



OPTOMETRISTS  
ASSOCIATION AUSTRALIA  
NEW SOUTH WALES



## **An Optometrist's Guide to Employment**

**A practical guide to your obligations and rights when it comes to  
employing staff or being an employee yourself**

A member resource prepared by the

**Optometrists Association Australia (NSW/ACT)**

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**(NB. All sample documents in the Schedules are available at [www.ooansw.com.au](http://www.ooansw.com.au))**

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# Contents

CONTENTS .....	3
<b>INTRODUCTION .....</b>	<b>6</b>
<b>THE GENERAL LEGAL FRAMEWORK .....</b>	<b>7</b>
<i>Fair Work Act (Cwlth) (2009)</i> .....	7
<i>Workplace Injury Management and Workers Compensation Act (NSW) 1998</i>	
<i>Work Safety Act (ACT) 2008</i> .....	7
<i>Annual Holidays Act (NSW) (1944)</i>	
<i>Annual Leave Act (ACT) (1973)</i> .....	8
<i>Long Service Leave Act (NSW) (1955)</i>	
<i>Long Service Leave Act (ACT) (1976)</i> .....	9
<i>Anti Discrimination Acts</i> .....	9
<b>SO, YOU WANT TO EMPLOY SOMEONE .....</b>	<b>10</b>
<i>Defining what you want from the position</i> .....	10
<i>Defining what you want in an employee</i> .....	10
<i>Writing a Job Description</i> .....	10
<i>Establish your basic Job Criteria</i> .....	11
<i>How will you advertise?</i> .....	11
<i>The Job Advertisement – Selling Yourself to the Market</i> .....	12
<b>SECRETARY/SALES CLERK</b> .....	12
<b>SECRETARY/SALES CLERK</b> .....	13
<i>Placing the advertisement</i> .....	15
<i>Handling Applications</i> .....	15
<i>Written Applications</i> .....	15
<i>Telephone Applications</i> .....	16
<i>Some general comments on interviews</i> .....	17
<i>A few interviewing “don’ts”</i> .....	18
<i>Advertising</i> .....	18
<i>Interviews</i> .....	19
<i>Unacceptable questions</i> .....	19
<i>Acceptable questions</i> .....	19
<i>Assessing applicants and checking references</i> .....	19
<i>Making the job offer</i> .....	21
<b>YOU’VE NOW GOT AN EMPLOYEE – WHAT NEXT?.....</b>	<b>22</b>
<i>The Written Employment Agreement</i> .....	22
<i>The Essential Conditions of Employment</i> .....	22
<i>The Mutual Nature of Employment</i> .....	22
<i>Form of Employment</i> .....	22
<i>The Trial Employment Period</i> .....	24
<i>The Job Description and the Written Employment Agreement</i> .....	24
<i>National Employment Standards</i> .....	24
<i>Industrial Awards</i> .....	25
<i>Salary</i> .....	26
<i>Salary Packaging and Fringe Benefits Tax (FBT) – Some General Comments</i> .....	26
<i>PAYG tax</i> .....	27
<i>Annual Payment Summary</i> .....	27
<i>Superannuation</i> .....	27
<i>Workers Compensation</i> .....	28
<i>Claims for workers’ compensation</i> .....	29
<i>Responsibilities of employers</i> .....	30
<i>Responsibilities of employees</i> .....	30
<b>ANNUAL LEAVE AND ANNUAL LEAVE LOADINGS.....</b>	<b>30</b>
<i>NSW Department of Industrial Relations Fair Work Australia</i> .....	32
<b>LONG SERVICE LEAVE.....</b>	<b>32</b>

<b>PERSONAL/CARERS LEAVE (PREVIOUSLY KNOWN AS ‘SICK LEAVE’)</b> .....	<b>35</b>
<b>OTHER FORMS OF LEAVE</b> .....	<b>35</b>
<i>Parental leave</i> .....	35
<b>WORKING HOURS</b> .....	<b>39</b>
<i>Meal Breaks</i> .....	39
<i>Specific Employment Conditions</i> .....	39
<i>Day to day relationships</i> .....	40
<b>REVIEWING PERFORMANCE AND SALARY</b> .....	<b>41</b>
<i>Maintenance Reviews</i> .....	41
<i>Confront issues early</i> .....	41
<i>Regular Appraisals – Salary and Performance</i> .....	41
<i>Salary</i> .....	43
<i>Award Payments</i> .....	43
<i>Market-linked Payments</i> .....	43
<i>Salary v Remuneration</i> .....	44
<b>PERFORMANCE APPRAISAL</b> .....	<b>44</b>
<i>Setting Goals and Objectives</i> .....	45
<b>THE DISCIPLINARY REVIEW</b> .....	<b>46</b>
<b>TERMINATION OF EMPLOYMENT</b> .....	<b>48</b>
<i>Resignation</i> .....	48
<i>Dismissal</i> .....	50
<i>Conclusion of Contract</i> .....	50
<i>Unsatisfactory Performance or Behaviour</i> .....	50
<i>Four Step Counselling Procedure</i> .....	52
<i>Step 4 Termination</i> .....	55
<i>Misconduct</i> .....	56
<i>Instant Dismissal Procedure</i> .....	57
<i>Notice of Dismissal</i> .....	58
<i>Pay in lieu of notice</i> .....	58
<i>Redundancy and Retrenchment</i> .....	60
<i>Other methods/situations of employment termination</i> .....	61
<i>Fixed term contracts</i> .....	61
<i>Specified Tasks</i> .....	61
<i>Casual employees</i> .....	61
<i>Abandonment</i> .....	62
<i>Frustration of the employment contract</i> .....	62
<i>Obligations upon termination</i> .....	62
<i>References</i> .....	62
<i>Employment Separation Certificates</i> .....	62
<i>Challenges to employment termination</i> .....	63
<i>Non award employees may be able to have their case heard in one of 2 jurisdictions:</i> .....	63
<i>Award employees have access to Fair Work Australia.</i> .....	63
<i>A final cautionary word – get your legal advice before you jump</i> .....	64
<b>SOURCES OF INFORMATION AND ADVICE</b> .....	<b>65</b>
<b>ACKNOWLEDGMENTS AND REFERENCES</b> .....	<b>66</b>
<b>ATTACHMENTS</b> .....	<b>67</b>
<b>INDEX</b> .....	<b>68</b>
<b>END</b> .....	<b>70</b>
<b>PARTIES</b> .....	<b>72</b>
<b>PERIOD OF CONTRACT</b> .....	<b>73</b>

RELATIONSHIP TO AWARDS, AGREEMENTS AND THE NATIONAL EMPLOYMENT STANDARDS .....	74
JOB TITLE .....	74
EMPLOYMENT STATUS.....	74
PROBATIONARY PERIOD OF EMPLOYMENT.....	74
DUTIES.....	74
HOURS OF WORK.....	75
REMUNERATION.....	75
ALLOWANCES.....	75
ANNUAL LEAVE .....	75
PERSONAL AND CARERS LEAVE.....	76
COMPASSIONATE LEAVE .....	76
LONG SERVICE LEAVE.....	77
PUBLIC HOLIDAYS.....	77
PARENTAL LEAVE.....	77
REDUNDANCY .....	77
TERMINATION OF EMPLOYMENT .....	77
CONFIDENTIALTY AND COMPETITION.....	78
POLICIES AND PROCEDURES.....	78
PERFORMANCE MANAGEMENT AND APPRAISAL .....	79
DISPUTE RESOLUTION PROCEDURE.....	79
USE AND RETURN OF PROPERTY .....	79
SIGNATORIES .....	80
<b>SCHEDULE A - REMUNERATION .....</b>	<b>81</b>
<b>SCHEDULE B – DISPUTE RESOLUTION PROCEDURE.....</b>	<b>82</b>
<b>PARTIES .....</b>	<b>85</b>
<b>PERIOD OF CONTRACT .....</b>	<b>86</b>
RELATIONSHIP TO AWARDS, AGREEMENTS AND THE NATIONAL EMPLOYMENT STANDARDS .....	87
JOB TITLE .....	87
EMPLOYMENT STATUS.....	87
PROBATIONARY PERIOD OF EMPLOYMENT.....	87
DUTIES.....	87
HOURS OF WORK.....	88
MEAL AND REST BREAKS .....	88
REMUNERATION .....	88
ALLOWANCES.....	89
OVERTIME.....	89
ANNUAL LEAVE .....	89
PERSONAL / CARER’S LEAVE .....	89
COMPASSIONATE LEAVE .....	89
LONG SERVICE LEAVE.....	89
PUBLIC HOLIDAYS.....	89
PARENTAL LEAVE.....	89
REDUNDANCY .....	89
TERMINATION OF EMPLOYMENT .....	89
CONFIDENTIALTY AND COMPETITION.....	90
POLICIES AND PROCEDURES.....	91
USE AND RETURN OF PROPERTY .....	91
PERFORMANCE MANAGEMENT AND APPRAISAL .....	91
DISPUTE RESOLUTION PROCEDURE.....	92
SIGNATORIES .....	93
<b>SCHEDULE A - REMUNERATION .....</b>	<b>94</b>
<b>SCHEDULE B – DISPUTE RESOLUTION PROCEDURE.....</b>	<b>95</b>
<b>ATTACHMENT 4.....</b>	<b>96</b>

## Introduction

This booklet is intended to assist both employers and employees, principally in optometric practices, to understand their rights and obligations under the many pieces of legislation, industrial awards and other instruments which impact on employment in the state of NSW & the Australian Capital Territory.

The booklet is written primarily from the perspective of the employer. The reason for this is that the law places much greater burdens on the employer than the employee and so it is first and foremost the employer who must clearly understand her/his responsibilities and act in accordance with the law relating to employment. We are certain that employees will also find this guide to be of great value – you will just need to read it from the opposite perspective, that's all!

It is important to note that this booklet is not intended to be a comprehensive guide to all matters related to employment law and/or practise. It will deal with the key issues which face most employers and employees, but it cannot hope to cover every eventuality in every situation.

***Accordingly, the Association strongly suggests that in the event of a dispute about employment arising, both the employer and the employee should seek specific, expert legal advice on their particular matter.***

With regard to legal advice, there is no doubt that this will incur some costs for the parties seeking the advice. As a guide, a good lawyer will probably charge around the \$400/hour mark for her/his services (as at May 2010). However when you weigh this against the potential losses which both parties can incur if they act improperly, then it is a small price to pay.

If, after reading this booklet, you have any further questions, please don't hesitate to call us at the OAA office on 02 9712 2199. If your question is beyond the scope of our expertise, we'll direct you to someone who can help.

## **The General Legal Framework**

There are numerous pieces of legislation which impact on the employment contract. Listed below are some of the more frequently encountered laws, together with a brief listing of their principal provisions and their potential impact on various aspects of employment. The particular application of the various laws is dealt with under specific headings throughout this booklet (eg. redundancies).

### **Fair Work Act (Cwlth) (2009)**

From 1 January 2010, the NSW government ceded all its industrial relations powers to the Commonwealth. The ACT, being a Territory rather than a state, has always fallen under the Commonwealth jurisdiction on employment matters.

The Fair Work Act now generally governs employment in all states and territories except Western Australia (as at May 2010). It principally deals with:

- Awards and how they can be made
- Maximum hours of work
- Employment protection
- Minimum sick leave
- The making of workplace agreements
- Parental leave (including maternity & paternity leave)
- Part time work
- Unfair dismissal
- Protection of injured employees
- Protection of entitlements when businesses are sold or transferred
- Unfair contracts of employment
- Payment of wages, salaries and other remuneration
- Conciliation and industrial disputes
- Powers and function of Fair Work Australia (the industrial tribunal)
- Regulation of trade unions and other industrial bodies
- Enforcement provisions and penalties

### **Workplace Injury Management and Workers Compensation Act (NSW) 1998 Work Safety Act (ACT) 2008**

*These Acts contain very largely parallel provisions and so for the purposes of this publication they will be dealt with as a single entity. However it is very important that any member who operates in a particular jurisdiction ensures that they are aware of the specifics of the laws that apply in that jurisdiction.*

The Act regulates workers compensation insurance and benefits, as well as providing a mechanism for the rehabilitation of injured workers. Its principal provisions include:

- ♦ The establishment and operation of:  
NSW - the WorkCover Authority of NSW, the Workers Compensation Premiums Rating Bureau, the Occupational Health and Safety Council and Industry Reference Groups  
ACT - the Work Safety Council
- ♦ How injury management programs are to be established and what must be included
- ♦ Requirements on employers to provide suitable alternative duties for injured workers, as well as general provisions for the rehabilitation and vocational re-education of injured workers
- ♦ Procedures for the making of claims
- ♦ Conciliation of disputes
- ♦ The establishment and function of the Compensation Court
- ♦ Regulation of medical examinations
- ♦ Regulation of the provisions of workers compensation insurance policies and the licensing of insurers
- ♦ Uninsured Liability and Indemnity Scheme (which provides protection for workers whose employers are uninsured)
- ♦ Enforcement and penalties

**Annual Holidays Act (NSW) (1944)**  
**Annual Leave Act (ACT) (1973)**

*These Acts contain very largely parallel provisions and so for the purposes of this publication they will be dealt with as a single entity. However it is very important that any member who operates in a particular jurisdiction ensures that they are aware of the specifics of the laws that apply in that jurisdiction.*

This Act provides the minimum standards for annual leave which apply to all employees in NSW (except casual staff and contractors). Its principal provisions include:

- ♦ The accrual of four (4) weeks paid annual leave for each year of service with an employer
- ♦ The terms under which annual leave may be taken
- ♦ A prohibition on the “buying out” of annual leave, except upon termination of employment
- ♦ Arrangements in respect of “annual close downs”
- ♦ Enforcement and penalties

## **Long Service Leave Act (NSW) (1955)** **Long Service Leave Act (ACT) (1976)**

*These Acts contain very largely parallel provisions and so for the purposes of this publication they will be dealt with as a single entity. However it is very important that any member who operates in a particular jurisdiction ensures that they are aware of the specifics of the laws that apply in that jurisdiction.*

This Act provides the minimum standards for long service leave which apply to all employees (except casual staff and contractors). Its principal provisions include:

- The accrual of long service leave by an employee on the general basis of 2 months leave after 10 years of continuous service, with pro-rata increases thereafter
- An entitlement for the employee to be paid pro-rata long service leave after 5 years of continuous service if they are dismissed for any reason other than serious and wilful misconduct or if they leave the employer “on account of illness, incapacity or domestic or other pressing necessity, or by reason of the death of the worker...”
- A prohibition on the “buying out” of long service leave, except upon termination of employment
- Enforcement and penalties

## **Anti Discrimination Acts**

There are a number of Acts which can be grouped together under the term “Anti Discrimination”. These Acts are:

- Human Rights and Equal Opportunity Act (1986) (Cwlth)
- Racial Discrimination Act (1975) (Cwlth)
- Sex Discrimination Act (1984) (Cwlth)
- Disability Discrimination Act (1992) (Cwlth)
- Anti Discrimination Act (1977) (NSW)
- Discrimination Act (ACT) (1991)

In essence, these Acts prohibit various forms of discriminatory behaviour in the workplace or in the employment process. For example, in the course of making an offer of employment or in dealings with (or between) employees at work, you may not discriminate on the basis of disability, sex, age, marital status, race or religion.

Note, however, that exemptions from the Acts do exist in various cases. If you are faced with a situation where the risk of discrimination may exist, we strongly recommend that you seek expert legal advice. Courts tend to favour employees in matters connected with discrimination, so don't put yourself at risk!

## **So, you want to employ someone**

If you want to enjoy a harmonious, productive and profitable working relationship between employer and employee, then there is simply no substitute for being properly prepared before you jump into the employment process. Any time you spend on preparation now will be rewarded manyfold in the future – preparation is an invaluable investment, so please ensure that you invest wisely!

### **Defining what you want from the position**

Before you start advertising, make sure that you have decided first what you want the position to do – is it straight optometric consulting?; consulting and dispensing?; consulting, dispensing and practice management? Or some other combination of duties? It is critical to be clear in your own mind what you want from the position, because that will strongly influence your job description, advertising, interview and appraisals! If you get it wrong here, all future aspects of this employment episode are likely to be tainted.

### **Defining what you want in an employee**

Again, take a few minutes to sit down quietly and think about the sort of person whom you would ideally like to fill this position. Think less about skills and more about personality and attributes – do you work best with a quiet person or someone who is a bundle of energy? Do you want (or need) a very methodical, orderly employee or would this drive you nuts? Think about the personalities of the other staff members – and what sort of person would “fit” best with your team. Note that “fit” doesn’t always mean “same or similar” – sometimes having a contrasting personality can add energy or balance to a business, whereas having all the “same” type of people can introduce staleness. But make sure you and your staff have thought about how you’d handle an “opposite” and are ready for the challenges which can emerge!

### **Writing a Job Description**

See Attachment 1 for an example of a Job Description.

Quite simply, a Job Description tells the employee what it is that they are expected to do and gives both employer and employee a point of reference when it comes time to review the employee’s performance.

The essential elements of a Job Description are:

- Job Title (the name given to the position)
- Role (a general description of the job and what it entails)
- Duties and Responsibilities (a listing of the main tasks which need to be performed in the job and any particular responsibilities which are attached to the task)
- Critical Performance Indicators (if required, you can list the key factors which are essential to the satisfactory performance of the job. This would usually be a short list of no more than 3 or 4 matters)
- Lines of Reporting (who the employee reports to for particular tasks – very important if the employee reports to different people – for example, if a receptionist is shared between an optometrist and a dentist in the same suite)

## **Establish your basic Job Criteria**

Set your basic criteria/conditions for the position:

- Basis of employment (full time, part time, casual – see page 22 for important information about casual employees)
- Rate of pay offered (and the maximum you will go to in order to attract an excellent employee)
- Will pay be on a salary-only basis, or will you offer incentives or bonuses based on some measurable criteria?
- Hours of work (including regular overtime)
- Payment for overtime (rates, time in lieu)
- Personal/carers (sick) leave (if above the legislated minimum)
- Superannuation (if above the legislated minimum)
- Payment of professional Association fees, CPD expenses etc
- Other benefits or key conditions (salary packaging etc)

## **How will you advertise?**

Now that you have done your homework and know exactly what you want in an employee and a position, its time to set about finding someone!!

But first, decide a few things about the applications and applicants before you start:

- How do you want applicants to respond to the ad – by letter, fax, e-mail, telephone, in person?
- Who is going to take the initial calls (if phone calls are an option) – yourself, your partner or another member of staff?
- What information do you want to elicit from such calls – and what information do you want to give out? Ensure that the person taking the calls knows all of this information!!

Telephone applications are vastly more time-consuming (for the employer) than written applications. However if verbal presentation skills and telephone manner are key aspects of the job, then asking people to at least make initial contact by telephone at least gives you the chance to see how they perform on the phone.

For positions where there are likely to be a lot of respondents (clerical positions, for example), written applications is usually the best way to go. Note that “written” can include email at your discretion.

## The Job Advertisement – Selling Yourself to the Market

No matter how you cut it, the basic fact is that when you advertise a position, you are trying to sell the benefits of your business and yourself to the market of people looking for a job.

Look at these two ads:

### **SECRETARY/SALES CLERK**

A **Secretary**/Sales Clerk is required at our Liverpool Plant which is involved in the sales of low voltage electrical switchgear products. While you would report direct to the National Administrator you will provide **secretarial** support for several Standard Products Managers. You should preferably be competent in MS Word, **Powerpoint**, and **Excel** Spreadsheets, however, **training** will be provided as necessary. You shall be willing to handle duties of a varied nature and be able to work within time constraints. Please forward your resume to:

REAL ESTATE RECEPTIONIST Monday,  
Tuesday, Wednesday. Permanent casual.  
Computer and people skills. Phone.....

Apart from the size, what sets the two advertisements apart?

Information.

The first advertiser wants to target potential applicants who have the skills they require and is interested in this particular type of industry. Any applicant reading the advertisement has an excellent idea of what skills they require, the nature of the role and the type of company they would be working for. The chances of this advertisement attracting the “right” type of applicant is strong.

Now look at the second advertisement.

It tells you very little – is it a large, multi-function commercial agent in the city or a little one-person agency in the suburbs? “Permanent casual” is a contradiction in terms – you can’t be both, so what are the general terms of employment? What are “computer skills” – an ability to type? an ability to use Microsoft Word or Excel? a working knowledge of industry-specific property management software? Who knows??!!

The likelihood is that the second advertisement will attract a great many “unqualified” applicants – not people without skills, but people with skills and attributes inappropriate to the position – simply because the advertisement didn’t offer the reader enough information for them to be able to screen themselves out in the first place.

So, what do you put into a good advertisement? We’ll use the example of the larger advertisement above:

- **Job title or description** – advertisements are generally listed by title and applicants tend to search by title

SECRETARY/SALES CLERK

“Secretary/Sales Clerk” is probably an accurate description of the job – and people will be looking for positions with this sort of title. I doubt that many will look for positions associated with “Trifectas”, as used in the example below

SELECT THE WINNING TRIFECTA Office Assistant/ Secretary to \$31K Race forward with these two great organisations.....

- **Who you are and what your business does** – if Fred Smith Optometrists are looking for a staff member, why not say so? Many businesses won’t advertise their name in positions vacant adverts – yet if you have a good name, why not use it? It gives greater credibility to the advertisement and generally adds appeal – people like to know who they are dealing with:

A **Secretary**/Sales Clerk is required at our Liverpool Plant which is involved in the sales of low voltage electrical switchgear products.  
{company logo featured prominently - name shown later in ad}

- **A general description of the position and the key tasks to be performed:**

While you would report direct to the National Administrator you will provide **secretarial** support for several Standard Products Managers.

- **A brief overview of the principal skills and attributes needed to carry out the job efficiently:**

You should preferably be competent in MS Word, **Powerpoint**, and **Excel** Spreadsheets, however, **training** will be provided as necessary. You shall be willing to handle duties of a varied nature and be able to work within time constraints.

- **Information on how to apply:**

Please forward your resume to:

There is no magic secret to writing an effective job advertisement – the basic elements are few, but important. People don't read job advertisements to be entertained, they read them to gain information about potential work and employers – give them what they want and you won't go too far wrong!

By way of example, this is a pretty good advertisement which appeared recently in an optical publication:

**OPTOMETRIST REQUIRED  
TOWN A / TOWN B**

A position is available with FRED SMITH OPTOMETRISTS in our modern, well equipped practices. The optometry we practice is full scope and is supported by qualified and well trained staff including two optometrists and three optical dispensers.

Town A and Town B are attractive, friendly towns in the north/south of the state, with a combined population of over 3 and offer all major sporting and social facilities.

To apply, or for further information, please phone Fred Smith on  
(99) 8888 7777

## Placing the advertisement

When placing an advertisement, try to target the publications which your potential employees are most likely to refer to. For example (in approximate order within category):

- Optometrists – OAA publications (state and National); OAA (NSW) employment listings; Australian Optometry; Insight; Mivision; [www.seek.com.au](http://www.seek.com.au); Sydney Morning Herald; Canberra Times (ACT)
- Optical Dispensers – Australasian Dispensing Opticians Association newsletter {tel 0424 187 475 }; [www.seek.com.au](http://www.seek.com.au) ; Sydney Morning Herald; Telegraph; Canberra Times
- Reception/floor staff – [www.seek.com.au](http://www.seek.com.au) ; Sydney Morning Herald; Canberra Times (ACT); Telegraph; local papers; Employment National (CES). In regional areas, the local paper will probably be the sole source of print advertisements.  
NB. For reception staff in particular, don't overlook local papers. They can be an excellent source of people who want to work locally and thus are less prone to being caught in traffic, transport disruptions etc.
- Don't skimp on an advert size! A small in-column listing will often attract disproportionately fewer readers than a prominent, double column advert. Check the cost differential – it often isn't all that great and the added impact is well worth it.
- Agencies (such as Employment National, Drake, Centacom etc) can be an efficient way of employing staff, but they can also be very expensive. They come into their own for temporary staff to fill an unexpected gap (if someone is taken ill, for example) or if you are recruiting a senior staff member where the cost of replacing that person would be high. Agencies almost invariably charge a fee, which can vary between \$250 and 12% of annual salary. Make sure you check before you sign up!

## Handling Applications

### Written Applications

Applications are now rolling in – so what do you do with them?

- Try to read applications as they arrive – at least skim them. If you leave the entire lot until the closing date, you may find that you have a mountain of paper to deal with and your attention could begin to wane by the time you get to the last few applications – which could be some of the best!
- When all applications have been received, read them briefly and rate the applicant against the 3 or 4 key criteria which you listed in your Job Description. Create 3 piles – 1. applications which don't meet most or any of the criteria; 2. those which meet most but not all; 3. those which satisfy all the key criteria.

- Start on Pile 3 and re-read the applications carefully. You are now trying to get a “feel” for the applicant and their skills and experience. Put applications into approximate priority order according to what you have read.
- Now go to Pile 2 and repeat the above step. If any applications seem less interesting on a more thorough reading, relegate them to Pile 1. For applications which seem to have merit, shuffle these into priority order within the group from Pile 3. You now have one priority group, consisting of applications from Piles 2 & 3.
- This consolidated pile is now your interview pool. Starting with the highest priority candidate, make interview appointments. As a general rule, allow yourself 30 minutes for clerical/administrative interviews, 45 minutes for professional staff interviews and 1 hour for managerial interviews. Give yourself 10-15 minutes between interview appointments to allow for time over-runs and just to refresh yourself between times.
- Schedule interviews for times when you won't be interrupted!!
- Try to interview a maximum of 5-7 people for a position. If you interview any more than this you'll have trouble remembering who was who and what skills and attributes they had!
- If possible, spread interviews out over 2 days or at least an early morning and late afternoon. A succession of interviews one after the other is very hard on you and unfair to the applicants, especially those who see you towards the end of the process.

### **Telephone Applications**

Assuming that you have decided to dispense with written applications altogether, telephone applications usually just take the place of written applications as a means of arranging an interview list. Some things to note:

- Accepting telephone applications is much harder on you than accepting written applications – you have no permanent record, generated by the applicant, of their interest and attributes and as such comparison of applicants over a period of time is much more difficult.
- The handling of telephone applications is very hard to control – applicants ring you at their convenience, not yours. Calling them back can often be difficult, especially if they are already working for someone else. Constant interruptions to your day can become very irritating – or alternatively, you might put aside a whole day to deal with telephone applicants and only get 3 calls!!
- If you do decide to accept telephone applications, make sure that you have set time aside to do this and that you take copious notes as each call progresses (or at very worst, immediately afterwards). Ensure that your notes reflect the applicant's attributes relevant to the key criteria in the Job Description.

- Don't make any decisions on the spot! Tell every caller that you will get back to them and wait until you have received what you judge to be the majority of likely applicant calls before deciding on who to interview.
- Once you have concluded receiving your applicant calls, use your notes to proceed as if you had received written applications (see above).

## **Some general comments on interviews**

Interviewing for staff is a subject on which many weighty tomes have been written and entire university courses based. If you are really interested in refining your interviewing skills, go into Dymocks or Angus and Robertson and pick up any one of probably a dozen books on the subject and read it – or alternatively go and enrol in a Community College or TAFE course.

For most of us, we just need to know enough to get by. The following are some hints for interviewing, based on many years of experience in conducting these interviews.

- Consider interviewing with someone else – two heads are very often better than one!
- Prepare thoroughly – re-read all the applications for the people you are interviewing and make notes about the key features you want to discuss with the applicant.
- Have a calendar of interviews ready, so that you know when each applicant is due
- Watch the time and control the interview – applicants can often get very enthusiastic and tell you their life story, setting back your interview schedule by 30 minutes or more! This is unfair to both you and the other applicants, so watch the clock (discreetly) and keep to time
- Arrange a place for interviews which is both private and quiet. Ensure that you won't be interrupted during the interviews and ensure that your staff understand this!! Try to organise things so that applicants don't bump into each other on the way to and from interviews – bring them in one way and out another, if possible (but NEVER take them out of the building by a 'back door' – they should leave by the same primary door that they entered).
- Take brief notes during the interview – but make sure you keep listening to the applicant!
- Start the interview by giving a brief overview of the organisation and the job – it gives the applicant a better idea of who you are and helps to put them at ease
- Ask open-ended questions at the start of the interview, focussing on what the applicant has put in their application. Open-ended questions are something like

*"I see you worked for ABC optometrists a couple of years ago – tell me about what the position entailed"*

Open-ended questions invite the applicant to open up about themselves, put the applicant at ease and usually elicit more information than closed questions like:

*"So, you worked for ABC optometrists?"*

- Make sure you give the applicant time and opportunity to ask questions which they might have  
*"What would you like to know about the position or the business?"*
- Conclude the interview with some factual questions  
*"How much notice do you need to give your current employer?"*  
*"If you were successful, when could you start?"*
- CONFIRM THAT IT IS OK TO RING THEIR REFEREES and seek their comments on the applicant. If the applicant didn't give referees in their application, ask for 2 or 3 referees now.
- Tell the applicant what the process of selection will be after the interviews have been completed. Let them know when you will be contacting them to advise of the success or otherwise of their application. Check if it is OK to ring them at work and what times are most suitable to make contact.
- Round off by asking again if there is anything else they would like to know or ask.
- Thank the applicant for their time and escort them out of the interview area.
- Take a few minutes immediately to reflect on the interview and make more notes if necessary. Then give yourself a short break of a minute or two just to regather your thoughts before seeing the next person.

## **A few interviewing "don'ts"**

In the modern world there are a few things to avoid like the plague when it comes to advertising and interviewing for staff:

### **Advertising**

- Don't specify that you want particularly either male or female applicants unless there is a good reason for so doing. One example of an appropriate reason for such a specification could be where a health professional needs a female staff member to be available to act as a "chaperone" with some female patients and all other staff members are male.
  - Don't specify race, religion or other personal attributes as being essential for the job unless there is good reason for so doing. For example, if you work in the Haymarket

and your patient base is predominantly Chinese, then it would be acceptable to ask for or give preference to applicants who speak Chinese.

## **Interviews**

- Don't ask or imply questions related to gender, marital status, sexuality, race or religion unless they are *demonstrably* related to the position (and there will be few circumstances where this is the case!). Some examples:

### **Unacceptable questions**

- ♦ *"I've found that women tend to get emotional under pressure and this is a high-stress job. Do you think you can handle it?"*
- ♦ *"Are you married?"*
- ♦ *"Do you intend to start a family in the near future?"*
- ♦ *"What will you do if your children are sick?"*
- ♦ *"Does your husband/partner support you working?"*

### **Acceptable questions**

- ♦ *"This position requires a fair bit of out-of-hours work. Are there any barriers in your private life which would impede you in such work?"*
- ♦ *"I see this position as a long term relationship, hopefully leading to equity involvement in the future. Does my view of the position match what you are looking for?"*
- ♦ *"Because we have patients booked several days in advance, reliable and regular attendance is vital to this position. Is there anything in your private life which might affect your ability to attend work regularly? If there is, do you have contingency plans made to deal with this?"*

Really, what is acceptable and unacceptable is often just a case of good sense. The basic rule is, unless the question can be demonstrably related to the needs of the position and the organisation, don't ask it!!

## **Assessing applicants and checking references**

You've finished the interviews – so now what?

- Review your interview notes and place the applicants into your order of preference
- Starting with your preferred candidate, reassess all interviewees against your key criteria and judge how well they match up
- You will often find that one candidate stands out from the rest. Perform a 'self-check' just to ensure that they stand out because of their skills and attributes and not for some

extraneous reason such as they follow your favourite sporting team! If they do stand out for the right reasons then back your judgement!

- If you have two candidates who are pretty much equal, it is wise to reinterview, this time definitely with someone else as a co-interviewer. When selecting a co-interviewer, don't overlook the obvious people – other staff members who might be familiar with the job and the organisation. It can also be worthwhile using the staff member who is leaving (assuming that they are parting on good terms) as they obviously know the job intimately and can give a good insight into how they think the applicants will handle the role.
- On the other hand, if you don't find anyone who you feel is truly suitable, then don't hesitate to re-advertise! It is much better to look again, than to settle for someone whom you feel is not quite right – you'll always be wondering if you could have done better.

OK, so you've selected your prime candidate:

- **CHECK THEIR REFERENCES!!** All candidates should have provided references by now and you did ask permission to ring them in the course of the interview, didn't you!?! So now ring them!
- Reference checking is usually pretty informal – contact the referee, tell them that you are interviewing ABC for a position as an optometrist/clerical assistant etc and ask for their opinion on how they think ABC will perform. Some specific additional questions to ask:
  - In what capacity did you come to know ABC?
  - How long have you known her/him?
  - Do you have any reservations or concerns about ABC's work performance?
  - Would you re-employ ABC in the future if an appropriate position was available?
  - Is there anything else you think I should know about ABC?
- Assuming that the references checked out, then make your decision – yes or no??
- If references didn't check out, you have a slight dilemma. If the discrepancy was minor, you may be able to ignore it (ABC claimed to have held a position for 12 months when in fact it was only 8 months). However if the discrepancy was significant (ABC had never held a claimed position or had dramatically embellished the role) then you will need to go back to ABC and check why the discrepancy has occurred.
- NB. NEVER assume that ABC has deliberately misled you until you check back with them. There could be a simple reason for the discrepancy, such as a referee not knowing about a role because it was in another department of a company.
- However, if you have well founded, reasonable suspicions that ABC has been "economical with the truth" then you should very carefully consider whether or not

you want such a person on your staff – if they have misled you at the outset, then they may well do so again, possibly with disastrous consequences!!

## **Making the job offer**

Yahoo!! Everything has checked out and you're confident that ABC is the person for you! Congratulations! Now you just have to get them to accept the position.

- Contact the applicant immediately that you have made your decision. They could well be looking at other positions and you may find you've been gazumped if you delay.
- Offer the position to them and ask if they would like a little time to think about it. Often they will want to discuss it with their partner or family. If they do want a little time, ask them when you could expect to hear back from them. 24 hours should be a fair time frame for a response.
- Assuming that they accept (either outright or conditionally) ask them to come back in to speak with you about the details of the position. You will need to ensure that you have covered all details such as salary, employment conditions, key features and requirements of the job etc.
- If the acceptance is conditional on some aspect of employment (salary, for example) negotiate it then and there. You defined your upper range before you started this process, so see what you can negotiate.
- If the applicant is looking for remuneration or conditions which are clearly outside your scope, then don't hesitate to say so. As with any financial decision, don't over-extend yourself. Know your limit and stick to it. It is better to lose a potential employee than to find yourself in financial trouble trying to pay for them!
- Consider other non-cash benefits which might sweeten the deal – flexible working hours, performance-based bonuses or equity can all be very attractive to a potential employee.
- OK, you've made your decision and come to an agreement with the applicant. NOW, CONFIRM IT IN WRITING!!! You will, of course, use the written Employment Agreement which we discuss in the next section as the basis for the formal Letter of Offer, won't you??!!

# You've now got an employee – what next?

## The Written Employment Agreement

Employment is a contract between two (or more) parties – and as every good lawyer will tell you, contracts should be in writing!

See Attachments 2 & 3 for examples of an employment document which sets out some common rights and obligations of each party (professional staff and award staff respectively). ALL employees should have a written employment agreement! If existing employees don't have one, now is the perfect time to correct that oversight ( be aware, however, that you cannot unilaterally impose new conditions on existing employees. Changes must be negotiated, or at the very least be demonstrably "reasonable" in all the circumstances. If you strike any difficulty with employment conditions, seek expert legal advice.

Why have a written employment agreement? When matters are transacted verbally, there is often much room for misinterpretation and error - especially with the passage of time. If agreements are written down, at least you have a concrete basis from which to work in the event of a dispute – and it is easier to ask for a clarification of the written word than it is to pin down the “shades of grey” which can exist in a particular person's use of English.

***PLEASE, ENSURE THAT ALL EMPLOYEES HAVE A WRITTEN EMPLOYMENT AGREEMENT!!***

## The Essential Conditions of Employment

### The Mutual Nature of Employment

To state the obvious, employment arrangements only work well when both parties benefit from the agreement. Don't try and “get at” your employer or employee – if there is mutual trust, respect and reward between the parties, then everyone will stand to maximise their benefits from the arrangement. Otherwise, the “us and them” mentality can quickly develop, with the result that everyone loses out.

### Form of Employment

There are three basic forms of employment – full time, part time and casual.

**A word on Contract Staff:** Genuine contract staff are not dealt with in this booklet, as they fall outside its scope. Be aware, however, that the Australian Taxation Office has very clear rules about what constitutes a bona-fide contractor. If you get it wrong, you as the “employer” could well be liable for substantial costs in retrospective annual leave, long service leave, PAYG taxes, superannuation, workers compensation etc.

And a word of particular caution – some accountants do advise optometrists to ‘employ’ locums on a contract basis. Be extremely careful in accepting this advice. *The Tax Office’s essential rule is – if a person provides principally their labour, then they are an employee.* Measure any potential ‘contractors’ against this yardstick – regardless of what your accountant says! Remember – accountants only offer advice – the responsibility is yours alone.

The key features of each form of employment are as follows:

**Full time** – the form of employment with which most of us are most familiar. Usually entails an employee working 35-40 hours per week on a regular basis for the same employer. The actual hours of work can vary, especially in a profession like optometry, where late night shopping and weekends are often worked, with time in lieu taken during the week or on a roster system. Full time employees receive all the benefits of employment including (but not limited to) paid annual leave, sick leave, parental leave, public holidays, long service leave and security of employment (relative to casual employees).

**Part time** – similar in many ways to full time employment, but with working hours usually ranging between 10-25 hours per week on a regular basis for the same employer. Like full time employment, the actual hours worked by part timers can vary (as indicated above) and also like full timers, part time employees enjoy all the benefits of employment on a pro-rata basis according to the number of hours that they work. See notes about particular benefits later in this chapter for more information on pro-rata calculations.

**Casual** – *CAUTION!! Don’t fall into the trap of trying to save yourself some money on employment benefits and conditions by classifying employees as “casual” vis-à-vis full time or part-time. A person’s employment classification depends on the FACTS of the situation, NOT what you choose to call them!! For example, if a person works every Tuesday afternoon and Thursday evening and has done so (or is expected to do so) for a reasonable period of time (often in excess of 12 months) then that person is probably a PART TIME employee, NOT a casual! If you have any doubts, seek expert legal advice.*

Casual employees often work irregular hours, work on-call and/or have little certainty in their employment. For example, casual employees can be called in at short notice if you suddenly have an overflowing appointment book, or someone is away sick. However they typically finish their “assignment” and then leave, with no solid expectation of future employment from that employer – if something comes up, well and good, but if not, then they will need to seek out other sources of employment in order to generate an income. In order to compensate for the uncertainty of casual employment, these employees are usually paid a higher hourly rate than full or part-time staff members. They also often work for more than 1 employer. Casual employees do not have access to paid annual leave, sick leave, paternity leave etc.

## **The Trial Employment Period**

Under the Fair Work Act 2009, all new employees are employed on a trial (or probationary) period. For small employers (less than 20 employees) the probationary period is 12 months. For larger employers it is 6 months. This standard is legislated and cannot be varied.

The benefit of the probationary period (for an employer) is that during this time an employer is generally exempt from the unfair dismissal provisions of the Fair Work Act. Thus if you take on a new staff member and after a few months you find out that they simply “don’t work” in your practice, you may be able to dismiss them without any ‘unfair dismissal’ repercussions.

Note that if you ever reach the stage of wanting to dismiss an employee ensure that you take advice BEFORE you act!

## **The Job Description and the Written Employment Agreement**

Just another gentle reminder – these are two of the most important documents you possess in relation to employment – either as an employer or an employee. MAKE SURE THAT YOU HAVE ONE OF EACH and keep them current.

And a special note for employees – if you don’t have a Job Description and a Written Employment Agreement, then ask your employer for one – and then read them and ensure you understand them!! If for some reason your employer won’t give you either or both, ask why not – and if you’re not satisfied with the answer, seek some further advice.

## **National Employment Standards**

The Fair Work Act 2009 introduced National Employment Standards (NES). The NES is a set of standards which govern the work of all employees in Australia (except at the moment in WA – May 2010). The standards deal with 10 basic conditions of employment which are common to all employees:

- Maximum weekly hours
- Flexible working arrangements
- Parental leave
- Annual leave
- Personal/carers leave (the old sick leave)
- Community Service Leave
- Long Service Leave
- Public Holidays
- Redundancy
- The Fair Work Information Statement

Details of the NES can be found at <http://www.fwa.gov.au>

## **Industrial Awards**

An award is a legal document setting out the minimum rates of pay and conditions of employment which apply to employees in a particular industry.

An award is agreed between a trade union and an employer organisation (the parties to the award) and ratified by Fair Work Australia. Like a contract, an award is legally binding. This means that if a party breaches the award, legal penalties may be imposed.

Many different types of awards cover different industries and occupations. Employers must find out which award covers their employees and this is legally binding. Information about the occupation or industries covered by a particular award are contained in the "Area, Incidence and Duration" clause and the "Industries and Callings" clause.

Across Australia, awards are termed "common rule" – that is, where the terms and conditions of a particular type of job fall within an award, then employees are generally obliged to extend award conditions to all relevant employees. For example, the General Retail Industry Award 2010 defines the types of jobs that it covers. If your employees perform this type of work, then they are probably covered by the award.

### *What happens if employees are award free?*

If there is no award covering employees (such as optometrists and optical dispensers), the terms and conditions of the contract of employment are mutually agreed by the employer and employee. Note however that the National Employment Standards still apply.

The essence of the bargain between the employer and the employee involves the personal performance of the contract by both sides.

General law, mainly the law of contract, regulates employer/ employee relationships. The law also requires that the terms and conditions of a contract of employment should be fair and just. If the contract is unfair, harsh, unconscionable or against the public interest, Fair Work Australia may declare the contract void or make variations to the contract.

It should be noted that a person employed or engaged by his or her spouse or parent is not an employee for the purposes of the Fair Work Act 2009.

### *Do awards have to be displayed at the workplace?*

The Fair Work Act 2009 requires an employer to exhibit a copy of all relevant awards in the workplace. Awards can be accessed through the Fair Work Australia website – <http://www.fwa.gov.au>

## Salary

This is the most obvious benefit of employment. Both employers and employees should be aware of:

- The amount of salary to be paid (either hourly, weekly, fortnightly, monthly or annually)
- How the amount of salary compares to any Award which governs employment in your particular circumstance (for example, all clerical/reception staff in an optometric practice are covered by a Federal award (most likely the General Retail Industry Award), whereas professional staff such as optometrists do not have award coverage). Under NO CIRCUMSTANCES can salary be paid at a level which is less than that specified by a binding Award
- How salary is constituted (straight amount, base+bonus etc)
- When salary is to be paid (weekly on a Thursday etc) and by what method (cheque, cash, direct deposit etc). If different parts of a salary are paid at different times or by different methods (bonuses, for example, will often be paid monthly, whereas base salary may be paid weekly) this should be specified
- Amount of tax deducted
- ENSURE THAT YOU GIVE/RECEIVE A PAY ADVICE for every pay date. The contents of a pay advice are specified by Fair Work Australia  
<http://www.fwa.gov.au>

## Salary Packaging and Fringe Benefits Tax (FBT) – Some General Comments

With the advent of FBT, many of the advantages of the more “exotic” forms of salary packaging went by the board. However in many circumstances there are still significant taxation benefits to be had by appropriately ‘packaging’ a salary – into a taxable income and car, for example.

Properly structured, a ‘packaged’ salary costs the employer no more than a ‘normal’ salary – yet for the employee, it can mean a significant taxation saving, putting more money into the employee’s pocket for no greater outlay by the employer.

A word of caution, however. Salary packaging does not suit everyone and in some cases can lead to an employee being worse off than if they took a ‘normal’ salary arrangement. If you are considering entering into a packaging arrangement, then it is essential that you speak to an accountant about it first!

## **PAYG tax**

Wage and salary earners are required to pay income tax to the government as they earn their money – Pay As You Go (PAYG). Equally, employers are obligated to deduct PAYG tax from their employees' salary payments and to forward these deductions to the government (via the Australian Taxation Office) on a regular basis (quarterly for most businesses as part of the Business Activity Statement – BAS). Remittances are usually required to be sent by the 21<sup>st</sup> day of the month following the end of the quarter (eg, the 21<sup>st</sup> April for deductions made during January-March). Employers who fail to deduct PAYG tax, who deduct incorrect amounts or who fail to remit deductions are liable to severe penalties, so pay attention to this aspect of your business!

If you are starting out as an employer and don't have an Australian Business Number (ABN) to facilitate the remittance of your BAS (including PAYG tax), contact the Australia Taxation Office nearest you and they will happily make the necessary arrangements!

## **Annual Payment Summary**

At the end of each financial year, an employer must provide to each of her/his employees a copy of an Annual Payment Summary covering any employment during the period 1 July to 30 June.

Annual Payment Summaries must be provided to all employees no later than 31 July in each year, or within 14 days of an employee leaving your employ. Forms and instructions are available from the Australian Taxation Office.

## **Superannuation**

Under the Federal Government's Superannuation Guarantee legislation, employers are required to pay an amount equivalent to 9% of an employee's taxable income as superannuation.

The legislation governing superannuation is some of the most complex around and as such it worthwhile getting expert advice if you are unsure about any aspect of your superannuation obligations. However some of the essential criteria with regard to superannuation are:

- Superannuation must be paid at the current rate of 9% of taxable salary into an "approved" superannuation fund. Note that employees have a right to nominate a fund if they so choose.

- Contributions must be remitted to the nominated fund on at least a quarterly basis

If you have any further questions, please contact your accountant or superannuation fund or adviser.

## **Workers Compensation**

***EMPLOYERS MUST PROVIDE WORKERS COMPENSATION INSURANCE FOR ALL EMPLOYEES. THIS IS COMPULSORY IN NEW SOUTH WALES AND THE A.C.T.***

The WorkCover scheme provides workers' compensation and rehabilitation benefits to injured workers in NSW and the ACT. It also helps employers to improve health and safety standards at the workplace. WorkCover is administered by WorkCover New South Wales and ACT WorkCover respectively. Both are state/territory government bodies set up to oversee the workers' compensation scheme in their jurisdictions.

Workers can claim compensation if they have had a work related injury or illness such as:

- an injury or illness while at work;
- an injury while travelling as part of their work;
- an injury while travelling from their home boundary to work, usually where they were not at fault;
- an injury while on an authorised absence from work.

Workers can claim compensation if their injury or illness results in:

- time off work;
- expenses for medical, hospital and rehabilitation services.

If an employee is injured at work (or in other circumstances as indicated above):

1. The employer should be notified about any injury as soon as possible after it happens.
2. A workers' compensation claim form must be completed. These forms are available from the employer's workers' compensation insurer.
3. A WorkCover medical certificate must be attached to the claim form. This certificate is provided by the employee's doctor.
4. Receipts for treatment or chemist expenses must also be attached to the claim form. The employer must forward the claim to their insurance company.
5. Employees should be encouraged to keep copies of all receipts and documents that form part of their claim.
6. If the employee's doctor determines that they are fit for some work but not their normal duties, the employer should discuss appropriate work with the doctor.

## **Claims for workers' compensation**

When a claim is made, the insurance company will decide whether to accept the claim. If it does accept the claim, the insurer will:

- pay for medical and rehabilitation costs;
- determine the amount of weekly benefit to be paid;
- assess what other benefits the employee is entitled to receive.

As part of deciding payments on a claim, the insurance company may require an employee to attend medical examinations.

### *What if the weekly benefits are delayed?*

While waiting for the insurance company to accept a claim and start paying weekly benefits, an employee may request sick leave or holiday leave. If the insurer accepts the claim, leave is restored.

### *What happens if the employee's claim is not accepted?*

The insurance company will usually make a decision about a claim within 21 days. If they need to carry out investigations they can take an additional 21 days to make a decision.

If the insurance company has not started to pay an employee's weekly benefits within this 42 day period they will refer the disputed claim to WorkCover NSW/ACT for conciliation. The employee will be advised by the insurance company of the reasons for their decision to dispute the claim.

Once the WorkCover Conciliation Service has all the information they need to try to resolve the dispute they will contact the employee.

While waiting for the dispute to be resolved, the employee should contact Centrelink about any entitlement to social security benefits that may be available.

## **Responsibilities of employers**

An employer must:

- provide a safe and healthy workplace;
- send any claim submitted by an employee to their workers' compensation insurance company within 7 days;
- give an employee any compensation benefits received from the insurer as soon as possible;
- notify WorkCover NSW/ACT if an employee is either off work or on suitable duties for more than 7 days;
- not dismiss an employee because of their injury within 6 months of becoming unfit for work.

## **Responsibilities of employees**

Employees must:

- take care to prevent work injuries to themselves and others;
- tell their employer of any injury as soon as possible;
- attend medical examinations as directed by their insurer or employer;
- provide accurate information about any aspect of their claim.

## **Where to get more information**

**WorkCover New South Wales**

Telephone: 13 10 50

**ACT WorkCover**

(02) 6207 3000

## **Annual Leave and Annual Leave Loadings**

The NSW Annual Holidays Act (1944) and the ACT Annual Leave Act (1972) allow full-time and part-time workers in New South Wales and the ACT respectively to have four weeks' paid leave per year. (As both Acts contain almost identical provisions, they are referred to below as a single Act).

The National Employment Standards now regulate annual holidays, even though the Annual Leave acts are still in place.

Under the NES, annual leave begins to accrue from the day employment commences and it may be taken, by agreement, as it accrues. This is a significant departure from the previous rules, where leave did not fall due until the anniversary of the date on which employment originally commenced.

### ***When can annual leave be taken?***

At any time by agreement between the employer and employee. If the worker and employer agree, leave may be taken in advance.

***What rate of pay is paid to full-time and part-time workers taking annual leave?***

The worker is entitled to their gross wage (not including overtime), plus any shift allowances and weekend penalties for the ordinary time that would have been worked if annual leave had not been taken.

If commissions or incentive payments are paid, they are averaged over the previous 12 months and added into the annual leave pay.

This is called the worker's "ordinary pay".

***What are annual holiday entitlements for an employee on workers compensation?***

When an employee is on workers' compensation, their annual holiday entitlements continue to accrue while the employment relationship continues to exist. The total period an employee is on workers' compensation is counted as service with an employer for the purpose of calculating the employee's annual holiday entitlement.

***How do casual workers receive their annual leave entitlements?***

Casual workers are generally paid an extra payment of 1/12th of their casual hourly rate in substitution of annual leave. Some awards may vary the method of payment.

***What payment is due for annual leave when a person leaves their employment?***

If the period of employment is more than 12 months, payment for the balance of leave accumulated and not taken up to the last anniversary date, plus a pro rata payment for leave accumulated after the last anniversary date is paid.

If the period of employment is less than 12 months, a pro rata payment calculated from the commencement date of employment is paid.

***How is a pro rata payment calculated?***

By multiplying the number of weeks worked since the last Anniversary Date or date of commencement by the gross weekly wage, then dividing that amount by 12.

***Can a lump sum payment be made instead of annual leave?***

No. The Act prohibits any payment instead of taking annual leave, except on termination of employment.

***What are the employer's responsibility?***

The employer must:

- keep full records of their workers' annual holidays for a period of six years after the last date on which holidays were taken;

- give at least one month's notice of requiring a worker to take annual leave or of an annual close-down;
- pay the worker before the commencement of the annual holiday.

### *What about Leave Loadings?*

Unless specified in an Award, loadings on annual leave payments are extremely rare. For most optometrists and optical dispensers, no loading is payable on annual leave payments.

This Act applies regardless of any agreement to the contrary between an employer and a worker.

### **Where to get more information**

**NSW Department of Industrial Relations**

Telephone: 13 16 28

**Fair Work Australia**

1300 799 675

## **Long Service Leave**

The NSW Long Service Leave Act (1955) and the ACT Long Service Leave Act (1976) provide that full-time, part-time and casual workers in New South Wales and the ACT respectively are entitled to be paid long service leave after working for an unbroken period of 10 years with an employer. (As both Acts contain almost identical provisions, they are referred to below as a single Act).

The general entitlement is for two months' paid leave after ten years' continuous service (see below) with one employer and one month paid leave for each additional five years' service.

Leave entitlements accrue pro rata on a daily basis for the first 15 years. After 15 years of service, only full years of service are taken into account for accrual purposes.

### *Is there an entitlement for less than ten years' service?*

Yes. A worker who has completed five years' service as an adult, or has received adult rates of pay, is entitled to a long service pro rata payment if he or she:

- resigns as a result of illness, incapacity, domestic or other pressing necessity;
- is dismissed for any reason except serious and wilful misconduct;
- dies.

### *What is "continuous service"?*

Continuous service is uninterrupted service with one employer, even if the worker's duties or position changes during that time. If the company is part of a group and the worker is transferred to other companies within the group, the worker's service is generally continuous.

If the business is sold and it is carried on by the new owner as the same business, and the worker is employed in that business, the continuity of the worker's service is not broken. If you are buying or selling a practice you should ensure that this liability is covered by the terms of the contract of sale.

The total period of time a worker is on workers' compensation is counted as service.

If an employee is absent from work on, for example, parental leave, continuity of a worker's service is NOT broken by this absence, even though the time of absence does not count for the purpose of calculation of the period of service for long service leave. The general rule is that unpaid leave does not count for the purposes of time calculations for Long Service Leave.

### *How is long service leave paid?*

Long service leave is paid at the ordinary pay rate (see below) which has been paid to a worker prior to taking leave or an average of the last five years' ordinary pay earnings, whichever is greater.

The worker, before proceeding on long service leave, has the right to elect to be paid in full for the leave, or to be paid at the ordinary pay rate at their normal regular pay intervals during their long service leave.

### *What is "ordinary pay"?*

Ordinary pay is the worker's ordinary time rate of pay plus an average of any bonus, commission or other incentive payments paid over the past 12 months or the past five years, whichever is greater. The cash value of board and lodgings provided is also included. Shiftwork, other penalty rates and overtime payments are not included.

### *How is long service leave paid on termination?*

The worker is entitled to receive a payment calculated in accordance with any long service leave entitlement due after ten years of continuous service. In some circumstances, a pro rata leave payment may be due to a worker with less than 10 years' service.

### *How can long service leave be taken?*

In one continuous period of leave or, if the worker and employer agree:

- where the leave due is two months - in two separate periods;
- where the leave due is between two months and 19 and one-half weeks - in two or three separate periods;
- where the leave exceeds 19 and one-half weeks - in two, three or four separate periods.

### *Can a worker be paid for the value of their long service leave?*

No. The long service entitlement must be taken as leave. Payment for leave entitlements is only made on termination of employment.

### *When can long service leave be taken?*

When a worker becomes eligible for long service leave, an employer is required to grant it as soon as practicable, taking into account the needs of the employer's business. One month's notice should be given. If both the employer and worker agree, leave may be postponed to a mutually convenient date.

### *Can long service leave be taken in advance?*

Yes. If both the employer and worker agree, not less than one month's leave may be taken in advance.

### *What happens if a public holiday occurs during long service leave?*

An extra day must be included in the long service leave.

### **Where to get more information**

**NSW Department of Industrial Relations**  
Telephone: 13 16 28

**Fair Work Australia**  
1300 799 675

## **Personal/Carers Leave (previously known as 'sick leave')**

Important note – this form of leave is available to employees for use in a much wider range of circumstances than was the old 'sick leave'. For example, it is now perfectly permissible for an employee to take such leave to care for an unwell child or close relative. Employers need to acquaint themselves with the range of circumstances where this form of leave may be taken. The National Employment Standards state:

*An employee may take paid personal/carer's leave:*

- *if the employee is not fit for work because of a personal illness, or personal injury; or*
- *to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of a personal illness or personal injury, or an unexpected emergency.*
- *The entitlement to paid personal/carer's leave does not extend to casual employees.*

The minimum period for personal/carers leave is ten days per annum. Untaken leave is carried forward accumulatively and indefinitely.

The payment for personal/carers leave is normally subject to the production of a medical certificate or other satisfactory evidence that the employee was unable to attend for duty because of illness, injury or other reason permitted by the legislation. Check the NES for more details.

Personal/carers leave entitlements are not used for illness or injury arising in the course of employment for which the employee is entitled to workers' compensation.

It is also important to note that Personal/Carers Leave in excess of 15 days may now be cashed out by agreement between the employer and employee. This is a significant departure from previous practice where cashing out was prohibited. There are a number of rules around cashing out which must be followed. These are detailed in the NES.

## Other Forms of Leave

### Parental leave

Parental leave is unpaid leave, unless otherwise specified in an award or agreement.

Parental leave taken by an employee can be:

- maternity leave, in connection with a pregnancy or the birth of her child; or,
- paternity leave, in connection with the birth of his spouse's child; or,
- adoption leave, in connection with the adoption of a child under five years of age.

#### *Who is eligible for leave?*

A male or female employee who has completed at least 12 months' continuous service with an employer is entitled to parental leave. Continuous service may be on a full-time or part-time basis, but not as a casual.

There is no limit on the number of times that parental leave can be taken.

#### *How much leave is an employee entitled to?*

In all cases parental leave must not be longer than 52 weeks and must be completed before the child's first birthday or anniversary of adoption. An employee and his or her spouse may not take parental leave at the same time, except where one spouse is on a period of short parental leave.

An employee may take parental leave in the following manner:

**Maternity** leave: an unbroken period not longer than 52 weeks, taken during or after pregnancy;

**Paternity** leave: an unbroken period of up to one week taken at the time of birth (short paternity leave) and a further period of unbroken leave (not longer than 51 weeks), taken in order to be the child's primary care giver (extended paternity leave);

**Adoption** leave: an unbroken period of up to three weeks, taken at the time of placement (short adoption leave) and a further period of unbroken leave (not longer than 49 weeks), taken in order to be the child's primary care giver (extended adoption leave).

### ***How much notice must an employee give?***

- at least 10 weeks' written notice of the intention to take maternity or extended parental leave; and
- at least four weeks (14 days for adoption leave) written notice of when they wish to start and end the leave.

Before commencing leave, the employee must provide a medical certificate confirming the pregnancy and expected date of birth or a notice from the adoption agency stating the date of placement.

### ***Can employees change their mind about the period of leave?***

Parental leave may be lengthened once without the employer's consent, by the employee giving at least 14 days' written notice. The employer and employee must agree to any further extension. Parental leave may be shortened if the employer consents and the employee gives at least 14 days' written notice.

### ***Can an employer ask an employee to come back to work to help out?***

At the employer's request, an employee can interrupt parental leave and return to work full-time, part-time or casually. However, the employee does not have to agree to the request.

This does not affect the employee's right to return to parental leave. However, the employee must still complete the period of leave by the child's first birthday or anniversary of adoption.

### ***Can an employee undertake paid employment while on parental leave?***

An employer may require that an employee not work for other employers while on parental leave, if such employment is inconsistent with his or her original employment.

### ***Does an employee have any special leave entitlements for illness?***

If an employee is ill because of the pregnancy while still at work, the employee is entitled to take special maternity leave (which is unpaid leave) or use any paid sick leave, or any combination of these. A medical practitioner's certificate is necessary.

### ***What happens if there is a miscarriage, the child dies or the adoption does not proceed?***

If the employee has not commenced parental leave, the leave is automatically cancelled. However, a female employee is entitled to special maternity leave, for a period certified as necessary by a medical practitioner.

If the employee is already on leave, he or she must write to the employer asking to return to work. The employee must be allowed to return to work within two weeks of this letter.

***What other leave is an employee entitled to?***

An employee may take any annual or long service leave instead of, or in addition to, parental leave. The total period of all leave must not exceed 52 weeks.

Sick leave is not paid while on parental leave, unless the employer agrees.

An employee seeking adoption leave is entitled to two days unpaid leave to attend compulsory interviews associated with the adoption.

***What if an employee thinks the workplace may be dangerous for her?***

Where there are risks associated with pregnancy or breast feeding, the employer is to adjust the working conditions or hours of work or transfer the employee to other appropriate work. The new position must be comparable in pay and status.

Any such risks are to be judged by the employee's medical practitioner.

Where it is not feasible to transfer the employee, an employee must be granted a period of special maternity leave, as certified by her medical practitioner.

***Does an employee have a right to return to work?***

Yes. An employee is entitled to return to the position they held immediately before commencing parental leave.

If this position no longer exists, the employer must provide the employee with a position as close as possible in status and pay to that of the employee's former position.

***Can an employee be dismissed while on parental leave?***

No. It is an offence to dismiss an employee because the employee or his or her spouse:

- is pregnant or has applied to adopt a child;
- has given birth to or adopted a child; or,
- has applied for or is on parental leave.

An employee may also lodge an unfair dismissal application to the NSW Industrial Relations Commission or the Federal Industrial Relations Commission (ACT).

***How does parental leave affect an employee's employment benefits?***

Parental leave does not break the continuity of service with an employer. However, such time away from work will not count for long service or other leave entitlements.

***What records have to be kept of parental leave?***

The employer must keep records of parental leave for at least six years.

*Are replacement employees allowed?*

An employer may engage a replacement employee for the duration of the parental leave. That employee must be informed of the temporary nature of their employment and the right of the employee on parental leave to return to the position.

*Can an employer discriminate against an employee for taking parental leave?*

No. If an employee believes that an employer has discriminated it against them because they are pregnant or wish to take parental leave, the employee may be able to take a claim of discrimination to the Anti-Discrimination Board of NSW or the Federal Anti Discrimination Commissioner.

**Where to get more information**

**NSW Department of Industrial Relations**  
Telephone: 13 16 28

**Fair Work Australia**  
1300 799 675

## **Working Hours**

Working hours are usually defined either by an award or by agreement between the parties in the absence of an award. An ordinary working week cannot exceed 40 hours – hours in excess of this will usually be classified as overtime.

In instances where an employee is not covered by an award, overtime payments are made at a rate agreed between the parties. Whilst there is no set rate for non-award staff, some typical award provisions for overtime include payment at 1.5 times the ordinary rate for the first 2 hours of overtime on any given day and 2 times the ordinary rate for hours thereafter on that same day.

Note that time-in-lieu of overtime may also be stipulated by the employer. In such cases, time-in-lieu (T-I-L) is typically given at the rate of 1 hour T-I-L for each extra hour worked.

It is highly advisable to specify overtime and time-in-lieu arrangements in your Written Employment Agreement.

## **Meal Breaks**

Generally, there must be at least one meal break of between 30 minutes and one hour during each day's work. The meal break must be normally given no later than five hours after the employee commences work.

The main meal break (usually lunch) is taken in the employee's own time; it is not a paid break.

Some awards provide for a 10-minute rest period (tea break) either in the morning or afternoon, or both. In other cases the award may not provide for any rest period at all in which case the granting of such breaks is largely at the employer's discretion. These rest periods or tea breaks normally count as time worked.

## **Specific Employment Conditions**

An employer is able to insist on reasonable standards of behaviour, dress etc from her/his employees, provided that they can be demonstrated to be appropriate to the circumstances.

For example, if you run a 'conservative' practice which caters predominantly to older patients and one of your staff reports for work one morning with bright green hair and several unusually placed earrings, you could reasonably ask the employee to adopt a more "conservative" standard of presentation, in line with what is normally expected within the practice.

Again, this sort of issue is best dealt with at the interview stage and should be confirmed in the Written Employment Agreement.

It is also permissible for an employer to require staff to wear appropriate uniforms. In such instances you may either specify the type of uniform to be worn or provide it to your staff (this latter method may be preferable, as it gives you a high degree of control over the uniform – what you regard as a “white blouse/shirt” may be very different to what your employee regards as the same item). Note again that uniform requirements must be “reasonable”.

### **Day to day relationships**

Remember that on a normal working day you will spend more time in contact with your work colleagues than you will with your partner and/or family! Working relationships can require just as much effort to keep them on an even keel as do personal relationships – sometimes more! Don’t just expect them to work perfectly, all day, every day.

## **Reviewing Performance and Salary**

### **Maintenance Reviews**

The golden rule of reviewing the performance of your staff is that a “formal” appraisal should never contain any unexpected surprises – especially nasty ones! If your staff first find out at appraisal time that their performance is unsatisfactory then YOU have failed to perform!

Whilst “formal” appraisals are typically held annually, it is also wise to hold regular (at least quarterly) ‘maintenance’ reviews, just to ensure that everyone is in touch with each other.

Maintenance reviews can be similar to the annual appraisal in that they can be “formal”, scheduled meetings between you and your staff or they can be informal chats over a cup of coffee – but they are a great way of ensuring that the lines of communication remain open.

### **Confront issues early**

One of the best ways of avoiding conflicts is to deal with little issues before they become big problems. Whilst it isn’t wise to make mountains out of molehills, you should never dismiss little niggles as unimportant – little niggles can often accumulate over time and then one day you’ll have an explosion over some trivial matter. Whilst the reaction can seem completely out of proportion to the incident, the person isn’t blowing up at one little thing – they are venting their accumulated frustration from an often lengthy period of time – but the ramifications of such an explosion on staff morale and harmony can often be long lasting and difficult to rectify.

If you notice that staff seem to be annoying each other or that there has been a cooling in a previously cordial relationship, make some inquiries as to what is going on. (Just a brief word of warning – there are ALWAYS two sides to a story – make sure that you have garnered ALL the facts before taking any action and be prepared to explain why you have taken a particular course of action if necessary). A little time spent now uncovering and addressing the problem could avoid a much more stressful encounter in the future.

### **Regular Appraisals – Salary and Performance**

It is often said that salary and performance reviews should be conducted separately – the idea being to break the nexus between good performance and salary increases. In reality, this is just about an impossible task. Most people have a natural assumption that performance = reward. And most managers/principals create the same nexus themselves!

However it is very important to stress that salary increases (outside of compulsory Award rises) are mainly linked to the overall performance of the business, not only individual performance. (I say “mainly” because as an employer, you still need to deal with the issue of how to reward good performers, even if overall business performance is only average – see below). If the “overall-performance/reward” connection is not established, then you can find yourself in the situation of having staff dissatisfied because they have performed well, but a salary increase is not forthcoming because the business overall has not performed to expectations. *Their* nexus is individual performance = salary *increase*. The nexus *should be* individual performance + business performance = salary *review*.

Get this expectation clear early in the business relationship – it is very important and can be a powerful ally in getting your staff to all move in the same direction – growing and improving your business!

Just going back to the issue of how to reward good performers in an average environment. This is a difficult issue, but can be fairly easily overcome by structuring remuneration reviews in two parts – individual performance *reward* and team performance *bonus*.

You conduct remuneration reviews thus: each individual is appraised on their individual performance and notionally ranked against all other staff members in terms of their level of performance (in terms of being satisfactory, above average, outstanding etc). If you adjudge all staff members to have performed about equally, then you would probably reward them about equally (say a uniform 3% salary increase). However if you have one outstanding staff member, then you might award them a 5% increase, with the others at 3% (these numbers are just for argument’s sake).

Additionally, you then look at how the team and the business performed overall. If the business went well, you might make a *bonus* payment to all members of the team (regardless of how well they performed individually). However, don’t make bonus payments part of a salary increase – otherwise they then form part of the base salary for next year’s review! Make bonuses a one-off payment or reward – that way they can stand alone year to year and it is less of a trauma if they are not paid one year.

Oh, one last thing – try not to pay bonuses in conjunction with a special event like Christmas. If you do, then you run the risk of the bonus becoming notionally connected with the event, rather than with business performance – “*its Christmas, so where’s my bonus*” can become the mindset, rather than “*the business did well this year, so maybe ...*”

## Salary

There are many components which go into salary decisions – the most basic two being Award requirements (where they exist) and market forces (which always exist).

### **Award Payments**

If you are paying in accordance with an Award, then most of your decisions are made for you – the Award sets out the precise rates of pay, any loadings payable, conditions of employment and just about everything else to do with remuneration and your employees' day to day work conditions.

**A word of caution** – paying strictly to an Award does little to encourage staff to perform. An Award represents the basic minimum that you can offer staff – if you're only paying at the minimum, what motivation is there for staff to perform at any level other than the minimum?

### **Market-linked Payments**

Paying in accordance with “what the market will bear” requires a little more work on your part, but has the great advantage of helping staff to see that there is a close relationship between performance and reward.

If you pay at or around the market rate, then it is obviously important to work out what the “market” rate is. Look on [www.seek.com.au](http://www.seek.com.au) or in newspapers like the Sydney Morning Herald, Telegraph or Canberra Times to get an idea of what the market is paying for similar positions. Local papers are also a good source of information. Also speak with your colleagues to see what sort of rates they are paying.

Having determined an appropriate “market rate” for the particular position, now establish in your own mind a working salary range for the position. The working range means that you know the base salary you are willing to pay for satisfactory performance; the mid range for better-than-average performance; and the top of the range for really outstanding performance.

The working range also gives you room to negotiate salaries with your staff – it is a good strategy to start salary negotiations a little lower than what you expect to pay for the person and position. You can then be bargained up a little way, leaving both your staff member and you feeling happy with the outcome.

Another word of caution – if you are paying genuinely at the top-of-the-range for a position, you should ensure that the staff member knows this. For every position there is a ceiling on what can be reasonably paid for the work being done. If a staff member has reached this ceiling, then let them know --it overcomes the problem of reality not meeting expectations when salary reviews are conducted.

It also affords the staff member the opportunity to decide if they are content with the general salary level and with future movements only being within a fairly narrow range or to seek bigger challenges elsewhere.

## **Salary v Remuneration**

These two terms are not synonymous. Salary is monetary payment – remuneration is the whole spectrum of rewards which goes together to make up the “reward package” for an employee.

If you have reached the top of the salary spectrum for a position, look for other ways to make the remuneration package more attractive for a valuable staff member. Some examples:

- Flexible working hours
- Additional holidays, especially during school holidays, for example
- Attendance at conferences (without an expectation that they’ll be at every session)
- Salary packaging (see comments re FBT above) – a good accountant can often give you options for increasing the net value of a remuneration package without costing you any more

## **Performance Appraisal**

Performance appraisal is all about communication – it is a formalised opportunity for the manager/principal to sit down with each member of staff and discuss how things have been going over the previous 6 or 12 months.

Whilst you would, of course, have been giving your staff regular feedback on their performance the planned appraisal creates an opportunity to explore issues in more detail or to canvas things that might not come up during the normal working day.

Attachment 3 gives you an example of an Appraisal Form which the OAA uses for its staff.

You will see that the form is really just a catalyst for thought and discussion – its basic intent is to get the employee and manager to think about the various elements that go into a person’s job, to critically assess how things have gone over the past period and to look forward at how to make both the job and the employee’s performance even better.

Even in small businesses with only 1 or 2 employees, it is important to set time aside for an annual appraisal. If you follow these basic steps, you won’t go far wrong:

- Conduct appraisals at least annually, preferably at about the same time each year
- Use an appraisal form – it gives both the staff member and principal a common set of points to work from and ensures that you at least start out thinking about the same things
- Set aside a definite time for the discussion – and stick to it (catastrophes notwithstanding)
- Ensure that you will not be interrupted during the discussion – get other staff members to answer the phone and take messages – or if necessary, take the phone off the hook
- Try to make the discussion as informal as possible – it is not the Spanish Inquisition!
- As an employer, you should do 20% of the talking and 80% of the listening – if it works the other way around then your staff member will leave the discussion thinking that it was just another avenue for you to tell them how you see the world
- Work your way through the appraisal form, asking open questions as you go. Questions like “What do you like/dislike about your job?” are much more productive than “Do you like your job?” – the former starts a discussion and elicits information – the latter gets you a “Yes” or “No”
- Explore issues as they come up, unless they are specifically dealt with in some other part of the appraisal
- Make sure you understand the scope of any issue which is raised – get more information if necessary, but don’t just “assume” that you know what is going on – you might not!
- During the discussions, make notes of points which need to be followed up after the appraisal. Be specific about follow up – what action is necessary, by whom and by when. At the end of the appraisal, document the notes and give the staff member a copy, so that you both know what is expected.
- Don’t make commitments you can’t (or won’t) keep – doing so is a great way to kill morale and ensure staff disillusionment

## **Setting Goals and Objectives**

At the commencement of the job and as part of the appraisal process, goals and objectives should be set for each member of staff.

Goals and objectives give both employee and principal a common yardstick against which to measure progress and activity during the year. They should be set co-operatively where possible, with the staff member agreeing on the goal or objective and how it is to be measured.

Again, goals and objectives do not need to be complex nor extensive – they are often a simple reflection of key elements of the position and an equally simple measure of accomplishment. For example:

- Reception staff – answer all incoming telephone calls within 3 rings
- Reception staff – telephone all patients 2 days before their appointment to confirm attendance
- Optometrists – greet all patients by name in the waiting area and escort them to the examination room
- Optometrists – write up patient notes at the conclusion of each consultation, ensuring that critical elements X, Y and Z are included. Hand notes back to reception staff for filing
- Practice Manager – elicit Patient Satisfaction Survey responses from no less than 100 patients quarterly. Collate responses and present to the Practice Meeting following the end of the quarter

As you can see, these examples are all simple, quantifiable and measurable – the key elements of a good goal or objective.

## The Disciplinary Review

At times it will be necessary to conduct a review with a staff member who isn't performing up to expectation. This is a critical task, as it will either a) lead to an improvement in staff performance or b) ultimately result in the staff member leaving your employ.

Note: before conducting a disciplinary review, ensure you have read the section on staff dismissal (pages 47-52), even if you have no intention of dismissing the employee. There are times when matters do not go as planned and forewarned is forearmed.

If you follow these steps you should end up with a productive and hopefully positive review result:

- Prepare for the review – know exactly what aspect of performance you want to discuss with the employee and have specific examples of the performance in question
- Verify your facts – make sure that any complaints/issues you wish to raise are indeed factual
- Advise the employee that you wish to discuss issue A, B and C with them (specify the issues to be discussed) and set a time for the review – give them a few hours' notice at least of the meeting
- Tell the employee who will be in the meeting, if it will be anyone other than you and them
- Ensure that the meeting can proceed uninterrupted

- As the review commences, state in specific terms what the matters at issue are and what your concerns/complaints are. Be specific!
- State what your understanding of the situation is, without being judgemental – make it a statement of “I understand that the situation is.....”
- Once you have finished stating your understanding, immediately ask the employee to respond.
- Give the employee ample opportunity to respond to the issues you have raised and to explain their point of view – remember, THERE ARE TWO SIDES TO EVERY STORY
- Be prepared to concede gracefully if you find that you have been in error or misunderstood the situation
- If, at the end of the review, you find that your concerns are justified, say so clearly and unequivocally to the employee
- State what the issues of concern are and precisely how the employee has failed to meet the expectations of the job
- State what it is that the employee must do in order to meet the job expectations in the future – set specific criteria against which their performance will be assessed, how you expect their performance/behaviour to change and when you will meet again to review the situation
- Document the discussions – make sure you record a) the matters at issue b) your initial comments c) employee’s response d) your conclusion e) changes expected of the employee f) actions required on your part g) time frame for review

**IF IT IS NECESSARY TO FORMALLY WARN AN EMPLOYEE**, make sure that this is also documented, together with the reasons for the warning. Warnings should be explicit – for example:

*“It is unacceptable for you to be verbally abusive towards our patients, regardless of the circumstances. We have spoken about this matter today and you have agreed that you will refrain from this sort of behaviour in the future. However it is necessary for me to formally warn you that if I receive another complaint about verbal abusiveness then your employment with the practice may be terminated without further warning.”*

**DO NOT** issue a warning in vague or ambiguous terms such as:

*“Your behaviour with patients needs to improve. If I receive any more complaints then I will have to review your position with the practice”*

The first example is explicit, specific and clear with regard to expected behaviour change and the consequences of failure to perform. If it was necessary to dismiss the employee for a future failure to perform, this sort of warning would give a good basis for such action.

The second example, on the other hand, is vague and would leave any attempt to dismiss the employee wide open to challenge on the basis of unfairness or failure to provide the employee with “natural justice”.

Lastly, ensure you keep good, accurate records of all discussions and reviews – just like clinical records, good employee records could be your salvation in the case of a dispute.

## **Termination of Employment**

*NB. There are many laws which govern the termination of employment – common law and equity, contract law, state law and federal law. The complexities of the legislation can be great. If you find yourself in a position where you want to dismiss an employee for any reason, we strongly recommend that you seek expert legal advice before proceeding. A little money spent on good advice prior to any action could save you a great deal of heartache and expense later on.*

Because there are so many aspects to consider with regard to employment termination, a question-and-answer format is used for this section:

### **Resignation**

*How can notice of resignation be given?*

Resignation can be given orally (either in person or by telephone) or in writing. It is preferable for the notice to be given in writing, as this ensures that there can be no misunderstanding of the terms of the resignation. The letter of resignation should contain the date that the employee wishes to conclude their employment and the fact (or clear implication) that they are resigning of their own volition.

*How much notice should an employee give?*

If the employee is covered by an Award, then the period of notice will usually be specified in the Award. For many clerical and administrative type occupations, the period of notice required by the relevant Award is one week. Even if you have specified a longer period of notice in your Written Employment Agreement, the Award provision will take precedence (if it applies).

In the case of non-Award employees, the Written Employment Agreement will specify the period of notice to be given (note that the period must be reasonable – you probably could not, for example, ask a receptionist to give you three months’ notice of resignation – it would probably be more reasonable to ask for 4 weeks notice).

For most non-Award employees (excluding senior managers and the like), four weeks notice of resignation is about the maximum that you could reasonably insist on.

### *Can an employee resign with less than the specified period of notice?*

The short answer is “yes” – within this answer there are two general conditions which might arise:

#### **1. Resignation of own volition**

Where an employee resigns without the required period of notice and of their own volition (for example, to take up a more attractive position elsewhere), then the employer may have some redress to recover damages from the employee for failing to meet their contractual or Award obligations. Any such action would be conducted through the legal system and the employer would have to establish the quantum of loss that they suffered because of the action of the employee. In practical terms, action of this sort is rarely worth the effort, but if you are faced with this situation, seek expert legal advice.

#### **2. Constructive Dismissal**

There are times where an employer is guilty of such a fundamental breach of the contract of employment that the employee is entitled to deem the contract to be at an end. A common example is where an employer tries to circumvent the Unfair Dismissal laws (or other relevant laws) by making life so unpleasant for the employee that they are virtually forced to resign.

In circumstances such as these, the employee may be able to argue that the contract of employment was terminated by the employer and was done so wrongfully.

#### **3. “Resign or be dismissed”**

In most circumstances, the courts would regard such an ultimatum as amounting to constructive dismissal by the employer – even if the employee actually does hand in a letter of resignation as a result of the ultimatum.

### *Can an employee resign whilst on leave?*

If an employee is on annual leave, long service leave or parental leave, then they are able to deliver their notice of resignation during the course of that leave. The matter of when such resignation takes legal effect is vexed, but a popular opinion is that it won't take effect until the period of leave expires.

This raises the interesting question of restraint clauses in a contract of employment –

For example, an employee has a restraint clause in their contract of employment which states that they can't work as an optometrist within a 3km radius for a period of 6 months after leaving your employ. The employee takes long service leave for, say, 3 months and shortly after commencing leave resigns. Their Employment Agreement requires them to give 4 weeks notice of resignation. When would the period of restraint commence? Would it be from the end of the 4 week notice period or the end of the 3 months long service leave? Unfortunately, we can't give you an answer, other than to say that it is a complicated question and one on which you should seek expert legal advice.

Where an employee is on unpaid leave (such as maternity leave) the question is not so vexed - because the leave is unpaid, our advice is that the notice of resignation would be governed by the normal requirements for notice.

## **Dismissal**

*On what grounds can an employee be dismissed?*

In most instances, an employee will be dismissed for one of four reasons - a) their contract of employment has come to an end (eg. as with contract or casual staff) b) unsatisfactory performance or behaviour c) misconduct or d) redundancy {see next section for commentary on redundancy}.

## **Conclusion of Contract**

If an employee has a contract of employment (preferably written) for a specified period of time or a defined task and that time or task has been concluded, then the employer may dismiss the employee in accordance with the terms of the contract. In circumstances such as these, the employer usually has no obligation to the employee beyond that which is specified in the contract.

## **Unsatisfactory Performance or Behaviour**

*Do I have the right to dismiss an employee?*

Yes, but you must always do so in accordance with both state and federal law and any relevant Award provisions and any dismissal action must always be "fair" - ie small employers should follow the Small Business Fair Dismissal Code as established by Fair Work Australia <http://www.fwa.gov.au>. We also recommend that you review the four step procedure which is outlined in the box below for additional information on how to proceed in this sort of circumstance.

*Are there circumstances where an employee cannot be dismissed?*

There are a number of instances where dismissal is prohibited. The more common instances of such prohibition include:

- absence from work on maternity, paternity or other parental leave
- temporary absence from work because of illness or injury
- dismissal related to the lodgement of a complaint alleging violations of laws or regulations (eg alleged violations of Occ Health and Safety regs)

- absence whilst on workers compensation during the first six months of such absence, where the employee is unfit for work because of the compensable injury or illness
- dismissal based on discriminatory grounds such as race, religion, sexual preference, sex, marital status, physical or mental disability (except in some instances where the disability would or reasonably could lead to a risk of injury or harm to the employee or fellow workers) or family responsibility.

***What constitutes unsatisfactory performance or behaviour?***

Like most answers in this section, the definition of “unsatisfactory performance or behaviour” will turn on the facts of each particular case. However the following examples may help:

- repeated late arrival for work
- unreasonable levels of absenteeism
- not performing work to a standard acceptable to the employer
- repeated behaviour which could endanger the health or safety of the employee or other staff members eg. refusal to observe proper procedures when operating machinery
- attitude problems, such as aggressiveness towards managers, other staff or patients/customers
- serious misconduct whilst working

***How do I go about dismissing an employee?***

***In all circumstances, you should carefully and methodically follow the Small Business Fair Dismissal Code!*** However beyond that the following will provide some additional guidance:

Firstly, you need to counsel the employee in an effort to bring their performance up to an acceptable level. **THIS IS A MOST IMPORTANT ASPECT OF THE DISMISSAL PROCESS.** If you end up having to dismiss an employee and the dismissal is challenged, the courts will look carefully at what steps you took to counsel the employee – dismissal without an effort on the part of the employer to change the employee’s behaviour is generally unacceptable, except in some limited circumstances (see the section on Instant Dismissal, page 55).

The Employers Federation of NSW recommends a four step counselling procedure. The Association very gratefully acknowledges the assistance of the Federation in granting us permission to reproduce the following article (1).

## Four Step Counselling Procedure

### What steps are involved in a counselling procedure?

There are four steps in the counselling procedure we recommend. These are:

1. counselling and verbal warning
2. counselling and written warning,
3. counselling and final written warning
4. termination

*The recommended procedure is intended to give you broad guidelines within which to operate. However, because the courts look closely at an employer's adherence to their stated policy, if you adopt these guidelines as your policy, we recommend that you consistently apply them.*

### A four-step counselling procedure

#### Step 1 Counselling and verbal warning

The first step in the procedure is to hold a counselling session. The counselling session is a discussion between the employee and usually their direct supervisor about their performance or behaviour.

The purpose of the counselling session is to correct the performance or behaviour of the employee by bringing it to their attention early in a constructive but serious manner.

Take this step only after you have:

- ensured that the employee is properly trained for their job
- removed any genuine obstacles to the employee performing the job properly.

#### Before the session

- Investigate the matter thoroughly.
- Review any notes made about the employee's past performance or behaviour, such as their last performance appraisal or performance interview.
- Prepare a short outline of the major points you plan to cover in the session.
- Have the session at a mutually convenient time that ensures that both you and the employee can focus on the subject of the counselling session.

### **During the counselling session**

- State the specific problem by comparing the desired performance or behaviour with the employee's actual performance or behaviour. Refer to the employee's job description if appropriate.
- Give the employee a chance to respond and explain. Try to find out the cause of the problem.
- Tell the employee the specific change in performance or behaviour you expect.
- Ask the employee to confirm that they understand what is expected of them.
- Confirm that the employee is receiving a verbal warning.
- Set a period (if possible, one you both agree on) within which you will further review the employee's performance or behaviour.
- Decide on any measures to be implemented during the review period (if possible, you should both agree), such as further training.
- Set a date for a further session following the review period. If things improve, let the employee know, and where appropriate set a date for any follow-up review. If the employee's performance or behaviour does not improve and it is appropriate to do so, move to Step 2.

### **After the counselling session**

Write a note in the employee's file summarising the discussion in the counselling session.

Include in it:

- the employee's name
- the date the counselling session occurred and the verbal warning was given
- the specific performance or behaviour problem
- details of the required performance or behaviour you expect
- any explanation the employee gave concerning the performance or behaviour problem
- other information you feel is relevant
- the time frame for the review period and any measures to be implemented during the review period.

### **Step 2 Counselling session and written warning**

The second step in the procedure is a counselling session between the employee and their immediate supervisor and usually the level of management above them, about the employee's performance or behaviour. After the session the employee is given a written warning.

#### **Before the session**

Follow the same procedure as you did for Step 1, but tell the employee they may have a friend or, where relevant, the union delegate present during the session.

### **During the session**

- Review the previous counselling session which you have had with the employee about their performance or behaviour.
- Discuss the employee's performance or behaviour during the review period.
- Give the employee a chance to respond and explain.
- Tell the employee the specific change in performance or behaviour you require.
- Ask the employee to confirm that they understand what is required of them.
- Tell the employee that they will receive a written warning and failure to produce the required change in their performance or behaviour may jeopardise their employment,
- Set a period (if possible, one you both agree on) within which you will review their further performance or behaviour.
- Set a date for a further session following the review period. If things improve, let the employee know, and where appropriate set a follow-up review. If the employee's performance or behaviour does not improve, and it is appropriate to do so, move to Step 3.

### **After the counselling session**

Provide the employee with a "written warning", containing the following:

- the date of the Step 2 counselling session
- the nature of the performance or behaviour problem
- a summary of discussions undertaken in accordance with Step 1
- a statement of the required change in the employee's performance or behaviour
- the period over which you will closely further review their performance or behaviour
- the time and date you will have a follow-up session with the employee
- a clear statement indicating that if the employee fails to produce the required change in performance or behaviour they may jeopardise their employment and will receive further counselling and if appropriate a final written warning.

Have the employee acknowledge receipt of the written warning.

Place a copy of the written warning in the employee's file along with any notes you have made during or immediately after the counselling session.

During the review period monitor the employee's performance or behaviour closely and make written notes of any further developments.

### **Step 3 Counselling session and final written warning**

Broadly follow the procedures in Step 2. However, you should give the employee a final written warning establishing a final review period.

In the letter, you should state in clear terms that if at the end of the final review period the employee's performance or behaviour has not improved to the required standard, their contract of employment will be terminated.

Set a date for a further discussion following the final review period. If things improve, let the employee know and where appropriate set a follow-up review. If the employee's performance or behaviour does not improve, and it is appropriate to do so, move to Step 4 and terminate the contract of employment.

## **Step 4 Termination**

### **Before dismissing the employee**

- Discuss the situation thoroughly with any relevant senior before taking any action.
- Collect and review all supporting documents, such as copies of warnings and notes of counselling sessions.
- Ensure you have all relevant information about legislative and award obligations dealing with termination, for example notice, long service leave, annual leave.
- Prepare an outline of the major points you need to cover. These should include a full review of the steps taken to date.
- Think of all the questions the employee is likely to ask you and how you will answer them.

### **During the termination session**

- Always try to have someone else from management with you
- Ask the employee to come into your office or some other private area. Allow them to bring a friend or, if relevant, a union delegate.
- Tell the employee that you are considering terminating their employment.
- Put the allegation specifically to the employee, in sufficient detail to allow the employee a fair opportunity to respond.
- Ask the employee for an explanation of their unsatisfactory performance or behaviour. Give the employee a fair opportunity to respond.
- Listen to the explanation and assess whether you should fairly consider it as counting against termination.
- If the explanation is not satisfactory, advise the employee that you are terminating their employment and outline the reasons, including referring to previous steps you have taken.
- Give the employee any information they need about payments, superannuation entitlements, and similar matters.
- Explain whether you are going to terminate the employee with notice or pay in lieu of notice.

### **After the session**

- Write down what happened and was said in the termination session. Place any notes you have made during or immediately after the termination in the employee's file.

## Misconduct

In the context of employment termination, “misconduct” can best be defined as a deliberate act on behalf of the employee which is of such magnitude (or repeated with such frequency) that it would be unreasonable for the employer to be required to continue to employ that person.

The Fair Work Act defines “serious misconduct” to include:

- wilful or deliberate behaviour by an employee inconsistent with continuation of the contract of employment
- conduct which causes imminent and serious risk to
  - (1) the health or safety of any person, or
  - (2) the reputation, viability or profitability of the employer’s business
- any of the following actions, unless the employee can demonstrate that they did not constitute “serious misconduct” in the circumstances:
  - ♦ theft
  - ♦ fraud
  - ♦ assault
  - ♦ intoxication
  - ♦ refusal to carry out the reasonable requests of the employer

Note however that even “serious misconduct” may not be grounds for instant dismissal – the requirements for an employer to act “fairly” still remain. The Employers Federation of NSW recommends the following procedure in situations where instant dismissal is being considered. The Association very gratefully acknowledges the assistance of the Federation in granting us permission to reproduce the following article (2).

## Instant Dismissal Procedure

*In all circumstances, you should carefully and methodically follow the Small Business Fair Dismissal Code!* However beyond that the following will provide some additional guidance:

### Instant dismissal procedure

- Give the matter priority attention.
- Inform the employee promptly of the **specific** allegation(s) against them.
- Inform them that you will be investigating the allegation(s) promptly and that they will be given an opportunity to respond to the allegation(s) (if at all possible).
- Inform the employee that they can have a friend (or where relevant a union delegate) present when you discuss the allegation(s).
- If the circumstances and time permit, stop the employee from working further while you investigate the allegation(s).
- If the circumstances and/or time do not permit the employee ceasing work, allow the employee to continue working, but inform them clearly that if the allegation(s) is factual and in an objective view justifies termination, their employment will be terminated, after they have had opportunity to respond 'An objective view' is one that would be considered fair and reasonable in court.
- Undertake your investigation and speak to anyone (within reason) who can shed light on the allegation(s).
- Undertake your investigation as soon as you are aware of the allegation(s).
- Having completed the investigation, consider the facts carefully.
- Discuss the allegation(s) with the employee concerned. You should have a witness present, take notes (or record what is said).
- Give the employee an opportunity to respond to the allegation(s). Let them tell their side without "interrogating" them,
- Take some time to consider the facts after the employee has responded.
- You should only terminate the employee's employment if the facts confirm that the major points of the allegation(s) in all probability occurred, and that the reason for termination justifies instant dismissal from an objective point of view.
- Write down what happened and what was said in the termination session. Place any notes you have made during or immediately after the termination in the employee's file.

## *What payments must be made to an employee who is instantly dismissed?*

The fact of instant dismissal does not change your obligations to make all required payments to an employee. These will include all wage and salary entitlements up to the date of dismissal, accrued annual leave and long service leave. Additionally, you should check the terms of the Written Employment Agreement and the relevant Award to ensure that you have discharged all your obligations to the employee.

## **Notice of Dismissal**

With the exception of instant dismissal, there are statutory requirements for notice of dismissal under the terms of the Fair Work Act 2009. These are:

<i>Employee's period of continuous service</i>	<i>Period of notice</i>
Not more than 1 year	at least 1 week
More than 1 year but not more than 3 years	at least 2 weeks
More than 3 years but not more than 5 years	at least 3 weeks
More than 5 years	at least 4 weeks

Add one extra week for employees aged 45 years or older with at least 2 year's continuous service.

Be aware that notice of dismissal must be given for a specific period eg "your employment will conclude on 23 March 2010". If the period/date of notice expires and the employee remains employed, then further notice must be given. For example, an employee is due to finish next Friday and has been served notice accordingly. However because of a sudden upturn in trade, you ask them if they can come in on Monday, especially because another staff member is away on holidays. The extension of the employment beyond the termination date has invalidated the original notice of dismissal and a new notice must be given. This new notice must also comply with all the normal rules, including length of notice etc.

## **Pay in lieu of notice**

The amount of pay in lieu of notice must equal or exceed the total of all amounts that, if the employee's employment had continued until the end of the required notice period, the employer would have become liable to pay to the employee because of the employment continuing during that period.

Amounts paid to the employee in lieu of notice must be calculated with reference to

- The employee's normal hours of work (including regular overtime or shift work)
- The employee's normal rate of pay, including any allowances, loadings or penalties usually paid
- Any other amounts to which the employee would normally be entitled (including amounts due to them under the terms of their Written Employment Agreement).

When calculating “normal rate of pay”, the following guide will be applicable in most circumstances:

Where an employee has been continuously employed and did not take unpaid leave at any time during the 12 months prior to their termination of employment, then their “normal rate of pay” is regarded as being the greater of:

- a) the remuneration the employee actually received in the 12 months before termination
- OR
- b) the remuneration the employee was entitled to receive in the 12 months before termination

In other circumstances, contact the Association for advice on “wages” calculation

*Can notice of termination be given to an employee whilst they are on annual or long service leave?*

The answer in all likelihood is “yes”, but the notice will not commence until such time as the period of leave is complete.

*What about employees on maternity or parental leave?*

Again, the probable answer is “yes”, but in the case of parental leave, there are very strict requirements which must be met before an employee can be dismissed. If an employer finds themselves in this situation, we strongly recommend that you seek expert legal advice before proceeding. The penalties for improperly or unfairly dismissing an employee who is on parental leave are particularly heavy.

## Redundancy and Retrenchment

Firstly, an explanation of the two terms

- “redundancy” refers to a position or job which no longer needs to be done – it has become “redundant”
- “retrenchment” refers to the actual dismissal of an employee whose position or job has become “redundant” – the employee is “retrenched”

Dismissal because of redundancy comes about because the employee’s position no longer exists – it has nothing to do with work performance.

### *What are my obligations to a redundant employee?*

The amount of redundancy pay under the NES equals the total amount payable to the employee for the redundancy pay period. This is worked out using the table below, at the employee’s ‘base rate of pay’ for his or her ordinary hours of work. NOTE – this does NOT apply to small businesses – those with less than 15 employees.

Employee’s period of continuous service with the employer on termination		Redundancy pay period
At least	but less than	
1 year	2 years	4 weeks
2 years	3 years	6 weeks
3 years	4 years	7 weeks
4 years	5 years	8 weeks
5 years	6 years	10 weeks
6 years	7 years	11 weeks
7 years	8 years	13 weeks
8 years	9 years	14 weeks
9 years	10 years	16 weeks
10 years		20 weeks

## **Other methods/situations of employment termination**

### **Fixed term contracts**

Some employment contracts/agreements exist only for a specified term and then automatically terminate. If you do employ someone on a fixed term contract, then the contract must specify the end date of the contract or precisely how long it will run for (eg. "3 calendar months commencing ....").

Fixed term contracts must usually be allowed to run for their duration – early termination can result in claims against the employer for unfair dismissal or for damages for breach of contract. Any fixed term contract should include provisions for the contract to be terminated because of unsatisfactory performance or other valid reasons.

NB. It may be tempting to employ staff on a fixed term contract and then constantly renew it, with a view to being able to avoid being caught by the Unfair Dismissal laws. The Fair Work Act specifically deals with such situations and courts or industrial relations tribunals would quickly see through any "sham" attempt to structure employment arrangements simply to avoid legal obligations.

### **Specified Tasks**

You may wish to employ someone to conduct a specified task, such as the conversion of your patient records from manual to computer-based. When drawing up such an agreement, ensure that you have very clearly specified how it will be determined when the task has been completed.

### **Casual employees**

Casual employment is a very special type of employment – by its nature, casual employment "contracts" come to an end each time the employee finishes a period of work – be it a shift, a day, a week or whatever.

Take special care when employing "casual" staff – in particular, beware of "casual" staff who work regular hours over an extended period of time. Courts have held that such employees are indeed "permanent" (although part time) employees, not casuals.

Remember that in law, it is the facts of the matter that will determine the outcome, not what label you choose to give to a particular situation.

If you retain staff on a regular basis (eg. 2 days per week on an ongoing basis) then it is likely that these employees would be regarded as "part time" employees, rather than "casual" staff.

## **Abandonment**

An employee can usually be regarded as having abandoned their employment if they are absent from work for at least 3 consecutive working days without advising you of their absence (either personally or through someone else).

Note, however, that you must make reasonable efforts to contact the employee – through visiting their home or contacting friends or relatives. If these efforts come to no avail, then you should send a registered letter to the employee's home advising them that their continued absence will result in the loss of their position and setting a date and time by which they must have made contact with you.

If you receive no reply within this time frame then you may usually take the employment contract to have been abandoned.

## **Frustration of the employment contract**

“Frustration” deals with a situation where it becomes impossible for the employment contract to be carried out – for example, the employee (or employer) being imprisoned (on such terms as to make employment impossible) or dying.

In cases such as these, the employment contract is said to have been “frustrated” and will terminate of its own accord, without the direct intervention of the parties.

## **Obligations upon termination**

As an employer, you have certain general obligations to fulfil when a person's employment is terminated:

## **References**

It is not compulsory to provide an employee with a reference, but you should at the very least give them a statement of service indicating their duration of their employment and any positions they held.

If you do decide to give a reference, bear in mind the following matters:

- you owe a duty of care to your (former) employee to be accurate in any reference you may prepare.
- you also owe a duty of care to potential new employers who may rely on your reference, so be completely factual about the employee, their skills and experience. If you are not intimately familiar with the employee's work, ask someone who is to check the reference before it is finalised

## **Employment Separation Certificates**

An Employment Separation Certificate must be provided to an employee if they request it. They are available from the Commonwealth Dept of Social Security (Centrelink).

## **Challenges to employment termination**

There are a number of grounds on which an employee may challenge the termination of their employment. These would include situations where the employee alleges that:

- there have been breaches of the employment agreement/contract by the employer
- the employment contract is unfair
- the reason for termination was invalid
- some aspect of the termination or its circumstance was unfair

**Non award employees** may be able to have their case heard in one of 2 jurisdictions:

- Fair Work Australia
- the civil courts, usually for breach of contract

**Award employees** have access to Fair Work Australia.

## **A final cautionary word – get your legal advice *before* you jump**

Defending unfair dismissal claims is both a costly and time consuming business, which, it should be said, more often than not is resolved in favour of the employee.

If you as an employer intend to terminate the employment of an employee, then it is strongly recommended that you seek expert legal advice before proceeding. It is a false economy to try and save a few hundred dollars by dispensing with such advice prior to taking dismissal action, when even a relatively minor error in process could cost you many thousands of dollars at a later stage.

**END**

# SOURCES OF INFORMATION AND ADVICE

## General

Optometrists Association Australia (NSW/ACT) (02) 9712 2199  
Department of Social Security (Centrelink) (ACT & NSW) 13 2850

## Advertising

OAA (NSW/ACT) newsletter (02) 9712 2199  
Australian Optometry (OAA National) (03) 9668 8500  
[www.seek.com.au](http://www.seek.com.au)  
[www.mycareer.com.au](http://www.mycareer.com.au)  
Canberra Times (02) 6280 2122  
Insight (02) 9955 6924  
Mivision (02) 8336 8616  
Sydney Morning Herald (classified ads) 13 2535  
Telegraph (02) 9288 2000

## Employment Agencies

Employment National (ACT) (02) 6240 9360  
(NSW) (02) 13 3444

*See also Yellow Pages under "Employment Services"*

## Industrial Relations

Fair Work Australia 1300 799 675

## Tax

Australian Taxation Office (ACT and NSW) 13 2866

## Workers Compensation

WorkCover ACT (02) 6207 3000  
WorkCover NSW 13 1050

### **Insurers - ACT**

- Allianz Australia Insurance Ltd
- CGU Workers Compensation
- Catholic Church Insurances Ltd
- GIO General Ltd
- Guild Insurance Ltd
- QBE Insurance
- Zurich Australian Insurance Ltd

### **Insurers - NSW**

- Allianz Australia Workers' Compensation (NSW) Ltd
- Cambridge Integrated Services Australia Pty Ltd trading as Xchanging
- CGU Workers Compensation (NSW) Ltd
- Employers' Mutual Indemnity (Workers Compensation) Ltd
- Gallagher Bassett Services Workers Compensation (NSW) Pty Ltd
- GIO Workers Compensation (NSW) Ltd
- QBE Workers Compensation (NSW) Ltd

## **ACKNOWLEDGMENTS AND REFERENCES**

1. "A four step counselling procedure", *Everything you need to know about being an Employer*, Employers Federation of NSW

2. "Instant dismissal procedure", *Everything you need to know about being an Employer*, Employers Federation of NSW

*Everything you need to know about being an Employer*, Employers Federation of NSW,

*Small Business Employers Handbook*, NSW Department of Industrial Relations

The Association also gratefully acknowledges the contributions of

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- David Kennedy, of Colin Biggers and Paisley, Lawyers, for his review of the document and significant contributions to the legal aspects of the Guide.

# ATTACHMENTS

1. Sample Job Description
2. Sample Letter of Employment – Optometrist/Professional Staff
3. Sample Letter of Employment – Clerical/Administrative Staff
4. Sample Staff Appraisal Format
5. National Employment Standards

# INDEX

<b>A</b>	Job Applications .....	
Abandonment .....	job description .....	62
ACKNOWLEDGMENTS .....	Job Description .....	66
Adoption leave .....	Job Interview .....	36
Advertisement placement .....	Job Interviews .....	15
Advertisements .....	Job offer .....	12
Annual Holidays Act (NSW) (1944) .....	<b>L</b> .....	8
Annual Leave - pro rata .....	Leave .....	31
Annual Leave Loadings .....	Leave - Other Forms .....	30
Anti Discrimination Acts .....	Legal Advice - when needed .....	9
Applicants - Assessing .....	Long Service Leave .....	19
Applications .....	Long Service Leave Act.(NSW) (1955) .....	15
Appraisals .....	<b>M</b> .....	41
Assault .....	Maternity leave .....	56
Assessing applicants .....	Meal Breaks .....	19
ATTACHMENTS .....	Misconduct .....	67
<b>C</b>	<b>N</b>	
Casual Staff .....	Notice of Dismissal .....	23
Challenges to employment termination .....	<b>P</b> .....	63
Conclusion of Contract .....	Parental leave .....	50
Contract Staff .....	Part time Staff .....	22
Counselling Procedure .....	Paternity leave .....	52
<b>D</b>	Pay in lieu of notice .....	
Disciplinary Review .....	Performance Appraisal .....	46
Discrimination .....	Performance or Behaviour - Unsatisfactory .....	9
Dismissal .....	<b>R</b> .....	50
Dismissal - Constructive .....	Redundancy and Retrenchment .....	49
Dismissing an employee .....	References .....	51
<b>E</b>	References for terminated staff .....	
Employment - Forms of .....	Resignation .....	22
Employment Agreement .....	Reviewing Performance and Salary .....	22
Employment conditions .....	<b>S</b> .....	21
Employment Conditions .....	Salary .....	22
Employment Conditions - Specific .....	Salary - Market-linked .....	39
Employment Separation Certificates .....	Salary Packaging and Fringe Benefits Tax (FBT) .....	62
Employment termination - Other Methods/Situations .....	Serious Misconduct .....	61
<b>F</b>	Sick Leave .....	
Formal Warning .....	<b>SOURCES OF INFORMATION AND ADVICE</b> .....	47
Fraud .....	Superannuation .....	56
Fringe Benefits Tax .....	<b>T</b> .....	26
Frustration of the employment contract .....	Tax .....	62
Full time Staff .....	Telephone applications .....	23
<b>G</b>	Termination .....	
Goals and Objectives .....	Termination of Employment .....	45
Group Certificates .....	Theft .....	27
<b>H</b>	Trial Employment Period .....	
Hours of Work .....	<b>U</b> .....	39
<b>I</b>	Unacceptable questions .....	
INDEX .....	<b>W</b> .....	68
Industrial Awards .....	Workers Compensation .....	25
Interview .....	Workplace Injury Management and Workers .....	16
Interview Questions .....	Compensation Act 1998 .....	18
Intoxication .....		56
<b>J</b>		

## **Attachment 1 – Sample Job Description**

### **ADMINISTRATIVE ASSISTANT**

#### **1. ROLE**

The Assistant is responsible for all aspects of Accounts Payable, Creditors and petty cash functions.

In conjunction with the Practice Manager the Assistant is also responsible for general office functions as indicated below.

#### **2. DUTY STATEMENT**

In conjunction with the Practice Manager:

##### **2.1. Finance**

- \* Process all aspects of the Accounts Payable function, including follow up of outstanding creditors
- \* Prepare monthly reconciliation of accounts
- \* Maintain, issue and control petty cash

##### **2.2. General Administrative Functions**

- \* Monitor stock levels for stationery and staff amenities and purchase needs in a timely manner
- \* Fulfil the role of Purchasing Officer with respect to all items except major capital acquisitions
- \* Assist the Practice Manager with word processing and other computer functions as required
- \* Maintain the general correspondence file
- \* File accounts payable invoices/forms
- \* Assist with the production of the patient newsletter and general promotional materials
- \* Act as second-line telephone receptionist after the Receptionist

### **2.3. Other Duties**

- \* The Assistant will attend and assist with patient support functions as required
- \* The Assistant will perform other such duties as are requested by the Practice Manager or Principal

### **3. LINES OF RESPONSIBILITY**

The Administrative Assistant reports through the Practice Manager to the Practice Principal

### **4. SKILLS AND COMPETENCIES REQUIRED**

#### **4.1. Knowledge of Optometry**

- . Appreciation of the optometry profession, its role, future directions and major issues affecting its development

#### **4.2. Communication**

- . Ability to communicate effectively at all levels, both verbally and in writing

#### **4.3. Planning and Action**

- . Ability to work with the practice management team to ensure effective delivery of services to patients
- . Capacity to identify areas of work flow improvement and implement change
- . Ability to identify opportunities for improved patient services

#### **4.4. Technical**

- . Ability to use various computer applications

**END**



**MODEL EMPLOYMENT CONTRACT  
Professional Employees (Non-Award)**

## Disclaimer

This model employment contract is provided for the exclusive use of Optometrist Association Australia NSW/ACT members. It enables the user to construct an appropriate employment contract covering terms and conditions of employment relevant to the employment of professional staff working within an optometrist practice in a retail environment.

All care has been applied to ensure the terms of the model employment contract when applied correctly will comply with all statutory requirements prescribed under the Fair Work Act 2010. However, no warranty or representation is made by the Association or any party connected with the design and publication of this model employment contract, express or implied, with regard to the quality, completeness or accuracy of the information provided therein.

The use of the model employment contract is at the users' sole risk and no liability will be accepted by the Association or any party associated with the design and publication of the model employment contract for any damage, direct, indirect, special or consequential arising directly or indirectly in respect of its use and application.

It is recommended that the user of the model employment contract obtain expert advice on each particular occasion that the document is to be used and prior to finalizing and issuing the contract to employees.

This document is a contract of employment ("contract") between the following parties.

## Parties

NAME AND ADDRESS OF EMPLOYER

("the employer")

AND

NAME AND ADDRESS OF EMPLOYEE

("the employee")

## Period of contract

This contract shall take effect from the date the employee commences employment with the employer i.e. **INSERT COMMENCEMENT DATE OF EMPLOYMENT** and will expire on the date that the employee's employment terminates.

## RELATIONSHIP TO AWARDS, AGREEMENTS AND THE NATIONAL EMPLOYMENT STANDARDS

Your employment is not regulated by any award but is subject to the National Employment Standards ("the NES") prescribed in the Fair Work Act 2009. The NES are national minimum standards of employment in respect of: maximum weekly hours of work, annual leave, personal/carer's leave, parental leave, long service leave, community service leave, public holidays, requests for flexible working arrangements, and notice of termination and redundancy.

A *Fair Work Information Statement* published by Fair Work Australia is enclosed with the contract for your information describing these standards and other matters relevant to your employment conditions.

## JOB TITLE

Your employment is in the position of **JOB TITLE**

## EMPLOYMENT STATUS

Your employment is full-time for an average of **38** hours per week to be worked in accordance with clause  'Hours of Work'.

## PROBATIONARY PERIOD OF EMPLOYMENT

If you are commencing employment with the employer you will be required to serve a probationary period of **SIX (6)** months beginning the first day of attendance at work. During this period, your employment may be terminated with two week's prior written notice or, in circumstances where the employer terminates your employment, by a payment in lieu thereof.

## DUTIES

The duties and responsibilities of your position are set out in the position description provided to you by the employer. Note that the position description may be varied from time to time in accordance with operational needs. You may be required to undertake such duties and responsibilities from time to time that are also within the limits of your skill, competence and training, including, but not limited to, duties and responsibilities which are incidental to your main tasks and functions.

During the performance of your duties and responsibilities, you will comply with all reasonable and lawful directions of the employer and in accordance with the employer's relevant employment policies and procedures.

You are required to always act in the employer's best interest and to refrain from acting, or being seen to act in conflict with those interests. You must use your best endeavours to protect and promote the employer's reputation and to perform the duties assigned to you from time to time to the best of your abilities and knowledge.

The employee does not have authority without the employer' written approval, to :

- (a). bind the employer to any agreement, or vary or terminate any agreement;
- (b). speak publically on behalf of the employer;
- (c). commit the employer to any liability or course of action; or

- (d). take any action which is otherwise the prerogative of the employer.

•

## HOURS OF WORK

The employee shall devote the whole of the employee's time and attention during the ordinary operational hours of the employer, to the employment duties and shall conform to such hours of work as may from time to time reasonably be required which shall not be less than an average of 38 hours per week.

The remuneration prescribed in clause 0 is in recognition of all hours of work performed by the employee including any reasonable additional hours of work performed beyond an average of 38 hours per week.

Whilst employed by the employer, you must not undertake any other appointment, position or work without first obtaining the employer's written consent. The employer will not unreasonably withhold consent in respect of some other non-professional position, where there is no conflict with your duties, no impact on your availabilities and no potential conflict of interest or potential for damage to the employer's reputation.

## REMUNERATION

Your salary/hourly rate of pay is set out in Schedule A.

Non-salary benefits (if applicable) are set out Schedule A.

Your salary/hourly rate of pay is inclusive of annual leave loading and incorporates a loading compensating you for any reasonable additional hours worked beyond the ordinary weekly hours.

You will be paid [weekly](#) by electronic funds transfer into an account specified in writing by the employee

Superannuation contributions

1. In addition to the salary referred to in sub-clause 0, the employer will contribute 9% of the value of your annual salary (excluding non-salary benefits) towards superannuation (providing your wages are in excess of \$450 per month).
2. The employer superannuation contribution will be paid monthly into a Superannuation Fund of your choice. If you do not choose a fund the contributions will be paid into the employers default fund [NAME OF SUPERANNUATION FUND](#).

Your salary/hourly rate of pay is subject to review each year and may be adjusted where satisfactory performance is achieved in accordance with the employer's Performance Management Policy.

You may be eligible for specific performance payments in accordance with the employer's policy. If so, the terms of the policy and your eligibility is set out in Schedule A.

## ALLOWANCES

The employer will reimburse any reasonable expenses incurred by the employee in the course of performing his or her work in accordance with the employer's policy.

## ANNUAL LEAVE

Entitlement

Full-time and part-time employees including fixed-term employees shall be entitled to four weeks annual leave per year at the ordinary rate of pay in accordance with the NES.

## Payment of Annual Leave

Unless otherwise agreed, an employee will be paid for annual leave at the employee's ordinary hourly rate on the regular pay day over the period of that leave. The ordinary hourly rate will not include any penalties or allowances the employee would ordinarily earn.

## Public Holidays

Annual leave is exclusive of public holidays. Public holidays falling within an employee's annual leave will be added to the employee's accumulated annual leave.

## Scheduling Leave

3. The specific time of taking annual leave will be determined by agreement and subject to the operational requirements of the business and employee preference.
4. The employer will not unreasonably refuse to approve an application to take a period of annual leave that has been credited to the employee.

# PERSONAL AND CARERS LEAVE

You are entitled to ten days paid leave per year (pro rata for part-time employees) in accordance with the National Employment Standards where:

- (a). You are not fit for work due to personal illness or injury, or
- (b). You are required to provide care or support to a member of your immediate family or household because that person is:
  - (i). Ill or injured, or
  - (ii). An unexpected emergency affects that person.

You are also entitled to two days unpaid leave to provide care and support for an immediate family member on each occasion the family member is ill, injured or suffers an unexpected emergency in which your care and support is required. Note that unpaid leave may only be taken where paid leave has been exhausted.

If you are absent for a reason provided in sub-clause 0 or 0, you are required to notify your immediate supervisor as early as possible on the day you are absent including the reason for your absence, and your estimated return date or time.

If you are absent for two or more consecutive days you must produce a medical certificate from a registered health practitioner, or if it is not reasonable to do so, a statutory declaration made by you, in order to qualify for the payment of the period of leave.

Paid personal/carer's leave that has accrued but not been used will accumulate from year to year.

# COMPASSIONATE LEAVE

The employee is entitled to a period of two days of paid compassionate leave in accordance with the NES, on each occasion when a member of the employee's immediate family or a member of the employee's household:

- (a). Contracts or develops a personal illness that poses a serious threat to his or her life; or
- (b). Sustains a personal injury that poses a serious threat to his or her life; or
- (c). Dies.

# LONG SERVICE LEAVE

Long service leave is prescribed in the NES. You will be entitled to long service leave in accordance with the relevant legislation regulating long service leave in the place that you are employed i.e. either the New South Wales Long Service Leave Act 1955 or ACT Long Service Leave Act 1976.

# PUBLIC HOLIDAYS

The employee shall be entitled to holidays on the following days without deduction of pay:

5. New Years Day, Australia Day, Good Friday, Easter Monday, ANZAC Day, Queens Birthday, Labour Day, Christmas Day and Boxing Day;
6. Any other day declared by or under a law of [Choose an item](#). observed generally within [Choose an item](#). as a public holiday other than those days prescribed below in substitution.

When Christmas Day falls on a Saturday or a Sunday, a holiday in lieu thereof shall be observed on 27 December.

When Boxing Day is a Saturday or a Sunday, a holiday in lieu thereof shall be observed on 28 December.

When New Year's Day or Australia Day is a Saturday or Sunday, a holiday in lieu thereof shall be observed on the next Monday.

# PARENTAL LEAVE

You are entitled to 52 weeks unpaid leave in accordance with the NES.

# REDUNDANCY

You may be entitled to redundancy pay in accordance with the NES if your employment is terminated because the employer no longer requires the job that you are employed in to be performed by anyone and this is not due to the customary turnover of labour.<sup>1</sup>

# TERMINATION OF EMPLOYMENT

The employer may terminate your employment by providing notice as follows:

Period of continuous service	Period of notice
Less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 5 years	3 weeks
5 years and over	4 weeks

In addition to the notice above, an employee over 45 years of age at the time of the employer giving notice, with at least two years continuous service, will be entitled to an additional week's notice.

In lieu of notice, the employer may make a payment to the employee or the employer may give part of the applicable notice and part payment in lieu thereof.

A casual employee can be dismissed without notice.

The employee will give the same notice of termination as the employer.

The employer may withhold moneys due to the employee who fails to give notice, up to the maximum amount the employee would have been entitled to if the employee were paid at the ordinary rate for the period of notice not given.

The employer reserves its rights to summarily dismiss the employee for misconduct.

## **CONFIDENTIALTY AND COMPETITION**

During the period of employment or at any time thereafter, confidential employer information shall not be disclosed to any unauthorized person. Further, any information, process, papers or documents to which access has been gained during the period of employment shall not be used at any time except on behalf of the employer.

The employee covenants and agrees that he/she will at all times during the period of the engagement and for a period of two (2) years from the date of termination observe strict secrecy in relation to:

7. Information received from the employer or obtained or acquired in the course of the engagement hereunder which is of a confidential or proprietary nature;
8. Information provided by the employer as to its business methods, mode of operation and advertising, profits, financial position and performance, development plans; and like information provided to the employee whether original documents or copies (hereinafter referred to as 'the confidential information');
9. Confidential information disclosed to the employer or employee by any potential client, supplier, other employee, agent, licensor or licensee of the employer;

Not at any time during the period of the engagement and for a period of two (2) years from the date of termination disclose the confidential information to any other person without the prior consent of the employer.

The employee acknowledges that:

10. A breach of this contract may be harmful to the employer;
11. Monetary damages alone may not be a sufficient remedy for the breach; and
12. In addition to any other remedy, which may be available in law or in equity, the employer is entitled to interim interlocutory and permanent injunctions or any of them to prevent the breach.

Nothing in this contract should be read as prohibiting or restricting the disclosure of the details of this contract by either party to any other person.

## **POLICIES AND PROCEDURES**

Employment policies will apply from time to time for the effective and safe conduct of the employer's operations and the welfare and interests of those who work for the employer. You are expected to comply with these policies. Information about particular policies will normally be provided in circulars, on notice boards or otherwise brought to the attention of the employee. Examples of such policies include

1. no smoking policies,
2. safety procedures,
3. uniform and dress code,
4. behavioural standards,

5. sexual harassment,
6. discrimination
7. bullying and violence in the workplace,
8. acceptable use of internet,
9. privacy and client confidentiality

The employer reserves the right to change existing policies, or introduce new ones, which you as an employee are required to observe.

Note the obligation imposed on employees to comply with employment policies and procedures is not intended to impose contractual obligations on either the employer or employee.

## **PERFORMANCE MANAGEMENT AND APPRAISAL**

It is a requirement of your employment that you participate in performance management including appraisal of performance.

## **DISPUTE RESOLUTION PROCEDURE**

In relation to any matter that may be in dispute between you and the employer will comply with the dispute resolution procedure set out in Schedule B.

## **USE AND RETURN OF PROPERTY**

The employer may supply you with particular items of clothing or particular things to assist you with your job. At all times those items remain the properties of the employer. You must take reasonable care of such items and return them in good condition, fair wear and tear excepted, on the termination of your employment.

Immediately on termination of your employment, you must return all of the employer's property which is in your possession or control.

All records relating to the operation of the employer and client/patient records are the employer's property including all clients/patients to whom you provide professional services during the period of your employment.

# SIGNATORIES

**EMPLOYEE SIGNATURE**

---

NAME IN FULL (PRINT)

ADDRESS

DATE

**EMPLOYER SIGNATURE** \_\_\_\_\_

NAME IN FULL                      **NAME OF DIRECTOR OR MANAGER**

ADDRESS

DATE

# SCHEDULE A - REMUNERATION

Employment details, remuneration and other benefits

## SCHEDULE B – DISPUTE RESOLUTION PROCEDURE<sup>i</sup>

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If a dispute relates to:

- (a). a matter arising under the agreement; or
- (b). the National Employment Standards;

This clause sets out procedures to settle the dispute.

An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.

If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Australia.

Fair Work Australia may deal with the dispute in 2 stages:

- (a). Fair Work Australia will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
- (b). if Fair Work Australia is unable to resolve the dispute at the first stage, Fair Work Australia may then:
  - (i). arbitrate the dispute; and
  - (ii). make a determination that is binding on the parties.

**Note** If Fair Work Australia arbitrates the dispute, it may also use the powers that are available to it under the Act. A decision that Fair Work Australia makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

While the parties are trying to resolve the dispute using the procedures in this term:

- (a). an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and
- (b). an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:
  - (i). the work is not safe; or
  - (ii). applicable occupational health and safety legislation would not permit the work to be performed; or
  - (iii). the work is not appropriate for the employee to perform; or
  - (iv). there are other reasonable grounds for the employee to refuse to comply with the direction.

The parties to the dispute agree to be bound by a decision made by Fair Work Australia in accordance with this term

Please note that this procedure allows Fair Work Australia to arbitrate a dispute in relation to the application of the National Employment Standards and other terms of employment provided in the contract. Employers and employees that do not agree for Fair Work Australia to arbitrate such disputes, or wish to reserve the right to agree in any particular dispute or wish to substitute another body or person to arbitrate a dispute should not use this clause and seek advice on an appropriate clause to replace this version.



## **MODEL EMPLOYMENT CONTRACT Clerical/Award Employees**

### **Disclaimer**

This model employment contract is provided for the exclusive use of Optometrist Association Australia NSW/ACT members. It enables the user to construct an appropriate employment contract covering terms and conditions of employment relevant to the employment of award covered employees working within an optometrist practice in a retail environment.

All care has been applied to ensure the terms of the model employment contract when applied correctly will comply with all statutory requirements prescribed under the Fair Work Act 2010. However, no warranty or representation is made by the Association or any party connected with the design and publication of this model employment contract, express or implied, with regard to the quality, completeness or accuracy of the information provided therein.

The use of the model employment contract is at the users' sole risk and no liability will be accepted by the Association or any party associated with the design and publication of the model employment contract for any damage, direct, indirect, special or consequential arising directly or indirectly in respect of its use and application.

It is recommended that the user of the model employment contract obtain expert advice on each particular occasion that the document is to be used and prior to finalizing and issuing the contract to employees.

This document is a contract of employment (“contract”) between the following parties.

## Parties

NAME AND ADDRESS OF EMPLOYER  
 (“the employer”)

AND

NAME AND ADDRESS OF EMPLOYEE  
 (“the employee”)

## Period of contract

This contract shall take effect from the date the employee commences employment with the employer i.e. **INSERT COMMENCEMENT DATE OF EMPLOYMENT** and will expire on the date that the employee’s employment terminates.

# RELATIONSHIP TO AWARDS, AGREEMENTS AND THE NATIONAL EMPLOYMENT STANDARDS

This contract must be read in conjunction with the General Retail Industry Award (“the award”) which also applies to the employment of the employee. However, the terms of the award have not been incorporated into the contract and are not to be read as terms of this contract.

The terms and conditions of employment are also subject to the National Employment Standards (“NES”) prescribed in the Fair Work Act 2009. The NES are national minimum standards of employment in respect of: maximum hours of work, annual leave, personal/carer’s leave, parental leave, long service leave, community service leave, public holidays, requests for flexible working arrangements, notice of termination and redundancy.

A ‘*Fair Work Information Statement*’ published by Fair Work Australia is enclosed with the employment contract describing these standards and other matters relevant to your employment conditions.

References in this employment contract to the award means the award as varied from time to time.

# JOB TITLE

Your employment is in the position of **JOB TITLE**

# EMPLOYMENT STATUS

Your employment is **full time** for an average of **38** hours per week to be worked in accordance with clause 0 'Hours of Work'.

# PROBATIONARY PERIOD OF EMPLOYMENT

If you are commencing employment with the employer you will be required to serve a probationary period of **SIX (6)** months beginning the first day of attendance at work. During this period, your employment may be terminated with two week's prior written notice or, in circumstances where the employer terminates your employment, by a payment in lieu thereof.

# DUTIES

The duties and responsibilities of your position are set out in the position description provided to you by the employer. Note that the position description may be varied from time to time in accordance with operational needs. You may be required to undertake such duties and responsibilities from time to time that are also within the limits of your skill, competence and training, including, but not limited to, duties and responsibilities which are incidental to your main tasks and functions.

During the performance of your duties and responsibilities, you will comply with all reasonable and lawful directions of the employer and in accordance with the employer's relevant employment policies and procedures.

You are required to always act in the employer's best interest and to refrain from acting, or being seen to act in conflict with those interests. You must use your best endeavours to protect and promote the employer's reputation and to perform the duties assigned to you from time to time to the best of your abilities and knowledge.

The employee does not have authority without the employer's written approval, to :

- (c). bind the employer to any agreement, or vary or terminate any agreement;
- (d). Speak publically on behalf of the employer;
- (e). commit the employer to any liability or course of action; or
- (f). take any action which is otherwise the prerogative of the employer.

# HOURS OF WORK

Your ordinary hours of work will be **152** hours per 4 week work cycle in accordance with the arrangement (inclusive of the daily start and finish times) provided in Schedule A.

The arrangement of ordinary hours of work may be varied by the provision of 7 days notice but only within a span of hours of 7am – 9pm Monday to Friday, 6am – 6pm Saturday and 7am – 6pm Sunday.

You may be required to work reasonable overtime to meet the operational needs of the business. Where such overtime is required by the employer and is worked by the employee, subject to any award flexibility agreement applicable to your employment, it shall be paid in accordance with clause 0 of this contract.

## MEAL AND REST BREAKS

The terms of the award apply.

## REMUNERATION

Your salary/hourly rate of pay is set out in Schedule A.

Non-salary benefits (if applicable) are set out Schedule A.

You will be paid [weekly](#) by electronic funds transfer into an account specified in writing by the employee

Superannuation contributions

13. In addition to the salary/hourly rate of pay referred to in sub-clause 0, the employer will contribute 9% of the value of your annual salary (excluding non-salary benefits) towards superannuation (providing your wages are in excess of \$450 per month).
14. The employer superannuation contribution will be paid quarterly into a Superannuation Fund of your choice. If you do not choose a fund the contributions will be paid into the employers default fund [NAME OF SUPERANNUATION FUND](#).

Your salary/hourly rate of pay is subject to review each year and may be adjusted where satisfactory performance is achieved in accordance with the employer's Performance Management Policy.

You may be eligible for specific performance payments in accordance with the employer's policy. If so, the terms of the policy and your eligibility is set out in Schedule A.

## ALLOWANCES

Subject to any award flexibility agreement applicable to your employment, the employer will reimburse any reasonable expenses incurred by the employee in the course of performing his or her work in accordance with the award.

## OVERTIME

Subject to any award flexibility agreement applicable to your employment, the terms of the award apply.

## ANNUAL LEAVE

The terms of the award and the NES apply.

## PERSONAL / CARER'S LEAVE

The terms of the award and the NES apply.

## COMPASSIONATE LEAVE

The terms of the award and NES apply.

## **LONG SERVICE LEAVE**

The terms of the award and NES apply.

## **PUBLIC HOLIDAYS**

The terms of the award and NES apply.

## **PARENTAL LEAVE**

The terms of the award and NES apply.

## **REDUNDANCY<sup>2</sup>**

The terms of the award and NES apply.

## **TERMINATION OF EMPLOYMENT**

The terms of the award and NES apply.

## **CONFIDENTIALTY AND COMPETITION**

During the period of employment or at any time thereafter, confidential employer information shall not be disclosed to any unauthorized person. Further, any information, process, papers or documents to which access has been gained during the period of employment shall not be used at any time except on behalf of the employer.

The employee covenants and agrees that he/she will at all times during the period of the engagement and for a period of two (2) years from the date of termination observe strict secrecy in relation to:

15. Information received from the employer or obtained or acquired in the course of the engagement hereunder which is of a confidential or proprietary nature;
16. Information provided by the employer as to its business methods, mode of operation and advertising, profits, financial position and performance, development plans; and like information provided to the employee whether original documents or copies (hereinafter referred to as 'the confidential information');
17. Confidential information disclosed to the employer or employee by any potential client, supplier, other employee, agent, licensor or licensee of the employer;

Not at any time during the period of the engagement and for a period of two (2) years from the date of termination disclose the confidential information to any other person without the prior consent of the employer.

The employee acknowledges that:

18. A breach of this contract may be harmful to the employer;
19. Monetary damages alone may not be a sufficient remedy for the breach; and
20. In addition to any other remedy, which may be available in law or in equity, the employer is entitled to interim interlocutory and permanent injunctions or any of them to prevent the breach.

# **POLICIES AND PROCEDURES**

Employment policies will apply from time to time for the effective and safe conduct of the employer's operations and the welfare and interests of those who work for the employer. You are expected to comply with these policies.

Information about particular policies will normally be provided in circulars, on notice boards or otherwise brought to the attention of the employee. Examples of such policies include

1. no smoking policies,
2. safety procedures,
3. uniform and dress code,
4. behavioural standards,
5. sexual harassment,
6. discrimination
7. bullying and violence in the workplace,
8. acceptable use of internet,
9. privacy and confidentiality

The employer reserves the right to change existing policies, or introduce new ones, which you as an employee are required to observe.

Note the obligation imposed on employees to comply with employment policies and procedures is not intended to impose contractual obligations on either the employer or employee.

# **USE AND RETURN OF PROPERTY**

The employer may supply you with particular items of clothing or particular things to assist you with your job. At all times those items remain the properties of the employer. You must take reasonable care of such items and return them in good condition, fair wear and tear excepted, on the termination of your employment.

Immediately on termination of your employment, you must return all of the employer's property which is in your possession or control.

All records relating to the operation of the employer and client/patient records are the employer's property including all clients/patients to whom you provide professional services during the period of your employment.

# **PERFORMANCE MANAGEMENT AND APPRAISAL**

It is a requirement of your employment that you participate in performance management including appraisal of performance.

# DISPUTE RESOLUTION PROCEDURE

In relation to any matter that may be in dispute between you and the employer will comply with the dispute resolution procedure set out in Schedule B.

## SIGNATORIES

**EMPLOYEE SIGNATURE**

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NAME IN FULL (PRINT)

ADDRESS

DATE

**EMPLOYER SIGNATURE**

---

NAME IN FULL

NAME OF DIRECTOR OR MANAGER

ADDRESS

INSERT ADDRESS

DATE

# SCHEDULE A - REMUNERATION

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Employment details, remuneration and other benefits

## SCHEDULE B – DISPUTE RESOLUTION PROCEDURE<sup>3</sup>

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If a dispute relates to:

- (a) a matter arising under the agreement; or
- (b) the National Employment Standards;

this clause sets out procedures to settle the dispute.

An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.

In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.

If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Australia.

Fair Work Australia may deal with the dispute in 2 stages:

- (a) Fair Work Australia will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
- (b) if Fair Work Australia is unable to resolve the dispute at the first stage, Fair Work Australia may then:
  - (i) arbitrate the dispute; and
  - (ii) make a determination that is binding on the parties.

**Note** If Fair Work Australia arbitrates the dispute, it may also use the powers that are available to it under the Act. A decision that Fair Work Australia makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

While the parties are trying to resolve the dispute using the procedures in this term:

- (a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and
- (b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:
  - (i) the work is not safe; or
  - (ii) applicable occupational health and safety legislation would not permit the work to be performed; or
  - (iii) the work is not appropriate for the employee to perform; or
  - (iv) there are other reasonable grounds for the employee to refuse to comply with the direction.

The parties to the dispute agree to be bound by a decision made by Fair Work Australia in accordance with this term.

Attachment 4 – Sample Staff Appraisal Format

## Attachment 4

# Optometrists Association Australia (NSW Division)

## *Staff Appraisal Scheme*

Name:.....

The period covered by this review is ...../...../..... to ...../...../.....

### Preparation for the appraisal discussion

Performance appraisal is an important key in helping each staff member integrate her/his own personal objectives with those of their work and the Association. These notes are intended to assist you in preparing for the appraisal discussion.

The principle purpose of the meeting is to discuss the standards agreed for the main elements of your work and to objectively review how well you have achieved them. It is also an opportunity to consider what may be done to remove any difficulties which you have encountered in your work, develop your capabilities and to agree on standards for the following period.

A full appraisal will be conducted every second year, with a shorter version, concentrating on performance and work duties, conducted in the intervening years. This appraisal is the shorter version and whilst preparation will still help both you and the Association to gain maximum benefit from the discussions, it may not be necessary to engage in the extent of preparation necessary for the full appraisal process.

Try considering the following questions:

### **1. Work Content**

**1a. What are the most important tasks in your job?**

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**1b. Have these tasks changed since your last appraisal? If so, what is different?**

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**2. Strengths, weaknesses and difficulties.**

**In your view:**

**2a. What do you believe to be your main strengths and weaknesses in your job?**

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**2b. What difficulties (if any) have you encountered with your work which are outside your control?**

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**2c. How would you summarise your performance? Consider not only what you have achieved but the way you have achieved it.**

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**3. Objectives**

**3a. What work or personal objectives do you hope to achieve through your position with the OAA ?**

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**3b. What do you see as being the Association’s objectives ?**

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**3b. Do you think that the OAA’s objectives could be improved? If so, what changes would you make?**

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**4. Actions for Change**

**4. In your opinion, what action(s) do you feel should be taken to assist you in performing your work to the best of your capabilities in the coming year?**

**(a) By you:** \_\_\_\_\_

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**(b) By the Office Manager/Executive Director:** \_\_\_\_\_

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(c) By anyone else (identify who): \_\_\_\_\_

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**5. Work preferences and capabilities**

In most positions there are some things we find more interesting than others.

**5a. What do you like most about your present role?**

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**5b. What do you like the least?**

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**5c. In what way could your capabilities be better used?**

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**6. Work relationships**

**6a. Do you feel that your current working relationships are helping to improve your work efficiency or are hampering your work output ?**

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**6b. What would you do to improve your working relationships?**

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**7. Personal Development/Training**

**7a. What steps, if any, would you like to take in personal development?**

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**7b. What training or development could the Association provide/assist with in order to further enhance your performance and work satisfaction?**

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## 8. Other matters

Are there any other matters that you particularly wish to raise during the appraisal discussion?

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## Development Plan Worksheet

The purpose of this worksheet is to record matters identified during the interview which require action by the staff member or any other person and to specify the nature of the action and the agreed time frame.

**Issue identified:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

**Goal of action:** \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

### Possible explanation of issue

### Possible courses of action

Within the individual

For the individual

Responsibility:

Time frame:

Within the OM/ED

For the OM/ED

Responsibility:

Time frame:

Within the situation/work itself

To change the situation or work itself

Responsibility:

Time frame: