



THE UNIVERSITY
of ADELAIDE

Legal Compliance Education and Awareness

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Fair Work Act 2009

(Commonwealth)

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Introduction

The content of this material is intended only to provide a summary & general overview of the *Fair Work Act* as it applies to the University of Adelaide.

It is not intended to be comprehensive nor does it constitute legal advice.

The material should be read in conjunction with the [University of Adelaide Enterprise Agreement 2017-2021](#) and the University's policies and procedures.

The Enterprise Agreement provides the minimum terms and conditions for all staff at the University and is compliant with the provisions of the *Fair Work Act 2009 (Cth)*.

Enterprise Agreement

- An **Enterprise Agreement (EA)** is a voluntary & negotiated agreement between employees (or their union representatives) & their employer
- Enterprise agreements are regulated under the Act & are designed & tailored specifically for a workplace & that workplace environment
- For an agreement to come into effect, it must be approved through a ballot process by a majority of the staff who cast a valid vote
- Statutory Individual Agreements (e.g. *Australian Workplace Agreements*) are prohibited under the Act
- The *University of Adelaide Enterprise Agreement 2017-2021* came into force on 6 March 2018 and applies to all staff of the University.

What does the Fair Work Act do?

- Sets out the rules & obligations for employees & employers under the national workplace relations system
- Provides for ten national employment standards
- Provides protection to all people working in Australia of certain rights, including:
 - workplace rights (i.e. a benefit a person is entitled to receive under a workplace law, award or agreement, or any order made by an industrial body)
 - the right to engage in industrial activities
 - the right to be free from unlawful discrimination
 - the right to be free from undue influence or pressure in negotiating individual arrangements

What does the Fair Work Act do? (cont.)

- Provides protection to all people working in Australia from certain unlawful actions, including (but not limited to):
 - adverse action
 - coercion
 - misrepresentations
 - undue influence or pressure in relation to:
 - individual flexibility arrangements under modern awards & enterprise agreements
 - guarantees of annual earnings
 - deductions from wages
- Establishes the *Fair Work Commission* to administer the Act
- Establishes an Anti-Bullying Jurisdiction
- Establishes a *Fair Work Ombudsman* to investigate allegations of discrimination in the workplace and initiate legal proceedings

How does the Act affect the University?

- All employees of the University are afforded certain rights & protections under the Act, including:
 - full time, part time & casual employees
 - probationary employees
 - apprentices & trainees
 - individuals employed for fixed periods of time or tasks
- The Act also provides a set of minimum terms and conditions called the National Employment Standards (NES)

National Employment Standards

- The Act prescribes [National Employment Standards](#), irrespective of whether an employee is covered by an award

The Standards prescribe:

- Maximum weekly hours (38 hours for a full time employee) plus reasonable additional hours
- A right to request flexible working arrangements
- Parental leave & related entitlements
- Annual leave
- Public holidays
- Personal/carer's leave & compassionate leave
- Community service leave for jury duty & emergency services work
- Preserved long service leave entitlements
- Notice of termination & redundancy entitlements
- A requirement for an employer to provide all new employees with a "Fair Work Information Statement"

Modern Awards

- The Act prescribes **Modern Awards**, that cover a whole industry or occupation (e.g. teachers, nurses, cleaners) & provide a safety net of minimum pay rates & employment conditions
- To be approved by the Fair Work Commission, the University's Enterprise Agreement had to pass the 'Better Off Overall Test' (BOOT), which ensures that the conditions under the Enterprise Agreement are better than those that would apply under the applicable Modern Award
- The Modern Awards that are relevant to the University of Adelaide are:
 - [Higher Education Industry - General Staff Award 2010](#)
 - [Higher Education Industry - Academic Staff Award 2010](#)

The right to protected industrial action

- All employers, employees & independent contractors have the right to become members of an industrial association, such as a trade union or employer association
 - [The National Tertiary Education Industry Union \(NTEU\)](#)
 - [The Australian Services Union \(ASU\)](#)
 - [The Community & Public Sector Union SPSF Group \(CPSU\)](#)
- All employers, employees & independent contractors are entitled to engage in 'industrial activities', for example;
 - *lawful participation in an industrial association & its activities*
 - *organising or promoting lawful activities for or on behalf of a trade union*
 - *representing the views of a trade union*
- A person cannot be victimised for refusing to be involved in unlawful activity organised or promoted by an industrial association or industrial action

The right to protected industrial action (cont.)

- Industrial action can only be taken after application to Fair Work Commission, & after there has been a ballot determining majority support for the industrial action.
- The Fair Work Commission can terminate or suspend industrial action if the industrial action is:
 - causing or threatening to cause significant damage to a part of the Australian economy (eg: the 2011 Qantas Dispute)
 - Is likely to cause significant harm to a third party
 - Threatens life, personal safety or the health or welfare of some of the population
 - Is causing or threatening to cause significant harm to the employer & any employee to be covered by the agreement

The right to be free from unlawful discrimination

It is unlawful for an employer to take adverse action against a person who is an employee, former employee or prospective employee because of the 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

The right to be free from unlawful discrimination

- Unlike other legislation - such as the *Equal Opportunity Act 1984* (SA) - the Act does not distinguish between direct & indirect discrimination
- Some defences to a claim of unlawful discrimination exist, such as “inherent requirements of a job”, however, a burden of proof is on the respondent to show a non-discriminatory reason for their action

Example:

- *If a member of University staff alleges unlawful discrimination against his Manager, it is the responsibility of the Manager to prove that his/her actions were not discriminatory*
- Conciliation in the Fair Work Commission is compulsory for dismissal disputes
- Uncapped compensation to victims of discrimination applies

What is not considered unlawful discrimination?

In certain circumstances, there are special rules permitting:

- Favourable discrimination in respect of pregnancy or childbirth, for example;
 - Maternity leave
- Measures intended to achieve equality, for example;
 - Schemes that benefit a particular race, age or persons with an impairment, such as Scholarships for Indigenous Australians
 - Positive discrimination in favour of women to redress past occupational bias, such as by providing management development plans
- Gender requirements in relation to employment for which gender is a genuine occupational requirement, for example;
 - Female advisors for sexual matters.

The right to request flexible working arrangements

- Employees can request flexible work arrangements where they:
 - are a parent or guardian of a child who is school age or younger
 - are a carer (as defined in the *Carer Recognition Act 2010*)
 - have a disability
 - are 55 or older
 - are experiencing family or domestic violence
 - are caring for or supporting an immediate family or household member who requires care or support because of family or domestic violence.
- The employee must have at least 12 months' continuous service at the organisation before making a request
- Under certain circumstances, casual employees are also entitled to make a request if there is a reasonable expectation of continued employment by the employer on a regular & systematic basis

What's a flexible working arrangement?

- Changes in hours of work
 - *reduction in hours*
 - *changes to start/finish times*
- Changes in location of work
 - *working from home*
- Changes in patterns of work
 - *job sharing arrangements*
 - *split-shifts*

The right to request flexible working arrangements (cont.)

- An employer can refuse the request on 'reasonable business grounds'
- Factors that may be relevant include:
 - the financial effect to the business, or impact to efficiency, productivity & customer service within the workplace
 - the inability to organise work among existing staff
 - the inability to recruit a replacement employee

Example:

- *A request by a School Manager for a flexible work arrangement in the middle of semester for care of a child under school age, might not be granted if the School can prove that the arrangement would adversely affect the workplace. However, if an arrangement has been previously granted in the area, it will be far more difficult to prove that the school will be adversely affected.*

The right to parental leave

- Under the Act, all employees with 12 months or more service have a basic entitlement to 12 months unpaid maternity, paternity or adoption leave for the primary carer
 - Same sex couples included
 - Each spouse/partner can take a year at separate times, if swapping as primary carer
 - Or one can ask for an extra year (employer can refuse on reasonable business grounds)
- The employee's partner can access 8 weeks concurrent unpaid leave (taken at the same time as the primary carer)
- The employer can request a medical certificate where the pregnant employee is working during the last 6 weeks of pregnancy

Note: At least these minimum requirements under the Act will be provided for under the UoA Enterprise Agreement

Protection from Adverse Action

- Under the Act, an employer must not take adverse action against an employee because they have or are attempting to exercise a workplace right
- Adverse action includes doing, threatening or organising any of the following:
 - dismissing an employee or altering their position to their detriment
 - injuring an employee in their employment
 - discriminating between one employee & other employees
 - refusing to hire someone
 - discriminating against a prospective employee on the terms & conditions in the offer of employment.

Protection from coercion, undue influence or pressure

- It is unlawful for a person to organise or take action (or threaten to) with the intent to coerce another person or third party to (among others):
 - take part in industrial activity
 - employ or not employ a particular person
 - give a particular employee or independent contractor certain duties & responsibilities.
- It is unlawful for an employer to force or try to force an employee to modify or alter their conditions of employment
- The undue influence or pressure or coercive behaviour can be unlawful even if it does not succeed in making the person take or not take the action.

Protection from sham contracting

- **'Sham' contracting arrangements** occur when an employment relationship is avoided or artificially disguised as an independent contract
- It may happen because the employer prefers it or because the worker prefers it;
 - *"it's a necessary work-around"*
 - *"it's quicker & easier than going through HR"*
- Sham arrangements may mean that a worker foregoes a range of entitlements that would be available to them under an Enterprise Agreement
- It may also mean that other legal obligations are being avoided, such as proper payment of taxation or payment of superannuation
- If the University is found to have contravened the sham arrangement provisions of the Act, a court may impose the following civil penalties:
 - *A fine to the University of up to \$51,000 per instance*
 - *Fines for individuals of up to \$10,200 per instance*

Right of Entry – Trade Unions

- Under the Act, Trade Unions (e.g. [NTEU](#), [ASU](#), [CPSU](#)) are able to enter a worksite:
 - to investigate a suspected breach
 - for occupational health & safety purposes
 - to hold discussion with employees
- When investigating a suspected breach, Union Officials must:
 - hold a permit
 - provide at least 24 hours notice to the premises' occupant
 - may inspect & make copies of any records relevant to the suspected breach, including non-member records

Unfair Dismissal

- If a person believes they have been unfairly dismissed in contravention of the general protections provisions, they can make an application to the Fair Work Commission to deal with the dismissal
- The application must be lodged within 21 days of the dismissal taking effect
- Some employees will not be able to make an unfair dismissal claim, including those who:
 - have not been employed for the minimum employment period of six months
 - earn more than the high income threshold (\$129,300 pa indexed) & are not covered by an award or agreement
 - have been dismissed because of genuine redundancy
 - are irregular casuals
 - are employed under a fixed term contract or training arrangement

Workplace Complaints

- A person who believes they have been subject to a general protections contravention can [lodge a complaint](#) with the Fair Work Ombudsman who is obliged to investigate the allegation
- Where identified, the Fair Work Ombudsman can initiate legal action for penalties of up to \$10,200 for an individual, or \$51,000 for a corporation

Anti-Bullying Jurisdiction (Fair Work Commission)

Who may apply?

- From January 2014, a worker who reasonably believes he or she has been bullied at work may apply to the Fair Work Commission for an order to stop bullying
- *Worker* is defined as: An individual who performs work in any capacity including as an employee, a contractor, a subcontractor, an outworker, an apprentice, trainee, student on work experience or a volunteer
- The application may be made while there is a parallel action under WH&S laws

A worker is bullied if:

- While at work on University business;
 - An individual or group repeatedly behaves unreasonably towards the worker or a group of workers; and
 - The behaviour creates a risk to health and safety
- Bullying does not include reasonable management action carried out in a reasonable manner

Employer Obligations – Employee Records & Payslips

- Employers are required to keep accurate & complete records & issue pay slips to ensure employees receive their correct wages & entitlements
- Employee records must:
 - be in a form that is readily accessible to a Fair Work Inspector
 - be in a legible form & in English
 - be kept for seven years
 - not be altered unless for the purposes of correcting an error
 - not be false or misleading to the employer's knowledge
- Employee records are private & confidential:- generally, no one can access them other than the employee, their employer & relevant payroll staff

Employer Obligations – Employee Records & Payslips (cont.)

- Employers must make copies of an employee's records available at the request of an employee or former employee
- Fair Work Inspectors may issue an employer with an **infringement notice** for failing to meet their record-keeping & pay slip obligations under the Act
- The maximum fines payable are:
 - \$510 per contravention for an individual
 - \$2,550 per contravention for a body corporate
- A contravention of this obligation may also be a breach of the [State Records Act 1997 \(SA\)](#)

What can happen if I don't comply?

University Consequences:

- Monetary penalties, including uncapped compensation to victims of discrimination
- Legal & administrative costs
- Damage to the University's reputation

Individual Consequences:

- A claim of Adverse Action may be brought against an individual
- Civil penalties may apply, which University insurance will not cover
- A breach of the UoA Enterprise Agreement may be a breach of the Act & vice versa

Additional Resources

- [Jane Welch](#), Director, HR Advisory
 - 8313 0257
- [University of Adelaide Enterprise Agreement 2017-2021](#)
- [Fair Work Ombudsman](#)
 - Infoline:13 13 94
- [National Employment Standards](#)
 - Fair Work Ombudsman Website



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Please contact , *Ms Jane Welch, Director, HR Advisory* if you are unsure of your compliance obligations under the Act.