



NEW YEAR BRINGS IN IMPORTANT VARIATIONS TO EMPLOYER COMPLIANCE FOR SMALL BUSINESSES AND NON-CONSTITUTIONAL CORPS.

Changes to the Small Business Fair Dismissal Code

A 'small business' is required to follow the Small Business Fair Dismissal Code when terminating an employee. If they follow this code the employee will not be considered to have been unfairly dismissed.

The definition of 'small business' for the purposes of unfair dismissal is an employer which employs fewer than 15 employees. The way the 15 employees is calculated changed with effect 1 January 2011.

Prior to 1 January 2011 the number of employees was calculated by taking the total number of hours worked by all employees in the business and dividing it by 38 to find the full-time equivalent number of employees.

From 1 January 2011 the method of calculation is based on a simple headcount of the number of employees in the business, irrespective of how many hours they work. The headcount includes casuals employed on a regular and systematic basis and employees of associated entities.

In short, from 1 January 2011, if you employ less than 15 employees (no matter what hours they work) you are a small business and must follow the code – remember to include regular and systematic employees into the calculation. If you employ 15 employees or more, the Code does not apply to you.

Modern Awards now apply to non-constitutional corporations

We have sent out several updates over the last 12 months advising members that on and from 1 January 2011 they would be bound by the applicable Modern Award and would be required to transition across to the classifications, minimum hourly rates, casual loadings, Saturday, Sunday, shift and evening penalties; as applied to Constitutional corporations on 1 July 2010.

Fair Work Australia moved the 1 January date back to 1 February 2011 to assist employer compliance. Therefore from today unincorporated employers are bound by the Modern Award applicable to their workplace.

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Who is affected by this?

These changes affect only unincorporated employers (such as sole traders and partnerships) who:

- Were previously covered by their State workplace relations system, and
- Are now covered by the national system as a result of the referral of State industrial powers to the Commonwealth government which occurred on 1 January 2010 – however which was subject to a 12 month period of implementation regarding ‘old State’ Awards; known as Division 2B Awards.

Incorporated entities are already bound by the Federal system and Modern Awards.

What do these non-constitutional employers need to do?

While all of this information has been provided previously we believe it is worthwhile again clarifying what employers must do to comply:

1. Firstly employers should reclassify employees under the *Legal Services Award 2010*.
2. Ensure you are paying the correct rates and penalties under the Modern Award taking into account application of the 20% transitional calculation. Remember however that the following overriding rules apply in regard to the transitional calculations:
 - (a) If the minimum wage in the Division 2B State award (Clerical Employees Award State – 2002) is lower than the modern award equivalent, but the transitional rate is higher than the modern award equivalent, the full modern award rate will apply:
Div 2B Award: \$15
Modern Award: \$16 **(Employer only required to pay Modern Award rate)**
Transitional rate: \$17
 - (b) If the minimum wage, penalty rate or loading in a Division 2B State award is higher than the modern award equivalent, but the transitional rate is lower than the modern award equivalent, the full modern award rate will apply:
Div 2B Award: \$17
Modern Award: \$16 **(Modern Award rate applies)**
Transitional rate: \$15
3. The National Employment Standards have applied to these employers since 1 January 2010 – however we again advise all employers to ensure they have reviewed their contracts, policies and processes to ensure compliance.

Remember you are obliged to comply with these arrangements. Fair Work Inspectors continue to conduct random audits so ensure your compliance.

**Need help to comply with the transitional arrangements or further Workplace Relations advice? Contact IR Assist on:
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