

# Employment Contracts

**JobWatch**  
Employment Rights Legal Centre

## What is an employment contract?

If you have agreed with your employer that you will work in return for wages, you have an employment contract, regardless of whether or not your terms and conditions of employment are in writing.

Having an employment contract, whether it is written or verbal, means that you are an employee. This is different from being an independent contractor or sub-contractor. An employee is someone hired for their time and skills (and usually to continue doing a job), whereas a contractor is someone who runs their own business and is engaged to perform a service (like fixing a broken hot water system).

Please see the JobWatch 'Independent Contracting Traps' Fact Sheet for relevant information.

Employment contracts come in various forms. They can be written or verbal or a combination of both. The written component can be named different things like 'agreement' or 'terms and conditions of employment' or 'workplace agreement'.

There may be implied terms to your contract which were not written down or verbally agreed upon but which are still binding. There are also various other rules which might affect your employment such as Modern Award conditions, Enterprise Agreements and legislation covering anti-discrimination and health and safety.

## Written contract

If you are offered a written employment contract it is important that you read and understand it before you sign and return a copy of the contract to your employer.

You should not sign anything you haven't read or fully understood. It is a good idea to get some advice about a contract before signing it so that you understand the terms and conditions of your employment before you are locked into the contract.

You may wish to contact JobWatch, your union or a lawyer for assistance before you agree to the terms of the contract to make sure that what you have been offered is a good deal and it complies with minimum terms and conditions of employment.

You should always keep a copy of the contract for your records.

Employment contracts can be confusing, particularly if you are just starting out in the workforce or if English is not your first language. This Fact Sheet is designed to explain the key elements that should be present in everyone's employment contract and what you can do if you encounter problems or changes to your existing contract.

## Disclaimer

This Fact Sheet contains information of a general nature only and is not a substitute for professional legal advice. You should obtain legal advice from a lawyer about your particular situation before acting on any of the following information. This Fact Sheet is designed for employees and prospective employees in Victoria, Tasmania and Queensland only. If you are not from these states, you should obtain advice about your specific case as soon as possible.

## What else is included in an employment contract?

Apart from the written terms of the contract, there may be other things that are still binding even if they have not been written down. These things might include:

- details about your duties at work;
- what level you are (e.g. supervisor);
- any work rules, practices or policies;
- procedures used at your workplace;
- your rate of pay, your employment status; and
- your hours of work.

## Implied terms in a contract of employment

Under an employment contract, you have both entitlements and obligations (duties) which may be explicit or implied. There are a number of implied obligations that bind all employers and employees. Below is an explanation of some of the implied obligations on each side of an employment contract. These obligations have developed over many years through decisions made by courts and tribunals in Australia and overseas. Some of these obligations have also been written into statute (i.e. legislation) and so they may be referred to as 'statutory obligations'.

### Employers

Employers have obligations towards their employees, including:

- to pay their employees' wages;
- to provide them with work (in certain circumstances);
- to provide them with a safe and healthy workplace; and
- to treat them with trust and respect – this means that the employer cannot do things that are likely to damage the employment relationship.

### Employees

Employees have obligations to their employers, including:

- to perform their job with due skill and care – this means doing your job properly and not being negligent or incompetent;
- to obey all reasonable and lawful directions – this means doing what the employer tells you to do, as long as the instruction is reasonable and lawful;
- to account for money received; and
- to act in their employer's best interests – this means you should not do things that could damage or hurt your employer's business.

The above obligations are fundamental to the operation of every contract of employment. Failing to work in a way that is in line with your obligations as an employee could give your employer a reason to dismiss you. At the same time, if your employer breaches its contractual obligations, you may be entitled to take legal action against them.

Depending on what the alleged breach is, you might, for example, sue for breach of contract in the Magistrates' Court of Victoria or bring an unfair dismissal claim against your employer if the breach has led to a termination of employment. Alternatively, if the alleged breach involves an underpayment of wages, it may be more appropriate for you to recover those wages through the Fair Work Ombudsman (FWO).

**Note!**  
Very few written contracts specify all of the terms and conditions that are applicable to both parties.

Please see JobWatch's 'Unfair Dismissal' and 'Getting Paid and Underpayments' Fact Sheets for relevant information. Note, there is a **21 day** time limit for filing an unfair dismissal claim.

## Legal minimum standards

Regardless of the terms of any employment contract you may enter into, you cannot receive employment conditions that are less than the legal minimum standards that are set out in:

- the National Employment Standards (NES); and
- any applicable Modern Award or Enterprise Agreement.

A contract containing terms and conditions that are lower than the minimum standards is unenforceable in relation to those terms and conditions. You may be able to recover money owed to you. For further assistance, contact JobWatch, your union, or a lawyer.

## National Employment Standards (NES)

The NES sets out some of the minimum conditions of employment for most Victorian, Tasmanian and Queensland employees and provides for:

1. a maximum standard working week of 38 hours for full-time employees, plus 'reasonable' additional hours
2. a right to request flexible working arrangements in certain circumstances e.g. to care for a child of school age or younger, if you have a disability or are 55 years of age or older
3. the right to receive offers and make requests to convert from casual to permanent employment
4. parental and adoption leave of 12 months (unpaid), with a right to request an additional 12 months
5. if permanent, four weeks paid annual leave each year (pro rata if part-time)
6. if permanent, ten days paid personal/carer's leave each year (pro rata if part-time), two days paid compassionate leave for each permissible occasion; and for all employees, two days unpaid carer's leave for each permissible occasion and five days a year of unpaid family and domestic violence leave
7. community service leave for jury service or activities dealing with certain emergencies or natural disasters (unpaid except for jury service)
8. long service leave
9. if permanent, public holidays and the entitlement to be paid for ordinary hours on those days
10. if permanent, notice of termination and redundancy pay
11. the right for new employees to receive the Fair Work Information Statement and Casual Employment Information Statement

### Note!

Some employees are not entitled to all the conditions in the NES. For more information contact the Fair Work Infoline on 13 13 94.

## Modern Awards and Enterprise Agreements

Most Victorian, Tasmanian and Queensland employees will also be covered by a Modern Award which, among other things, will set out the minimum rate of pay for your particular job as well as entitlements to overtime and penalty rates etc. Entitlements in Modern Awards are in addition to the NES.

If your employment is covered by an Enterprise Agreement, this will also provide further minimum conditions in addition to those set out in the NES.

If your employment is covered by one of these instruments your employment contract cannot provide lesser or inferior terms (even if the contract is in writing and even if it is signed).

## Individual flexibility arrangements

If your employment is covered by an Enterprise Agreement or Modern Award, you can vary your minimum entitlements by signing an Individual Flexibility Arrangement (IFA). For an IFA to be valid you must be better off overall. For further assistance, contact JobWatch, your union, or a lawyer.

## Guarantee of annual earnings

Further, while a Modern Award might cover a particular type of employee, it will not apply to you if you have a written guarantee of annual earnings at or above a certain threshold (indexed annually, see the Fair Work Commission website for details).

## Contract changes

During the life of an employment contract, some of its terms and conditions may change. This can happen for various reasons including length of employment, changes in technology and pay increases.

Any proposed change or variation to your contract should be negotiated (discussed) with you. That is, one party cannot legally change the contract without the consent of the other party. Just because an employer wants to change the contract does not mean you have to accept the change. You are entitled to say “no” to a proposed change.

## Rejecting a proposed change

If you disagree with a proposed change, it is sometimes a good idea to confirm this in writing to your employer (always keeping copies of these letters or emails for your own records).

Here is an example of a letter to an employer, rejecting a proposed change to the hours of work. You would need to change the wording of this letter to suit your circumstances.

### Example of a letter rejecting a proposed contract change

Dear [Employer Name],

I confirm the following:

- I have been employed with you as a full time machinist since 1 January 2016.
- The terms and conditions of my employment include that I am to work eight hours per day from Monday to Friday (excluding a 30 minute unpaid lunch break).
- Yesterday, you notified me that starting from next week my hours will be changed to four hours per day from Monday to Friday.

Please note that once an employment contract is in place (whether or not it is a written contract), one party cannot change that contract without the consent of the other party. Any variation to my contract (including any change to my hours) should therefore be negotiated and agreed upon by both parties.

I do not accept the proposed change to my hours. Accordingly, I ask that you confirm as a matter of urgency that my contract will remain unchanged and that I will continue to be employed on my existing terms and conditions.

Yours sincerely  
[Your Name]

## Rejecting a proposed change (cont.)

Sometimes changes to a contract can be so fundamental that they create a whole new contract. In these situations, you might be entitled to take action for unfair dismissal, provided that you never accepted the proposed change. You could then effectively claim that by insisting on the variation, your employer ended your old contract and therefore terminated your employment.

Circumstances that may mean the end of an employment contract include:

- switching from permanent employment status to casual;
- a major cut in hours of work;
- a major cut in pay, classification or conditions; and/or
- a major change in job description, location or responsibility (e.g. demotion).

If anything like this happens in the course of your employment, you should seek further assistance from JobWatch, your union, or a lawyer.

## Terminating the employment contract

Because an employment contract is legally binding, it must be ended in the legally correct way. What is correct depends on what sort of contract you have.

1. A contract which is specified to last for a defined period (also referred to as a fixed term contract) or a specific project will automatically come to an end upon expiry of that timeframe or when the project comes to an end, unless both parties agree to renew or extend the contract.

Therefore if your employment ends simply because the set time period has expired (i.e. because of 'the effluxion of time') or the project has been completed, you will not be entitled to lodge an unfair dismissal claim, as the employment has not been terminated at the initiative of the employer. If you have been dismissed prior to the end of your fixed term contract, you may be eligible to make an unfair dismissal claim or a breach of contract claim.

2. However, more commonly, an employment contract that states that it will last for a certain period of time also allows you or your employer to end the employment within the life of the contract. This is not a true fixed term contract. In this case, if your employer terminates your employment you might, depending on the circumstances, be entitled to pursue an unfair dismissal action, seeking reinstatement or compensation for amounts you would have earned if the contract had continued.
3. An ongoing contract which has no expiry date (ie, a contract for a permanent position) can be terminated by either party with proper notice. Proper notice is discussed further below.

Apart from giving an employee proper notice, an employer who wishes to terminate a permanent employee's employment should be aware of potential claims under the *Fair Work Act 2009*. For example, if an employer dismisses an employee without a valid reason and without notifying the employee of that reason, it may be open to the employee to lodge an unfair dismissal claim or a claim for failure to make a payment instead of notice.

Please see JobWatch's 'Unfair Dismissal' Fact Sheet for relevant information. Note, there is a **21 day** time limit for filing an unfair dismissal claim.

Please see JobWatch's 'Unfair Dismissal' and 'Notice of Termination' Fact Sheets for relevant information.

## Notice periods

A permanent employee with an ongoing contract must be given a minimum period of notice, or pay instead of that notice, unless they have engaged in serious misconduct that justifies summary dismissal. The minimum statutory notice period varies depending on the employee's length of service. The minimum periods (which apply even if they are not mentioned in a written employment contract) are as follows:

Period of Continuous Service	At Least
Up to 1 year of service	1 week
1 – 3 years of service	2 weeks
3 – 5 years of service	3 weeks
More than 5 years of service	4 weeks

Employees aged 45 or over, with at least two years of continuous service, are entitled to one week extra.

If there is no agreement reached between you and your employer about how much notice must be given for a termination of employment, it is possible that you will be entitled to more notice than simply the minimum period as outlined above, particularly if you are employed in a senior managerial role. What is proper or reasonable notice in these circumstances will depend on factors such as your employment duties, length of service, age, industry standards etc.

## How does an employee end the contract?

If you want to end the contract (i.e. resign) you also have to give proper notice of the termination, unless the employer has fundamentally breached your contract and has made it impossible for you to continue working there.

It is generally best to resign in writing and keep a copy of your resignation letter. You can then prove that you gave the correct amount of notice and, if necessary, why you have resigned. An employer does not have to let you work out the notice period, but if they say they do not want you to work out the time given, then they have to pay you the difference between the time worked and the notice given.

If you do not give the correct amount of notice when resigning, your employer may be entitled under an applicable Modern Award or Enterprise Agreement to withhold up to one week's wages only (other entitlements may not be withheld) if the employee notice specified in the Award or Enterprise Agreement is not given. If you fail to give any additional period of notice required under your employment contract, your employer may be entitled to sue for any damages your employer may have suffered as a result of you not giving the correct notice, provided they can show an actual loss.

In practice, employers sometimes unlawfully withhold final payments from the worker who is leaving (for example, any annual leave that has not yet been taken and should be paid out at the end of employment). If you give the correct amount of notice, you will minimise the chances of your employer withholding any monies that are owed to you.

**Note!**  
Remember, these are minimum periods only, so if your contract, Modern Award or Enterprise Agreement requires your employer to provide more notice than the above, your employer is legally obliged to provide that much notice or payment instead of notice.

**Note!**  
If you do not know what the applicable notice period is in your case (for example from your written employment contract, or from the relevant Modern Award or Enterprise Agreement) you should seek further assistance from JobWatch, your union, or a lawyer.

## Constructive Dismissal

In some instances you may feel that you have been forced to leave your employment because of something the employer has done or not done (i.e. the employer's conduct has resulted in the termination of employment). You may be able to argue that you have been constructively dismissed (as part of an unfair dismissal claim). This is a complex area of law and, if this applies to you, it is strongly recommended that you seek further assistance from JobWatch, your union, or a lawyer before you leave the employment.

Please see JobWatch's 'Constructive Dismissal' Fact Sheet for relevant information.

## Confidentiality

You must not misuse or disclose any of your employer's confidential information which is acquired during your employment.

Even after your employment ends, there may be some limitations on what sort of information you may use or disclose. That is, you will still be bound by a duty of confidentiality, meaning that you will not be entitled to misuse any of your former employer's sensitive or secret information (including trade secrets) or information which you did not properly acquire in the course of your employment.

Information which is not properly acquired might include, for example, information which you might have deliberately memorised in order to take business away from your employer.

You will not, however, be prevented from using information which makes up your employee 'know-how', or your body of acquired skills and experience, as this will not be seen to be 'confidential information'.

## Post-employment restraints of trade

Some written contracts of employment contain what is known as a post-employment restraint of trade clause. This is a clause that seeks to stop you from working in competition with your employer for a certain period of time after your employment ends. For example, your employment contract might specify that after the employment ends you agree not to do any of a number of things, including:

- work for a competitor;
- solicit your employer's clients;
- do business with your employer's clients; or
- poach your employer's staff.

A restraint of trade clause will only be enforced by the courts if it is reasonable in all the circumstances having regard to such things as the geographical area and the duration of the restraint, and is no more restrictive than reasonably necessary to protect the legitimate business interests of the employer.

## Where to get help

### JobWatch's free and confidential Telephone Information Service

**P:** (03) 9662 1933 (Melb Metro), 1800 331 617 (Regional Vic, Qld, Tas)

**W:** [jobwatch.org.au](http://jobwatch.org.au)

Fair Work Infoline (Office of the Fair Work Ombudsman)	13 13 94
Fair Work Commission	1300 799 675
Community Legal Centres Australia	02 9264 9595
ACTU Worker Information line (for referral to a union)	1300 362 223
Law Institute of Victoria's Legal Referral Service	03 9607 9311
Queensland Law Society (for referral to a lawyer)	1300 367 757
Law Society of Tasmania (for referral to a lawyer)	03 6234 4133

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JobWatch acknowledges the Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which we are located and where we conduct our business. We pay our respects to ancestors, and Elders, past, present and emerging.