Legal Requirements

Introduction

Whether you're hiring staff – either for the first time or if you have been an employer for a while - it's important that you understand what the law requires of you. This section provides resources to help you understand your rights and responsibilities.

The information provided is a guide only and should not be used as a substitute for seeking independent professional advice, which should be sought regarding your specific circumstances.

Fair Work Commission

From the 1 July 2009, the Australian Industrial Relations Commission was replaced by a new body called the Fair Work Commission

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Fair Work Ombudsman

The Fair Work Ombudsman is an independent statutory body whose role is to ensure compliance with Australian workplace laws.

The Fair Work Information Statement, published by the Fair Work Ombudsman, is a document to help you and your employees better understand the Fair Work Act. There is also a handbook available that provides more detailed information.

IT'S THE LAW

You ***must*** give all new employees a copy of the Fair Work Information Statement, this provides basic information on matters that will affect their employment. You must also make sure that all employers have access to the National Employment Standards and a copy of the relevant award.

The Fair Work Information Statement provides information for employees on:

- National Employment Standards (NES)
- how a transfer of business effects entitlements

- requests for flexible working arrangements
- modern awards
- agreements under the Fair Work Act 2009
- individual flexibility arrangements (IFA)
- freedom of association and workplace rights
- Termination of Employment
- Right of Entry (including privacy laws to protect personal information)
- Fair Work Ombudsman and Fair Work Commission

RESOURCES AND REFERENCES

Fair Work handbook - Word Doc
Fair work Information Statement- PDF
Fair Work Commission Website

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Different Types of Employment

An employee is someone who works under an employment contract and is an individual, rather than a company or a partnership. Their employment is controlled by state (Some Employers in WA) and federal industrial relations laws and Awards. (See resources below for more information.)

An employee doesn't have the right to control how and when work is performed and can't delegate their work to others.

IMPORTANT

Some laws, such as workers compensation, superannuation and certain tax laws may apply to independent contractors.

There are a number of different types of employees including:

- permanent full-time employees
- permanent part-time employees
- casual employees and
- seasonal employees

It is important to understand each type of employee as they have different rights and entitlements.

Permanent employees

Full-time employees work fixed hours each week and are entitled to a number of different forms of leave such as annual leave, personal/carers leave, long-service, and parental leave. They are also

entitled to notice of termination.

Part-time employees are employed for fixed hours every week and have the same entitlements as full-time employees. Their entitlements are calculated on a pro-rata basis, for example, if they only work half as many hours as a full time employee, they are only entitled to half as many annual leave days. If public holidays fall on days usually worked, the employee must be paid for that holiday. The Pastoral Award 2020 requires employers to roster part time employees for a minimum of 3 consecutive hours on any shift or 2 hours for full time secondary students who are 18 years or under and who are working in the Dairy Industry.

> **NOTE**
> Employees who work similar hours each week, hours that are known in advance, should be employed as permanent part time rather than casual. Ask an industry adviser for more information.

Casual employees

Casual employees do not have regular working hours or any arrangement or expectation of continuing work. A typical casual employee is employed on a daily basis as needed and they are not entitled to notice of termination. If public holidays fall on a day that they are rostered to work the employee must be paid for that holiday if they do not work.

Casual employees must be:

- paid at the **Hourly Rate +25%** (***20% for non national system employers in WA***). This is to make up for other entitlements that they do not receive such as annual leave and paid personal/carer's leave.
- paid for a minimum of 3 hours work on each occasion they attend work or 2 hours for full time secondary students who are 18 years or under and who are working in the dairy industry. ***(Pastoral Award 2020 only)***

Unfair termination laws can still apply to some casual employees if they have been engaged on a regular basis and systematic basis for an ongoing period and they have a reasonable expectation of continuing work. For more information, see the Termination section.

> **NOTE**
> Casual conversion - from the first full pay period on or after 1 October 2018, regular casual employees are able to request that their employment be converted from casual employment to full time or part time work. See definition and requirements below.

Regular casual employees are defined as employees who have in the preceding 12 months worked a pattern of hours on an ongoing basis which the employee could without significant adjustment continue to perform as a full time or part time employee.

Casual conversion - what's the procedure?

- Employers will have to give notice of the right to convert before completion of the first 12 months' work for new casual employees and for current employees by 1 January 2019. This means giving the employee a copy of clause 11.8 of the Pastoral Award 2020 or clause 11.5 of the Horticultural Award 2020 or clause 1.5 of the Cotton Ginning Award 2020.
- The employee must make a written request to the employer and the employer must consult with the employee and consider the request.
- The employer may refuse the request on reasonable grounds.
- Any refusal must be in writing within 21 days of the request being made and state the reasons.

Seasonal employees

Seasonal employees are hired to perform work during a specified season with no expectation of continuing work once that season has finished. The season must be clearly defined, for example by weather or temperature, availability of the particular product or activity, or marked by certain conditions such as festivities, calving, or harvesting.

Under the federal industrial laws, seasonal employees are not entitled to notice of termination and if they are dismissed at the end of the season they cannot bring an action for unfair dismissal.

Seasonal Worker Program

The Seasonal Worker Program program offers Australian employers in the agriculture and accommodation industries access to a reliable workforce able to return season after season. Employers in a range of agriculture industries including cattle, sheep, grain and mixed enterprises can apply to be part of the Seasonal Worker Program.

Information for employers on how to recruit seasonal workers - Link

Independent contractors

You may often have professionals or trades people come to work on your property (e.g. electricians, vets and other technicians). The jobs and services these professionals perform are usually clear cut and well defined.

However, you may also engage an independent contractor to perform a specific job that needs to be done by a person with a particular skill (like silage making or hay making). Sometimes that person's employment status on the farm, as an employer or an independent contractor, can be unclear.

It is important to be able to distinguish between an independent contractor and an employee as there are different rules, rights, and obligations. See the Contractor or Employee fact sheet for more information.

Employment of children

The laws about the employment of children vary from state to state and deal with issues such as the age at which children are permitted to work, the types of work they can perform and the hours they can work.

Awards, the NES, and the Fair Work Act apply to the employment of children. Awards contain specific information about junior and trainee wages. See Awards for more information.

RESOURCES AND REFERENCES

WA Information Document - PDF
Contractor or Employee? - Word Doc

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Employing people from overseas

On 4 April 2020, the federal government announced changes to the visa system as it applies to Working Holiday Makers (WHMs) (subclass 417 working holiday visas and subclass 462 work and holiday visas).

People with a WHM visa:

- whose visa is due to expire in six months who have not completed the requirements for a second or third working holiday visa as at 4 April 2020 (3 months' and 6 months' work in specified work respectively)
- and who wish to stay in Australia (and/or are unable to return to their home country)

are able to work in 'specified work', which includes dairy farming, if they obtain an extension to their visa via the Temporary Activity subclass 408 Australian Government Endorsed Event (AGEE) stream visa. The "Pandemic visa" is free.

Visit Department of Home Affairs for further information and to apply for the "Pandemic visa" and read the Frequently Asked Questions for WHM visa.

For more information, direct all enquiries to the Department of Home Affairs

Remember: working in Australia without a visa with work rights is a breach of the law by both employer and employee. Check visa conditions online at VEVO

WHMs working in 'specified work', which includes dairy farming, are able to work for the one employer for 12 months, rather than six months.

WHMs who have completed the 3 month or 6 month requirement for specified work should apply in the ordinary manner for a second or third 417 or 462 visa. A bridging visa will be provided to enable them to continue to work while the visa is processed.

Hiring backpackers or working holiday makers can be the perfect solution to help with those busy times on your farm. However, it is important to remember that there are strict laws around hiring non-Australian citizens.

If you knowingly, ***or recklessly*** allow someone without a valid working visa to work or refer them for work you could face criminal charges. People found to be working illegally can also be removed from the workplace without any notice being given to their employer. This can disrupt the workplace and might end up costing you money due to loss of income.

IT'S THE LAW

Every worker from overseas must have a valid Australian visa with work rights.

It is your responsibility to check potential employee's rights to work, preferably at the application stage and before an offer of employment is made. You can check a persons' right to work in Australia by asking to see their passport or other evidence of Australian citizenship, such as a birth certificate or certificate of citizenship, as well as appropriate photo identification.

REMEMBER

Australian workplace laws apply to overseas workers.

Overseas workers, legally employed in Australia, have the same rights as Australian workers. All entitlements, penalty rates, unfair dismissal laws, workers compensation, work health and safety laws, still apply for overseas workers. Australian tax laws still apply but the rate depends on whether the overseas worker is defined as an 'Australian resident'. See the fact sheet below for further information.

There is a free online service you can use to check the different types of visas, Visa Entitlement Verification Online (VEVO). This is the safest and easiest way to check work entitlements of all new workers from overseas as it provides you with current visa information. You may also like to read the "Do your employees have a valid visa to work in Australia?" booklet.

Australian citizens and permanent residents only need 1 single check at the time of employment. Temporary visa holders must be rechecked to ensure that no changes have occurred. You should check these visas on VEVO every 3 months. If you discover an employee is an illegal worker, you must end the working relationship immediately.

IT'S THE LAW

Employers are responsible for checking all workers' rights to work in Australia. It is an offence under the Migration Act 1958 to knowingly or recklessly allow workers to work, or to refer workers for work, where those workers are from overseas and either illegally in Australia or working in breach of their visa conditions.

RESOURCES AND REFERENCES

Visa Entitlement Verification Online (VEVO)

"Do your employees have a valid visa to work in Australia?" booklet. - PDF

Overseas workers taxation fact sheet - Word Doc

Overseas workers and visas fact sheet - Word Doc

FAQ Backpackers - what to pay them - PDF

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National Employment Standards (NES)

The NES are a safety net of 10 minimum conditions, set out by law, for all full, and part-time employees. Any Award or Workplace Agreement must provide at least these minimum entitlements for employees. Some of the conditions in the NES may also apply to casual employees. For more information and links to further resources, see below. You can see a summary of the NES conditions in this fact sheet or read more detailed information about the NES at the Fair Work Ombudsman website.

IT'S THE LAW

You must make sure that all employers have access to the National Employment Standards. It's also a good idea to give them all a copy of the Introduction to the National Employment Standards. (See Resources and References section below for a copy of these documents)

RESOURCES AND REFERENCES

The National Employment Standards

Introduction to the National Employment Standards Fact Sheet - PDF link

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Awards

The Pastoral Award 2020, Horticulture Award 2020, and the Cotton Ginning Award 2020 are all modern awards created under the Fair Work Act. They came into operation on 1 November 2020 and, depending on your business structure and type of farm, one of the three awards will cover all your employees (except some Managers). They also apply to some Employees in WA

IMPORTANT

Awards are constantly changing and being updated. Make sure you have the latest version of the award by visiting the Fair Work Commission web site and downloading the Pastoral Award 2020, Horticulture Award 2020, Cotton Ginning Award 2020.

For more information on awards and which one is right for your business, see the Awards section.

IT'S THE LAW

The Pastoral Award 2020, Horticultural Award 2020, and the Cotton Ginning Award 2020 require employers to keep a copy of the relevant award at the workplace. This could be a hard copy on a workplace noticeboard or an electronic copy, whichever is more easily accessible by employees.

RESOURCES AND REFERENCES

Fair Work Ombudsman - Website

Pastoral Award 2020 - Weblink

Horticulture Award 2020 - Weblink

Cotton Ginning Award 2020 - Weblink

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Employee Entitlements

To make sure you're paying your employees all of their entitlements, you need to read and understand the appropriate award. Awards set minimum wages and conditions for employees in a particular industry. These entitlements apply in addition to the National Employment Standards. (For more information, see the Awards section.)

Clause 32 of the Pastoral Award 2020 and clause 15 of the Horticulture Award 2020 and clause 17 of the Cotton Ginning Award 2020, provide for the Minimum Wage which can be paid to each classification of employee. This is the minimum you can legally pay an employee. These minimum wage rates are reviewed each year by the Fair Work Commission. This is called the 'annual wage review'. Any changes to minimum wages usually start to apply from the first pay period commencing on or after 1 July.

REMEMBER

If you need more help understanding the award, or just want to make sure that you have the right information, check with your local industry advisors.

Your employee's minimum wages depend on a number of things, including:

- whether you are in WA;
- their age (if they're under 20);
- their job duties, responsibilities and any qualifications they're required to have.

Other things that employers sometimes forget about are:

- loading for Casual Workers;
- minimum three-hour shift length for casual or part-time staff or 2 hours for full time secondary students who are 18 years or under and who are working in the dairy industry. (Pastoral Award 2020 only); and minimum 2 hour shift length for casual staff under the Horticulture Award 2020 and Cotton Ginning Award 2020.
- 17.5% loading for Annual Leave

The Fair Work Ombudsman provides a quick and easy reference for calculating minimum wages called the Pay and Conditions Tool or P.A.C.T. Once you have selected the relevant Award, Classification and start date for your employee, you can calculate entitlements, minimum wages, and leave. See the Awards section for more information.

RESOURCES AND REFERENCES

Fair Work Ombudsman 'The P.A.C.T. – Pay and Conditions Tool

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Things to avoid

You should make sure you, your managers, and your staff understand the laws that apply on your farm. These are a few key things that aren't okay in the workplace.

- Unpaid work trials. You can't ask people to work for free.
- Cash in hand payments. It's against the law to pay an employee without taking out tax. This is called paying someone 'cash in hand.' You can pay an employee in cash as long as you deduct tax from their earnings and send it to the Australian Taxation Office (ATO). For information on tax law, contact the ATO.
- Not giving employees a pay slip within 1 day of being paid. You need to give employees a pay slip that has certain information on it – see Payroll Section. for more details and a pay slip template.
- Not paying employees in money – giving them goods (including food) or services instead of pay is against the law. Any deductions that have been agreed upon such as for accommodation need to be put in writing and recorded on employee Payslips.
- Making unlawful deductions from employees' pay. Payroll deductions can only be made in very limited circumstances – see Payroll Section.
- Not giving employees the meal breaks or rest breaks set out in the Award or Agreement.
- Unreasonably refusing employee requests to take their Leave Entitlements.
- Sham contracting. Independent contracting is where one business does work for another business. Some employers try to avoid paying minimum rates, tax and entitlements by claiming that someone is an independent contractor, when really they're an employee. This is called 'sham contracting', and it is illegal – refer to FAQ – Contractor or employee?

Fair Work Inspectors regularly conduct random face to face visits of farms and check that employers are fulfilling their obligations regarding record keeping. Inspectors often check that employers are giving pay slips with all the necessary information, within one working day of pay day, and are keeping correct time-and-wages records.

RESOURCES AND REFERENCES

Link to ATO

Links to Awards Section

FAQ – Contractor or employee? - Word Doc

The Law checklist

- Have all employees been given a copy of the Fair Work Information Statement?
- Is the relevant award available to all employees covered by the award?
- Are the National Employment Standards available to all employees?
- Are all casual and part time employees engaged for a minimum of 3 hours or 2 hours for full time secondary students who are 18 years or under and who are working in the dairy industry? (Pastoral Award 2020 only)
- Are all casual employees engaged for a minimum of 2 hours (Horticulture Award 2020 and Cotton Ginning Award 2020)
- Do you pay 17.5% leave loading on holiday pay for award employees?
- Does your employee have a valid Australian work visa?
- Do you know the difference between a contractor and an employee

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Also relevant Employers