



Employing a support worker: laws and obligations

Information for participants on engaging their own support worker

If you have decided to manage your plan yourself you may want to directly employ a support worker.

There are several ways that you can do this, for example, you could engage someone as an employee, an independent contractor or an employee of an organisation or business. This is important, as depending on the relationship, you may be an employer and subject to a number of workplace obligations.

The following provides an overview of the laws and obligations that you need to consider when engaging a support person as a contractor, employee or volunteer.

Australia's workplace relations system

Australia's national workplace relations system is governed by the Fair Work Act 2009 and supporting regulations. The national workplace relations system covers the majority of workplaces and employees in Australia. An unincorporated private sector employer in Western Australia would generally be covered by the state

workplace relations system and not the Fair Work Act.

The Fair Work Ombudsman (FWO)

The Fair Work Ombudsman (FWO) is the Australian Government agency responsible for administering the Fair Work Act and should be the first point of contact for employees, employers and contractors requiring information and advice about workplace rights and obligations.

FWO provide templates and fact sheets on their website and operates the Fair Work Infoline.

For workplace information, advice and assistance visit the [Fair Work website](#) or call **13 13 94**.

Employee versus Independent Contractors

Paid support workers can generally be engaged as employees or as independent contractors. Telling the difference between independent contractors and employees isn't always easy. It's important to know whether you're engaging an independent contractor or an employee so you can be sure you are meeting your legal requirements.

Just because a support worker has an Australian Business Number (ABN) or gives you an invoice for payment doesn't automatically mean they are an independent contractor. Likewise, even though a contract between an employer and the support worker may define the support worker to be an employee or an independent contractor, it doesn't necessarily make it so. There are a number of things that can help tell the difference between an employee and a contractor. There isn't one thing that makes the difference on its own - you need to consider everything together.

Employees usually

- do ongoing work that is controlled by their employer
- work hours they're told to work by their employer
- are not responsible for financial risk
- are entitled to superannuation from their employer
- are entitled to minimum wages
- have income tax taken out of their pay
- are paid regularly (weekly / fortnightly / monthly)
- are generally entitled to paid leave (if they are permanent rather than casual employees).

Independent contractors usually

- decide how to do their work and what skills they need to do it
- decide whether to employ someone else to do the work
- carry the risk of making a profit or loss
- pay their own superannuation and tax, including GST
- have their own insurance
- are contracted to work for a set time or do a set task
- decide what hours to work
- invoice for their work or get paid at the end of the contract or project
- don't get paid leave.

It is illegal for genuine employment relationships to be treated as independent contracting arrangements. The FWO has an 'Independent Contracting Quiz' to help workers and the business or person who pays a worker to understand whether they are in a contractor or employment relationship. You can find the quiz by going to the [FWO website](#).

Individuals are also encouraged to seek independent professional advice to ensure they understand their obligations when engaging employees or independent contractors.

Employment status – full time, part time and casual

If you are an employer, you'll need to know whether an employee is full-time, part-time or casual to work out the right pay and conditions.

- Full-time employees generally work an average of 38 hours per week and usually have ongoing employment.
- Part-time employees work an average of less than 38 hours per week. They're usually hired on an ongoing basis and may work the same set of hours.
- Casual employees are paid based on the number of hours they work. They usually aren't guaranteed a certain amount of hours of work per week, but can work regular hours. Casual employees receive a casual loading to compensate them for not receiving other entitlements.

Volunteering and unpaid work

Genuine volunteers are not employees. For a voluntary arrangement to be genuine there must be no intention to create an employment relationship. This means that a volunteer must agree that they will not be paid for any work performed. The arrangement must be at the volunteer's own free will and there cannot be any element of coercion in the relationship.

Determining whether a volunteer arrangement is genuine will depend on the individual circumstances of each arrangement and can involve complex legal issues. Contact the FWO for further information and advice on volunteering arrangements.

An unpaid work trial or other type of work cannot be disguised as a voluntary arrangement. As a general rule, a prospective employee must be paid for any trial work they have performed to establish their suitability for a role. Generally, not paying workers for work trials is illegal.

National Employment Standards and Fair Work Information Statement

The National Employment Standards (NES) cover everyone in the national workplace relations system. They comprise 10 legislated employment standards covering essential conditions such as maximum weekly hours of work, leave, public holidays, notice of termination, redundancy pay and the right to request flexible working arrangements.

All employers in the national workplace relations system have to give every new employee a copy of the Fair Work Information Statement before or as soon as possible after they start their job. Getting the statement is one of 10 minimum entitlements in the NES.

You can get a copy of the statement from the [FWO website](#).

Modern awards

Modern awards are industry or occupation-based minimum employment standards which apply in addition to the NES. They were created to establish one set of minimum conditions for employers and employees across Australia who work in the same industries and occupations.

Modern awards generally provide employees with overtime and penalty rates, allowances, breaks and other conditions and entitlements that are not provided by the NES.

The *Social, Community, Home Care and Disability Services Industry Award 2010* (the SACS Modern Award) covers employers and employees in the social and community services sector, which includes the provision of disability services, personal care, domestic and lifestyle support to a person with disability in a community and/or residential setting including respite centre, day services or in a private residence. Contact the FWO for further information and advice.

The national minimum wage and wage increases

The national minimum wage acts as a safety net for employees in the national workplace relations system to provide minimum rates of pay for employees not covered by awards.

Annual adjustments to the national minimum wage by the Fair Work Commission (FWC) take

effect from the first pay period on or after 1 July each year. Minimum rates of pay in modern awards can also be adjusted by the FWC.

For further information and advice contact the FWO.

Paid parental leave scheme

Employees may be entitled to paid parental leave on top of their unpaid leave entitlements. Call the Centrelink Family and Parents line on 136 150 for eligibility information about your obligations as an employer.

Record keeping requirements

Employers have to keep a written time and wages records for their employees for seven years. Employers also have to give all of their employees a pay slip within one day of paying their wages. The FWO provides record keeping templates to help you keep the right records and give your employees proper pay slips.

Tax

You have a legal requirement to withhold tax from payments you make to employees. You need to make sure you register for PAYG withholding. Your obligations include making regular payments to the Australian Taxation Office (ATO), ensuring you withhold correct amounts from salary and wages and reporting them on your activity statement.

Your obligations as an employer may involve collecting Tax File Numbers (TFN) from your employees for taxation and superannuation purposes. It is important to handle TFNs only for authorised purposes.

The ATO provides tools to help employers calculate how much tax to withhold for their employees. For more information on handling employee taxation and superannuation information visit the [ATO website](#) or phone the ATO Business tax enquiries line on 13 28 66.

Superannuation

You need to pay superannuation guarantee contributions for most employees and certain contractors. You also need to know your obligations if your employees fall under choice of superannuation fund legislation. For more information call the ATO's Superannuation info line on 13 10 20.

Workers compensation insurance

You must provide workers compensation insurance for your employees in the event of an accident or sickness. For information on state and territory workers compensation legislation contact your State or Territory OH&S and workers compensation agency or an insurance broker in your State or Territory (see yellow pages).

Workplace health and safety (WHS)

As an employer, you are obliged by the law in your state or territory to exercise a duty of care to protect your employees against potential WHS risks. Some risks include:

- manual handling, such as heavy lifting,
- slips, trips and falls,
- bullying and harassment,
- electrical safety, for example from damaged equipment, and
- use of chemicals, such as for cleaning and laundry.

In the event of an injury occurring or disease being present in your workplace, you may be

required to contact the relevant State or Territory agency.

Contact the relevant agency or check its website to determine which injuries and diseases must be reported. You also may have other obligations such as assisting an injured employee to return to work.

Ending employment

Certain obligations apply when ending employment, including notice periods for termination and final payments. If the dismissal is found to be unfair an employee can seek compensation or reinstatement.

The *Small Business Fair Dismissal Code* (the Code) applies to small business employers (those with fewer than 15 employees, calculated on a simple headcount of all employees including casual employees who are employed on a regular and systematic basis).

Employees of small businesses cannot make a claim for unfair dismissal in the first 12 months following their engagement. After this date, if an employee is dismissed and the employer is found to have followed the Code, then the dismissal will be found to be fair. A dismissal that is found to be unfair can result in reinstatement or compensation for the employee.

For more information about the Code and termination of employment in general, contact the FWO. There may also be taxation implications from ending employment. For information visit the [ATO website](#) or phone the ATO Business Tax Enquiries Line on 13 28 66.