

## TERMINATION PAYMENTS - GETTING IT RIGHT

The Australian Medical Association has received a number of queries in relation to the correct calculation of final payments to employees on termination.

Paying an employee correctly on termination of their employment is vital, not only for the reputation of the employer, but also in order to avoid claims of underpayments and unlawful terminations.

The below sets out the principles to be considered for the proper application of the checklist:

### 1. HOURS WORKED

Employees are entitled to be paid for all hours worked up to and including their last day of work, even if an employee leaves in the middle of a pay cycle.

*Check that all hours worked have been paid in full*

### 2. OTHER CONTRACTUAL ENTITLEMENTS

An employee's remuneration package in the contract may be supplemented with items other than base salary, such as bonus or incentives for work performed or goals reached, or commission payments. When including these items in a contract, it is advisable to be clear on what will happen in the event of an employee terminating their employment prior to the end of a specified period against which the bonus or incentive is measured. For example, if an employee is entitled to a bonus calculated on sales generated over a 3 months period, the contract should state that no bonus is payable for any quarter which has not been fully served, unless you want the bonus to be calculated on a pro rata basis.

*Check the contract to ensure that the employee has been paid all other contractual entitlements for the work performed up to the date of termination.*

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## 3. NOTICE OF TERMINATION

The Fair Work Act 2009 establishes minimum periods of notice, or payment in lieu of notice, that an employer must give an employee to lawfully terminate their employment. These minima apply to all employees (other than casuals, fixed term employees, seasonal employees, employees terminated for serious misconduct or employees under specified training arrangements), regardless of whether they are covered by a State Award, a Modern Award, or are award free.

Notice given by an employer must be in writing, and cannot be retrospective. Such notice may be given by delivering it personally, leaving it at the employee's last known address, or sending it by pre-paid post to the employee's last known address.

If the employee is paid in lieu of notice, the employee must be paid at the full rate of pay for at least the hours the employee would have worked had the employment continued until the end of the minimum period of notice (see table below).

An employee's full rate of pay (other than a pieceworker) is the rate of pay payable to an employee, including all the following:

- Incentive-based payments and bonuses
- Loadings
- Monetary allowances
- Overtime or penalty rates
- Any other separately identifiable amounts.

The minimum period of notice required to be given is as follows:

Employee's period of continuous service with Employer (at the time the notice is given)	Minimum Notice required to be given
Not more than 1 year	1 week
More than 1 year, but not more than 2 years	2 weeks
More than 2 years, but not more than 5 years	3 weeks
More than 5 years	4 weeks

If the employee is over 45 years old, and has completed at least two years of service at the end of the day notice is given, the employee receives an additional one week's notice.

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Awards or contract of employment may provide for a greater period of notice than the minimum, in which case the greater period will prevail. Some State Awards simply refer to fixed periods (eg 2 weeks) of notice, in which case the employee will be entitled to whichever is the greater period, either the award or the sliding scale above.

Payment in lieu of notice is only payable where the employer does not wish the employee to work out the notice period. If an employee resigns and gives 4 weeks' notice, but then only works 2 out of the 4 weeks, the employer is not obliged to pay for the 2 weeks not worked. Some awards may provide for an employer being able to deduct monies from the employee's final pay where the employee has failed to provide the required notice or work out the notice period, but it is essential that you check these provisions carefully before withholding any monies from the employee's final pay.

***Check that the relevant award or contract does not provide for a greater notice period than the minimum under the Fair Work Act.***

***Make sure you either allow the employee to work out the required notice period or pay them in lieu as part of their final payment.***

## 4. ANNUAL LEAVE

Annual leave accrues in accordance with ordinary hours worked and is cumulative. The amount of annual leave to be accrued per annum will depend on the provisions of the applicable award, industrial instrument or contract of employment, whichever is the highest.

On termination all annual leave accrued but not taken must be paid out, at the ordinary or base rate of pay applicable as at the time of termination.

Federal system employers are obliged to pay the employee the amount that would have been payable to the employee had the employee taken that period of leave. This means that an employee who would have been entitled to annual leave loading had they proceeded on leave during their employment, must also be paid the annual leave loading on leave on termination.

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Employers covered by State Awards will have to be guided by the provisions of the applicable award. More often than not State Awards prescribe that loading is payable only on fully accrued annual leave but not on pro rata leave on termination.

*Check the annual leave balance on termination*

*Check whether leave loading is payable on leave on termination*

## 5. LONG SERVICE LEAVE

Unless more favourable terms and conditions are agreed to in a contract of employment, award or enterprise agreement, employees will be entitled to long service leave in accordance with the provisions of the Long Service Leave Act 1958 (WA) (“the LSL Act”).

Long service leave under the LSL Act is 8.66 weeks of paid leave after 10 years’ service working in the same business. For every five years of continuous employment after this initial 10 years, the employee will be entitled to an additional 4.33 weeks of paid long service leave.

If an employee resigns, is dismissed (except for serious misconduct) or made redundant, the employee is entitled to be paid out long service leave provided they have worked continuously with the business (even if there have been different owners) for at least 7 years.

An employee with between 7 and 10 years’ service will have their long service leave payment worked out on a pro-rata basis for the entire period of employment, including years, months and days. An employee who leaves lawfully after working 10 or more years, will have their entitlement worked out on completed years of service only.

The LSL Act sets out a number of situations where an employee’s service is deemed continuous, despite some apparent ‘breaks’ in service, such as approved leave without pay. It is important that you seek clarification and advice if you are uncertain about the entitlement and how it should be calculated. Please note that the LSL Act applies to all employees, including casuals, provided they have been regularly and continuously employed in accordance with the provisions of the LSL Act.

*Check whether the employee is entitled to pro rata long service leave*

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## 6. REDUNDANCY/SEVERANCE PAYMENTS

Where an employee's employment is terminated on the basis of a redundancy, the employee may, in addition to the other requirements stipulated above, be entitled to a severance or redundancy payment. Employers may also be required to provide paid leave for job interviews, and meet requirements about holding discussions with the affected employee(s) prior to termination.

Examples of redundancies include situations where an employer has decided to abolish an employee's job, or transfer an employee to a lower paid position as a result of a restructure. Employees cannot be terminated on the grounds of redundancy where the employer simply wishes to engage another person to carry out the employee's job. Similarly, employees terminated for poor work performance, inappropriate behaviour or serious misconduct, are not entitled to severance pay.

An employee's entitlement to severance pay will depend on the size of the employer's business and the provisions of the applicable award and/or contract.

Although under different provisions, both the State and Federal system provide a minimum entitlement to severance pay for an employee who is made redundant from a business with a total of 15 or more employees (the employee count includes casual and part time employees and the employee to be made redundant) unless the employee:

- Is on probation
- Has less than one year's service
- Is an apprentice or trainee
- Is a casual or fixed term contract employee.

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The minimum amount of severance pay is as follows:

Employee's period of continuous service with Employer (at the time the notice is given)	Minimum number of weeks' pay*
Less than 1 year	NIL
1 year and less than 2 years	4 weeks
2 years and less than 3 years	6 weeks
3 years and less than 4 years	7 weeks
4 years and less than 5 years	8 weeks
5 years and less than 6 years	10 weeks
6 years and less than 7 years	11 weeks
7 years and less than 8 years	13 weeks
8 years and less than 9 years	14 weeks
9 years and less than 10 years	16 weeks
10 years or more	12 weeks

If an applicable WA award specifies a higher severance payment, the employee is entitled to the higher amount.

\*The calculation of redundancy pay is based on the applicable number of weeks multiplied by ordinary time earnings. It excludes bonuses, allowances, loadings, overtime, penalty rates and any other additional payments.

***Check if a redundancy/severance payment applies***

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## TERMINATION CHECKLIST

1. Have all hours worked been paid?	
2. Does the employee have any other specific entitlements under their contract (eg bonus, incentives, commission etc)?	
3. Is employee entitled to payment in lieu of notice?	
4. Has employee been paid for all hours of accrued but untaken annual leave?	
5. Is leave loading payable on annual leave on termination?	
6. Does the employee qualify for payment of Long Service Leave?	
7. Is the employee entitled to a redundancy/severance payment?	
8. Has Superannuation been paid in accordance with legislative requirements?	