

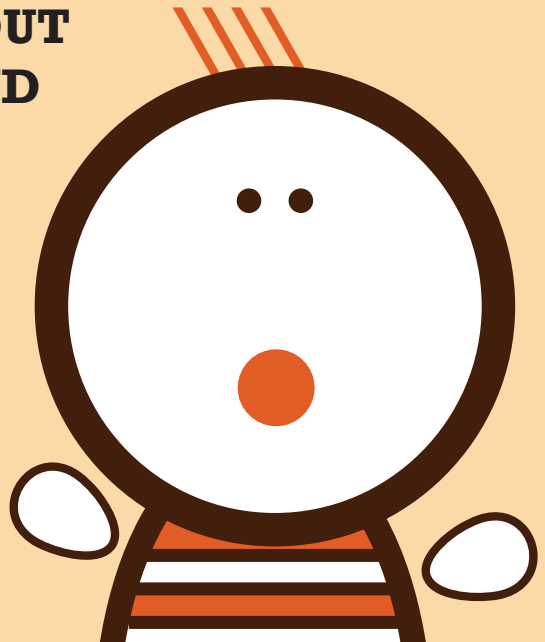


**Ripped
OFF?**

**YOUR RIGHTS ABOUT
UNPAID WAGES AND
ENTITLEMENTS
AT WORK**



**100%
GOOD READ
GUARANTEED**



Far West
Community Legal Centre

Legal Aid
NEW SOUTH WALES

Disclaimer: This information is a general guide to the law. It should not be relied on as legal advice. If you have a specific legal problem you should consult a lawyer.

It applies to people who live in, or are affected by, the law as it applies in NSW, Australia.

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Ripped Off? Your rights about unpaid wages and entitlements at work.

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What is this?

As an employee you have certain rights under the law; you should be paid correctly, receive the correct entitlements from your employer and be treated fairly in the workplace. Unfortunately some employees can be “ripped off” by their employers. Some employees may not realise that they are receiving the incorrect pay or not receiving the benefit of all of their entitlements.

This guide sets out what it means to be an employee, how to check what type of employee you are, what your minimum entitlements are and how to check if your superannuation is being paid. Most importantly the guide will tell you where to get help if you feel you have been wronged by your employer.

If you feel like you are not being paid the correct amount, not receiving all of your entitlements or you are unsure about your rights at work, then this guide is for you.

Abbreviations List

ATO	Australian Taxation Office
CIM	Chief Industrial Magistrate's Court
EA	Enterprise Agreement
FEG	Fair Entitlements Guarantee
FWC	Fair Work Commission
FWO	Fair Work Ombudsman
NES	National Employment Standards

Working for a Local Council or the NSW State Government?

If you are, this guide might not be for you. Local Council and most NSW State Government employees are not covered by the Federal system, which is what this guide gives information about.





Contents

Am I an employee?	7
What type of employee am I?	11
How do I know what my employment contract says?	15
What are my minimum entitlements at work?	21
How do I get my correct entitlements?	25
I have got a problem. What do I do?	31
Independent contractors	35
How can I check if my employer has paid my super?	37
If my employer is insolvent or bankrupt and I have entitlements owing to me, where can I get help?	41
Getting help	45



Am I an employee?

There are lots of different ways that a person can work – for example, you can:

1. Be employed as an employee;
2. Volunteer – usually you are not paid if you volunteer;
3. Do work experience as a student placement;
4. Run your own business by working as an independent contractor.

Each of these different ways of working has different legal consequences.

Volunteers usually don't get paid for work at all. There is a clear understanding by everyone concerned – the organisation and the person doing the work – that the work is done as a gift to the organisation. Sometimes, organisations might pay the costs of petrol or bus and train fares – but this will not turn a volunteer into an employee.

Also, work experience students, who work with an employer during their studies, are usually volunteers, and do not expect payment.

If you are an independent contractor:

- You are responsible for paying your own tax;
- You can work when you want to;
- You usually provide your own tools;
- You don't get paid holidays or sick leave;
- You may get paid for each task you finish;
- The person who hires you usually does not take tax out of your pay and does not integrate you into their workplace or organisation (for example you don't usually have to attend staff training or wear a uniform).

Probation or Training

It is usually illegal to require an employee to work for free during a probation or training period.



Deciding whether you are an employee or an independent contractor or a volunteer can be really difficult. For example, some people might be given a “gratuity” (a small sum of money) for volunteering, or might be described as a contractor by their employer but really be an employee (for more information about contractors go to page 35).

If it is not clear to you whether you are an employee or not, you should get advice from a lawyer to help you – see the Getting Help Section on page 45.

Case Study

Noah had been looking for work for a while. He found an ad in his local paper – a company was looking for a receptionist. He went for an interview, and was asked to start work soon after. He was given a job description, and asked to fill in forms for tax and also given an induction. Noah was told by the boss that because he was young and this was his first office job that he would need to do a job trial.

During the trial, he was expected to turn up for work, and do the job, but was not going to be paid, because it was “volunteer work”. Because he was a “nice guy” his boss told him that he would give him \$100.00 a week to cover his petrol.

Noah worked for 3 months and then was told that he was not going to be employed because he “did not fit in”. Noah was really upset! He had really worked hard, and everyone seemed happy with his work. He saw a lawyer who contacted the employer and pointed out that Noah was entitled to be paid wages for his work.

The company then back-paid Noah for all of the work that he had done. He was not a volunteer at all, but had an employment relationship with the company.

Case Study

Chloe had worked for a company for a few months as an employed cleaner. She was told that the company would no longer be employing her, but that she could do her job as a contractor.

She was told that she would be paid at a different rate but still based on the hours that she worked. She was also told that she “would have to sort out the tax”, and would not be paid for holidays or sick leave any more.

Apart from that, everything stayed the same. She would have to come to work to do the same shifts, still wear the company uniform, and still do the same work.

If Chloe wasn't able to do the work, she was told that she would not be paid. She was also

told that she was not allowed to get someone else to do the work for her. She would need to do the work herself or she would not get paid at all.

After a few weeks, Chloe realised that she was worse off in this arrangement. When she was sick, she didn't get paid. The new hourly rate less the tax that she had to pay meant that she actually got to keep a smaller amount.

Chloe saw a lawyer who told her that the company had to treat her as an employee. The difference between what she would have earned as an employee and what she had earned as a “contractor” should be paid to her. She was also able to access all of her employee entitlements (like holiday pay, sick pay, carers leave and so on).



What type of employee am I?

You think that you are an employee. Your employer treats you as an employee, you have tax taken out of your wage each pay. But what type of employee are you? This is an important question – the type of employee you are may change what you are entitled to.

Basically, you can be employed to work in 3 different ways:

Full time

An employee who works full time is usually contracted to work about 38 hours a week. Full time employees may also receive:

- Paid leave (personal carer's leave, holiday pay, sick leave and so on).
- Guaranteed regular, weekly hours of work.
- Minimum notice requirements if your employment is terminated, for example, if your job is made redundant.

Part time

Part time employees usually work less than 38 hours a week. The work hours of a part time employee are usually regular, with little change from week to week. Also there is an expectation that the employment relationship with the employer will continue. Part time workers may also receive:

- Paid leave (personal/carer's leave, holiday pay, sick leave and so on).
- Guaranteed regular, weekly hours of work, that can't usually be altered without your agreement.
- Minimum notice requirements if your employment is terminated.

Casual

Casual workers are hired to work irregularly. That means that there is no expectation, certainty or guarantee of ongoing work, fixed shifts or hours. Casual employees are hired only from the start of their work day or shift to the end of their work day or shift. Casual employees **don't** get:

- Paid leave (personal carer's leave, holiday pay, sick leave and so on);
- Guaranteed regular, weekly hours of work;
- Minimum notice requirements if your employment is terminated or your job is made redundant.

Because of this, casual employees are usually paid at a higher hourly rate than part time or full time employees. You might wrongly be called a casual even though you work regular hours like a permanent employee.

Case Study

Ella worked at a restaurant. She worked the same hours every week. It was a small work place, with only 2 other employees. She had been working there for 2 years. There had never been any change in the days that Ella worked or the times that she worked. She was paid as a 'casual'. A family emergency came up, and Ella needed to take off 2 weeks of annual leave.

Her boss told her that she was a 'casual' and was not entitled to take leave or be paid for any leave. Ella saw a lawyer. Ella was advised that her boss was

required to allow her to take leave because she was not really a casual. Ella then spoke to her boss about the situation. Her hourly rate was adjusted to a part time rate.

Although it was less money per hour, she could now take paid holidays, and have sick leave and carer's leave. Even though it was hard to confront her boss about this, Ella's boss was happy to do the right thing – she hadn't realised that Ella should be a part-time employee, not casual.



Case Study

Olivia worked for a fast food restaurant. She knew when she was working by ringing up every Sunday to find out when she was rostered to work.

Some weeks she worked lots of hours; but other weeks, she worked little to no hours at all. There were no set days that she worked every week.

She was paid at a higher rate an hour than her co-workers who worked part time or full time (25% an hour more) – but she did not get paid holidays or sick leave like they did.

Olivia's work was truly casual.



How do I know what my employment contract says?

If you are an employee, you have a contract – employment is a contractual relationship between you and your employer.

Contract of employment

It is important to know that an employment contract can be made:

- In writing;
- In conversations (and that those conversations can be face to face or happen over the phone – you still have a contract even though it is not in writing); or
- Both in writing and in conversations.

Your terms and conditions of work may be outlined in a letter of offer. As well as a your letter of offer, you may also receive a formal contract setting out the entitlements, terms and conditions of your employment.

Many employees don't even get a letter of offer – there is just a conversation between the employee and their employer that leads to employment (this happens a lot when you work for a small or medium sized business).

The matters agreed to in the conversation will form part of an oral agreement or contract. For example, if you have a conversation about start and finish times then those details are part of the oral employment contract or agreement.

An Award may also apply to your employment so not every detail about your employment terms will be mentioned in a written letter contract or a conversation.

An Award is a legal document that sets the minimum standards of employment in a particular industry. Awards usually set out the minimum pay rates, entitlements and conditions for each industry. Awards cover most industries. Some employees who are not covered by a specific Award may be covered by the Miscellaneous Award (depending on the industry).

Some employees – such as management workers or professional workers (like lawyers) are not covered by an Award.

Enterprise Agreement (EA)

Some employers have approved EAs that apply to all employees of that employer. In most cases the EA will replace an Award that might have applied to workers in the employers business.

If your employer has an EA, it is possible that the pay and conditions are different to the Award. But, this can only happen if the EA passes the “better off overall” test. Most EAs provide for higher wages with more flexible work hours as well as adjustments of penalties rates etc.

Sometimes the EA might not completely rewrite the Award, but will “import” parts of the Award into the EA. You need to read it carefully to work out exactly what it says. Sometimes you need to read it with the Award that applies to your industry to get the full picture of the EA means.

It can be hard to work out exactly what terms and conditions apply to your employment. If you are not sure, get some help – see the Getting Help Section on page 45.

If you want clear information about your pay and conditions of work, a good place to start is to ask your employer. If you do:

- Be courteous – don’t be confrontational or accuse your employer of anything. Remember that your employer might not know that they are doing something wrong;
- Be clear – ask for exactly what you want to know.



Is there a national minimum wage?

Yes! All workers should be paid at least \$19.84 per hour, or \$753.80 per week for a 38 hour week. But, junior workers (people under 20) can be paid less than this amount though.

Check your Award or EA. Go to www.fairwork.gov.au to find your Award and pay-rate, or www.fwc.gov.au to find your Award or EA.

This rate is current as at July 2020. Check what rates apply at www.fairwork.gov.au. Most Awards require higher minimum rates. Pay rates for apprentices are different to junior rates of pay.

If possible, ask your employer to confirm the answers to your questions in writing, such as via email or letter.

If you need more advice, or if your employer can't or won't help you, then visit the Fair Work Ombudsman (FWO) website at www.fairwork.gov.au or see the Getting Help Section on page 45.

There are a number of tools on the FWO website that can help:

Pay and Conditions Tool (PACT): You can calculate some base pay rates, allowances, overtime and penalty rates of pay. You can also calculate some pay rates for entire shifts worked over a seven day period.

Award Finder: You can search for the Award that applies to your industry and to you.

Industry Pay and Conditions Guides: You can find a summary of pay and conditions under some relevant Awards for the following industries:

- Accommodation, liquor & gaming industry
- Clerical industry
- Fast food industry
- Retail industry
- Hair & beauty industry
- Horticulture industry
- Registered and licensed clubs industry
- Restaurant & cafe industry
- Social and community services industry
- Security industry
- Metal manufacturing industry
- Vehicle industry

If you need help, call the FWO info line on 13 13 94 to speak to an information officer (Line operates Monday to Friday 9.00am to 6.00pm) or visit their website www.fairwork.gov.au – There is an interactive chat session that operates daily.

Also, if you need to find an EA that applies to you, you can look on the Fair Work Commission's (FWC) website at www.fwc.gov.au under Agreements, Find an Agreement) or call the FWO and give the information officer the name and ABN of your employer and they can then find the EA that applies to you.





When does my employment contract finish?

There are 2 types of employment contracts:

A fixed term contract – that finishes on a date or after the completion of a fixed period, for example traineeship or special project.

And

An ongoing contract – which continues until you give notice that you want to finish your employment or your employer gives notice to terminate your employment. Your letter of offer or confirmation of employment letter may also set out how your employment can end. Also Awards and EAs set out how employment can end.

Case Study

Jack went to work at a club as a barman. When he was offered the job, he was given a short letter from the Club confirming:

- His start date;
- His rate of pay;
- His usual hours of work;
- His entitlements to annual leave, sick leave and long service leave.

After working for nearly 5 years, the Club started to talk about needing to make people redundant. Jack was not sure what that meant for him. Also, he could not find the Award mentioned in his letter of employment at all!

The letter that he received from the Club was really short and did not cover this issue.

Jack rang the FWO. The FWO was able to:

- Tell Jack which Award applied;
- Help Jack work out what the Award and the law said about redundancy entitlements.

In the end, the redundancy did not happen. But Jack now knew what Award applied to him, and what his termination and redundancy entitlements were.



What are my minimum entitlements at work?

The law creates 10 areas of minimum entitlements and conditions. These are called the National Employment Standards (NES). The NES apply to all employees no matter what the pay rate, job description or the industry. These are the basic NES:

1. **Maximum weekly hours of work** - 38 hours per week, plus reasonable additional hours.
2. **Requests for flexible working arrangements** – this allows some parents and carers to ask for a change in working arrangements to help with their parental or carers responsibilities.
3. **Parental leave and related entitlements** - up to 12 months unpaid leave for each worker parent, plus the ability to ask for an additional 12 months unpaid leave. This NES also applies in cases of adoption and same sex parenting. Some 'long term' casual employees are entitled to parental leave. After the period of parental leave ends the employee has the authority to return to their job.
4. **Annual leave** - 4 weeks paid leave per year, plus an additional week for certain shift workers. This NES does not apply to casual employees.
5. **Personal / carer's leave and compassionate leave** - 10 days paid personal / carer's leave, two days unpaid carer's leave as needed, and two days compassionate leave as needed. This NES does not apply to casual employees.
6. **Community service leave** - unpaid leave for voluntary emergency activities and leave for jury service, with an entitlement to be paid for up to 10 days for jury service.

7. **Long service leave** – For most NSW workers the Long Service Leave Act 1955 (NSW) will still apply. Some Awards and EAs also set out these entitlements.
8. **Public holidays** - a paid day off on a public holiday, except where the worker is reasonably asked to work. Casuals are not entitled to be paid for public holidays unless they work on the public holiday.
9. **Notice of termination and redundancy pay** - up to 4 weeks' notice of termination (5 weeks if the worker is over 45 and has at least 2 years of continuous service) and up to 16 weeks redundancy pay, both based on continuous length of service. This NES will not apply if you are a casual employee.
10. **Each employee must be given a Fair Work Information Statement** - employers must provide this statement to all new workers. It contains information about the NES, Awards, agreement-making, the right to freedom of association, termination of employment, individual flexibility arrangements, right of entry, transfer of business, and the roles of the FWC and the FWO.

Case Study

Sarah's little girl Chloe was 18 months old when Sarah went to work for a company. Everything was going really well with her work schedule – Sarah's mum and dad were able to look after Chloe when she went to work. Sarah usually worked from 12.00pm to 4.00pm Monday to Friday.

Sarah's parents moved away when Sarah's dad started

another job. Sarah had tried to find childcare for Chloe, but was only able to get Chloe into childcare in the mornings from 9.00am to 1.00pm.

Because her employer agreed, Sarah was able to negotiate a change of start and finish time to fit in with Chloe's childcare times. The negotiations took place because of the NES about flexible work arrangements.



Is it ok to be paid cash in hand?

It is okay for you to be paid cash in hand – but, even if that is the way you are paid, your employer must give you a payslip.

Always get a payslip. Sometimes, employers who pay cash without giving you a payslip are not following the law – not paying your tax to the Taxation Office and not paying your superannuation.

Also, it can be really hard to show that you are working for an employer without a paper trail – so, ask your employer for a payslip!

If you can't get a payslip, call the FWO for help. If you are worried about your employer finding out, you can ask the FWO to keep your identity a secret.

Case Study

James and Samuel had been on the adoption waiting list for their baby for a few years. They found out only a short time before they were going to be parents that their baby was available to adopt.

After talking about it, they decided that James would take 12 months off work to look after their baby.

James spoke to his employer – who was not sure if parental leave was available in “cases like theirs”.

James and Samuel spoke to the FWO – James was entitled to take 12 months leave, under the NES. James is now enjoying his time looking after baby Will.



How do I get my correct entitlements?

If you are not getting your correct entitlements, there are a number of different ways that you can go about claiming what you are entitled to.

- Make a complaint to the FWO; or
- Make a claim in a court; or
- If you are a member of a Union, you can get help from your Union.

Fair Work Ombudsman

The FWO has a good process to resolve disputes between employers and employees about entitlements. The first step is to make a complaint in writing using the Workplace Complaint Form – attach as many documents as you have about your pay and employment to the complaint form. That form can be found on the website at www.fairwork.gov.au. You should make a complaint in writing, even if you have spoken to the FWO and the information officer is not encouraging. Once a complaint is received by the FWO, an investigator should make contact with you to discuss the complaint.

Often, you and your employer are referred to Assisted Voluntary Resolution. This is a mediation process that gives both you and your employer the opportunity to resolve the dispute.

Sometimes, in this process, you might decide to accept less money than what you are owed by your employer. You are not obliged to accept less than what you are owed. But, it might be a good solution for you to settle for less because:

- You can access the agreed amount soon after the agreement is made;

- If you decide not to settle, you might need to wait through a long investigation and court claim before getting anything from your employer.

However, these are your legal entitlements, and you should not feel pressured to accept less money than you are owed. Think carefully about this before you settle for less.

During an investigation, you may be asked lots of questions and to hand over all of the documents you have. Your employer may also be questioned and required to provide documents to the FWO. FWO investigations can lead to many different results, including employers being issued with letters of caution, compliance notices or penalty infringement notices.

Sometimes the FWO may take legal action in the courts against an employer. The FWO does not take legal action for workers in all underpayment matters.

The FWO might also recommend that you start legal action to recover your entitlements from your employer. You might want to get your investigation report and calculations from the FWO – you can ask for a copy of these by sending a letter to the FWO.





Working for board and lodging?

It is fine for an employer to give you board and lodging as part of your pay.

But, be careful – if you are working you should be paid for the work you do in money. Working long hours for only board and lodging can be exploitation.

Going to Court

At any time during the FWO complaints process, you can take your own legal action to recover wages or entitlements owed to you (it is important to remember that this might stop the FWO complaints process – so talk it over with the investigator before you do anything).

There is an important time limit for court claims: You only have 6 years from the date that the amount became due and payable to you to claim in a court for unpaid entitlements.

If you do not take action in a court to recover the unpaid wages or entitlements during that time, you will lose the right to claim entirely.

Which Court?

If you live and work in NSW, it is possible to make a claim for unpaid entitlements in 5 different courts:

1. **The Federal Circuit Court and the Federal Court:** These courts deal with claims for unpaid wages and entitlements for any worker covered by the Fair Work Act (usually any worker under an Award or EA, but not State Public Servants or Local Government Employees).
2. **The Chief Industrial Magistrates Court (CIM):** This is a specialist local court dealing with employment issues in NSW. It can deal with claims for unpaid wages or entitlements.

3. **The Local Court:** The Local Court is exactly what it sounds like – the Magistrates Court in your local area. The Local Court can handle claims for unpaid wages or entitlements up to \$100,000.00
4. **The District Court:** This is a court, which handles claims between \$100,001.00 and \$750,000.00. It is unusual for a claim about unpaid wages or entitlements to be commenced in the District Court.

If your claim is up to \$20,000.00, then you can claim in either the CIM, Local Court or in the Federal Circuit Court under the small claims procedures in those courts. These procedures are less formal, and lawyers are not usually allowed to represent parties in small claims matters unless the Court gives permission.

As each court is different, you should get legal advice before making a claim in the Courts - see the Getting Help Section on page 45.

Case Study

Ethan had been working in Aged Care for 10 years. 8 years ago, he started doing a different job (with more responsibility), and working on weekends and public holidays. His employer did not increase his pay rate even though he was doing work that required a higher rate of pay under the Award. Also the employer did not pay weekend rates due to him under his Award.

Because of the time limit, Ethan was only able to claim the difference between what he had been paid and what he should have been paid for the last 6 years, not the last 8 years. He lost out on being able to claim several thousand dollars because he had not taken legal action in time.





I have got a problem.

What do I do?

Gather information

If you are going to make a complaint to the FWO or make a Court claim, you will need as many of the following documents as you can find:

- The job advertisement;
- Your letter of appointment;
- Your written contract of employment and any duties statement;
- Your pay slips provided by your employer;
- Any group certificate(s) or annual payment statement(s) showing your income for the year and any tax paid;
- Any other letters or emails from your employer, for example, about pay rises, promotions, or super;
- Any diary notes listing hours that you worked and breaks taken.

You should also download the FWO's phone application, 'Record My Hours'. With this app you can record the time you spend at your workplace. GPS technology tracks when you arrive at work and when you leave. The app is a great way to protect yourself from wage underpayment and can help with a complaint.

If you are no longer working for your employer (and you have them) you will also need:

- Your employment separation certificate (you can also get a copy from Centrelink if you do not have it);
- A copy of your letter of resignation or dismissal;
- Any reference or statement of service your employer gave to you.

Write a letter to your employer

This is often called a letter of demand. It will help you work out your claim, and notify your employer of what you say that you are owed. If you don't get a response or payment, then get some legal advice. You also could complain to the FWO or start action in a Court.

Some employers may try to get you to sign a letter or a document to resolve the dispute – don't sign anything until you have it checked by a lawyer. You might be bargaining away more than you think. If you are thinking of signing this type of document, get some help – see the Getting Help Section at page 45.



Case Study

Isabella had been working for Big Company Pty Ltd for 6 months. She was told by her friend Joe, who was working at another company doing the same job as Isabella, that he was paid \$2.00 an hour more than she was.

Confused, she rang FWO. The FWO confirmed that the Award rate for Isabella's job was \$2.00 per hour higher than she was being paid. Isabella brought this to her employer's attention with

the letter of demand set out on the next page.

Her employer, after checking their records and also talking with the FWO, paid the net amount underpaid to Isabella. Her employer also sent the tax payable on that amount to the ATO and paid the extra superannuation to her nominated Super Fund.

Sample Letter of Demand

1 July 2012
Big Company Pty Ltd
1 Robbins Street
Prettyville NSW 2912

Dear Sir/Madam,

Re: PAYMENT OF WAGES/ENTITLEMENTS

I have been employed with your organisation as a clerical assistant since 1 February 2012. I am employed on a full time basis. I understand that I was employed under the Clerks - Private Sector Award 2010.

I believe that an additional amount is owed to me for work performed by me. My calculation of the outstanding amount is as follows:

Entitlement	Calculation	Amount Owed
Underpayment of Wages for the period 1 January 2012 to 30 June 2012	No. of hours: 912 x \$2.00 per hour	\$1,824.00

As this payment is an underpayment of wages for my usual working hours, please also pay \$164.16 to my nominated superannuation fund.

Please pay the outstanding amount within 14 days of the date of this letter. If I do not receive a response from you within this time, I may lodge a complaint with the Fair Work Ombudsman or take other legal action.

This letter provides an opportunity for you to correct these outstanding issues. If you wish to discuss this matter further, please contact me on my email address: hotfrog@spunky.com.au

Yours sincerely,

Isabella Greeme



Discrimination or unfair treatment at work

Have you been discriminated against because of 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?

Or, have you been treated unfairly or dismissed because:

- You asked about your workplace rights or complained to your employer;
- You took sick leave and provided a medical certificate;
- You complained about safety or made a worker's compensation claim;
- You are involved in union activities;
- Your employer wants to make you an independent contractor.

If any of the above things has happened to you then your employer may have breached the 'General Protections' in the *Fair Work Act*. You may have a right to compensation. You should get legal advice quickly - see the Getting Help Section on page 45.

If any of the above things has happened to you and you were dismissed, then you only have 21 days to make a claim with the FWC. If you don't lodge your claim within 21 days from the date of your dismissal, then you will lose your right to claim. If you can't see a lawyer in time then think about lodging a claim yourself. Contact the FWC to get information about how to make a claim.

If the discrimination or unfairness caused you some serious problems (other than dismissal) then you have six years to make a claim with the FWC or the Courts - but don't wait too long, see a lawyer quickly.

Serious problems include:

- Cutting your pay;
- Reducing your hours;
- Bullying and harassing you.

Another option is to make a discrimination complaint to the Australian Human Rights Commission (AHRC) or the NSW Anti-Discrimination Board (ADB). You must complain to the AHRC within 6 months of the discrimination taking place or to the ADB within 12 months of the discrimination taking place.

Do you think you have been unfairly dismissed?

Your employer must have a valid reason for dismissing you. If you think that your dismissal was unfair, you can lodge a claim with the FWC. If the FWC decides that your dismissal was unfair it can order your employer to reinstate you or pay you compensation.

Again, you have only 21 days from the date of your dismissal to lodge a claim with the FWC - so see a lawyer quickly or make a claim yourself with the FWC.

Independent Contractors

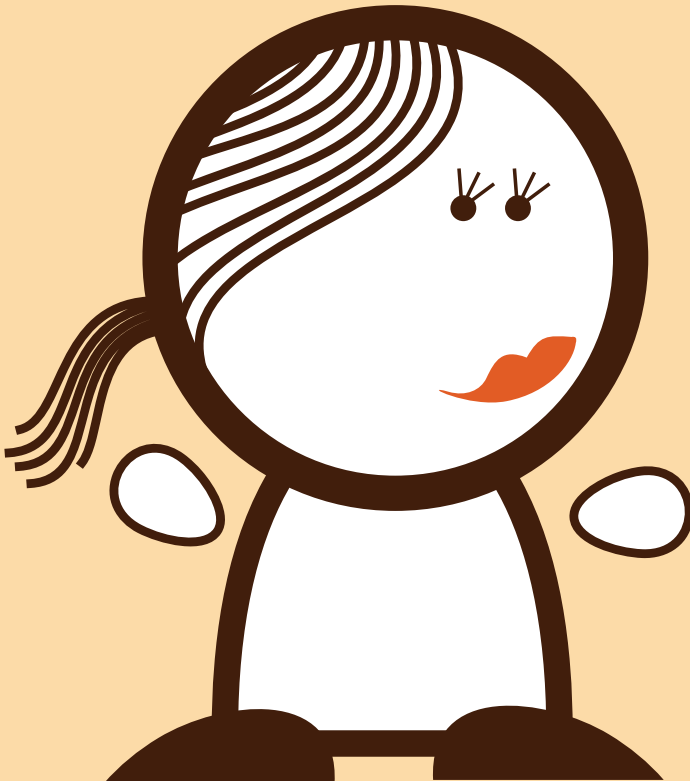
If you are unsure if you are an employee or an independent contractor, think about the following questions:

Question	Employee	Contractor
The person or company hiring you makes you do the work their way	✓	
You look and feel like an employee at work in the workplace	✓	
You are required to wear a uniform or display the company logo	✓	
You have to supply your own tools and work materials (especially if these are expensive)		✓
You are paid for each task you complete		✓
You are paid wages calculated on an hourly rate	✓	
You get paid annual leave and paid sick leave	✓	
The person or company that hires you takes tax out of your pay	✓	
You have an ABN and give invoices before you get paid		✓
You are running your own business, have a chance of earning profit and can build your own customer base		✓
You are free to work for other people or organisations as well as the person or company who has hired you		✓
You can subcontract the performance of your work to other people. In other words, someone else can do the work for you but you will still be paid by the person or company who engaged you.		✓
You have a written contract and it says you are an independent contractor		✓

If most of the ticks in the 'employee' boxes apply to you, then it is likely that you are an employee. If most of the ticks in the 'contractor' boxes apply to you then you are likely to be a contractor. Just because your hirer or boss calls you a 'contractor', does not always make it so. Some employers call their workers 'contractors' to avoid providing all employee entitlements like paid annual leave and sick leave.

If you really are an employee then the law will recognise this. If you are being called a 'contractor' but think that you are really an employee you should get some legal advice about your situation and entitlements –see the Getting Help Section on page 45.

Even if you are a contractor you may still be entitled to superannuation contributions and you may also be covered for workers compensation by the person or company who has hired you.



How can I check if my employer has paid my superannuation?

If you are an employee aged 18 years or over and are paid \$450.00 or more (before tax) in wages in a month, your employer must pay superannuation (super) for you. It does not matter whether you work full time, part time or as a casual.

If you are under 18 years old, you must work at least 30 hours per week and be paid \$450.00 or more (before tax) in wages in a month to be entitled to super.

Contractors are also entitled to super if they earn more than \$450 per month (before tax).

The minimum super an employer must currently pay is 9.50% of each eligible worker's 'ordinary time earnings' - basically, 9.50% of the amount you earn for your ordinary hours of work.

The contribution rate may continue to rise over the coming years.

Your employer must keep records that show:

- The amount of super paid for you and how it was calculated
- The date that super contributions were made to your fund
- The choice of super fund you have made (if you chose a particular fund)

Your payslip must record the super amounts contributed for you.

What if I have a problem?

If you are worried that your employer is not paying your super, or is not paying as much super as you are entitled to, then you can take the following steps:

Step 1

Contact your employer and ask:

- How often is super being paid for you?
- Into which fund is your super being paid?
- How much super is your employer paying?

Step 2

Check your most recent member statement from your super fund. This statement shows how much super your employer has contributed to your fund in the last financial year. You can also contact your super fund for more up-to-date information. You can usually log on to your super fund website to get an up to date statement of your super.

Step 3

If you still believe that your employer is not paying enough or any super, or is not paying your super into your chosen fund, lodge an enquiry with the Australian Taxation Office (ATO) about unpaid super by:

- Using the online Employee Superannuation Guarantee (SG) calculator;
- Lodging an enquiry online at www.ato.gov.au/unpaidsuper; or
- Phoning the ATO on 13 10 20.

The ATO will ask for:

- Your contact details and whether you give permission for the ATO to use your name when contacting your employer;
- Your employer's contact details (including business address);
- Your employer's ABN (this should be on your last pay slip or on your employer's business letterhead);
- Whether you are employed full time, part time or casual, and when you started employment with your employer;
- When the payment problem started and ended, including the month and year.

You will also need to confirm with the ATO that you:

- Were paid at least \$450 pay (before tax) in a month - the online calculator tool asks you to enter total wages per quarter;

- Checked with your employer and super fund if any super has been paid - the online calculator asks for the amount paid to the super fund each quarter (the ATO may also need your super fund name and membership number);
- Were offered a choice of super fund (your employer should have given you a form for this – if so, the ATO will need the date the form was given to you);
- Checked if your super had been paid to your chosen fund.

The ATO will ask for your identity information including your:

- Tax File Number;
- Address;
- Bank account details;
- Date of birth;
- Details from an ATO-generated notice;
- The amount of your last refund or payment.

At any time during the ATO complaints process, you can take your own legal action to recover unpaid super owed to you (this might stop the ATO complaints process – so talk it over with the ATO before you do anything).

Case Study

Liam had been employed as an apprentice butcher in a small business. He thought everything was fine, and then he got his end of year statement from his superannuation fund.

He spoke to his boss, who wouldn't answer his questions.

Liam rang the ATO hotline for help. The ATO told him that

he was entitled to be paid superannuation, and that there should have been \$3150.00 in contributions to Liam's super fund during the financial year.

The ATO took steps to ensure that Liam's superannuation was paid. This involved the ATO contacting Liam's employer.



If my employer is insolvent or bankrupt and I have entitlements owing to me, where can I get help?

It is a real problem if your employer is insolvent. Insolvent means your employer cannot pay debts and may mean that your employer is placed in liquidation or becomes bankrupt. You might not be paid for long service leave or holiday pay that you have worked for. You could also lose your job.

The Fair Entitlements Guarantee (FEG) is a safety net scheme set up to pay some outstanding employee entitlements that might not be paid because of the liquidation or bankruptcy.

Are you eligible?

To get assistance from FEG, you must be employed by an employer who has entered liquidation or bankruptcy.

You are not usually eligible for FEG assistance if you are an 'excluded employee' (including company directors, and their relatives), contractor, subcontractor, or are owed money by the employer for any reason other than for eligible worker entitlements.

What can FEG help with?

FEG can help with:

- Up to 13 weeks of unpaid wages;
- Unpaid annual leave;
- Unpaid long service leave;
- Unpaid amounts in lieu of notice up to a maximum of 5 weeks' pay; and
- Unpaid redundancy pay up to a maximum of 4 weeks per completed year of service (and pro rata for less than a full years' service).

In calculating all entitlements under FEG, a maximum rate wage is used. If you earn more than this rate, then FEG assistance will be calculated as if you earned only the maximum wage. The maximum wage is indexed every financial year. As at July 2020, the maximum wage is \$2451.00 per week.

FEG won't pay superannuation. But if there are sufficient assets to pay employees, then the Liquidator or Trustee in Bankruptcy must pay your superannuation.

If you need help recovering entitlements under the FEG scheme, contact the FEG Hotline on 1300 135 040 or go to the website on <http://www.employment.gov.au/fair-entitlements-guarantee-feg>



Case Study

Mia had been working for Little Company Pty Ltd for 4 years. Suddenly, everything changed at work, and the company was placed in the hands of a liquidator. The liquidator had a meeting with Mia, and explained that the company's financial position was very bad, and that there was no money to pay Mia for her owed wages, or pay her annual leave. In fact, the

company's business was going to close down.

Mia contacted FEG. They were able to contact the liquidator, and once they had confirmed the financial position of the company, were able to help Mia by paying her unpaid wages, unpaid annual leave, pay in lieu of notice, and redundancy pay.



Getting Help

If you are confused, have more questions, or need help about other employment problems, then get advice in these ways:

- The Fair Work Info Line can give information about employee entitlements and other work matters: 13 13 94
- The Fair Work Ombudsman can help with complaints by employees about:
 - Under payment of wages or entitlements;
 - Non payment of wages or entitlements;
 - Some other work place problems.www.fairwork.gov.au
- The Fair Work Commission (FWC) is the national workplace relations tribunal. The FWC can conciliate and determine some workplace disputes - such as unfair dismissal matters. You can contact the Commission on 02 8374 6666 or www.fwc.gov.au
- If you are a member of a Union, your Union can assist and advise you. More information about Unions can be found at Unions Australia: www.australianunions.org.au or Unions NSW: www.unionsnsw.org.au
- LawAccess NSW is able to give information and referral over the telephone: 1300 888 529. The LawAccess NSW website also has employment law related information: www.lawaccess.nsw.gov.au
- Community Legal Centres can give advice and assistance with employment law matters. Information about Community Legal Centres and where you can find your local Community Legal Centre can be found at Community Legal Centres NSW website: www.clcnsw.org.au
- Legal Aid NSW can provide some advice about employment law matters. Information about Legal Aid NSW and the location of your nearest Legal Aid NSW office can be found by calling LawAccess NSW on 1300 888 529 or by going to the Legal Aid NSW website: www.legalaid.nsw.gov.au



Legal Aid NSW

www.legalaid.nsw.gov.au

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