

INFORMATION GUIDE: LAW GRADUATES' AND JUNIOR LEGAL PRACTITIONERS' WORKING AND PAY CONDITIONS

THE **ESSENTIAL** MEMBERSHIP FOR
THE LEGAL PROFESSION

Prepared by the Law Society of Western Australia

lawsocietywa.asn.au

June 2018

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1. Background

This is a guide to employer legal practices to encourage best practice, fairness and compliance with legal obligations when employing graduates and junior practitioners. It aims to promote fair access to employment in the legal profession and support the health and wellbeing of legal practitioners and other employees engaged in the legal profession.

It should be acknowledged that law graduates and newly admitted lawyers may be especially vulnerable to exploitation and in weak positions to negotiate employment terms because the number of law graduates exceeds available jobs, and because they have incurred significant debts in completing their university, post-graduate and admission requirements.

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 2010* (**Legal Services Award**) in respect of certain employees (administrative staff, paralegals and law graduates only).

However, even unincorporated firms may fall within the Commonwealth system, for example where they have partnerships registered in other States or Territories that have referred their industrial relations powers to the Commonwealth. For example, where a partnership is registered in Victoria, and that Victorian partnership is the employing entity of non-partner level staff in WA, then those WA based staff are likely to be subject to the Commonwealth industrial relations system because that employing Victorian based entity falls within a jurisdiction that has referred its industrial relations powers to the Commonwealth Government.

WA based law firms who operate as sole traders or as partnerships registered in WA and who employ WA based employees are likely to be subject to the State industrial relations system, which is primarily governed by the *Industrial Relations Act 1979* (WA) and the *Minimum Conditions of Employment Act 1993* (WA).

There are situations where some WA firms have a separate Pty Ltd entity which is the employing entity of all non-partner level staff that provide services to the partnership. It is a likely possibility that those non-partner level staff employed by the Pty Ltd will be subject to the Commonwealth industrial relations system.

Each situation will depend on its own facts. These are just examples of how law firms, depending on their structure, may fall within the State or Commonwealth industrial relations system. This is not an exhaustive analysis of the various firm scenarios.

Below is a brief summary of the applicable legislation and industrial awards that may apply to employees of a law firm, depending on whether they fall within the State or Commonwealth industrial relations system:

State industrial relations system	Commonwealth industrial relations system
<ul style="list-style-type: none"> <i>Industrial Relations Act 1979 (WA)</i> <i>Minimum Conditions of Employment Act 1993 (WA)</i> <i>Long Service Leave Act 1958 (WA)</i> 	<ul style="list-style-type: none"> <i>Fair Work Act 2009 (Cth)</i> – including the National Employment Standards <i>Long Service Leave Act 1958 (WA)</i> <i>Legal Services Award 2010</i> (admin staff, paralegals and law graduates only)

3. Written agreement

In order to minimise the likelihood of disputes, it is recommended that the employee and the employer should agree the terms of employment in writing. The Law Society of Western Australia’s view is that, as a matter of best practice, the written contract of employment should 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;
- if the engagement is for a fixed or maximum term, state 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;
- 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;
- whether the employee will be required to use their personal vehicle, and how the employer will compensate the employee for that use;
- 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.

Terms offered to any employee must not breach anti-discrimination laws, the National Employment Standards (in the federal system) or the *Minimum Conditions of Employment Act 1993 (WA)* (in the WA State system), or be exploitative in terms of working hours or pay.

4. Remuneration

All employees, including admitted legal practitioners, must be paid a salary or wage rate that is at least equal to the amount the employee would have received under the applicable legislation, including with respect to minimum wages.

Administrative employees, paralegals and law graduates may be subject to an award that may provide for other terms and conditions of employment, such as rates of pay, stipulations on the ordinary hours of work, possible overtime payments and other allowances. Such employees of National System Employers are covered by the Legal Services Award.

Where a legal practitioner or any employee of a legal practice is required to incur an expense, employers should reimburse the relevant employee for that expense, including in respect of legal practitioners:

- the cost of the legal practitioner's practising certificate;
- all insurance premiums associated with insurances required to enable the legal practitioner to work for the employer; and
- all reasonable expenses to enable the legal practitioner to meet continuing professional development requirements.

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.

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 the business.

Full time employees should be afforded the following minimum conditions of employment:

- 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 compassionate leave per occasion; and
- 52 weeks of parental leave (including maternity, paternity and adoption leave) but only after one year of continuous service.

Employers should refer to the National Employment Standards contained in the *Fair Work Act 2009 (Cth)* and the conditions in the *Minimum Conditions of*

Employment Act 1993 (WA) in relation to the above entitlements. Employers also need to have regard to entitlements under any applicable award, or industrial instrument.

For example, law graduates covered by the Legal Services Award are also entitled to leave to attend to their pre-admission study requirements: see 5.4 below.

5.2 Flexible work practices to accommodate family responsibilities

National System Employers are, subject to some exceptions, required to give consideration to requests for flexible working arrangements. However, they are not obliged to agree to those requests and may refuse them on reasonable business grounds. They are required to respond to such requests in writing. Regard should be had to the provisions of Chapter 2, Part 2.2, Division 4 of the *Fair Work Act 2009* (Cth).

5.3 Taking up other employment

There is a prohibition in the *Fair Work Act 2009* (Cth) on making unauthorised deductions from payments due to an employee. That prohibition applies to where an employed legal practitioner chooses to leave employment to take up another opportunity at another firm and the employer might 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.

5.4 Special conditions of employment for law graduates

The Legal Services Award obliges National System Employers to provide their law graduates with the following leave of absence with pay to attend to their pre-admission study requirements:

- (a) for study and attendance at examinations, not exceeding 4 days in respect of each subject for which they present themselves for examination which is necessary to enable the employee to qualify for admission; and
- (b) to attend lectures and organised classes at a university or other course of instruction which is required to enable the employee to qualify for admission.

It is recommended that all law firm employers provide the above entitlements to law graduates to attend to their pre-admission study requirements.

6. Supervision

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

- daily contact between the supervisor and the supervised person;
- the supervisor:
 - being fully aware of the work being done by the supervised person;
 - 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 himself or herself 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.

7. Supportive environment

Employers should provide a working environment where:

- professional skills are able to be passed on by competent and more experienced practitioners to less experienced practitioners who need to acquire specified skills;
- junior practitioners are encouraged to develop competencies more easily gained through experience as opposed to education; and
- junior practitioners are assisted with the planning, development and management of their careers.