

FACT SHEET– EMPLOYMENT CONTRACTS

1. What is covered in this fact sheet

This fact sheet explains:

- what an employment contract is;
- how to know if you have an employment contract;
- when and how an employment contract can be changed;
- common questions about employment contracts; and
- what you can do if your employer has breached your employment contract.

Every employment contract is different. If you still have questions about your employment contract after reading this fact sheet, you can get legal advice from a lawyer or call our Advice Line. Our Advice Line contact details are at the end of this Fact Sheet.

This fact sheet only applies to employees. It does not apply to independent contractors. If you aren't sure about whether you are an employee or independent contractor, see our Fact Sheet - "Employee or independent contractor: which one are you?"

Some of the information in this fact sheet is different for national system employees and state system employees. If you are not sure which type of employee you are, see our Fact Sheet - "National system employee or state system employee: which one are you?"

2. What is an employment contract?

An employment contract (also called a "contract of employment" or a "contract of service") is a legal agreement between you and your employer. It contains the terms and conditions that you have agreed will apply to your employment relationship. Examples of common terms in an employment contract are: how much you will be paid, your ordinary hours of work, whether you will receive overtime pay (and at what rate), and the notice you must give your employer if you want to resign from your job.

The terms and conditions of an employment contract can be agreed:

- in a written document (sometimes even if it is not signed);
- in a verbal discussion;
- by the actions or behaviour of both you and your employer;

or by any combination of these.

Sometimes your employer's workplace policies and even common workplace practices in your industry can form part of your employment contract.

The law also requires all employment contracts to contain certain key terms, even if you and your employer have not specifically talked about them or agreed on them. For example, even if nothing is said in your employment contract, your employer must pay you (at least) the minimum wage and you must not work in competition with your employer or misuse your employer's confidential information.

3. How do you know if you have an employment contract?

Generally, if you agree to work for someone in return for payment of wages, it is likely that an employment contract exists. However, sometimes it is not clear whether an employment contract has been created yet.

The main steps which must be completed for an employment contract to exist are:

(1) The employer makes an **offer of employment** to you

This can be done by sending you a letter of offer, making you a verbal offer of employment (eg. at an interview or over the telephone), sending you an email asking you to start work, or any other communication which could reasonably be considered as an offer of employment.

(2) You **accept** the offer of employment **and communicate your acceptance** to the employer

Common ways to communicate your acceptance include signing and sending the letter of offer; replying to an offer by email and verbally accepting an offer. Sometimes you can also accept an offer by your actions if the employer is aware of those actions.

(3) You and your employer must have **agreed on the most important terms**

You don't have to agree on every detail of your employment relationship. But the most important terms must be clearly agreed between you and your employer.

Remember that the terms do not need to be written down or even signed. Terms can be agreed verbally or by the actions of both parties or by a combination of all of these things.

If you and your employer have not agreed on the most important terms, it is possible that you don't have an employment contract yet.

This is a complex legal area so you should get specific legal advice if you are not sure about whether you have an employment contract.

4. When and how an employment contract can be changed

4.1 What if you agree with the proposed change?

An employment contract can be changed by agreement if both parties agree to the proposed change.

But before agreeing to any change, make sure that you understand what the proposed change is and how it will affect your employment. If possible, you should always record any changes in writing (for example, on your employment contract or in an email or letter).

4.2 If you don't agree to the proposed change, can your employer go ahead and change your employment contract anyway?

When one party (usually the employer) tries to change the employment contract without the other party's agreement, this is called a "unilateral variation" or "unilateral change". Usually, this is not allowed, and you may be able to make a claim for breach of contract if this happens. However, you should be aware that if you continue to work without protesting the change this can be seen as evidence that you have agreed to the change. If you disagree with a change your employer wants to make to your employment contract, you should tell your employer that you disagree. It is best to do this in writing (for example, in a letter or by email) and to keep a copy for your records.

If you do not agree to the proposed change, your employer can change your contract without your agreement only if they are allowed to do so by law or under the terms of the original contract or an award or agreement that applies. Many industrial agreements also require employers to consult with employees before going ahead with a major change that will significantly affect the employees' employment. So, under these agreements, even if your employer has the power to make unilateral changes to your work arrangements, they can still be in breach if they don't consult you first.

Sometimes, your employer can make reasonable changes to your working arrangements as part of their power to give lawful and reasonable instructions to employees. In these cases, there is no formal change to your employment contract. Whether a proposed change is simply one which falls within this power will depend on the nature of the change and its impact on you.

If you have any concerns about a change your employer is proposing, you should get legal advice or call our Advice Line as soon as possible.

4.3 What if the proposed change leaves you with no other option but to resign?

If you resign because you believe that your employer's actions leave you with no other option, you may be able to make a claim for unfair dismissal or some other termination-based claim. You will have to argue that you were constructively dismissed. It is not easy to do this and, if possible, you should get legal advice before you resign. You can also read our Fact Sheet – "Constructive dismissal: when you are forced to resign".

If you resign and want to make a claim for unfair dismissal, you should be aware that you may have as little as **21 days** from when your employment ended to file your claim. It is very difficult to get a late claim accepted. For more information on unfair dismissal see our Fact Sheets "Unfair dismissal for national system employees" and "Unfair dismissal for state system employees".

4.4 You believe your employer has changed your employment contract because of a discriminatory or other prohibited reason

If you believe that your employer changed your contract because of one or more discriminatory reasons, you may be able to make a claim for workplace discrimination.

Changing your contract for a discriminatory reason includes changing your employment contract because of your race, colour, sex, sexual preference, gender history, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy (including breastfeeding), religion, political opinion, having a spent conviction, national extraction, or social origin. For more information, see our Fact Sheet – "Discrimination and sexual harassment".

Other claims you might be able to make can depend on whether you are a national system employee or state system employee.

National system employees

If you are a national system employee and you believe your employer has changed your employment contract because of a prohibited reason, you might be able to make a general protections claim against your employer. Some examples of prohibited reasons include:

- because of a discriminatory reason (such as those listed above);
- because you exercised a workplace right, such as taking sick leave or any other entitlement under a workplace law, industrial award or industrial agreement;
- because you made a complaint or inquiry;
- because you engaged in industrial activity including union activity; or
- because you *didn't* engage in industrial activity including union activity.

There are other prohibited reasons which we haven't listed here. If you think your employer has changed your employment contract because of a prohibited reason, you should read our Fact Sheet – "General protections for national system employees" and get legal advice.

State system employees

If you are a state system employee and you believe your employer has changed your contract because of a prohibited reason and left you with no choice but to resign, you might be able to make an unlawful termination claim. Some examples of prohibited reasons include:

- because of a discriminatory reason (such as those listed above);
- because of your trade union membership or participation in trade union activities;
- because you *weren't* a member of a trade union;
- because you filed a complaint or participated in proceedings against your employer;
- or
- because you were absent from work during maternity leave or other parental leave.

There are other prohibited reasons which we haven't listed here. For more information on unlawful termination and a full list of the prohibited reasons which apply to this type of claim, see our Fact Sheet – "Unlawful termination for state system employees." You should also read our Fact Sheet – "Constructive dismissal: when you are forced to resign".

5. Common questions about employment contracts

5.1 You are a volunteer. Do you have an employment contract?

No. For an employment contract to exist, you must be paid wages in exchange for your work or labour. If you are a volunteer, you will not be paid. Therefore, you will not be working under an employment contract.

5.2 You are helping a friend or family member. Do you have an employment contract?

It depends. For an employment contract to exist, the parties must intend to enter into a legally binding contract. When you do work for a friend or family member, it can sometimes be unclear whether the parties intended to enter into a legally binding contract. If you agree that you will be paid wages in exchange for the work, it is more likely that an employment contract exists. It is best to make sure both parties agree on this before you do the work to avoid any misunderstandings.

5.3 Your contract is for a fixed period of time or for a specific project. Do you have an employment contract?

Yes, but these types of employment contracts can mean that you have different legal rights.

An employment contract that is for a fixed period of time or a specific project will automatically end when the time period ends, or the specific project is finished. These are called "fixed term contracts".

Sometimes an employment contract is for a fixed period of time or a specific project, but it allows either party to end the contract earlier with reasonable notice. These are not fixed term contracts under the law.

The difference is important because if you have a fixed term contract, you cannot make a claim for unfair dismissal if the contract simply ends on the agreed end date or at the end of the agreed project. Having said that, if your employer terminates your fixed term contract early (ie. before the agreed end date), you might be able to make a claim for unfair dismissal or denial of contractual benefits or breach of contract.

5.4 You're not getting any work so you're not getting paid. What can you do?

If you have an employment contract and your employer is not giving you any paid work as agreed under the contract, you might be able to make a claim for breach of contract.

If you do not have an employment contract, you cannot make a breach of contract claim. However, if your potential employer misled you about the availability or nature of work, you may be able to make a claim under fair trading laws for misleading or deceptive conduct. For more information, you can contact the WA Department of Mines, Industry Regulation and Safety Consumer Protection Advice Line on 1300 304 054 or get legal advice.

5.5 Your employer is not paying you your minimum entitlements under the law. Is this allowed?

Generally, this is not allowed and terms in an employment contract that are below your minimum entitlements under the law will probably be invalid. Usually, your employer must pay you (at least) your minimum entitlements in any applicable legislation, industrial award or industrial agreement.

One exception to this general rule is that your employer can "trade off" certain penalty rates or allowances in an industrial award or industrial agreement in return for paying you a higher wage. For example, your employer might ask you to sign an industrial agreement where you are not paid extra for working overtime, but you receive a higher hourly rate for all the work you perform.

If you are a national system employee, this can be done by creating an "Individual Flexibility Agreement" provided there is a flexibility clause in an applicable modern award or enterprise agreement. To find out whether an industrial award or agreement applies to you, call the Fair Work Infoline on 13 13 94. Your employer can only make an Individual Flexibility Agreement if you genuinely agree. You should also be aware that you can terminate an Individual Flexibility Agreement at any time by giving 28 days' notice. Your award or agreement sets out other rules on this type of agreement.

Another way your employer can ask you to trade penalty rates or allowances against a higher wage or salary is through a "set-off clause" in your contract of employment. To be legally effective, set-off clauses have to be drafted in a particular way. For example, they must specify the award entitlement that is not being given. Also, the higher wage must be equal to or greater than the value of the entitlement.

Both Individual Flexibility Agreements and set-off clauses must leave you in the same position as, or better off than, you would be if you had not agreed to them. If you think you have been put in a worse position because of an individual flexibility agreement or set-off clause you should get legal advice.

6. What you can do if your employer has breached your employment contract

If your employer has breached your employment contract, you might want to first try resolving the issue with them directly. It is a good idea to do this in writing or to keep a written record of any verbal discussions. For example, you can write an email or letter to your employer setting out your concerns.

If your employer acknowledges your concerns and you reach an agreement about your employment it is important to record this agreement in writing.

If you cannot reach an agreement with your employer, you might want to consider making a legal claim. There are two main claims you might be able to make. You have 6 years from the date of the breach to make either of these types of claims. But you cannot make both of these claims at the same time; you must choose one.

6.1 Breach of contract claim

For breaches of contracts generally, including employment contracts, you can make a breach of contract claim to the Magistrates Court of Western Australia.

If your claim is for \$10,000 or less, you can use the minor cases procedure. If you use the minor cases procedure, lawyers are not allowed to be involved except in exceptional circumstances. You also cannot be made to pay the legal costs of the other side unless your claim is frivolous, vexatious or without merit.

For more information on this type of claim see our Information Kit – “Making a breach of contract claim”.

6.2 Denial of contractual benefit claim

If your employer’s breach has resulted in you being denied a benefit you are owed under your employment contract, you may be able to make a denial of contractual benefits claim to the Western Australian Industrial Relations Commission.

For more information on this type of claim see our Information Kit – “Making a denial of contractual benefits claim”.

7. Further information

The Employment Law Centre of WA (Inc)

Advice Line 1300 130 956 or 08 9227 0111

Web www.elcwa.org.au

Fair Work Commission

Address Level 16
111 St George’s Terrace, Perth 6000

Tel 1300 799 675

Web www.fwc.gov.au

Fair Work Ombudsman

Infoline 13 13 94

Web www.fairwork.gov.au

Wageline

Tel 1300 655 266

Web www.commerce.wa.gov.au/labour-relations/contact-wageline

WA Consumer Protection

Advice Line 1300 304 054

Email consumer@dmirs.wa.gov.au

WA Industrial Relations Commission

Tel 9420 4444

Outside Perth Metro 1800 624 263 (FREECALL)

Web www.wairc.wa.gov.au

8. Disclaimer

By using this publication and the information* contained within it, you agree that:

The Employment Law Centre of WA (Inc), and its directors, employees and agents (**ELC**), do not accept responsibility for any consequences, including loss and/or damage, arising from your access to, or use of, the information contained in this publication, or from your reliance on any materials contained within this publication.

While the information has been formulated with all due care, ELC does not guarantee the accuracy, currency, reliability or correctness of any of the information, nor that the information provided is exhaustive. This publication, and all the information therein, is intended to be for informational purposes only and is not intended to provide or replace specialist legal advice.

ELC does not accept responsibility for the accuracy, currency, reliability or correctness of any information included within the publication that has been provided by third parties, including third party website links.

None of the information or materials provided within this publication may be used, reproduced or transmitted, in any form or by any means, without written permission from ELC.

Ultimately, you use this publication, and the information contained within it, at your own discretion and risk. You accept as a condition of your use of this publication and the information contained therein that you will make no claim for any loss, damage or expense that may arise from your use of publication, or your reliance on any of the information contained within it.

If you have concerns or questions about any of the above, you should contact us for assistance on 1300 130 956.

*Information includes any and all data, documents, pages and images.