

AUSTRALIA

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1. Are there any laws that govern a layoff of employees? If so, what do the laws require?

The Commonwealth Government has recently passed the *Fair Work Act 2009* (“Act”), which came into effect on 1 July 2009, and replaced the previous *Workplace Relations Act*.

An employer can legitimately dismiss an employee or group of employees, without facing potential unfair dismissal claims, if the dismissal was a case of **genuine redundancy**. Section 389 of the Act provides that a ‘genuine redundancy’ occur if:

- a) The job is no longer required to be performed due to changes in the **operational requirements** of the employer’s enterprise; and
- b) The employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

Conversely, a dismissal will not be considered to be a ‘genuine redundancy’ if it would have been reasonable in all the circumstances for the employee to have been redeployed within the employer’s enterprise or the enterprise of an associated entity of the employer (section 389(2) of the Act).

The Act does not define the term ‘operational requirements’. However, the government has provided some examples of reasons that a genuine redundancy may occur:

- ◆ The particular job becomes mechanised;
- ◆ The business slows down due to lower sales or production;
- ◆ The business relocates;
- ◆ A merger or takeover happens; or
- ◆ The business restructures or reorganises.

2. Are there any formal requirements for terminating an employee or groups of employees?

Written notice of termination

Section 117 of the Act provides that an employer must not terminate an employee’s employment unless they have given that employee written notice of the day of termination. The period of notice to be given depends on the employee’s period of continuous service with the employer. For example, one week’s notice is required where

the employee was employed for a period of less than 12 months, and four week's notice is required for a period of five years or more.

Payment in lieu of notice can also be made by the employer, if the amount paid is based on the full rate of pay for the hours the employee would have worked had the employment continued for the minimum notice period.

A modern award or enterprise agreement may also provide specific terms about the period of notice that must be given to an employee.

Certain classes of employees are not required to be notified of their termination, including:

- ◆ Casual employees;
- ◆ Probationary employees of three months or less;
- ◆ Employees engaged under a contract for a specific period or specific task;
- ◆ Seasonal employees;
- ◆ Employees guilty of misconduct, where their continued employment is unreasonable;
- ◆ Trainees;
- ◆ Daily-hired employees in the building and construction industry or in connection with livestock slaughter within the meat industry;
- ◆ Weekly-hired employees in the meat industry whose termination is determined solely by seasonal factors; and
- ◆ Employees who earn over \$108,300 per year, and who are not covered by an award or agreement.

Redundancy pay

An employer is required to pay to the employee 'redundancy pay' if the industrial agreement, award, or notional agreement preserving state awards that applies to the employment provides that the employee is entitled to redundancy pay.

Pursuant to section 119 of the Act, an employee is entitled to receive redundancy pay if their employment was terminated:

- a) Because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
- b) Due to the insolvency or bankruptcy of the employer.

The amount of pay, calculated on the employee's base rate of pay for his or her ordinary hours of work, is determined by reference to a table set out in section 119(2). The minimum period of continuous service required by an employee before redundancy pay is required to be paid is one year.

However, in certain circumstances an employer is not required to pay redundancy pay to terminated employees. For example, employees who are engaged for a specific

period or for a specific task or tasks, casual employees, and seasonal employees are usually not entitled to redundancy pay.

Section 120 of the Act also provides that where the employer obtains other acceptable employment for the employee or the employer cannot pay the amount of redundancy pay due, they can apply to Fair Work Australia (“the Authority”) seeking a determination that the amount of redundancy pay calculated under section 119 be reduced to the amount specified in the determination.

Other situations that exclude the obligation to pay redundancy pay are where the employee’s period of continuous service is less than 12 months or where the employer is a small business employer having less than 15 employees (section 121(1) of the Act).

Other statutory requirements

Employees may also have accrued annual leave and other leave that an employer will be required to pay out upon termination. In addition, the termination may leave the employer liable to pay severance pay to the employee.

3. Are there special legal requirements for a layoff caused by redundancy in the workforce?

See above answers to questions one and two relating to redundancy.

4. Are there employment laws that laid-off employees can use to challenge their inclusion in the layoff?

Unlawful termination

Section 772(1) of the Act sets out a number of grounds upon which employment is not to be terminated by an employer. Some of these grounds include, but are not limited to:

- ◆ Temporary absence due to illness or injury;
- ◆ Trade union membership activities or non-membership of a trade union;
- ◆ 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;
- ◆ Absence during maternity or parental leave; or
- ◆ Absence to file a complaint against an employer and to seek out competent administrative authorities.

Exceptions to this provision exist in section 772(2) where the termination was based on the inherent requirements of the particular position concerned, or the employment was with an institution conducted in accordance with certain beliefs or a religion and the termination was in good faith and to avoid injuries to the religious susceptibilities of adherence to that religion.

Unfair dismissal

An employee may also try to bring a claim for unfair dismissal. Unfair dismissal is proven if the Authority is satisfied that a person’s dismissal from their

employment was harsh, unjust, or unreasonable and the dismissal was not due to a genuine redundancy, was not by a small business, and was not consistent with the Small Business Fair Dismissal Code (section 385 of the Act).

Section 387 sets out specific criteria for determining what is 'harsh' in the circumstances. Certain employees may also be protected from unfair dismissal by a modern award or enterprise agreement that covers them.

General Protections

The Act also provides general protections in Part 3-1.

These include prohibitions that adverse action not be taken against another person (including dismissal) because they have a workplace right or have not exercised a workplace right, that adverse action not be taken due to discriminatory factors and prohibitions against dismissing an employee only to re-hire them to perform the same work as an independent contractor (sham arrangements).

Anti-Discrimination laws

In addition to the Fair Work Act 2009, the Commonwealth Government has enacted several anti-discrimination Acts to deal with specific claims for discrimination, as follows:

- ◆ *Racial Discrimination Act 1975;*
- ◆ *Sex Discrimination Act 1984;*
- ◆ *Disability Discrimination Act 1992;* and
- ◆ *Age Discrimination Act 2004.*

The States and Territories also have their own Acts dealing with equal opportunity. In Victoria, the government has enacted the *Equal Opportunity Act 1995* to deal with such claims.

5. What sanctions or penalties may be imposed against employers for violating any of the requirements mentioned in No's 1-4 above?

Contravention of Unfair dismissal provisions

Where there is a contravention of the unfair dismissal provisions, the Authority may order that the dismissed employee be reinstated, or if this is not appropriate in the circumstances, order that the employer pay compensation to the employee in lieu of reinstatement (Division 4 of Part 3-2 of the Act).

Termination that is not a genuine redundancy may be considered unfair dismissal and will attract the same penalties as a contravention of unfair dismissal.

Contravention of unlawful termination under section 772

Section 772 is a civil remedy provision. The Federal Court or Federal Magistrates' Court can make any order it considers appropriate in the circumstances where they are satisfied that an employer has breached a civil remedy provision. These courts have the power to:

- ◆ Order the granting of an injunction, or interim injunction to prevent the contravention;
- ◆ Order an award of compensation for loss suffered due to the contravention; or
- ◆ Order the reinstatement of a person.

The courts can also make a pecuniary penalty order of up to \$6,600.00 for a person or up to \$33,000 for a corporation for each breach.

An employee can also apply to the Authority to deal with an unlawful termination dispute.

6. What are one or two most common mistakes that employers make that lead to liability for a layoff?

Many employers believe that making part of their workforce redundant is a good way to reduce their business costs. However, employers should only consider redundancy as a last resort and ensure that they manage the process effectively to avoid possible penalties or claims for unfair dismissal or unlawful termination. This includes following all procedures for the giving of notice, redundancy pay and all other statutory entitlements.

Another common mistake is that employers often view the person as redundant in their workplace, rather than the actual job or position. This may set the groundwork for a potential unlawful termination or discrimination claim by the disgruntled employee.

Some options to avoid making employees redundant are to encourage them to take any unused annual leave where possible, negotiate a short-term reduction in work hours, or put certain positions on hold for short periods of time and rotate staff.

7. What other employment issues are likely to arise from a layoff in your jurisdiction that you have not addressed in your answers to the previous questions?

Dismissal at common law

At common law, damages can be claimed by an employee for **wrongful dismissal** under an employment contract, on the basis that the dismissal was without notice when notice was required. However, the calculation of damages does not include distress and humiliation at the loss of a job and similarly a court will not award damages for an employee's inability to find further work because of the wrongful dismissal.

An employee may also seek to bring a claim for **summary dismissal** under common law where they were dismissed for minor breaches of the terms of the employment contract. The award of damages in this instance will usually be restricted to the reasonable period of notice required to be given under the contract.

It is also important to note that when an employer sells their business to a new owner, this act of sale effectively terminates the employment contracts of all staff. Those employees who take up positions with the new owners will be entering into new employment contracts, even if the terms and conditions stay the same or the Vendor and Purchaser agree that certain entitlements carry over to the new contracts or agreements.