Frequently Asked Questions – For Employers

Types of engagement

1. How do I know if I should be employing or contracting someone in the arts?

When you need work performed, you have the option of hiring someone as an “employee” or engaging someone as a “contractor”.

You would typically hire someone as an employee, if:

- You want the individual to be a part of your business.
- You want to own the copyright in all work they create as part of their employment.
- You want control over how, where and when they work.

The question of “control” in creative industries is considered differently in artistic roles, where a person is hired for their particular expertise and to exercise artistic control.

Employees are paid a wage (usually weekly, fortnightly or monthly). Depending on how much work you have available, there are different types of employees.

You would typically engage a contractor, if:

- You need a service performed.
- You are happy for them to retain copyright in their work and you’re happy for them to continue to do similar work for other clients.
- You don’t need a lot of control over how, where and when that service is provided.

A contractor is usually paid a fixed fee for the services they provide and the fee is often paid directly to the contractor’s business (rather than to the individual person providing the service).

The rights and obligations for employees are different to the rights and obligations for contractors. It is not as simple as calling someone a contractor or employee in your agreement with them. The terms of the agreement overall will be considered to determine whether by law they are employed as a contractor or employee. We recommend you obtain legal advice on any contract before you enter into it.

Contract wording in relation to copyright ownership and licensing is an important consideration in engaging an artist. If a contract does not say otherwise, the default position is that the employer will own the copyright in any material an artist employed as an employee creates; whereas an artist engaged as a contractor will retain copyright, with an implied limited licence for use by the employer. The default position is slightly different in print media and for works created for government.

Employers should also consider an artist’s moral rights. Even if an artist employee is not the owner of copyright in their creative work, they have moral rights in relation to it; for accurate attribution and for it not to be subjected to derogatory treatment. If an employer wishes to use the work in a way that would violate an artist’s moral rights beyond a threshold of ‘reasonableness’, they need the artist’s written permission. Examples might include changing the artist’s work to suit the employer’s purpose or failing to credit or acknowledge them. An employee’s consent to an employer’s activities that would otherwise infringe their moral rights is often included in a formal written employment contract. If the arrangement is more flexible, an employer should consider whether they intend to honour an artist’s moral rights or whether they need to seek their written permission to infringe them.

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If engaging artists who identify as Aboriginal or Torres Strait Islander, you will also need to consider any indigenous cultural intellectual property (ICIP) arising in the work. This is not yet separately protected by the law in Australia and so protection of these rights must be inbuilt into contracts. This involves protection of elements such as traditional stories, practices, language and symbols and can involve things like notices of custodial interest, incorporating best practice protocols or general restrictions on use. This should be discussed with any Aboriginal or Torres Strait Islander artists at the inception of their employment so that any necessary protections can be built into the contract.

The focus of this page is employees, and some key issues to be aware of when you are hiring someone as an employee are covered in the questions below.

2. What are the different types of employees?

Broadly, there are three different types of employees: full time, part time and casual. You can offer employment to a person as either a full time, part time or casual employee.

Generally:

- A full time employee works an average of 38 hours in a week.
- A part time employee works less than 38 hours in a week in a regular pattern of work.
- A casual employee works the hours offered by the employer, however there are no guaranteed hours of work, and no expectation that the employee will receive ongoing work.

Full time, part time and casual employees share some but not all rights and entitlements. Generally, casual employees have fewer paid entitlements than full time and part time employees. For example, casual employees are not entitled to any paid annual leave or paid sick leave. Please see Question 6 for more information on employee minimum terms and conditions.

3. If I commission someone to create something are they my employee?

It depends. If you commission a person to do work for you, they may be an employee or a contractor. Whether they are an employee or a contractor will depend on the terms and conditions you and the person agree to at the time of the commission, as well as how they perform their work or provide their services to you in practice.

You can find further information about this topic here.

There is no presumption that because artistic work was commissioned the commissioner will own the copyright. That presumption online exists in clear cut employment situations. A commissioner may have an implied licence for certain uses of the work, but it is always best to have these arrangements clarified in writing.

4. I've been working with an artist for some time, and want to keep working with them, but we never entered into a written contract. What should I do?

If you are working with someone and you don't have a written agreement, you will likely be working in accordance with a verbal agreement between you and the artist.

If this is the case, you can either:

- Continue working with the individual in line with your verbal agreement.
  OR
- Enter into a written agreement with the individual to reflect the terms and conditions.

A contract generally does not need to be in writing for it to be legally binding. While a verbal agreement can be a valid and enforceable agreement, a written agreement provides certainty and important clarity for both parties around the terms and

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conditions for the work. Putting things in writing can help you and the artist avoid ending up in a future disagreement.

There are some arrangements when dealing with an artist's intellectual property that **must** be in writing to be enforceable. For example:

- An exclusive licence of copyright.
- Agreement/consent to allow conduct that would otherwise infringe the artist's moral rights.

Employee entitlements

5. How do I employ someone? (Do I need a written agreement to employ an artist)?

To employ someone, you and the employee need to agree on the terms and conditions of the employment relationship. This might include, for example, their start date as well as their regular days and times of their work.

You can agree on the terms and conditions of the employment relationship either verbally or in a written agreement. A written agreement helps ensure that both parties understand the terms and conditions of employment and assists in avoiding disputes.

For an artist, clauses about copyright and moral rights will be particularly important and if you want an exclusive licence over copyright material or be able to infringe an artist's moral rights these **must** be in writing.

If you do not have a written agreement with an artist who is your employee, it is important to be aware that they will still be entitled to minimum terms and conditions at law. Please see Question 6 below.

6. Are there minimum terms and conditions for my employees?

Yes. There are minimum terms and condition for all employees. You cannot "contract out" of the minimum terms and conditions and you will be required to comply with them.

The specific minimum terms and conditions that will apply to your employees depend on the type of employee you hire and the type of industry you are working in. They can be found as follows:

- **National Employment Standards (NES)**

The NES are found in the Fair Work Act 2009 (Cth). There are 11 minimum employment entitlements that all employees in Australia are entitled too (other than government employees).

- **Modern awards**

Modern awards are a type of industrial instrument which cover certain industries or jobs. If a modern award applies to your industry or your employee it will set out certain minimum terms and conditions for employees. These entitlements are in addition to the NES!

Generally, a modern award has additional or supplementary entitlements to the NES. But, a modern award will not contain terms that are less than the NES. For example, under the NES a permanent full-time employee is entitled to 4 weeks of annual leave per year. A modern award might entitle your employee to 5 weeks of annual leave per year.

You can find the step by step guide for employers, which can be found here and the 'find my award' tool, which can be found here

- **Enterprise Agreement**

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Enterprise agreements are made between an employer and a group of employees (rather than between an employer and one individual employee).

If an enterprise agreement covers your employees, the NES will also apply but a modern award generally won't apply to your business. However this depends on the specific words of the enterprise agreement. For example, sometimes an enterprise agreement will apply to some of your employees and a modern award will apply to others. More information about enterprise agreements can be found on the Fair Work Commission website here.

7. Are there special conditions for employees under the age of 18?

A modern award or enterprise agreement often sets out special terms and conditions for junior employees. These usually relate to pay. There are additional restrictions, based on the state or territory in Australia around the age of employment and the nature of the work or the authorisation required in order to employ children.

A junior employee under a modern award is not always limited to employees under the age of 18. The age of a junior employee can differ between modern awards. If there are not special "junior" or "child" rates in the modern award, you should pay the junior worker the correct adult rate.

Some states and territories also have specific obligations about working with young employees. More information on employing junior workers can be found on the Fairwork website here.

When it comes to children in creative or artistic industries there is more to think about than just the award. The law also imposes restrictions on working with children, child pornography and obscenity/indecency, classification and censorship laws and privacy laws relating to the photographing or filming of others. See the Creative Australia Protocol for working with children here, and the Arts Law information sheet on children in the creative process here.

8. Where do I find/check that I am meeting the minimum terms and conditions?

An employee's minimum terms and conditions are set out in the NES, as well as any modern award or enterprise agreement that applies to their employment.

Often employers will choose to enter written contracts of employment that include employment terms that are more favourable than a modern award. You will need to check any written contract to make sure those terms are also complied with.

9. What happens if I don't meet the minimum terms and conditions?

If you fail to meet the minimum terms and conditions for your employees you could be exposed to a legal claim and/or a penalty.

For example, if a modern award covers your employee and you fail to pay your employee their correct entitlements (such as minimum rates of pay and overtime) under the modern award, you may be exposed to:

- An underpayment claim.
- A penalty for breaching a term of the modern award.

If you realise you have not complied with a term or condition of an artist's employment you should take proactive steps to rectify it as soon as possible.

Other employment issues

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10. What information/documents do I need from a new employee?

On or before an employee's first day, you will need to collect information about your new employee. For example, you will need their tax and superannuation details.

It is important that:

- You only collect the information you need to onboard and pay your employee.
- You keep the employee information confidential and secure.

Generally, the documents you will need from a new employee are:

- Signed letter of offer or employment contract (if you have a written agreement).
- Tax File Declaration Form.
- Superannuation nomination form.
- Personal details form (only to the extent you need further information to onboard and pay your employee, for example their full name and contact number).

If you are employing a worker from overseas you also need to ensure they have a right to work in Australia and have documentation to support this.

You should also ask your employee to confirm that they are not bound by any ongoing obligations to a previous employer, for example, if they have agreed not to work for any other company for a period of 6 months.

Before your employee starts their employment with you, or as soon as possible after, you are required to provide them with the Fair Work Information Statement. If you employ a casual employee, you will also need to provide them a Casual Employee Information Statement. Copies of both of these statements can be found here.

11. Do I need to reimburse my employee for their expenses?

Some modern awards and enterprise agreements have specific clauses about expenses. If a modern award or enterprise agreement covers your employee, you should check your obligations under the modern award or enterprise agreement.

You may also have a written policy or procedure that deals with expenses. If you do, you should make sure it is compliant with any obligations under a modern award or enterprise agreement.

It is an offence under the *Fair Work Act* for an employee to spend their own money on work, where:

- You directly or indirectly require the employee to spend their own money.
- The purchase is in relation to the performance of work.
- The requirement is unreasonable.
- The purchase is directly or indirectly for your benefit.

For example, it would be unreasonable to require an employee to pay $5,000 of their own money to cover company training before they have started in their employment, or to purchase paint products that they will be using on the job.

12. Do I need to pay superannuation to all employees?

Generally, yes, you need to pay superannuation to all of your employees and this will need to be done at least once a quarter. You should check with the Australian Taxation Office, if you think an exemption applies. More information can be found here.

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13. My employee has asked to work flexibly – do I need to agree to this?

It depends. Some employees who have worked for the same employer for at least 12 months may be eligible to request flexible working arrangements including changes to start and finish times for work, patterns of work and location (e.g. request to work from home). Generally, the following employees have a right to request flexible work:

- Pregnant employees.
- Employees with caring responsibilities, including for young children.
- Employees over 55 years old.
- Employees with a disability.
- Employees experiencing family and domestic violence.

Some modern awards and enterprise agreements also have specific clauses about flexible work. If a modern award or enterprise agreement covers your employee, you should check your obligations under the modern award or enterprise agreement.

If you receive a request for flexible working arrangements, under the Fair Work Act:

- There are certain steps that you have to take before responding, those steps are summarised here.
  AND
- You must respond in writing within 21 days of the employee submitting a request.

You are only able to refuse an eligible request for flexible working arrangements if you have:

- Discussed the request with the employee.
- Genuinely tried to reach an agreement with the employee.
- Have considered the impact of refusing the request on the employee.
- The refusal is on reasonable business grounds.

What is 'reasonable business grounds' will depend on the individual circumstances of the employee and your business. But it can include things like cost and practical impact of the change. See the Fairwork website here for further information.

14. My employee has been injured while at work on set/in the studio. Am I liable for this?

You have a duty to keep employees safe while they are at work. If an employee is injured while at work, including in a creative environment that they inhabit as part of their job, such as a studio, workshop, or on set, you can be exposed to a legal claim, such as:

- **A workers compensation claim**

An injured employee may be entitled to make a workers compensation claim through your workers compensation insurer if they suffer an injury and allege that it is related to their work. The workers compensation scheme is different in every Australian state and territory. To find out more information, you can contact your local regulator here.

- **A prosecution under your respective state or territory's work health and safety legislation**

If you breach your safety duties under the act or if a worker is injured at your business, you may be exposed to a claim. These claims are brought by the regulator and can result in significant penalties of over $3million in NSW for serious offences. This penalty will shortly increase.

- **A negligence claim**

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You will also owe a separate common law duty of care to your employees to keep them safe at work. If an employee is injured while at work and the cause of that injury is your negligence, you may be liable for their injury, including to make a payment of damages.

15. Can I stop my employee from working for someone else?

It depends on the terms of any employment contract and the circumstances. For example, one circumstance which is relevant is the type of employment (being full-time, part-time or casual). If an employee is a casual employee, generally, you can't stop them from having another job.

If the employee is still employed by you

You will need to check the terms of any written contract. Often, a contract will include clauses that will protect your business interests. For example, common contract clauses include:

- **Conflict of interest**

Depending on how the clause is written, an employee is likely to have an obligation to protect the interests of the business.

In this case, an employee cannot take a second job if it will interfere with the interests of your business.

- **Confidential information**

An employee will have an obligation to protect the confidential information of your business. What information is confidential, will depend on the words of the contract.

If the contract does contain a confidential information clause, an employee cannot use your business's confidential information outside their job. This is also precluded under *the Corporations Act*.

If the employee no longer works for you

An employment contract may also state that an employee cannot work for a competitor, or engage in similar work, for a period of time after their employment ends. This is known as a 'non-competition' clause. These types of clauses are generally difficult to enforce and will only be upheld in certain situations.

Terminating employment

16. My employee is not performing – are there any processes that I need to follow to manage this?

Generally, yes.

Depending on the circumstances, you may decide to manage the underperformance of an employee informally. This can be by coaching, training or other development. However, if there are ongoing performance issues you may decide to formally manage the employee's performance. This can be through a performance improvement plan.

A performance improvement plan, sets out:

- The issues with the employee's performance.
- What the employee needs to do to improve their performance, and how they achieve this.
- The support you will provide to the employee.
- The timeline for the employee's performance to improve (which should include an end date for the performance improvement plan).

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This process is especially important for businesses with over 15 employees.

17. What if I want to end my employee's employment?

Before you terminate someone's employment, broadly, it is important to ensure:

- You have a valid reason for dismissal.
- The employee has been given a fair and just process and the dismissal is not harsh, unjust or unreasonable.
- You are not dismissing an employee for any prohibited or unlawful reason. For example, you are not able to end an employee's employment because they have made a complaint about bullying or taken a period of parental leave.

To end an employee's employment, you must give the employee written notice that their employment is ending. The amount of notice you need to give to your employee usually depends on the terms of their written contract. If you do not have a written contract, the amount of notice can depend on their age, the type of employment, and length of employment.

When an employee's employment ends, you will need to make some final payments to the employee, which include:

- Outstanding wages.
- Accrued but unused annual leave.
- If applicable, any notice in lieu.
- If applicable, any accrued but unused long service leave.
- If applicable, any redundancy pay.

18. I only employ a couple of employees – does this really all apply to me?

Yes, all businesses are required to comply with all Australian workplace laws.

But there are some exceptions for a 'small business'. A small business is any business with fewer than 15 employees. For example, there are different rules for small business employers when they are dismissing an employee. These differences are set out in the Small Business Fair Dismissal Code, which can be accessed here.

19. Where can I go to find out more information?

Helpful resources are available on:

- Creative Workplaces Australia, which can be accessed here.
- Fair Work Commission website, which can be accessed here.
- Fair Work Ombudsman website, which can be accessed here.
- Your local community legal centre. You can look up community legal centres here.

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