Modern awards and enterprise agreements

Legal information for community organisations

This fact sheet covers:

► what governs employment relationships under the *Fair Work Act 2009* (Cth) (*Fair Work Act*)?
► what is a modern award?
► when does a modern award apply?
► what is an enterprise agreement?

An employment contract determines the terms of an employment relationship. However, these terms can be changed by a modern award or an enterprise agreement under the *Fair Work Act*.

If an employment contract provides an entitlement that is less than an applicable modern award or enterprise agreement, the lesser provision does not have effect - the more beneficial entitlement applies to the employee.

Modern awards

Modern awards set out the minimum employment entitlements for the majority of employees in a particular industry or occupation.

Enterprise agreements

Enterprise agreements set employment entitlements for employees of a particular employer or group of employers. They are normally negotiated between the employer and employees collectively, usually through a union.

There are specific terms that must be included and specific terms that must not be included in an enterprise agreement. An enterprise agreement can’t provide entitlements that are overall less than those provided by the relevant modern award.

Generally, except where an employee is covered by an enterprise agreement, a modern award applies to everyone who works in the industry or occupation it covers.

If an enterprise agreement is terminated by the Fair Work Commission, the appropriate modern award will apply.
What is a modern award?

Modern awards contain the minimum employment entitlements for employees. There are approximately 122 modern awards that cover most occupations and industries in Australia.

Modern awards can’t include entitlements that are less beneficial to employees than the National Employment Standards (NES). The NES are 10 minimum standards of employment that apply to all employers and employees covered by the Fair Work Act.

Modern awards include, among other things, terms concerning:
- the engagement of full-time, part-time and casual employees
- minimum rates of pay
- penalty rates for overtime, shift work and weekend work
- leave, and
- allowances to be paid

When does a modern award apply?

A modern award applies to the majority of employees who work in the industry or occupation it covers. However, it’s possible for certain ‘high income employees’ (those who earn more than $148,700 as of 1 July 2019) to be excluded if they have a guarantee of annual earnings.

If an employee is covered by an enterprise agreement, the modern award that would otherwise cover the employee will not apply (although some award terms may be incorporated into the enterprise agreement). If the enterprise agreement ends, the appropriate modern award will generally then apply.

Finding the right modern award

To identify the modern award that covers your employees, you must consider the industry in which you operate, and the employee’s job type and duties.
Awards and enterprise agreements Cth

Common awards for not-for-profit organisations:

Social, Community, Home Care and Disability Services Industry Award 2010
This award applies to employers and employees engaged in:
• the crisis assistance and the supported housing sector
• the social and community services sector; the home care sector, and
• the family day care sector

Clerks - Private Sector Award 2010
This award applies to employers and employees in the private sector throughout Australia regarding employees engaged wholly or primarily in clerical work, including administrative duties of a clerical nature.

Miscellaneous Award 2010
This award applies to employees not covered by any other Modern Award, who are unskilled, semi-skilled or trade qualified, and not performing managerial or professional work. This award may also cover certain charities in limited circumstances.

Tip
You can check the ‘coverage’ clause (usually under section 4) of a modern award to see if it covers you and your employees. For example, the Social, Community, Home Care and Disability Services Industry Award 2010 says the award applies to employers in the social and community services sector (as well as other sectors) and applies to employees listed in the classifications found in the award.

Related resources
For help finding the applicable modern award, see our flow chart ‘How to find your modern award’.

The Fair Work Ombudsman can also help you find the applicable modern award using its ‘Find my award tool’. This tool allows searches by occupation and industry to help determine the applicable modern award.

Caution
There are both industry-based and occupational-based awards. This means that multiple awards may appear to cover your employees. For example, a call centre operator employed in the social and community services sector could potentially come under both the Clerks – Private Sector Award 2010 and the Social, Community, Home Care and Disability Services Industry Award 2010.

You must take care to determine which award is the most appropriate by comparing the coverage clauses (clause 4) of the awards to your employees’ job type, duties and industry. Some awards may contain exclusions which indicate which award takes priority. If not, the correct award will be that which is most appropriate to the work performed by the employee and the environment in which the employee normally performs the work.

You may need help from a lawyer to determine this question.
What is an enterprise agreement?

An enterprise agreement is a collective agreement made between an employer (or employers) and their employees about the employment relationship between them.

A modern award will not apply to an employee when an enterprise agreement applies to them. If the enterprise agreement is terminated and not replaced by a subsequent enterprise agreement, the appropriate modern award will then apply.

An enterprise agreement must not exclude the NES. To the extent that it does so, it will have no effect.

Example

The NES provides that employees (other than casual employees) are entitled to 4 weeks of paid annual leave (or 5 weeks in the case of shift workers).

If a term of an enterprise agreement provides that employees are only entitled to 3 weeks’ paid annual leave, this term would not comply with the NES and would have no effect. The NES entitlement of 4 weeks’ annual leave will automatically apply.

An enterprise agreement must also pass the Better Off Overall Test (BOOT) (discussed below) – this means the employees are better off under the enterprise agreement than under the relevant modern award.

How is an enterprise agreement made?

An enterprise agreement is made through collective bargaining between an employer (or employers) and employees. It can be a complex process because:

- employers must comply with a number of steps when negotiating an enterprise agreement with their employees, and
- there are certain terms that:
  - must be included
  - may be included, and
  - can’t be included

For example, an enterprise agreement can’t include a term that excludes any NES entitlement.
Bargaining representatives

When negotiating an enterprise agreement, the parties will usually have bargaining representatives.

An employer will generally be their own bargaining representative. If employees are members of a union, the union will usually be the employees' bargaining representative. However, the employees can appoint anyone to be their bargaining representative (including themselves).

Bargaining process

Once bargaining has begun (because the employer has agreed to bargain or a Fair Work Commission order initiates bargaining), the employer must give employees a Notice of Employee Representational Rights within 14 days. You can download the template (which must be followed) on the Fair Work Commission website.

All bargaining representatives must bargain in good faith and comply with the good faith bargaining requirements. These requirements include:

• attending and participating in meetings
• disclosing relevant information
• responding to proposals from other representatives in a timely manner
• giving genuine consideration to the proposals of other representatives, and
• refraining from ‘capricious’ or unfair conduct

As long as the bargaining representatives have bargained in good faith, they don’t have to agree to the proposed agreement.

At any time (21 or more days after the Notice of Representational Rights is issued), an employer may put a proposed enterprise agreement to the vote. An agreement is made if 50% plus 1 of eligible employees vote on the agreement, and 50% plus 1 of the voters vote in support of the agreement.

Approval of the enterprise agreement by the Fair Work Commission – the Better Off Overall Test

Once a lawful enterprise agreement is reached, the Fair Work Commission must approve the enterprise agreement.

To approve an enterprise agreement, the Fair Work Commission must be satisfied the employer has followed all the necessary steps and that the agreement contains appropriate terms.

Modern awards are used by the Fair Work Commission as the benchmark for assessing enterprise agreements before approval. The Fair Work Commission will apply the ‘Better Off Overall Test’ (BOOT).

The BOOT allows award conditions (but not NES conditions) to be traded off or excluded, as long as the total remuneration and benefits received by the employee leave them better off overall than if the conditions remained the same. That said, the enterprise agreement can’t provide for a minimum base pay rate lower than the applicable award, or national minimum wage if no award applies. As a result employers must identify what modern award would apply to the employment relationship (if the enterprise agreement did not apply) and make sure the agreement will meet the BOOT.
Related resource

For more information see the Fair Work Commission webpage on the approval process for enterprise agreements.
Resources

Not-for-profit Law resources

► Employees
   We have resources on recruitment and management of employees, employee entitlements, the Fair Work System, termination and resignation, and disputes with employees

Other related resources

► Fair Work Commission
   The Fair Work Commission is Australia’s national workplace relations tribunal. Its website provides information and resources on awards and the enterprise approval process

► Fair Work Ombudsman
   The Fair Work Ombudsman website provides information and advice about Australia’s workplace rights and rules and includes a ‘Find my award’ tool and an enterprise bargaining sheet

Legislation

► Fair Work Act 2009 (Cth)