

# EMPLOYMENT CONTRACTS

## What you need to know about CHANGES to your existing contract

Everyone who works as an employee has an employment contract with their employer. Employment contracts come in various forms. They can be written or verbal or a combination of both. The written component can be named different things like 'agreement', 'terms and conditions of employment' or 'workplace agreement'. For further information about what is in an employment contract, see the JobWatch *Employment Contracts* infosheet.

### Contract changes

During the life of a contract of employment, some of its terms and conditions may change. This can happen for various reasons including length of employment, changes in technology and pay increases.

Any proposed change or variation to your contract should be negotiated (discussed) with you. That is, one party cannot change the contract without the consent of the other party. Just because an employer wants to change the contract does not mean you have to accept the change. **You are entitled to say "no" to a proposed change.**

If you disagree with a proposed change, it is sometimes a good idea to confirm this in writing to your employer (always keeping copies of these letters for your own records).



JobWatch Inc is .....

an independent, not for profit, employment rights legal centre. It provides a free, confidential telephone information and referral service and other assistance to Victorian workers.

**Hours:- Monday – Friday 9am-5pm**  
(Except Tuesday 12-2pm)

**Phone: (03) 9662 1933 or  
1800 331 617**

**Website: [www.jobwatch.org.au](http://www.jobwatch.org.au)**

Here is an example of a letter to an employer, rejecting a proposed change to the hours of work. You would need to change the wording of this letter to suit your circumstances:

[Employee's details]  
[Employer's details]

[Date]

Dear ...

*I confirm the following:- I have been employed with you as a full time machinist since 1 January 2006;*

- *The terms and conditions of my employment include that I am to work eight hours per day from Monday to Friday (excluding a 30 minute unpaid lunch break);*
- *Yesterday, you notified me that starting from next week my hours will be changed to four hours per day from Monday to Friday.*

*Please note that once an employment contract is in place (whether or not it is a written contract), one party cannot change that contract without the consent of the other party. Any variation to my contract (including any change to my hours) should therefore be negotiated and agreed upon by both parties.*

*I do not accept the proposed change to my hours. Accordingly, I ask that you confirm as a matter of urgency that my contract will remain unchanged and that I will continue to be employed on my existing terms and conditions.*

*Yours sincerely*  
[Name].

Sometimes changes to a contract can be so fundamental that they create a whole new contract. In these situations, you might be entitled to take action for unfair dismissal, provided that you never accepted the proposed change. You could then effectively claim that by insisting on the

variation, your employer ended your old contract and therefore terminated your employment.

Circumstances that may mean the end of an employment contract include:

- switching from permanent employment status to casual;
- a major cut in hours of work;
- a major cut in pay, classification or conditions;
- a major change in job description or responsibility (e.g. demotion).

If anything like this happens in the course of your employment, you should get **urgent** advice from your union, a lawyer or JobWatch.

For more information on unfair dismissal, see the JobWatch infosheet *Unfair Dismissal*.

## Terminating the employment contract

Because an employment contract is legally binding, it must be ended in the legally correct way. What is correct depends on what sort of contract you have.

1. A contract which is specified to last for a defined period (also referred to as a **fixed term contract**) or a specific project will automatically come to an end upon expiry of that timeframe or when the project comes to an end, unless both parties agree to renew or extend the contract. Therefore if your employment ends simply because the set time period has expired (ie, because of 'the effluxion of time') or the project has been completed, you will not be entitled to lodge an unfair dismissal claim, as the employment has not been terminated at the initiative of the employer. If you have been dismissed prior to the end of your fixed term contract, you may be eligible to make an unfair dismissal claim.
2. Alternatively, a contract which states that it will last for a certain period of time but also allows you or your employer to end the employment within the life of the contract is **not** a true fixed term contract. In this case, if your employer terminates your employment prematurely, you might, depending on the circumstances, be entitled to pursue an unfair dismissal action, seeking reinstatement or compensation for the amount you would have earned if the contract had been completed. Similarly, your employer may be entitled to sue you if you leave prematurely without

giving the required notice, causing your employer to suffer a loss.

3. An ongoing contract which has no expiry date (ie, a contract for a **permanent** position) can be terminated by either party with proper notice. Proper notice is discussed further below.

Apart from giving an employee proper notice, an employer who wishes to terminate a permanent employee's employment should also comply with any applicable obligations, as outlined in the *Fair Work Act 2009*. For example, they may be obliged to have a valid reason and to notify the employee of that reason before they are entitled to terminate the employment. If an employer doesn't comply with these obligations (wherever they are applicable) it may be open to the employee to lodge an unfair dismissal claim or a claim for failure to pay pay instead of notice.

For more related information, see the JobWatch infosheet on *Unfair Dismissal* and *Notice of Termination*

## What is the proper notice that must be given by an employer?

An employee with an ongoing contract must be given a minimum period of notice, or compensation instead of that notice, unless s/he has engaged in serious misconduct that justifies summary dismissal. The minimum statutory notice period varies depending on the employee's length of service.

The minimum periods (which apply even if they are not mentioned in a written employment contract) are as follows:

| Terms of continuous service   | Minimum notice Period |
|-------------------------------|-----------------------|
| Less than 1 year              | 1 week                |
| 1 year but less than 3 years  | 2 weeks               |
| 3 years but less than 5 years | 3 weeks               |
| More than 5 years             | 4 weeks               |

An employee who is over the age of 45 and who has at least 2 years of continuous service with

their employer is entitled to an additional week of notice.

Remember, these are minimum periods only, so if your contract (or applicable award, enterprise agreement, ITEA or AWA) requires your employer to provide more notice than the above, your employer is legally obliged to provide that much notice or payment instead of notice.

If there is no agreement reached between you and your employer about how much notice must be given for a termination of employment, it is possible that you will be entitled to more notice than simply the minimum period as outlined above, particularly if you are employed in a senior managerial role.

What is proper or reasonable notice in these circumstances will depend on factors such as your employment duties, length of service, age, industry standards etc.

You should speak to your union, JobWatch or a solicitor if you think you might be entitled to more than the minimum notice provisions.

### ***How does an employee end the contract?***

If you want to end the contract (ie, resign) you also have to give proper notice of the termination, unless the employer has fundamentally breached your contract and has made it impossible for you to continue working there. If you do not know what the applicable notice period is in your case (for example from your written employment contract, or from the relevant award or enterprise agreement) you should check with your union or the Fair Work Infoline (see 'Where to get help' below).

It is generally best to resign in writing and keep a copy of your resignation letter. You can then prove that you gave the correct amount of notice and, if necessary, why you have resigned. An employer does not have to let you work out the notice period, but if they say they do not want you to work out the time given, then they have to pay you the difference between the time worked and the notice given.

If you do not give the correct amount of notice when resigning, your employer may be entitled to recover the amount of notice which should have been provided plus further amounts for any damage your employer may have suffered as a result of you not giving the correct notice. In practice, employers often ensure they get the money that is legally owed to them by withholding final payments from the worker who is leaving (for

example, any annual leave that has not yet been taken and should be paid out at the end of employment). If you give the correct amount of notice, you will minimize the chances of your employer withholding any monies that are owed to you.

### ***Constructive Dismissal***

In some instances you may feel that you have been forced to leave your employment because of something the employer has done or not done (ie, the employer's conduct has resulted in the termination of employment). You may be able to argue that you have been **constructively dismissed** (as part of an unfair dismissal claim). This is a complex area of law and, if this applies to you, it is strongly recommended that you obtain legal advice before you leave the employment.

See the JobWatch *Constructive Dismissal, Unfair Dismissal and Notice of Termination* Infosheets for further information.

### ***Confidentiality***

As an employee, you are bound by a duty of fidelity toward your employer during your employment, regardless of whether or not you have a written employment contract. This means that you must not misuse or disclose any of your employer's confidential information which is acquired during the course of your employment.

Even after your employment ends, there may be some limitations on what sort of information you may use or disclose. That is, you will still be bound by a duty of confidentiality, meaning that you will not be entitled to misuse any of your former employer's sensitive or secret information (including trade secrets) or information which you did **not** properly acquire in the course of your employment.

Information which is not properly acquired might include, for example, information which you might have deliberately memorized in order to take business away from your employer.

You will not, however, be prevented from using information which makes up your employee 'know-how', or your body of acquired skill and experience, as this will not be seen to be 'confidential information'.

## **Post-employment restraints of trade**

Some written contracts of employment contain what is known as a *post-employment restraint of trade clause*. This is a clause that seeks to stop you from working in competition with your employer for a certain period of time after your employment ends. For example, your employment contract might specify that after the employment ends you agree not to do any of a number of things, including:

- work for a competitor;
- solicit your employer's clients;
- do business with your employer's clients; or
- poach your employer's staff.

A restraint of trade clause will only be enforced by the courts if it is reasonable in all the circumstances, having regard to things such as the geographical area and the duration of the restraint.

## **Where to get help**

### **JobWatch Inc:**

**(03) 9662 1933 (metro);  
1800 331 617 (rural)**

### **Fair Work Infoline**

**(Office of the Fair Work Ombudsman)  
13 13 94**

### **Fair Work Australia Helpline**

**1300 799 675**

### **Victorian Equal Opportunity and Human Rights Commission:**

**(03) 9281 7111  
1800 134 142**

### **ACTU Worker Information line**

**(for referral to a union):  
1300 362 223**

### **Law Institute of Victoria**

**(for referral to a lawyer):  
(03) 9607 9550**

### **Important disclaimer**

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