

# NOTICE OF TERMINATION OF EMPLOYMENT

If you were a permanent employee and have been dismissed from your job without receiving the required minimum amount of notice of termination or pay instead of notice under the National Employment Standards (NES) as outlined in Fair Work Act 2009 (the Act), you may have grounds to file a complaint with the Fair Work Ombudsman (FWO).

Additionally, if you are entitled to pay instead of notice under a collective/enterprise agreement or individual agreement (e.g. AWA/ITEA) or a common law employment contract (which may be more generous than the NES) you may also be entitled to file a complaint with FWO.

Alternatively, you may be entitled to file a claim with an eligible Court. Either way, you have **6 years** from the date of your dismissal to file your claim in an eligible Court.

This infosheet is designed to help you understand your rights as to notice of termination and to take the most appropriate action.

The following information applies to Victorian employees. If you are employed in a state or territory other than Victoria, you need to obtain specialist advice about your case. However, not all Victorian employees are entitled to notice of termination or pay instead of notice (see "Can you make a claim?" – page 2).

It is also advisable to check whether you are covered by a modern award. As of 1 January 2010, these can contain additional notice requirements. For example, an employer may be able to withhold money if the period of notice of resignation given by an employee is not sufficient.

You should also see JobWatch's 'Unfair Dismissal' infosheet and note that, if you are eligible, you only have **14 days from the date of your dismissal** to file an unfair dismissal claim at Fair Work Australia.

As an employee, you may also have to give minimum notice of resignation under a modern award. If you do not, your employer may be able to withhold your entitlements to cover your notice period.



**Job Watch 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**  
(Closed Tuesday 12.00noon – 2.00pm)

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

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

## Written Notice & Minimum Notice of Termination

### Written Notice

Under the NES, your employer must give you a written notice specifying the day of termination of your employment no later than the last day you worked for your employer.

Your employer can give this notice by delivering it to you personally, leaving it at your last known address or by sending it to your last known address by pre-paid post.

Your employer may receive a financial penalty for not giving you a written notice even if it has complied with the minimum notice of termination or pay instead of notice requirements (see page 2 – "Can you make a claim?").

### Minimum Notice

It is unlawful for your employer to terminate your employment without giving you the required period of notice or pay instead of notice.

Pay instead of notice should be calculated at the full rate of pay for the hours that you would have worked had your employment continued until the end of the notice period.

The required periods of minimum notice under the NES are set out in the following table.

<b>Minimum Notice Periods</b>	
<b>Period of Continuous Service</b>	<b>At Least</b>
<b>Up to 1 year of service</b>	<b>1 week</b>
<b>1 – 3 years of service</b>	<b>2 weeks</b>
<b>3 – 5 years of service</b>	<b>3 weeks</b>
<b>More than 5 years of service</b>	<b>4 weeks</b>
<b>Employees aged 45 or over, with at least two years of continuous service, are entitled to one week extra.</b>	

If you are guilty of serious misconduct, a summary dismissal (i.e. termination without notice) may be justifiable.

The minimum periods of notice apply to all employees employed in Victoria (subject to the below exceptions).

Nevertheless, you should check to see if you are entitled a longer notice period under a collective/enterprise agreement, individual agreement or your common law contract of employment.

### **Can you make a claim?**

#### **1. You must be an employee**

Workers engaged as independent contractors or sub-contractors are not entitled to notice or pay instead of notice under the NES. In some circumstances workers who are called contractors may be legally recognised as employees. If you do not know your employment status or you are unsure whether you are a genuine contractor or not, you should get legal advice as soon as possible.

#### **2. You must be eligible**

Before filing your claim, check that you are entitled to file a claim.

Some “types” of employees are not entitled to minimum notice of termination or pay instead of notice. If you are unsure whether you are covered by the NES, seek legal advice quickly.

You are not entitled to notice or pay instead of notice of termination under the NES if, at the time of termination, any of the following **exceptions** applied:

- You were employed for a **specified period of time**, for a **specified task** or for the duration of a **specified season** (unless a substantial reason for your employer employing you this way was to avoid its notice obligations);
- You were a **casual employee**;

- You were a **trainee** (other than an apprentice) bound by a training agreement and your employment is for a specified period or it is limited to the duration of the training agreement;
- You were a **daily hire employee** in certain areas of the building and construction or meat industries;
- You were a **weekly hire employee** in the meat industry, whose termination is determined wholly by seasonal factors;
- You are guilty of **serious misconduct** including wilful or deliberate behaviour that is inconsistent with the continuation of your employment contract and conduct that causes imminent and serious risk to a person’s health or safety or the employer’s reputation, viability or profitability; or
- You are an employee prescribed by the Act’s regulations as an employee who is not entitled to notice or pay instead of notice of termination.

#### **3. The termination of employment must be at the initiative of the employer**

**Your employer must have ended your employment. You cannot have voluntarily resigned.**

However, you may have been forced to resign or leave because of your employer’s conduct which may still constitute a termination “*at the initiative of the employer*”. This is called a “*constructive dismissal*”. Sometimes you can use this argument to make an unfair dismissal claim where you didn’t resign voluntarily but were e.g. “*forced out*” of your employment by something your employer does (such as in the case of an assault or continued non-payment of wages). You should obtain legal advice before you leave your employment where these issues arise. See also JobWatch’s “Constructive Dismissal” infosheet.

#### **4. You must be within the time limit**

**TIME LIMIT: 6 years**

### **Fair Work Ombudsman Complaint & Court Proceedings**

If your employment was covered by the NES, a collective/enterprise agreement, individual agreement or a contract of employment that provides you with an entitlement to notice of termination of your employment, you may be entitled to make a Fair Work Ombudsman (FWO) complaint (see “*Where to get help*” on page 4).

**FWO can, as of the 1 January 2010, also recover contractual entitlements related to the NES.**

The Fair Work Infoline (13 13 94) can tell you if you are covered by the NES, a collective/enterprise agreement or an individual agreement that provides you with an entitlement to notice of termination (see “*Where to get help*” – page 4).

You (or FWO) have **6 years** from the date of your dismissal to file your claim in an eligible Court so you should file your FWO complaint well before that time so that the FWO has time to investigate.

Generally, it is best to file your FWO complaint as soon as possible because your employer may lose your employment records or go out of business.

If you want to take your claim to Court because the FWO cannot recover your unpaid notice and will not be taking your matter to Court on your behalf, you can contact the Magistrates' Court of Victoria regarding the appropriate forms (see "*Where to get help*" – page 4).

You should get legal advice before filing your claim at Court. You may, in limited circumstances, even be entitled to more than the minimum pay instead of notice under the NES or possibly more notice than is provided for in your contract of employment. However, if your case is unsuccessful, you may have to pay your former employer's legal costs. You should also get legal advice about this before you file your claim at Court.

### What remedy do you want?

Once you have established that you are eligible to make a claim for failure to pay pay instead of notice, you should think about what remedy you want (i.e. what are you seeking by filing your claim?).

**You should be seeking your unpaid pay instead of notice or the balance of pay in instead of notice if you worked for some of the notice period.**

For example, if you are over the age of 45, worked for your employer for 6 years and you worked one week of notice after you were told you were dismissed, you are entitled to 4 weeks wages as pay instead of minimum notice of termination under the NES.

### Letter of Demand

Before you file your FWO complaint, you should consider sending a letter of demand to your former employer demanding payment of your unpaid pay instead of notice by a certain time e.g. within 7 days from the date of your demand letter.

You should also inform your former employer that, if it does not pay your unpaid pay instead of notice, you will file a FWO complaint without further notice or delay. You should also keep a copy of your letter of demand for future reference.

### Complaint Form

The relevant FWO form is called "**Wages and Conditions Workplace Complaint Form**" and is available from:

**Fair Work Ombudsman**

**Tel: 13 13 94**

**Website: [www.fwo.gov.au](http://www.fwo.gov.au)**

This form will authorise FWO to investigate your complaint. If you have also not received your minimum entitlements e.g. to wages or contractual entitlements relating to the NES, this form can also be used.

### What happens next?

If your letter of demand is unsuccessful, you should then file your claim with FWO.

A FWO Inspector should, if he or she thinks you are entitled to be paid pay instead of notice, then ask for your former employer's pay records and/or send a compliance letter to your former employer.

If your former employer still does not pay your pay instead of notice, you have the following options:

1. The FWO Inspector may decide to take your former employer to Court for your unpaid pay instead of notice and/or for a penalty; or
2. If the FWO Inspector does not take your former employer to Court, you can do so yourself. Nevertheless, you should first get legal advice about the likelihood of success of your claim as well as to what remedies you are entitled to.

(See "*Where to get help*"- page 4) for referral to a lawyer.

If your claim is for minimum notice under the NES or for pay instead of notice under an enterprise/collective agreement or individual agreement (excluding your common law contract), then an eligible Court can order that you be compensated for the non-payment of pay instead of notice as well as ordering your former employer to pay a penalty (usually payable the federal government) for breaching the Act or enterprise agreement etc.

If your claim is for non-payment of contractual notice (breach of contract), the Court can award you damages for breach of contract.

You may also be entitled to seek other remedies so you should always obtain legal advice before filing your claim at Court.

## Costs

If you are in doubt about the strength of your claim, you should get independent legal advice before filing your claim at Court. As the plaintiff, you run the risk of having to pay your employer's legal costs from the moment you file a claim at Court.

In a claim for minimum notice or other non-contractual notice, an eligible Court (e.g. the Magistrates' Court of Victoria) cannot order you to pay your former employer's legal costs unless the Court is satisfied that you:

- Instituted the proceeding vexatiously or without reasonable cause; or
- Caused costs to be incurred because of an unreasonable act or omission in connection with the conduct of the proceeding.

However, if your claim or part of your claim is for non-payment of contractual notice (breach of contract), you usually have to pay the other party's legal costs if your claim is unsuccessful. These legal costs could be very high and may even outweigh the actual amount of your claim.

For this reason, you should obtain legal advice before filing your claim at Court.

## Separation Certificates

Your former employer has a legal obligation to provide you with a Separation Certificate for Centrelink purposes.

If your employer does not have a precedent form of a Separation Certificate, you can obtain one from Centrelink, or on the internet at [www.centrelink.gov.au](http://www.centrelink.gov.au).

If your former employer refuses to provide you with a Separation Certificate within a few days of termination, you may contact Centrelink to make a report. Centrelink has the power to contact your former employer and request it to provide you with the Certificate. Under the Social Security legislation, it is a strict liability offence (carrying possible imprisonment for up to 12 months) for an employer not to comply with a Centrelink request to provide the Certificate.

**If you are unsure about any information in this infosheet it is important to seek advice as soon as possible.**

## Where to get help

### Job Watch Inc:

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

### Fair Work Infoline

(Fair Work Ombudsman)  
13 13 94

[www.fwo.gov.au](http://www.fwo.gov.au) (Here, you will find a fact sheet further outlining your right to notice)

### Fair Work Australia Helpline

1300 799 675

[www.fairwork.gov.au](http://www.fairwork.gov.au)

[www.fwa.gov.au](http://www.fwa.gov.au)

### Magistrates' Court of Victoria: 9628 7777

[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)

### 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

The information in this brochure is of a general nature only. It is not a substitute for professional legal advice. Readers should not act on the basis of any information contained here without first obtaining legal advice relevant to their particular employment situation. Job Watch Inc disclaims any liability in respect of any action taken or not taken in reliance on the contents of this publication. This information is current at the time of printing

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