

Know Your Rights Guide

Law graduates' and junior legal practitioners' pay and working conditions



Prepared for the Law Society of Western Australia
by the Young Lawyers Committee

August 2021

The Law Society of Western Australia

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Disclaimer: This is a guideline only and does not constitute legal advice. You should obtain your own information and advice as to the applicable employment laws. People can contact the Fair Work Ombudsman, Department of Mines, Industry Regulation and Safety (WA) or the Law Society of Western Australia to be referred to a recognised employment lawyer.

1 Background

This is a guide for law students, law graduates and junior lawyers to increase their awareness of applicable workplace rights and entitlements. Unfortunately, the legal profession is not immune from instances of underpayment and unfair employment practices. Increasing awareness of workplace rights and entitlements will help ensure that instances of underpayments and unfair employment practices are recognised as such by employees so that they can be dealt with and rectified.

The information in this guide is correct at the time of publication. Information in the guide should be checked against the relevant documents referenced in it before reliance is placed upon the information.

2 Jurisdictional issues

As the WA Government has not referred its industrial relations powers to the Commonwealth Government, employer law firms in WA may fall within either the national system — as National System Employers, under the *Fair Work Act 2009* (Cth), or within the State system under the *Industrial Relations Act 1979* (WA).

Incorporated legal practices (Pty Ltd or Ltd entities) are National System Employers primarily governed by the *Fair Work Act 2009* (Cth), but also covered by the *Legal Services Award 2020* (**Legal Services Award**) in respect of certain employees (administrative staff, paralegals and law graduates only).

However, even unincorporated firms may fall within the National System (e.g. where they have partnerships registered in other States or Territories that have referred their industrial relations powers to the Commonwealth).

If you are employed in the public sector or at a community legal centre, an award or industrial agreement specific to your sector or employer may be applicable to you.

To understand your entitlements, you should check with your employer whether you are an employee of a State or National System Employer, and whether an award or industrial agreement applies to you.

3 Written agreement

An employment contract should ideally be in writing and set out:

- the date of the agreement;
- the parties to the agreement (i.e. the name of the employee, and the legal name of the employer);
- the position title of the employee (e.g. lawyer, law graduate, associate, etc);
- whether the engagement is permanent (full-time or part-time), casual, or for a fixed or maximum term;

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- if the engagement is for a fixed or maximum term, the start and finish dates of the engagement;
- if applicable, that the employee has an obligation to obtain a practising certificate and to comply with any restrictions on that practising certificate;
- if applicable, who is responsible to cover the cost of the employee's practising certificate, professional indemnity insurance, and the employee complying with their CPD requirements;
- which laws the agreement is subject to, including the *Legal Profession Act 2008 (WA)*, the *Legal Profession Conduct Rules 2010 (WA)*, and possible awards or industrial agreements;
- the expected hours of work, and whether there is any flexibility in how and when the employee works those hours;
- the primary location of work, and whether the employee may be required to work from other locations and/or travel;
- the proposed annual salary (for salaried lawyers) or the proposed hourly rate (for waged lawyers) and provision for superannuation in accordance with the legislated superannuation guarantee minimum;
- overtime rates (if any) and the circumstances in which overtime will be paid;
- reimbursement for expenses that the employee reasonably incurs in performing work for the employer;
- any relevant rules or guidelines for reviews of employee performance and remuneration;
- the employee's entitlement to annual leave, personal/carer's leave, parental leave, compassionate/bereavement leave, long service leave, community service leave, and public holiday pay (with reference to the applicable legislation to ensure that the contract at least meets the minimum legislative entitlements);
- how the parties can terminate the employment, including notice periods (with reference to applicable legislation to ensure that the contract meets the minimum notice requirements) and redundancy entitlements;
- that the employer can store and maintain personal and health information about the employee for certain purposes related to the employee's employment, subject to relevant privacy legislation and the employee's rights to confidentiality;
- that the employee has an obligation not to disclose or use the employer's confidential information and intellectual property except in the course of the employee's duties and employment as directed by the employer;
- who is responsible for paying for work-related expenses such as practising certificate fees if the employee leaves the employment part-way through the financial year;
- whether the employee will be required to use their personal vehicle, and how the employer will compensate the employee for that use; and
- whether the employer will provide the employee with personal communication devices (e.g. phones, tablets and laptops), and whether there are any restrictions on the employee's use of those items.

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If any other conditions or options, either during the course of the contract or at its completion, are agreed during contract negotiations, it is best practice for them to be included in the written agreement.

4 Remuneration

4.1 Minimum wages under the Legal Services Award

If you are an administrative employee, paralegal or law graduate at a National System Employer, the Legal Services Award applies to you and provides for a minimum wage. Your employer must pay you in accordance with the terms and conditions of the Award.

The minimum wages apply under the [Legal Services Award](#).¹

Clause 20 of the Legal Services Award sets out entitlements to overtime pay. Overtime is defined as any time worked:

- outside ordinary hours on any day or shift; or
- in excess of an average of 38 hours per week.

The [Legal Services Award](#) sets out overtime rates.

The Legal Services Award also provides that employees and employers may agree to the employee receiving time off instead of overtime pay. Please consult the Legal Services Award for details as to the calculation of overtime and related conditions.

4.2 Volunteering

Students should be wary of unpaid volunteering opportunities. Whether an unpaid work arrangement is lawful under the *Fair Work Act 2009* (Cth) (National System Employers) depends on:

1. whether an employment relationship exists; or
2. whether the arrangement involves a vocational placement.

A vocational placement is a formal work experience arrangement that is part of an educational or training course. A vocational placement is lawfully unpaid if it meets the following criteria:

1. There must be a placement;
2. There must be no entitlement to pay for the work the student undertakes;
3. The placement must be done as a requirement of an education or training course; and
4. The placement must be one that is approved.

The Fair Work Commission website provides a useful summary of the criteria for a lawful vocational placement at National System Employers.²

¹ Slightly lower rates are applicable where the employee is under the age of 21.
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Otherwise, an employment relationship can arguably exist which can entitle you to the benefits of a minimum wage, the National Employment Standards and potentially, the Legal Services Award (National System Employers).

4.3 Redress

If you believe you have been underpaid, you may have a claim for unpaid employment entitlements. See part 10 for organisations you can contact for further advice or assistance.

5 Conditions of employment

5.1 Minimum conditions of employment

Full-time employees may be required to work up to an average of 38 ordinary hours of work a week, plus reasonable additional hours. This applies to State and National System Employers.

What constitutes reasonable additional hours depends on a range of factors including how much more than the minimum wage the employee is paid, the nature of the employee's role, and the requirements of their employer's business.

Full time employees are entitled to the following minimum conditions of employment (subject to limited exceptions):

- 20 days paid annual leave accrued on a pro rata basis;
- 10 days of paid personal/carer's leave accrued on a pro rata basis with provision for an additional two days of unpaid carer's leave per occasion and an additional two days of paid bereavement leave per occasion;
- Long service leave in accordance with the *Long Service Leave Act 1958* (WA);
- 5 days unpaid domestic and family violence leave (National System Employers only); and
- 52 weeks of unpaid parental leave (including maternity, paternity and adoption leave) but only after one year of continuous service.

Under the *Minimum Conditions of Employment Act 1993* (WA) (State System), where an employer and an employee have not agreed when the employee is to take his or her annual leave, the employer is not to refuse the employee taking, at any time suitable to the employee, any period of annual leave the entitlement to which accrued more than 12 months before that time (so long as the employee provides at least 2 weeks' notice).

Part 4, Division 6 of the *Minimum Conditions of Employment Act 1993* (WA) also provides for protections for employees returning to work after a period of parental leave, including an entitlement to take up the position held prior to commencing leave (State System).

² <https://www.fairwork.gov.au/tools-and-resources/fact-sheets/unpaid-work/student-placements#vocational-placement>.

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You may be entitled to be paid any outstanding annual and long service leave at the end of your employment. If you have outstanding annual and long service leave and have not been paid it out at the end of your employment, you may have a claim for unpaid employment entitlements.

5.2 Unlawful deductions

Under the National System, an employer can only deduct money out of an employee's pay before it is paid to them if:³

- the employee agrees in writing and it's principally for their benefit;
- it's allowed by a law, a court order, or by the Fair Work Commission;
- it's allowed under the employee's award; or
- it's allowed under the employee's registered agreement and the employee agrees to it.

There is a prohibition in the *Fair Work Act 2009* (Cth) (National System) on making deductions from payments due to an employee if it benefits the employer directly or indirectly and is unreasonable in the circumstances.⁴ This prohibition may apply where an employed legal practitioner chooses to leave employment to take up another opportunity at another firm and their former employer may wish to deduct any pro rata practising certificate fee, insurance costs, Law Society membership fees, or CPD expenses from monies owing to the departing legal practitioner. Even if there is a term in the employment contract purporting to allow such a deduction, the deduction may still be unlawful if it is not specifically authorised by the employee and the deduction is not principally for the employee's benefit.

It will be a matter for the departing legal practitioner and the former employer to agree on how pro rata practising certificate and insurance fees and costs will be dealt with. This may include the departing legal practitioner agreeing to make a reimbursement payment, or the new employer reimbursing the former employer.

If the employment is terminated by the employer (rather than by the legal practitioner), then it is generally reasonable to expect the employer to wear the costs of any unused portion of the departing legal practitioner's practising certificate or insurance fees, unless and until they are employed in legal practice elsewhere.

5.3 Study leave

If you are a law graduate at a National System Employer you are entitled to study leave. Clause 28.1 of the Legal Services Award provides that a law graduate is entitled to paid study leave not exceeding a total of 20 days in any 12-month period to attend a course of instruction, and to prepare for and attend examinations that relate to the practical legal training required for their admission to practice as an Australian lawyer.

5.4 Breaks

³ <https://www.fairwork.gov.au/pay/deducting-pay-and-overpayments>

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If you are covered by the Legal Services Award, you are entitled to a lunch break (of a 30 min to 60 min duration) for each 5 hour period worked, and two paid 10 min rest breaks per day. If you are directed by your employer to work in excess of 5 hours without a meal break, you must be paid at the rate of 150% of the minimum hourly rate for the meal break, and be permitted to have your usual meal break without deduction from your pay as soon as possible after the prescribed meal break.

6 Flexible working arrangements

Under the National System, employees who have worked with the same employer for at least 12 months (regularly and systematically, and with a reasonable expectation of continuing work with the employer on that basis, for casuals) can request flexible working arrangements if they:

- are the parent or have responsibility for the care of a child who is school-aged or younger;
- are a carer;
- have a disability;
- are 55 or older;
- are experiencing family or domestic violence; or
- provide care or support to a member of their household or immediate family who requires care and support because of family or domestic violence.

Examples of flexible working arrangements include:

- hours of work (e.g. changes to start and finish times);
- patterns of work (e.g. split shifts or job sharing); and
- locations of work (e.g. working from home).

Requests for flexible working arrangements should be in writing, explain the changes being asked for, and the reasons for those changes.

An employer must provide a written response within 21 days outlining whether the request is approved or refused. Employers can only refuse a request on reasonable business grounds, including:

- the requested arrangements are too costly;
- other employees' working arrangements can't be changed to accommodate the request;
- it's impractical to change other employees' working arrangements or hire new employees to accommodate the request; or
- the request would result in a significant loss of productivity or have a significant negative impact on customer service.

The Legal Services Award contains some additional provisions applicable to the above.

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7 Bullying, sexual harassment and discrimination

7.1 Fair Work Act

Under the *Fair Work Act 2009* (Cth), discrimination on the basis of the following attributes is unlawful:

- race;
- colour;
- sex;
- sexual orientation;
- age;
- physical or mental disability;
- marital status;
- family or carer's responsibilities;
- pregnancy;
- religion;
- political opinion;
- national extraction; and
- social origin.

The *Fair Work Act 2009* (Cth) also contains provisions relating to 'general protections'.⁵ The general protections provisions:

- protect workplace rights (such as commencing or participating in a process or proceeding under a workplace law or instrument, making a complaint or inquiry about your employment);
- protect freedom of association (such as joining a union);
- provide protection from workplace discrimination; and
- provide effective relief for persons who have been discriminated against, victimised, or have experienced other unfair treatment.

An employer cannot take any 'adverse action' against an employee because that employee has a workplace right, has exercised a workplace right or proposes to exercise that workplace right. In addition, an employer cannot apply undue influence or pressure in relation to flexibility arrangements, guarantees of annual earnings or deductions from wages.

If you have been unfairly dismissed or unlawfully dismissed on the basis of discrimination or adverse action, you have 21 days to lodge an application for unfair dismissal or a general protections claim with the Fair Work Commission.

⁵ *Fair Work Act 2009* (Cth), s 336. See also <https://www.fwc.gov.au/general-protections-benchbook/what-are-the-general-protections>

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Under the *Fair Work Act 2009* (Cth), workplace bullying is when an individual or group repeatedly behaves unreasonably towards an employee and that behaviour creates a risk to health and safety.⁶ Examples of bullying behaviour can include:

- behaving aggressively;
- teasing or practical jokes;
- language or behaviour that causes fear or humiliation or which demeans another
1. person;
- pressuring someone to behave inappropriately;
- inappropriate remarks about a person's lifestyle or family;
- excluding someone from work-related events; or
- treating an employee unfairly in relation to their entitlements, such as leave or reasonable training.

7.2 Equal Opportunity Act 1984 (WA)

The *Equal Opportunity Act 1984* (WA) prohibits discrimination on the following grounds, as well as sexual and racial harassment:⁷

- age;
- breastfeeding or bottle feeding;
- family responsibility — having a caring role;
- family status — being a relative of a particular person or having the status of being a relative;
- having personal details published on the Fines Enforcement Registrar's website;
- having a reassigned gender as under the *Gender Reassignment Act 2000* (WA);
- having a current, past or assumed physical, intellectual or mental disability;
- marital status;
- political conviction including a lack of conviction;
- pregnancy;
- race including skin colour, ethnicity or national origin or descent;
- religious conviction including a lack of conviction;
- sex; and
- sexual orientation.

If you have experienced discrimination or harassment, you can make a complaint to the Equal Opportunity Commission within 12 months.

⁶ *Fair Work Act 2009* (Cth), s 789FD. See also <https://www.fairwork.gov.au/employee-entitlements/bullying-and-harassment>.

⁷ <http://www.eoc.wa.gov.au/your-rights/fact-sheets>

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7.3 Sex Discrimination Act 1984 (Cth)

The *Sex Discrimination Act 1984* (Cth) prohibits discrimination on the following grounds, as well as sexual harassment:

- sex;
- sexual orientation;
- gender identity;
- intersex status;
- marital or relationship status;
- pregnancy or potential pregnancy;
- breastfeeding; and
- family responsibilities.

Such discrimination is prohibited in multiple contexts, not just employment (for example, also in education).

Discrimination in the employment context includes discrimination in:

- deciding which applicants are to receive a job offer;
- an employee's terms and conditions of employment;
- decisions to grant or not grant promotions; and
- decisions to dismiss.

Complaints as to discrimination or sexual harassment can be made to the Australian Human Rights Commission.

The Commission will generally provide a copy of the complaint to the alleged perpetrator or employer and invite the parties to conciliation.⁸

If the complaint is not resolved before the Australian Human Rights Commission, the complaint can be taken to the Federal Court of Australia or the Federal Circuit Court.

7.4 If you have experienced discrimination, harassment or unfair treatment

If you have experienced discrimination or harassment, you can make a complaint to the Equal Opportunity Commission, the Australian Human Rights Commission, or the Fair Work Commission, depending on the applicable legislation.

A confidential report of sexual harassment can also be made to the Legal Practice Board:
<https://www.lpbwa.org.au/Harassment-Report>.

⁸ See the Australian Human Rights Commission guide titled "[Know your rights: Sex discrimination and sexual harassment \(2012\)](#)".

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You can also apply to the Fair Work Commission for orders to stop workplace bullying.

See the below resources for information on counselling services available to Law Society members, information on organisations which may be able to assist you if you wish to make a complaint, and links to further resources.

7.5 Other relevant legislation

The following pieces of legislation also prohibit certain types of discrimination and harassment:

- *Racial Discrimination Act 1975* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)

8 Unfair dismissal

Unfair dismissal is when an employee is dismissed from their job in a harsh, unjust or unreasonable manner. In determining whether the dismissal was harsh, unjust or unreasonable the Fair Work Commission must consider whether:

- There was a valid reason for the dismissal related to the employee's capacity or conduct;
- The employee was notified of any such valid reasons for dismissal;
- The employee was given an opportunity to respond to the reasons for dismissal;
- The employer did not allow the employee to have a support person present during any discussion about the dismissal;
- The employee had received warnings about their unsatisfactory work performance; and
- Any other relevant matters.

There are various exceptions to an unfair dismissal claim. These include where:

- the dismissal is a case of genuine redundancy;
- the employee has not been employed with the employer for the minimum employment period (12 months for a business with fewer than 15 employees, otherwise 6 months); or
- the employee is not covered by an enterprise agreement or modern award and is earning above the high income threshold.

Employees covered by the National System of employment (as outlined above in section 2) can apply to the Fair Work Commission if they have been unfairly dismissed. The application should be made within 21 days from the date of the termination of employment.

9 Supervision

All law graduates and restricted practitioners should receive appropriate supervision that includes, by way of general overview, the supervisor:

- being fully aware of the work being done by the supervised person;

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- having direction, oversight, the ability to give instructions and assign tasks and the ability to amend, override or intervene in relation to the matter and the tasks being undertaken;
- giving regular feedback and guidance to the supervised person;
- satisfying themselves that correspondence and advice is accurate and well-founded, with advice being endorsed and signed off; and
- being fully aware of matters essential to the conduct of a file in relation to advice, documentation and correspondence, with minor matters and non-essential matters requiring less strict supervision.

It is ultimately up to the Legal Practice Board whether the supervision arrangements in any given circumstance are adequate. If you have any uncertainty about whether your supervision arrangements are adequate, you should contact the Legal Practice Board. Please refer to the Supervised Legal Practice Guidelines published on the website of the Legal Practice Board, found at www.lpbwa.org.au.

10 Need further information or assistance?

Law Care

If you are a member of the Law Society of Western Australia, you can access member services and resources through [LawCare](#). This includes:

- a free and confidential Employee Relations Advice Line;
- an advice line for professional ethics issues; and
- access to three free counselling sessions per year.

For more information and further resources head to the Law Society of Western Australia's resources page. If you are a law student, you may be eligible for a [student membership at a significantly discounted](#) rate.

Fair Work Ombudsman

The Fair Work Ombudsman can assist you by providing information and education, and helping you resolve a workplace issue. The Fair Work Ombudsman website contains a number of useful guides and resources which you can find at www.fairwork.gov.au applicable to the National industrial relations system. These includes online tools to check whether an award or industrial agreement applies to you, and to calculate whether you are being paid correctly. If you need assistance with a workplace dispute or have a question relating to pay or entitlements, you can also get in touch using the Fair Work Ombudsman website or on 13 13 94 between 8 am – 5:30 pm.

Joining a Union

You may be eligible to become a member of a union, if you wish to do so. As a union member, you may be entitled to advice and representation as to workplace issues. The Australian Services Union represents solicitors in certain sectors. If you are working in the public sector, you may be

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eligible to become a member of a public sector union such as the Community and Public Sector Union. Consult the relevant union website for further information.

Department of Mines, Industry Regulation and Safety's Labour Relations Division / Wageline

Information on labour relations, including pay and leave entitlements, under the State System can be found at: <https://www.commerce.wa.gov.au/labour-relations>

You can also call the Department's Wageline for answers to questions about the following:⁹

- pay rates, leave entitlements, hours of work and other employment conditions for employees working in private sector businesses covered by the WA state industrial relations system;
- employer obligations when an employee resigns, is dismissed or made redundant for employees working in private sector businesses covered by the WA state industrial relations system;
- long service leave for employees working in Western Australia;
- action private sector employees in the WA state industrial relations system can take if they believe they have been underpaid or not provided with an annual or long service leave entitlement; and
- action employees in the national industrial relations system can take if they believe they have not be provided with a long service leave entitlement.

Employment Law Centre of WA (Circle Green Community Legal Centre)

You may be eligible to receive legal advice and/or representation from the Employment Law Centre. The Employment Law Centre is a community legal centre that provides free employment law advice and representation to eligible non-unionised employees in Western Australia.

For more information, and to request legal advice, head to <https://elcwa.org.au>

Fair Work Commission Workplace Advice Service

The [Fair Work Commission Workplace Advice Service](#) provides free legal assistance service available to eligible employees and employers on topics relating to:

- dismissal,
- general protections, and
- workplace bullying.

10 Further Resources

- Fair Work Ombudsman, [Leave webpage](#) (page reference No: 1778),
- Fair Work Ombudsman, [National Employment Standards webpage](#) (page reference No: 2143)

⁹ <https://www.commerce.wa.gov.au/labour-relations/contact-wageline>
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- Resources available on the [Employment Law Centre's website](#)
- [A Practitioner's Plan for Time Off](#) by Gianna Di Stefano, The Law Society of South Australia, August 2012
- Resources available on the Equal Opportunity Commission's website, including [fact sheets and brochures](#), [helpful contacts and websites](#), and [making a complaint about sexual harassment or bullying](#)
- Fair Work Ombudsman's [Bullying & Harassment Fact Sheet](#)
- Fair Work Ombudsman's [Protection from Discrimination at Work Fact Sheet](#)
- The Law Society of Western Australia, [LawCare information page](#), and links to mental health information and resources

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