

Notice of Termination

Written notice

Under the National Employment Standards (NES) set out in the *Fair Work Act 2009*, if you are eligible to receive notice, your employer must give you written notice specifying the day of termination of your employment no later than the last day you worked for your employer.

Your employer can give this notice by delivering it to you personally, leaving it at your last known address or by sending it to your last known address by pre-paid post.

Your employer may receive a financial penalty for not giving you a written notice even if it has complied with the minimum notice of termination or pay instead of notice requirements.

Minimum notice

It is unlawful for your employer to terminate your employment without giving you the required period of notice or pay instead of notice.

Pay instead of notice should be calculated at the full rate of pay for the hours that you would have ordinarily worked had your employment continued until the end of the notice period. The required periods of minimum notice under the NES are set out in the following table.

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.

The minimum periods of notice under the NES apply to all national system employees (subject to the exceptions below). You may be entitled to a longer notice period under a Modern Award, Enterprise Agreement or your employment contract.

Am I entitled to notice?

1. You must be an employee

Workers engaged as genuine independent contractors or sub-contractors are not entitled to notice or pay instead of notice under the NES. In some circumstances workers who are called contractors may be legally recognised as employees. If you do not know your employment status or you are unsure whether you are a genuine contractor or not, you should seek further assistance from JobWatch, your union, or a lawyer.

This infosheet is designed to help you understand your rights about notice of termination and to enable you to take the most appropriate action.

Disclaimer

This infosheet 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 infosheet 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.

2. You must be eligible

You are not entitled to notice or pay instead of notice of termination under the NES if, at the time of termination, any of the following exceptions applied:

- You were employed for a specified period of time, for a specified task or for the duration of a specified season (unless a substantial reason for your employer employing you this way was to avoid its notice obligations).
- You were a casual employee.
- You were a trainee (other than an apprentice) bound by a training agreement and your employment is for a specified period or it is limited to the duration of the training agreement.
- You were a daily hire employee in certain areas of the building and construction or meat industries.
- You were a weekly hire employee in the meat industry, whose termination is determined wholly by seasonal factors.
- You are guilty of serious misconduct including willful or deliberate behaviour that is inconsistent with the continuation of your employment contract and conduct that causes imminent and serious risk to a person's health or safety or the employer's reputation, viability or profitability.
- You are an employee prescribed by the Act's regulations as an employee who is not entitled to notice or pay instead of notice of termination.

3. The termination of employment must be at the initiative of the employer

Your employer must have ended your employment. You cannot have voluntarily resigned. However, you may have been forced to resign or leave because of your employer's conduct which may still constitute a termination 'at the initiative of the employer'. This is called a constructive dismissal.

Sometimes you can use this argument to make an unfair dismissal claim where you didn't resign voluntarily but were forced out of your employment by something your employer did (such as an assault) or didn't do (continued non-payment of wages). Before you leave your employment, seek further assistance from JobWatch, your union, or a lawyer.

My employment been terminated with little or no notice

If you have not been given the notice or pay instead of notice to which you are entitled, you may claim this amount as an underpayment of employment entitlements. If you worked for part of the notice period, you are entitled to be paid for the remainder.

You have **6 years** to file a claim in an eligible court from the date your pay instead of notice was due to you. You should also consider writing to your former employer to demand the payment, and making a formal request for assistance to the Fair Work Ombudsman before filing your claim in court.

In limited circumstances, you may be entitled to more than the minimum pay instead of notice under the NES, or possibly more notice than is provided for in your employment contract. For further assistance, contact JobWatch, your union, or a lawyer.

Note!

Some types of employees are not entitled to minimum notice of termination or pay instead of notice. If you are unsure whether you are covered by the NES, you should seek further assistance from JobWatch, your union, or a lawyer.

Note!

Sometimes a casual employee may be legally recognised as a permanent employee in certain circumstances. See JobWatch's 'Casual Employment' infosheet for more information.

Note!

See JobWatch's 'Constructive Dismissal' infosheet for more information.

For example, if you are over the age of 45, worked for your employer for 6 years and you worked one week of notice after you were told you were dismissed, you are entitled to 4 weeks wages as pay instead of notice.

Separation Certificates

Your former employer has a legal obligation to provide you with a Separation Certificate for Centrelink purposes. If your employer does not have a precedent form of a Separation Certificate, you can obtain one from Centrelink.

If your former employer refuses to provide you with a Separation Certificate within a few days of termination, you may contact Centrelink to make a report. Centrelink has the power to contact your former employer and request them to provide you with the Certificate. Under legislation, it is a strict liability offence (carrying possible imprisonment for up to 12 months) for an employer not to comply with a Centrelink request to provide the Certificate.

Employee notice requirements

The NES does not require employees to give minimum notice of resignation. However, you may be required to give the minimum notice of resignation set out in your applicable Modern Award or Enterprise Agreement. Most Awards require employees to give the same notice period for resignation as employers are required to give for termination, and authorise employers to withhold up to one week's wages only (other entitlements may not be withheld) if the period of notice of resignation given by an employee is not sufficient. Employers may not lawfully withhold pay where sufficient notice of resignation is not given, unless this is permitted under an Award or Enterprise Agreement.

However, you may also have to give notice of resignation under your employment contract. It is possible for this period to be longer than required under the applicable Modern Award or Enterprise Agreement. If you do not give the notice of resignation required under your contract, even if you have complied with your Award or Enterprise Agreement, your employer may be able to make a legal claim against you for breach of contract, provided that they can show that your breach has caused them an actual loss.

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

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
Centrelink	132 850

Note!

See JobWatch's 'Getting Paid and Underpayments' infosheet, and 'Making a small claim under the *Fair Work Act 2009*' resource.

You should also see JobWatch's 'Unfair Dismissal' and 'General Protections Dispute - Termination claim' infosheets. If you are eligible, you only have **21 days** from the date of your dismissal to file these claims at the Fair Work Commission.

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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.