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RIGHTS



TERMINATING EMPLOYMENT

A SMALL BUSINESS GUIDE

Why do small businesses have different standards?

The law understands that small businesses don't usually have access to the same resources as larger ones, so it streamlines the process you need to follow for terminating a worker's employment.

Your business will fall under the small business rules if it (and any associated entities) employ fewer than 15 staff. This includes full-time, part-time and permanent employees, but not independent contractors and some casual employees.

When can you terminate a worker's employment?

If you want to dismiss an employee who has been with you for more than 12 months you need to follow the Small Business Fair Dismissal Code. If an employee is terminated and you've complied with the Code, then the termination will be deemed to be fair.

The Code says that you need to have a 'valid reason' to terminate a worker's employment based either on their capacity to work or your business requirements.

If you're dismissing a worker for poor performance, you first need to let them know what the problem is as well as how they can rectify it. (If they lack a particular skill this could even include providing them with training.) You must also tell them that they risk being dismissed if there is no improvement.

You should always try to do this in writing, as well as verbally and you must always allow them to have a support person present at any meeting where you discuss the likelihood of termination. You must provide the employee with the opportunity to respond to the warning.

If you're dismissing a worker because the operational requirements of your business have changed, you should

first find out whether any modern awards or enterprise agreements cover the worker's employment. If they do, it's likely they will have redundancy provisions you'll need to follow, which could include the need to consult the worker before making them redundant.

You'll also need to consider whether you could have redeployed the worker elsewhere in your business.

If you fail to meet these tests, the employee will have 21 days to bring an unfair dismissal claim in the Fair Work Commission.

What about employees of less than 12 months?

Your employees can't bring an unfair dismissal claim in the first 12 months of their employment, which means that they can't take you to the Fair Work Commission simply because they believe their dismissal was 'harsh, unjust or unreasonable'.

However, this doesn't mean you can dismiss an employee for any reason, even in the first 12 months of employment. You're still bound by the general protections in the termination provisions of the Fair Work Act.

Can a worker bring an unfair dismissal claim if they resign?

Sometimes an employer can bring an unfair dismissal claim, even if they're the one who ended the employment. For this to happen, they must be able to prove that your actions (or one of your employee's actions) left them with no option but to resign.

This type of claim is known as a 'constructive dismissal' and it can be difficult to prove. However, if a worker does meet the test for constructive dismissal, the Fair Work Commission generally takes an unfavourable view of the employer. So you should always consult your solicitor if an employee brings a constructive dismissal claim.



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What is a general protections (unlawful termination) claim?

A general protections (unlawful termination) claim is a different concept to unfair dismissal. The general protections provisions, which apply to all workers, prohibit you from taking adverse action against a worker (including dismissing anyone):

- Because of their race, colour, sex, sexual orientation, age, religious beliefs, mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin (Although it makes an exception if it's an inherent requirement of the job)
- Because they've been away from the work through illness or injury
- Because they are or aren't a union member or are running for office as a union representative
- Because they're on parental leave, paid or unpaid
- Because they're away doing emergency volunteer work, or
- Because they've filed a complaint or started proceedings against you or someone you employ.

If you dismiss an employee for any of these reasons, it's likely you'll face heavy fines (currently up to \$10,200 for an individual and \$51,000 for a company) as well as the prospect of having to pay the worker compensation or even being made to rehire them. Usually, a worker has 21 days after their dismissal to bring an unlawful termination claim.

When can you dismiss a worker without notice?

You can dismiss a worker without any notice if they engage in 'serious misconduct'. Examples of serious misconduct include theft, fraud, violence and serious safety breaches.

If you think they have stolen, assaulted someone or engaged in other criminal behaviour you should always report the incident to the police before you dismiss them for serious misconduct.

It doesn't matter whether or not the worker is later charged or convicted with the offence, so long as you have reasonable grounds for believing on balance that they engaged in the serious misconduct.

What happens if an employee brings an unfair dismissal or a general protections (unlawful termination) claim?

If a worker brings an unfair dismissal claim against you, you'll need to lodge a written response and show that you've complied with the Small Business Fair Dismissal Code. One of the best tools for doing this is to download and complete a Dismissal Checklist from the Fair Work Commission website, www.fairwork.gov.au/, ideally prior to the dismissal.

If a worker brings a general protections claim against you, you have seven days to respond. If the claim is not resolved the Fair Work Commission will then try to find a solution through conciliation. If this fails the matter will then go to a full hearing.

If a former employee brings any kind of legal action against you, you should always consult your solicitor, who will help you explore the best, most cost-effective way of resolving the dispute.

How can a solicitor help?

If you're a small business owner considering terminating a worker's employment your solicitor can help in many ways, including:

- Advising you on the process you should follow to minimise risk
- Advising you on the employee's entitlements
- Advising you on any alternatives to dismissal
- Helping you organise evidence if the worker brings a claim for an unfair dismissal or breach of the general protections provisions, and
- Representing you in the Fair Work Commission.

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