



Government of **Western Australia**
Department of **Commerce**

Employer Employee Agreements Information Guide



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Introduction to Employer Employee Agreements

Employer Employee Agreements (**EEAs**) are formal written agreements between employers and employees in the State system covering working arrangements, pay and conditions.

The EEA system has been designed to provide appropriate protections for employees and employers. EAs must be voluntary agreements and the *Industrial Relations Act 1979* contains provisions to ensure that employees who choose to sign EEAs will do so well informed, with genuine choice and without any overall disadvantage to their employment arrangements.

Broadly, EEAs:

- are an option if an employee is covered by a State award or solely by the *Minimum Conditions of Employment Act 1993*;
- are voluntary agreements that cannot be offered as a condition of employment;
- cannot be offered to existing employees as a pre-condition for promotion or transfer;
- are registered by the Registrar of the Western Australian Industrial Relations Commission (**WAIRC**);
- replace the provisions of any relevant award;
- must pass a no-disadvantage test to ensure that employees are not overall worse off than under the applicable award;
- must contain an expiry date and can run for a maximum of three years;
- must include a dispute settlement procedure; and
- must be countersigned by a parent or guardian where the employee is under 18 years old.

Determining if an EEA is an option

Employers and employees can make EEAs when they are covered by a WA award, or when no award covers the workplace.

EEAs cannot be made while an industrial agreement applies to an employee's employment. This includes situations where an industrial agreement has passed its nominal expiry date and continued in operation. Should an employer wish to offer an EEA, the industrial agreement must first be cancelled.

There is an exemption for persons with disabilities who can make EEAs while an industrial agreement applies under certain specific circumstances.

EEAs are voluntary agreements

EEAs are voluntary agreements and no employee can be required to sign one to gain or continue employment. It is unlawful for an employer to advertise or offer employment conditional on signing an EEA. It is also unlawful to offer a transfer or promotion conditional on the employee signing an EEA.

Information requirements

An employer is required to provide the employee with specific, detailed information at the time of offering an EEA. This allows the employee to make a well informed decision.

This information can be provided electronically, and must include:

- the EEA document;
- the EEA Information Statement issued by the Registrar of the WAIRC; and
- a copy of the relevant award or an approved summary of the WA award.

Time frame

To ensure that an employee has adequate time to read and consider the information provided, a cooling-off period applies prior to any decision to sign an EEA.

For new employees, the required information must be provided at least five days before the EEA is signed and the employee starts work. For existing employees, the required information must be provided at least 14 days before the EEA is signed.

If an employer fails to provide this information, or does not provide it within the required time frames, the EEA will not meet registration requirements.

The impact of EEAs on other employment arrangements

EEAs do not change other employment rights and obligations in the workplace. Legislation regulating superannuation, taxation, workers' compensation and occupational safety and health continue to apply. Employees retain the right to lodge a claim of unfair dismissal in the WAIRC if terminated while working under an EEA.

All employers in Australia are bound by the unlawful termination provisions in the federal *Fair Work Act 2009* – regardless of whether an EEA is in operation.

The *Minimum Conditions of Employment Act 1993* continues to apply while employees are covered by an EEA. All EEAs must meet the minimum leave and minimum wage provisions of this Act.

Required content

There are a number of mandatory requirements for the content of EEAs.

Who EEAs cover

EEAs must name employers and employees who are parties to the agreement. Employers must be named as the legal entity (eg private name or partnership). A trading name, franchise name or trust name alone is not sufficient.

Period of operation

EEAs can run for a maximum of three years. An EEA must specify an expiry date or period of operation. The EEA will expire and cease to have effect on the date specified. An EEA must not contain a clause stating that its provisions will continue to apply after the expiry date is reached. An EEA will not be registered if it contains this type of clause.

Status of employment

EEAs must specify whether employees are employed on a full time, part time or casual basis.

Signatures and witnesses

An EEA must be signed by both the employer and the employee, and witnessed by a person who is over 18 years old (and not a party to the EEA). It is recommended that the EEA be dated when signed by all parties.

In the case of a body corporate, an authorised officer may sign the EEA on behalf of employers. EEAs made with employees who are under 18 years of age must also be countersigned by the employee's parent or guardian. In limited circumstances where a parent or guardian is not available, a counter-signatory may be another person.

Dispute settlement procedures

An EEA must contain a Dispute Settlement Procedure (DSP). The aim of a DSP is to provide a method of dealing with any question, dispute or difficulty that arises out of or in the course of employment under an EEA.

The DSP must make provisions for:

- the parties to confer together and attempt to settle any dispute;
- referral to an arbitrator if the matter is not settled;
- the manner in which the referral is to be made;
- compliance with regulations; and
- how any costs of arbitration are to be borne.

Commencement and expiry

For existing employees, EEAs commence the day after the date of registration or any later date specified in the agreement. EEAs for new employees commence on the date their employment starts or any later date specified in the agreement.

An EEA must include an expiry date or period of operation, which must not exceed three years from the date of effect.

Once the expiry date is reached, an EEA ceases to have effect. However, the expiry of an EEA does not end employment.

When an EEA expires, any relevant award again applies to the employee. If there is no award, the terms of the EEA become part of the contract of employment, with a continuation of the agreement's pay and working arrangements.

Any EEA will automatically cease to have effect if an employer sells a business.

EEAs can be cancelled at any time by written agreement between the parties.

Minimum conditions of employment in an EEA

The *Minimum Conditions of Employment Act 1993* specifies minimum entitlements for wages, leave, public holidays, redundancy and workplace change. An EEA must meet all of the minimum conditions of employment as established by this Act.

Employers must also provide employees with their other statutory entitlements, such as long service leave, superannuation and the notice periods for termination required by the federal *Fair Work Act 2009*.

The 'no-disadvantage test'

All EEAs must pass an award-based no-disadvantage test (**NDT**). The NDT ensures that an EEA cannot disadvantage the employee overall in comparison with a relevant or comparable State award. The NDT is an overall assessment of employee entitlements under the EEA compared to the award. This means that an EEA will not fail the NDT solely because a particular entitlement is reduced, as long as overall entitlements are not diminished in comparison to the relevant award.

Consequently, EEAs may include negotiated fixed hourly rates, which absorb overtime, penalty rates or various allowances, provided the other terms and conditions in the EEA do not amount to an overall reduction in entitlements when compared to the award.

The Registrar of the WAIRC is responsible for applying the NDT – in accordance with established guidelines and principles. A full copy of these guidelines is available on the WAIRC website.

Offering the EEA - information requirements

To ensure employees considering EEAs make an informed choice employers are required to provide employees with specific, detailed information at the time of offering an EEA. A set cooling off period then applies for employees to consider the information, prior to choosing whether to sign the EEA.

Information to be provided by employers:

- the EEA document
- the EEA Information Statement issued by the Registrar of the WA Industrial Relations Commission
- a copy of the relevant award or an approved summary of the award.
- Please note that not all award summaries produced by the Labour Relations division of the Department of Commerce have been approved by the Registrar of the WA Industrial Relations Commission for the purposes of EEAs.

Time frame

To ensure that employees have adequate time to read and consider the information provided, a set cooling-off period applies prior to employees choosing whether to sign the EEA.

For new employees, the required information must be provided at least five days before the EEA is signed and employees start work. For existing employees, the required information must be provided at least 14 days before the EEA is signed.

If employers fail to provide this information, or do not provide it in the required time frames, the EEA will not meet registration requirements.

Registration of an EEA

The Registrar of the WA Industrial Relations Commission is responsible for the registration of EEAs.

Lodgement requirements

All EEAs must be lodged for registration within 21 days of signing. Any EEAs lodged later than 21 days after signing will be refused lodgement. Employers or employees can lodge the agreement.

Completed lodgement forms must be provided with the signed EEA document when it is lodged for registration. The forms required are available on the WA Industrial Relations Commission website.

Registration process

The Registrar must not register EEAs for a period of at least 14 days after lodgement. This provides a cooling off period during which time the Registrar determines whether EEAs meet the registration requirements. The Registrar has broad powers to gather information to assist in determining whether EEAs meet all requirements. Either party to EEAs or their bargaining agents can make written submissions to the Registrar to assist in the registration process.

The no-disadvantage test (**NDT**) will be conducted on proposed EEAs during the registration process to determine whether employees are disadvantaged by EEAs.

If an EEA does not meet the technical content requirements for registration or pass the NDT, the Registrar will give the parties an opportunity to amend the EEA.

Approval or refusal

The Registrar will either approve or refuse registration of an EEA. If an EEA is refused, employers or employees can appeal to the WA Industrial Relations Commission within 14 days of being notified of the refusal. A refusal does not have effect until the end of the period allowed for an appeal, and if an appeal is made, a refusal does not have effect unless the appeal fails.

Effect of refusal on new employees

As EEAs for new employees can commence on the day employment starts, an EEA may come into effect prior to registration. If the EEA is not lodged for registration within the required 21 day period, the EEA ceases to have effect at the end of that period. If the EEA is refused registration, the EEA automatically ceases to have effect on the date the refusal comes into effect.

In both these cases employees then becomes subject to any relevant award, or if no award applies, employees are covered by a contract of employment containing the same pay and conditions as those of the EEA that was refused registration. Where an award applies, employers and employees are entitled to recover any amount that they were entitled to receive or would not have been required to pay during the period between the day when the EEA took effect and the day on which the EEA ceased to have effect.

Registration requirements checklist

An EEA is in order for registration if:

- no industrial agreement applies (limited exception applies - see EEAs for people with disabilities section)
- it names the employer and employee
- it describes the employee's employment status (i.e. full-time, part-time or casual)
- it is signed by both parties and witnessed by an independent person
- it is countersigned by parent or guardian if the employee is under 18
- it contains a dispute resolution procedure
- it contains an expiry date not more than 3 years from date of effect
- the employer has properly complied with requirement to provide information to the employee and in the appropriate time frames
- it passes the no-disadvantage test
- it meets the Minimum Conditions of Employment

- the employer did not offer employment or intimate to a new employee that he/she would be employed only if they agreed to the employment being under an EEA
- the employer did not offer an existing employee a transfer or promotion or intimate to the employee that he or she would be transferred or promoted only if he or she agreed to the employment being under an EEA
- each party understands their rights and obligations
- no party or representative was persuaded by threats or intimidation to enter into the EEA
- each party genuinely wishes to have the EEA registered

EEAs for people with disabilities

Special provisions apply for EEAs for employees with disabilities.

Supported Wage System and the no-disadvantage test

Employees who are eligible for the Commonwealth's Supported Wage System can make EEAs with their employers that provide wage rates lower than the relevant award rate. These EEAs will not fail the no-disadvantage test on the basis of reduced wage rates.

The Supported Wage System allows the payment of reduced wage rates to employees with disabilities based on their productive capacity. While employers and employees are not required to use the SWS to determine wage rates under EEAs for people with disabilities, the SWS will provide the Registrar with a nationally accepted benchmark against which wage rates can be measured for the purposes of the NDT.

When an EEA can be made

Under certain circumstances people with disabilities and their employers can make EEAs while an industrial agreement is in operation. The industrial agreement must not contain supported wage provisions and the employment under the EEA must have been arranged through an organisation that provides employment services for people with disabilities.

Approved representatives

The *Industrial Relations Act 1979* allows for people with mental disabilities to appoint, or have appointed, a substitute decision-maker known as an "approved representative", to make an EEA on their behalf. In this context a mental disability includes an intellectual disability; a psychiatric condition; an acquired brain injury; or dementia.

Approved representatives may sign EEAs on behalf of employees they represent, and undertake other roles in connection with the operation of the EEA. The aim of these provisions is to overcome any potential issues concerning a person's legal capacity to make an EEA.

An approved representative can be an employee's spouse or anyone who regularly provides for or arranges domestic services and support. A representative need not be related to the employee but must be over the age of 18. A representative cannot be appointed if a guardianship order is currently in force for the relevant person.

The appointment of an approved representative must be approved by the Registrar of the WA Industrial Relations Commission. An application must be made to the Registrar on the appropriate form.

If employees have an approved representative, the EEA must contain a dispute settlement procedure which refers to this arrangement. Two model dispute settlement procedures that can be used for represented employees have been developed. Please see the Dispute Settlement Procedures section for more information and links to copies of the model clauses.

Other essential information on EEAs

Bargaining agents

Both employers and employees can appoint a bargaining agent to assist with the negotiation and registration of an EEA. Bargaining agents may also represent parties in disputes, including arbitration proceedings under the EEA dispute settlement provisions.

Bargaining agents must be appointed in writing, with a copy given to the other party to the EEA. Any person can be appointed as a bargaining agent, including a trade union or an employer association. It is important to note that a bargaining agent is different from a representative for employees with a mental disability. For information on approved representatives, see the EEAs for People with Disabilities section.

Prohibited conduct

Certain conduct is prohibited in connection with offering and making EEAs. It is unlawful for employers to advertise or to offer employment conditional on the making of EEAs. It is also unlawful to offer a transfer or promotion to an existing employee conditional on the making of an EEA. However, there is nothing to prevent parties from providing for promotional or transfer opportunities within an EEA.

The *Industrial Relations Act 1979* contains civil penalty provisions to deal with prohibited conduct in relation to EEAs. These apply to employees, prospective employees and employers. The civil penalty provisions cover a wide range of situations, including where employees are dismissed or disadvantaged in employment because they choose not to make an EEA.

Public access to EEAs

The Registrar of the WA Industrial Relations Commission is required to keep a record of all EEAs registered. With the exception of employees' names and addresses, the provisions of EEAs on this register made by private sector employers and employees are available for public inspection. However, the parties to an EEA may apply to the WA Industrial Relations Commission to exempt part or all of their EEA for public inspection. The Registrar is able to charge a fee for access to EEA documents.

Record keeping requirements

The record keeping requirements for employers and employees working under an EEA are outlined in the *Industrial Relations Act 1979*. An employer must ensure that details are recorded of:

- the employee's name and date of birth if under 21 years old;
- details of the EEA which applies;
- the date on which the employee commenced employment;
- for each day the employee works:
 - start and finish times
 - period or periods for which the employee was paid
 - details of any work breaks including meal breaks
- for each pay period:
 - the employee's designation
 - the gross and net amounts paid
 - all deductions and the reasons for them
- all leave taken, whether paid or unpaid;
- any information necessary for the calculation of long service leave; and
- any other information that is necessary to show that the employee received all remuneration and benefits payable under the EEA.

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