sheet

New Unfair Dismissal Changes from 1st of July 2009

The WorkChoices system of 100 Employee or less exemption for Unfair Dismissal claims will no longer apply from 1st of July 2009.

Under the new bill, Employees will have access to unfair dismissal remedies if they have completed 6 months of service (or 12 months if they are employed by a business with 15 Employees or less).

A small business (as defined by the legislation) may dismiss an Employee fairly after 12 months if the Employer complies with the Fair Dismissal Code for Small Business and the Small Business Fair Dismissal Code Checklist. Employees must be given a reasonable opportunity to improve before being dismissed and they must be advised the seriousness of the issue and that their employment could be terminated.

The use of the qualifying periods will be crucial in determining suitability of Employees. Where you have Employees who are under performance management or show no willingness to improve, termination should be considered whilst they are in their qualifying period. Qualifying periods again are 6 months for Employers who employ 15 and more and for small business – 12 months.

Small business is defined as having 15 or less full time Employees.

Employers still have the right to summarily dismiss an Employee without notice where the Employer believes on reasonable grounds that the conduct of the Employee is serious enough to warrant the immediate termination of their employment. These areas could include any conduct that has a serious and or detrimental impact on the business such as theft and fraud, violence or assault, breaches of pertinent policies such as workplace health and safety.

Fair Work Australia will replace the Australian Industrial Relations Commission, Australian Industrial Registry, Australian Fair Pay Commission, Australian Fair Pay Commission Secretariat, and Workplace Authority and operate as a “one stop shop” for workplace relations.

FWA will have the right to vary awards, make minimum wage orders, approve enterprise agreements, determine unfair dismissal claims and make orders in relation to good faith bargaining.

Unfair dismissal claims must be lodged with Fair Work Australia (FWA) within 7 days of dismissal. FWA will determine unfair dismissal claims via informal conferences or hearings. Lawyers will only be able to represent clients with the consent of FWA and appeals will only be allowed in limited circumstances.

Reinstatement will be the primary remedy, otherwise compensation will remain at a maximum of six months.

Whilst the Fair Code Dismissal Checklist is there for Small Businesses, I encourage all Employers to implement performance counselling guidelines and structured poor performance management systems to ensure that you limit your risk of unfair dismissal claims against you.

Fair Dismissal Code Checklist

	Yes	No
<p>1. How many employees are employed in the organisation (including full time, part time and regular long term casual employees):</p> <ul style="list-style-type: none"> - under 15 - 15 or more 	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>
<p>2. Has the Employee been employed in this business as a full time, part-time, or regular casual employee for 12 months or more?</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>3. Did you dismiss the Employee because of a genuine redundancy as set out in the Code, explaining the reason for redundancy if so?</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>4. Do any of the following statements about dismissal on reasonable grounds apply?</p> <ul style="list-style-type: none"> • The Employee was stealing money or goods from the Business • The Employee defrauded the business • The Employee threatened me or other Employees or clients with violence, or actually carried out violence in the workplace • The Employee committed a serious breach of occupational health and safety procedures 	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
<p>5. Did you dismiss the Employee for some other form of serious misconduct?</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>6. Did you dismiss the Employee because of the Employees unsatisfactory conduct, performance or capacity to do the job? If so:-</p> <ul style="list-style-type: none"> • Did you clearly warn the Employee that improvements to conduct or performance would have to be made? • Did you provide the Employee with a reasonable amount of time for improvement? If so, how much? 	<input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/>

<ul style="list-style-type: none"> • Did you offer to provide any training or development opportunity? • Did the Employee subsequently improve? • Did you give the Employee the reason for dismissal and an opportunity to respond? • Did you keep any records of warnings made to the Employee, or of discussions on how his or her conduct or performance could be improved? • Did you dismiss the Employee for some other reason, if so, what? • Did the Employee voluntarily resign or abandon his or her employment, giving details if necessary. 	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	<input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>
<p>7. Did you dismiss the employee for some other reason?</p> <p>If yes, what was the reason:</p>	<p>Yes</p> <input type="checkbox"/>	<p>No</p> <input type="checkbox"/>
<p>8. Did the employee voluntarily resign or abandon his or her employment?</p>	<p>Yes</p> <input type="checkbox"/>	<p>No</p> <input type="checkbox"/>

Exemptions

From the 1st of July 2009 all Employers under the Federal workplace relations regime will be subject to unfair dismissal claims by their Employees unless the Employees are exempt for one of the following reasons:-

They are a high income earner:

As part of the changes to the legislation, Employees who are “high income earners” will not be covered by the new Modern Awards that commence from the 1st of January 2010. As a general rule, they will also be exempt from unfair dismissal proceedings. The Fair Work Act provides that a “high income earner” is an Employee who has earnings of more than \$100,000 gross per annum as a full time equivalent salary excluding compulsory superannuation. This is to be indexed from 27th of August 2007 and then annually from 1st of July each year which suggests that the high income threshold will actually start higher than \$100,000.

They are a short term irregular casual Employee:

Casual employees are not covered. This means casual Employees without regular and systematic employment for a 6 month or 12 month period, depending on whether or not the business is a small business or not.

They are dismissed within their qualifying period:

Employees dismissed within their “qualifying period” will not be able to commence unfair dismissal. There is currently an exemption to unfair dismissal where an Employee is dismissed within the 6

month qualifying period (this applies to all Employees in the Federal workplace relations regime until 30th of June 2009. The qualifying periods will then change from 1st of July 2009 to be:-

- ❖ 6 months – for a business with 15 Employees or more (medium to large business); and
- ❖ 12 months for a business with less than 15 Employees (small business).

To commence an unfair dismissal claim, an Employee must have completed their qualifying period. Whether an Employee has served the qualifying period is assessed either:-

- ❖ When the Employee is given notice of termination by the Employer; or
- ❖ When the dismissal actually takes effect, whichever happens first.

An Employees period of employment is defined as the period of continuous service the Employee has completed with the Employer. Generally service as a casual Employee does not count towards the period of employment. However, where the casual Employee worked on a regular and systematic basis, and had a reasonable expectation of a continuing engagement on a regular and systematic basis, they will be able to commence unfair dismissal where their qualifying period has elapsed.

They are employed for a specific task or a specific period, or are seasonal employees:

For these Employees, due to the nature of their employment, the employment comes to an end due to completion of the task / season technically there is not dismissal.

End of Information Sheet
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