



Proposed reforms to the definition of employee:

Persons paid wholly by commission

On 25 June 2020, the *Industrial Relations Legislation Amendment Bill 2020* (the Bill) was introduced into State Parliament. The Bill provides for changes to the definition of ‘employee’ in two key pieces of state industrial relations legislation: the *Industrial Relations Act 1979* (IR Act) and the *Minimum Conditions of Employment Act 1993* (MCE Act).

Current situation

At present, people in the state industrial relations system who are paid wholly by commission or percentage reward (‘commission only employees’) are excluded from the definition of ‘employee’ set out in the MCE Act. ‘Commission only employees’ means employees who are paid entirely according to the amount they sell, for example, as a percentage of their total sales.

The exclusion of commission only employees from the MCE Act means that commission only employees who are covered by the state industrial relations system are not currently entitled to the WA minimum wage and other minimum conditions of employment provided in the MCE Act.

Commission only employees are not excluded from the definition of ‘employee’ in the IR Act. This means that they may potentially be covered by a WA award. If a WA award applies to a commission only employee, they will be entitled to the conditions in that award, and also to the minimum conditions of employment which are taken to be implied into all WA awards. However, for commission only employees who are ‘award free’, the minimum wage and other WA minimum conditions of employment do not currently apply.

Proposed changes

The Bill provides for the removal of the exclusion of commission only employees from the definition of ‘employee’ in the MCE Act, so that commission only employees would be:

- entitled to be paid at least the applicable minimum wage under the MCE Act; and
- entitled to the WA minimum conditions of employment contained in the MCE Act.

All employers of commission only employees would be required to ensure that their employment arrangements comply with the MCE Act, as well as existing employment entitlements and obligations under other relevant legislation.

Employee entitlements and employer obligations under the MCE Act

An overview of key employee entitlements and employer obligations under the MCE Act is available in Wageline’s Summary of minimum pay rates and entitlements for award free employees at www.dmirs.wa.gov.au/awardfree. A full copy of the MCE Act can be obtained at www.legislation.wa.gov.au.

The MCE Act currently requires employers to keep specific employment records for each employee. The Bill provides for the record keeping requirements that are currently in the MCE Act to be deleted, and would establish new record keeping and pay slips obligations in the IR Act for all employers in the state system.

More information about each of the existing minimum conditions is available on the [Wageline website](#).

Existing employee entitlements and employer obligations

Existing requirements in relation to commission only employees under various State and Federal laws will continue to apply.

State legislation

Commission only employees are currently included in the definition of 'employee' in the IR Act. This means that they are covered by the unfair dismissal provisions in the IR Act, and can make a contractual benefit claim to the Western Australian Industrial Relations Commission.

A commission only employee may be covered by a WA award. If an employee is covered by a WA award they must receive award rates of pay and employment entitlements. Employees covered by WA awards are also entitled to the minimum conditions of employment, as the MCE Act conditions are implied into all WA awards.

Commission only employees are entitled to long service leave under the *Long Service Leave Act 1958* (LSL Act), and employers of commission only employees must keep employment records in accordance with the LSL Act. Visit www.dmirs.wa.gov.au/longserviceleave for information.

There is no exclusion of commission only employees from the *Workers' Compensation and Injury Management Act 1981* or the *Occupational Safety and Health Act 1984*.

Federal legislation

Under the federal *Fair Work Act 2009*, commission only employees in Western Australia are entitled to:

- unpaid parental leave;
- notice of termination; and
- protection from unlawful termination.

The Fair Work Ombudsman can provide information about requirements in the *Fair Work Act*, visit www.fairwork.gov.au. Employers also have obligations in relation to superannuation and taxation – visit www.ato.gov.au for more information.

More information

Visit the Wageline website at dmirs.wa.gov.au/wageline for information on state employment laws.

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