Employment Issues (NSW)

This information sheet provides information about employment law in NSW for employees, contractors and volunteers, including employers' legal obligations under the Fair Work Act 2009 (Cth).

Introduction

If you work as an employee, contractor or volunteer for an individual or organisation, it is important that you are aware of your rights. An employer must comply with various legal requirements related to your working conditions and other minimum conditions of employment. If the employer fails to meet these obligations, you may be able to force them to comply.

As of January 1, 2010, all New South Wales private sector employers and employees are covered by the federal industrial relations scheme – the *Fair Work Act 2009* (Cth). You should read this information sheet carefully to understand how recent changes in the law may affect your rights and responsibilities.

The difference between employees and contractors

Not every individual who performs services is considered an employee. In order to assess your rights as a worker, you must first determine whether you are an employee or a contractor. Contractors (independent contractors or freelancers) perform specific services without detailed control by the employer. Whether you are characterised as an employee or contractor has important consequences, especially in terms of minimum conditions of employment, workers compensation, intellectual property and superannuation.

Control test

The traditional test used to determine the difference between employees and contractors depends largely on control – the power (whether exercised or not) of the employer to direct how the work is carried out. If the worker appears to be running his/her own enterprise with independence in the conduct of his/her operations, the worker is most likely a contractor. If the worker operates as a representative of the employer's business with little or no independence in the conduct of his/her operations, he/she is most likely an employee.

The situation of artists and otherwise skilled workers

However, in situations where specialised skills are required, workers often exercise more discretion over their work and rely less on the employer's direct instruction or control. Similarly, the employer is unlikely to give, and the worker to accept, directions about the manner the work should be done if a worker's task is to carry out skilful or creative work, for example a cartoonist supplying comic strip drawings to a newspaper. Such a person may, however, still be considered an employee for the purpose of determining the employer's legal obligations. Therefore, a more flexible approach to the traditional "control test" is necessary in the artistic context or in other fields requiring a high level of skill.

In those situations, an "organisational test" is usually more appropriate to determine whether the person is an employee or a contractor:

- the person is an employee if he/she is employed as part of the business and his/her work is an integral part of it;
- the person is a contractor if his/her work is not integrated into the business but only an accessory to it.

Generally, other factors may be considered in determining whether a worker is an employee or contractor, including:

- whether the person receives a periodic wage (employee) or is paid per task (contractor);

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- whether the person sells his/her labour (employee) or only the product of his/her labour (contractor);
- whether the person is supplied with equipment (employee) or provides their own equipment (contractor);
- whether the person is merely an individual worker (employee) or part of a company or sole trader (contractor); and
- whether the worker works exclusively for the employer (employee) or if his/her work is non-exclusive/advertises business to the world at large (contractor).

No one factor is conclusive. It is necessary to examine the entire relationship of the parties.

The Australian Taxation Office (**ATO**) has made available on its website an online decision tool that is helpful in determining whether a worker is an employee or contractor.

Volunteers

Volunteers are neither employees nor contractors. They make a gift of their work without financial remuneration. They work in a charitable context with no intention to create legal relations with the organisation. If you are a volunteer, you are unlikely to have an enforceable employment contract with an organisation. However, an employer still has certain obligations towards you.

Copyright and employment

Copyright ownership

As an employee in the arts, you should be aware of your and your employer's intellectual property rights. Generally, when an employee makes a creative work in the course and within the scope of the employment relationship, the employer is the copyright owner unless there is an agreement to the contrary. However, when the person creating the work is a contractor or a volunteer (not an employee), the contractor or volunteer generally retains copyright in the works created for the organisation. Thus, if you are a contractor or volunteer, and the employer wants to use the work they have requested you to create, they cannot do so unless you grant them a licence (written or oral). Alternatively, your employer might seek to acquire full ownership of the work and ask you to sign a written assignment of copyright. If you want to maintain ownership of copyright, do not sign any agreement without fully understanding the consequences. You should contact Arts Law or your solicitor for more information.

Moral rights

If you are an employee and you make a creative work in the course and within the scope of the employment relationship, you retain moral rights although your employer owns the copyright in your work. Moral rights recognise your ongoing connection with your creative work, and there are 3 types:

- **Right of attribution**: you can make sure that you are named and acknowledged for your work.
- **Right against false attribution**: you can stop other people from claiming that they created your work.
- **Right of integrity**: you can stop your work being used in a way that harms your honour or reputation.

Workplace health and safety

Every employer has a duty to provide a safe working environment for employees, contractors and volunteers. Thus, under occupational health and safety (**OH&S**) legislation, there is a general duty of care on employers to ensure the health, safety and welfare of employees by: maintaining a safe workplace and facilities, ensuring the safe handling and use of equipment, and providing proper information, instruction, training and supervision. The employer must take all reasonably practicable

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measures to control risks against injuries that may occur in the workplace. For example, your employer must ensure that premises are structurally sound, that exits are well-identified, and that the temperature and quality of the air do not endanger health.

As an employee, you have a corresponding duty to take care of others and cooperate with your employer in the implementation of health and safety measures. If you have any health and safety concerns related to your workplace, you should alert your employer. Your employee has a duty to consult with employees on matters of health and safety and to respond to employee concerns.

If you suffer an injury or illness at your workplace, you should notify your employer as soon as possible. If you need medical treatment and/or cannot work for a certain period of time because of the injury, you can make a claim for workers compensation. When you see your doctor to arrange treatment, you should get a WorkCover medical certificate to give to your employer.

Workers compensation

Most employers in NSW are required to maintain workers compensation insurance. Workers compensation provides compensation to workers who suffer a work-related injury or disease. Employees injured at the workplace may be entitled to weekly payments, lump sum for permanent impairment (including pain and suffering), payment of medical bills, rehabilitation assistance and provision of legal assistance. If an employer is uninsured, an injured worker can make a claim under the uninsured liability and indemnity scheme and receive payment from WorkCover NSW (www.workcover.nsw.gov.au).

Workers compensation insurance may cover injuries suffered by independent contractors. However, workers compensation insurance does not cover volunteers. Thus, if you are a volunteer, you should inquire whether your organisation has a separate volunteer insurance policy.

Before making a workers compensation claim, you must inform your employer that you have been injured and provide medical information. A workers compensation claim should be made within six months of the date of injury. Generally, you do not need to send a written claim to the insurer, as the employer must inform its insurer of the injury. However, you may need to submit a written claim if the insurer requests one, if weekly payments are needed for more than 12 weeks, or if medical expenses exceed $7,500. After the employer has notified the insurer of the injury, most employees will receive provisional liability payments within 7 days, and the insurer will investigate the facts surrounding the injury.

You should make all efforts to return to work as soon as possible. Your employer cannot dismiss you within the first 6 months of your injury. If you are terminated after 6 months but become fit for your old job within 2 years, you can apply to be reinstated.

If you need additional information, you should contact WorkCover Assistance Services on 13 10 50.

Discrimination in the workplace

Under federal and state laws, it is illegal for an organisation to discriminate against an employee or contractor because of that person’s race, colour, sex, sexual preference, age, physical or mental disability, marital status, carer’s/family responsibilities, pregnancy, political opinion, religion, national extraction or transgender status. In the context of employees, an employer may not discriminate in: hiring or promotion decisions; termination or other discipline; or terms and conditions of employment.

Similar anti-discrimination provisions apply to contract workers. An organisation may not discriminate against a contractor in relation to: the terms and conditions on which the contract worker is allowed to work; deciding whether to allow the person to work or continue work; access to opportunities or benefits associated with the contract, and subjecting the person to some other detriment.

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Although volunteers are not explicitly covered by the *Anti-Discrimination Act 1977* (NSW), it may be against the law in some circumstances to discriminate against volunteers who receive any kind of benefit (more than out of pocket expenses) in return for their voluntary work.

Laws prohibiting sexual harassment apply to all three categories of workers: employees, contractors and volunteers.

If you believe you have been discriminated against, you may make a complaint to any of the following:

- NSW Anti-Discrimination Board, tel. (02) 9268 5555. The complaint must be within 12 months.
- Fair Work Ombudsman, tel. 13 13 94. The complaint must be within 60 days.
- Australian Human Rights Commission, tel. 1300 656 419.

Minimum conditions and other employer obligations

National Employment Standards

The *Fair Work Act 2009* (Cth) sets out the National Employment Standards (**NES**), which include ten entitlements related to minimum working conditions. An employer and an employee cannot make an agreement with entitlements that are less than these minimum standards. Accordingly, all employers are obligated to provide their **employees** (not contractors or volunteers) with the following entitlements:

- **Maximum weekly hours of work**: 38 hours plus reasonable overtime.
- **Requests for flexible working arrangements**: parents/carers of children under school age or children with disabilities under 18 may request a change in working arrangements. You must make your request in writing, and the employer has 21 days to respond.
- **Parental leave and related entitlements**: 12 months unpaid leave, with the right to request an additional 12 months.
- **Annual leave**: 4 weeks paid leave per year.
- **Personal/carer's leave and compassionate leave**: 10 days paid personal/carer's leave, two days unpaid carer's leave as required, and two days compassionate leave (unpaid for casual workers).
- **Community service leave**: unpaid leave for voluntary emergency activities and leave for jury service, with up to 10 days paid leave for jury service.
- **Long service leave (LSL)**: transitional entitlement for certain employees who had LSL entitlements before January 1, 2010, pending development of uniform national standards.
- **Public holidays**: paid days-off on public holidays, except where reasonably requested to work.
- **Notice of termination and redundancy pay**: up to 4 weeks notice of termination (5 weeks if the employee is over 45 and has at least 2 years of continuous service) and up to 16 weeks redundancy pay (i.e. payments made when a position is eliminated due to genuine operational needs), both based on length of service. Small businesses under 15 employees are not required to make redundancy payments.
- **Provision of a Fair Work Information Statement**: employers must provide this document to all new employees.

National Employment Standards for casual employees

If you are characterised as a **casual employee** (generally engaged for short-term, irregular or seasonal work without the promise to provide work or be available for work on other occasions), only certain NES entitlements apply to you:

- two days unpaid carer's leave and two days unpaid compassionate leave per occasion;
- maximum weekly hours;

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- community service leave (except paid jury service);
- day-off on a public holiday, unless reasonably requested to work by the employer; and
- provision of the Fair Work Information Statement.

In addition, casual employees who have been employed for at least 12 months by an employer on a regular and systematic basis and with an expectation of ongoing employment are entitled to make requests for flexible working arrangements and parental leave.

In addition to the ten entitlements of the NES, there are several other obligations that employers are required by law to fulfil for all employees:

- **Minimum wage**: the Federal Minimum Wage is $14.31 per hour ($543.78 per week), and will be replaced by the "national minimum wage" on 1 July 2010. However, the minimum wage may be higher in different industry sectors, which are controlled by **awards** or **enterprise agreements** (i.e. legal documents that set out the rights and obligations of employers and employees engaged in particular types of work).
- **Award display**: employers must display a copy of every award applying in the workplace in a place conspicuous to employees.
- **Payslips**: employers must give employees written particulars about their pay including: name and Australian Business Number (**ABN**) of the employer; name of employee; classification of the employee under any applicable award (including full-time, part-time and casual status); date when the payment was made; period of employment to which the payment relates; the amount of money paid before tax (gross amount); amount paid as overtime; amount deducted for tax; amount deducted for as employee contribution for superannuation; particulars of all other deductions; amount paid after tax (net amount).
- **Records**: employers must keep accurate time and wage, leave, superannuation contribution records.

Making a complaint

If you are being underpaid or if your employer is failing to provide the minimum NES conditions or any of its other obligations, you may file a complaint with the Fair Work Ombudsman, tel. 13 13 94.

Tax matters

Employees

Your employer has the following tax obligations:

- **Pay As You Go (PAYG)**: employers have a legal requirement to withhold a portion of employees' salaries for income tax purposes and remit the withheld amount to the ATO. The amount withheld is determined by using the tax tables published by the ATO and information provided by the employee on a tax file number declaration (and withholding declaration if applicable). The amount of PAYG tax deducted from your salary should appear in your payslips.
- **Fringe Benefits Tax (FBT)**: an employer must pay FBT tax must on any non-salary benefits to employees or their associates (such as family members). Examples of fringe benefits include allowing an employee to use a work car for personal purposes or when an employer pays an employee's private health insurance costs. It is the employer's responsibility to pay this tax, and it should **not** be deducted from your salary.

Contractors

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You should provide the individual or business who is engaging your services with your ABN number. If you do not provide your ABN number, the individual or business is required to withhold 46.5% of the payment due to you and remit it to the ATO (unless the total payment is $75 or less excluding Goods and Services Tax (**GST**)). In addition, you are normally required to charge GST and remit it to the ATO, and this should be factored in to the price of your services.

Superannuation

Employees' contributions

Superannuation is money saved for your retirement, and your employer may have an obligation to make a contribution to your account. Employees are eligible for compulsory superannuation contributions if they: are aged between 18 and 70; are paid $450 (before tax) or more in a calendar month; and work full-time, part-time or on a casual basis. If you are under 18, you are eligible for compulsory superannuation contributions if you earn $450 or more per month and work for more than 30 hours per week.

Employers are required to make superannuation guarantee contributions on behalf of their eligible employees at least once each quarter. The minimum contribution is 9% of your earning base (generally ordinary time earnings). These contributions must be in addition to your salaries and wages.

Contractors

If you are a self-employed contractor, an employer is **not** required to make superannuation contributions. However, an employer may not disguise an employee as a contractor for the purposes of avoiding superannuation payments. To determine whether you are self-employed (i.e. a contractor) or an employee for superannuation purposes there are two key questions:

1. Under whose "control" are you working? Who has the right to control how, when, where and who is to perform the work? Do you have discretion to accept or reject work?
2. Are you "integrated" with the business of the employer? Do you provide labour or service as a truly independent contractor carrying on your own business (as a contract for services: not an employee) or individually as an integral part of another business organisation (as a contract of service: an employee)? Are you presented to the public as part of the business of the hiring organisation? For whose benefit is your work performed?

Most employees have the right to choose the superannuation fund that will receive their employer's contributions. If you are eligible to choose your fund and fail to do so, your employer must make payments to an employer nominated fund on your behalf. If you make additional contributions directly into you personal superannuation fund, this does not count towards your employer's obligations and they must still contribute a minimum of 9% of your earnings.

If you think you are eligible for superannuation and your employer is not making the required payments, you can lodge an enquiry with the Australian Tax Office on 13 10 20.

For more information see Arts Law's information sheet on Superannuation and contract for services.

Termination

Employer-employee relationships do not always work out as smoothly as planned, and there are certain things that you should be aware of if you lose you job. These provisions apply to employees only, not contractors.

Notice requirements

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An employer wishing to terminate an employment relationship must provide the employee with **advanced written notice** (1-4 weeks, depending on length of employment) or **payment in lieu of notice** (the full amount the employee would have been paid during the applicable notice period. Notice (or payment) is **not** required when the employee engaged in serious and wilful misconduct (eg. theft, fraud, violence) entitling the employer to instantly or summarily dismiss the employee. If you resign from your position, you are not required to give your employer advanced notice under federal workplace laws. However, you may be required to provide notice if provided for by your award, enterprise agreement or employment contract.

Termination Pay

You should receive the following entitlements in their final pay:

- outstanding wages owed to the employee;
- accrued annual leave entitlements;
- accrued or pro-rata long-service leave (if applicable); and
- redundancy pay entitlements (if applicable).

If you have not been paid out for all of your entitlements in your final pay, you should file a complaint with the Fair Work Ombudsman, tel. 13 13 94.

Unfair dismissal

Certain eligible employees may be able to file an unfair dismissal claim against their employers if the circumstances surrounding their termination were harsh, unjust or unreasonable.

- **Requirements for unfair dismissal**: you can file an unfair dismissal claim if you have been: (1) dismissed; (2) the dismissal was harsh, unjust, or unreasonable; and (3) the dismissal was not a case of genuine redundancy.
- **Employees eligible to file an unfair dismissal claim**: to be eligible to make an unfair dismissal claim, you must: (1) have worked for the business for a minimum of 6 months; and (2) earn less than $108,300 per year (unless covered by an award or enterprise agreement).
- **Consequence of unfair dismissal**: if Fair Work Australia determines the dismissal was unfair, the employer can be ordered to reinstate you or compensate you for up to 26 weeks pay (up to a maximum of $54,150).
- **Filing an unfair dismissal claim**: you must lodge an application with Fair Work Australia (**FWA**; www.fwa.gov.au) within 21 days of your dismissal. For more information, you should call FWA on 1300 799 675 or visit the Fair Work Australia website.

Special considerations for employees of small businesses

If you worked for a business that employed fewer than 15 full-time employees, the Small Business Fair Dismissal Code applies, and it is more difficult – though not impossible – to be successful in filing an unfair dismissal claim.

- **Eligibility**: to be eligible to make an unfair dismissal claim, you must have: (1) worked for the business for at least **12 months**; (2) be covered by a modern award/enterprise agreement; and (3) earn less than $108,300 per year.
- **Summary dismissal**: an employee may be dismissed without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal (eg. theft, fraud, violence, breach of occupational health and safety procedures).
- **Other dismissals**: an employer may avoid an unfair dismissal claim if, prior to dismissing an employee, the employer gives the employee a reason why he/she is at risk of being dismissed (based on the employee's conduct or capacity to perform the job). If there is no improvement, the employee should be warned (preferably in writing), and the employee should be given the opportunity to respond to the warnings and a reasonable chance to rectify the problem (which may

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include additional training and ensuring the employee knows the job expectations).

Unlawful termination

It is illegal for an employer to dismiss an employee based on any of the following reasons:

- a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (some rare exceptions apply, such as where it's based on the inherent requirements of the job);
- temporary absence from work because of illness or injury;
- trade union membership (or lack thereof);
- seeking office as, or acting as, a representative of employees;
- being absent from work during maternity leave or other parental leave;
- temporary absence from work to engage in a voluntary emergency management activity;
- filing a complaint, or participating in proceedings against an employer.

If you think you have been dismissed for any of these reasons, you can apply to FWA. You must lodge your application within 60 days after the dismissal. For more information, you should contact FWA, tel. 1300 799 675. In addition, you may seek help from the Fair Work Ombudsman, tel. 13 13 94, which may seek penalties against your employer for unlawful termination.

Further information

You can find additional information about these topics on the following government websites:

- Australian Taxation Office
- Australian Workplace
- Fair Work Australia
- Fair Work Ombudsman
- New South Wales Industrial Relations
- WorkCover NSW

Other Arts Law publications on employment issues include:

- Superannuation and contract for services information sheet

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