

Law Council of Australia

Small Business Employer's Checklist

A checklist for small legal workplaces and/or sole practitioners considering hiring a new employee

8 August 2022



Law Council
OF AUSTRALIA

Introduction

Are you considering hiring a new employee, perhaps through the Law Council's [Rural, Regional and Remote \(RRR\) Digital Treechange Initiative](#), and not sure where to start? This checklist will help you get started.

NOTE: This checklist outlines your general obligations under Federal legislation. You should review the legislative requirements in your own State and Territory to confirm the relevance of this information to your individual location and circumstances.

This is a general, non-exhaustive checklist. The information is for guidance purposes only and is current to 8 August 2022. This document does not purport to be, or replace, legal advice.

The relevant major legislation for each jurisdiction is listed below.

Jurisdiction	Key Legislation
Australian Capital Territory	<ul style="list-style-type: none"> • Fair Work Act 2009 (Cth) • Work Health and Safety Act 2011 (ACT)
New South Wales	<ul style="list-style-type: none"> • Fair Work Act 2009 (Cth) • Annual Holidays Act 1944 (NSW) • Employment Protection Act 1982 (NSW) • Industrial Relations Act 1996 (NSW) • Work Health and Safety Act 2011 (NSW)
Northern Territory	<ul style="list-style-type: none"> • Fair Work Act 2009 (Cth) • Annual Leave Act 1981 (NT) • Return to Work Act 1986 (NT) • Work Health and Safety (National Uniform Legislation) Act 2011 (NT)
Queensland	<ul style="list-style-type: none"> • Fair Work Act 2009 (Cth) • Work Health and Safety Act 2011 (QLD) • Industrial Relations Act 2016 (QLD)
South Australia	<ul style="list-style-type: none"> • Fair Work Act 2009 (Cth) • Fair Work Act 1994 (SA) • Work Health and Safety Act 2012 (SA)
Tasmania	<ul style="list-style-type: none"> • Fair Work Act 2009 (Cth) • Industrial Relations Act 1984 (Tas) • Work Health and Safety Act 2012 (Tas)
Victoria	<ul style="list-style-type: none"> • Fair Work Act 2009 (Cth) • Occupational Health and Safety Act 2004 (Vic) • Equal Opportunity Act 2010 (Vic)
Western Australia	<p>Western Australia has a State industrial relations system that applies to unincorporated practices.</p> <ul style="list-style-type: none"> • Fair Work Act 2009 (Cth) (applies to incorporated practices) • Industrial Relations Act 1979 (WA) • Minimum Conditions of Employment Act 1993 (WA) • Work Health and Safety Act 2020 (WA)

Checklist

Step	Description
<p>Step One –</p> <p>Know your business needs</p>	<p><u>Key questions to ask before employing new staff:</u></p> <p>1A. Do you need assistance?</p> <p>The first step is knowing:</p> <ul style="list-style-type: none"> • Do you need legal or human resources assistance? <ul style="list-style-type: none"> - Not every lawyer is an employment lawyer, so you may consider whether you want to get some specialist legal or other assistance with, for example, contracts and advice. • Do you need recruitment assistance? <ul style="list-style-type: none"> - It can be difficult to find the right ‘fit’ for your organisation. If you are not confident with assessing resumes and conducting interviews, consider asking for help from a legal recruitment specialist. Recruitment specialists could save you time and money by finding a better candidate sooner. They can also assist in preparing the right interview questions and provide coaching on interview techniques. <p>1B. What is the role?</p> <p>Key to finding the right candidate is first clarifying:</p> <ul style="list-style-type: none"> • what tasks you need the new employee to undertake and what responsibilities or supervision will they have; • the skills and experience they must have; • what qualifications are required; and <ul style="list-style-type: none"> - for example, do you need a clerk/paralegal,¹ a graduate or a qualified lawyer? • what is the position description? <ul style="list-style-type: none"> - Employers should give some detailed consideration of what the job is going to involve and how performance is going to be measured. <p>1C. What type of employee does your business need?</p> <p>Consider:</p> <ul style="list-style-type: none"> • Do you need someone on a full-time, part-time, or casual basis?²

¹ See Law Society of South Australia, ‘Employment of Paralegals/Specialist Law Clerks’, https://www.lawsocietysa.asn.au/PDF/Prof_Employment_of_Paralegals.pdf.

² Fair Work Ombudsman, ‘Types of Employees’, <https://www.fairwork.gov.au/employee-entitlements/types-of-employees>.

Step	Description
	<ul style="list-style-type: none"> Do you need them on an ongoing basis or is it for a specified period (e.g. parental leave, replacement or for a specified task/project)? Will you have a probationary period for the role? ³ <p>Depending on the type of employment, the employee's pay and entitlements may vary.⁴</p>
<p>Step Two –</p> <p>Know your obligations and the applicable costs</p>	<p>2A. What is the minimum you must pay your new employee?</p> <p>Before committing to hire someone you should make sure you can cover the costs involved.</p> <p>Many employees are covered by a modern award. Modern awards set the minimum pay rates (as well as other minimum terms and conditions) for employees in particular industries and occupations.</p> <p>For example, certain employees working in the legal services industry, such as law graduates, law clerks and clerical and administrative staff, are covered by the Legal Services Award 2020. Please find the link to the Legal Services Award 2020 on the Fair Work Commission's website.</p> <p>Please note that qualified and practising lawyers are not covered by the modern award. This award also does not cover community legal centres, Aboriginal and/or Torres Strait Islander legal services or an employer whose primary activity is not within the legal services industry.</p> <p>As a first step, you will need to determine which (if any) modern award applies to the potential employee. Determining award coverage can be complex as there are some narrow groups and practices that will not be covered. You may wish to seek advice on which (if any) modern award applies to your business or a particular employee.</p> <p>If an employee is not covered by a modern award (or an enterprise agreement), the employee cannot be paid less than the current National Minimum Wage.</p> <p>Of course, as a matter of contract law, an employer and employee can agree to the employee being paid a higher wage. Employers wanting to hire and retain staff should be mindful of the market rates for the relevant position. For further information on what is an award, visit the Fair Work Commission's website.</p>

³ Fair Work Ombudsman, 'Probation', <https://www.fairwork.gov.au/starting-employment/probation>.

⁴ Fair Work Ombudsman, 'Employee Entitlements', <https://www.fairwork.gov.au/employee-entitlements>.

Step	Description
	<p>Some helpful resources include:</p> <p><u>Modern awards</u></p> <ul style="list-style-type: none"> • List of all modern awards. • General information on what is an award. • Fair Work Ombudsman’s ‘Pay Guide – Legal Services Award’ (updated as of 18 January 2022). • Fair Work Ombudsman’s ‘Pay Calculator’. • The Fair Work Ombudsman also provides a 3-step form to find the applicable award or agreement on its website. <p><u>National Minimum Wage</u></p> <ul style="list-style-type: none"> • The Fair Work Ombudsman provides information on the National Minimum Wage on its website. • See also the Australian Government’s business.gov.au website. <p><u>Market Rates</u></p> <p>Helpful tools to check how much you should pay your employee(s) include:</p> <ul style="list-style-type: none"> • researching and finding in-depth salary data from websites such as Payscale; and • looking up advertised pay rates for comparable positions on job search websites such as Seek or Indeed. <p>2B. Tax and superannuation obligations</p> <p>Employers have tax and superannuation obligations to comply with before, during and at the end of the working relationship with their employees. These include paying the superannuation guarantee for eligible employees to a complying fund or retirement savings account, and withholding tax from your employees’ wages.⁵</p> <p>There are also various administrative steps you must take in connection to these matters including, among other things, confirming that the employee is allowed to work in Australia, asking the employee to complete a Tax File Number declaration, and reporting the employees’ payroll information through Single Touch Payroll. Further information about these obligations can be found on the Australian Tax Office website.</p> <p>For more information on your tax obligations, see:</p> <ul style="list-style-type: none"> • The Australian Tax Office has information for small

⁵ Australian Tax Office, ‘Super guarantee percentage’, <https://www.ato.gov.au/Rates/Key-superannuation-rates-and-thresholds/?anchor=Superguaranteepercentage#Superguaranteepercentage>.

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	<p>businesses, including a 'Tax Time Toolkit', helplines and live chat assistance.</p> <ul style="list-style-type: none"> The Australian Government's business.gov.au website also has helpful resources for businesses needing guidance. <p>2C. Other obligations</p> <p>The National Employment Standards (NES) set the minimum terms and conditions of employment for all employees (regardless of whether they are covered by an award). The 11 minimum entitlements of the NES relate to:</p> <ol style="list-style-type: none"> maximum weekly hours <p>e.g. under the Legal Services Award 2020, the hours of work 'must not exceed 152 hours in 28 days'. If work is required outside of this then overtime rates will apply. There are additional limitations for when employees can be required to work overtime including safety and employment;⁶</p> requests for flexible working arrangements;⁷ offers and requests to convert from casual to permanent employment; parental leave and related entitlements; annual leave; personal/carer's leave, compassionate leave and family and domestic violence leave; community service leave; long service leave; public holidays; notice of termination and redundancy pay* (*noting redundancy pay may not be payable if you are a small business employer); and provision of Fair Work Information Statement and if applicable a Casual Employment Information Statement (see step 4A below). <p>A modern award or employment contract may prescribe terms and conditions that are more beneficial than, or additional to, an employee's entitlements under the NES. These instruments cannot exclude, or provide for conditions that are less than, the NES.</p> <p>The NES is set out in Part 2-2 of the <i>Fair Work Act 2009</i> (Cth). The Fair Work Ombudsman has published general guidance on</p>

⁶ Fair Work Ombudsman, 'Maximum weekly hours', <https://www.fairwork.gov.au/tools-and-resources/fact-sheets/minimum-workplace-entitlements/maximum-weekly-hours>.

⁷ See Fair Work Ombudsman, 'Flexible working arrangements', <https://www.fairwork.gov.au/employee-entitlements/flexibility-in-the-workplace/flexible-working-arrangements>.

Step	Description
	<p>the NES here.</p> <p>2D. Workplace health and safety (WHS) obligations</p> <p>Employers should provide their employees with a safe and healthy workplace, which includes having workers' compensation insurance for employees and considering public liability insurance.⁸ Work health and safety obligations and workers compensation obligations are distinctly separate obligations and employers should carefully consider the requirements of each.</p> <p>For information on managing work health and safety, see the business.gov.au website.</p> <p>Each jurisdiction has its own WHS laws and a regulator to enforce those laws. Each regulator has further information specific to the State or Territory it is responsible for available on its respective website:</p> <ul style="list-style-type: none"> • Australian Capital Territory: Work Safe ACT • New South Wales: SafeWork NSW • Northern Territory: NT WorkSafe • Queensland: Workplace Health and Safety Queensland • South Australia: SafeWork SA • Tasmania: WorkSafe Tasmania • Victoria: WorkSafe Victoria • Western Australia: WorkSafe WA <p>Workplace bullying and harassment is a significant risk to employees' health and safety and is best dealt with by taking steps to prevent it from occurring and responding quickly if it does occur.⁹ SafeWork Australia's 'Guide for Preventing and Responding to Workplace Bullying' is a useful resource on how to manage the risks of workplace bullying, which is part of meeting your duties under the work health and safety laws.</p> <p>2E. Managing employees</p> <p>Employers are responsible for their employees in several ways, including:</p>

⁸ In some states, such as NSW, employers must have a workers compensation insurance policy to help cover the costs related of potential employees' injury of illness. The workers compensation policy has to be obtained through a licensed insurer and it depends on:

- a. the total wages the employer has or is expected to pay during the policy year; and
- b. the number of worker the policy should cover.

See NSW State Insurance Regulatory Authority, 'How to get workers compensation insurance', <https://www.sira.nsw.gov.au/insurance-coverage/workers-compensation-insurance/how-to-get-workers-compensation-insurance>.

⁹ See Law Council of Australia, 'Bullying and harassment in the workplace', <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/bullying-and-harassment-in-the-workplace>.

Step	Description
	<ul style="list-style-type: none"> • managing their employees' conduct and performance; • supervising their employees and providing any required training; and • taking all reasonable steps to ensure the safety and wellbeing of staff. <p>The Fair Work Ombudsman has helpful information on its website regarding managing employees.</p> <p>The Fair Work Ombudsman also has helpful best practice guides for employers. This includes guidance for small businesses and the Fair Work Act 2009 (Cth).</p> <p>2F. Professional obligations</p> <p>Legal workplaces should also be aware of their professional obligations, noting that professional conduct rules and legislation contain provisions holding the principals of legal practices responsible for ensuring that their employees comply with the rules.¹⁰</p> <p>Legal workplaces should also be aware that instances of unwanted or unwelcome behaviour in the workplace (or in connection with the workplace) can be a breach of solicitors' professional obligations.</p> <p>These rules and provisions place the onus on senior management within law practices to properly manage the business and professional affairs of the practice, including supervision of staff (practitioner and non-practitioner employees) on an ongoing basis, noting that the retainer is with the principal(s) of the firm, not the employed solicitor.</p> <p>Failure to properly supervise an employed solicitor, and failing to take control of the matter when the solicitor fails to properly manage the case,¹¹ may result in a finding of unsatisfactory professional conduct or professional misconduct against the principals of a law practice.¹² It can also result in costs orders being made against the principals personally.</p> <p>2G. Traineeships and internships</p> <p>Employers may also consider legal service traineeships, which provide foundational knowledge and administrative skills to</p>

¹⁰ See, for example: Rule 37 of the Australian Solicitor's Conduct Rules (NSW, Vic, QLD, Tas, ACT, SA); *Legal Profession Act 2007* (QLD) s 701; *Legal Profession Act 2008* (WA) s 584; *Legal Profession Act 2006* (ACT) s 588; *Legal Profession Act 2006* (NT) s 698; *Legal Profession Act 2007* (Tas) s 644; *Legal Profession Uniform Law* s 34.

¹¹ *Kelly v Jowett* [2009] NSWCA 278 (4 September 2009), [78]- [79], [99].

¹² *Legal Services Commissioner v Mould* [2015] QCAT 440 (16 October 2015), [10].

Step	Description
	<p>employees entering a legal environment. The Australian College of Commerce and Management is one such service provider.¹³ The Australian Government's Apprenticeship page also provides information to employers on the apprenticeship incentives system and other relevant information.¹⁴</p> <p>Employers may also consider offering internships¹⁵ and/ or work experience opportunities, particularly where such opportunities are unpaid.¹⁶ In this regard, employers should be aware of their obligations and keep in mind that unpaid work may be unlawful in certain circumstances.¹⁷</p> <p>2H. Other costs</p> <p>Other costs that employers might need to consider are:</p> <ul style="list-style-type: none"> • recruitment and advertising fees (if applicable); • the cost of additional equipment or workspace, e.g. desks, stationery and computers; • training costs; • insurance premiums, including workers' compensation and professional indemnity; and • professional costs, such as: <ul style="list-style-type: none"> - practising certificate; and - membership fees for the relevant law society and/or association.
<p>Step Three – Administration and record keeping</p>	<p>3A. Reference checks</p> <p>Reference checks can help employers verify the claims made by prospective employees in their application and/or interview and help you make informed hiring decisions. The following steps should be followed:</p> <ul style="list-style-type: none"> • Obtain referee details from your interviewees / shortlisted applicants. <ul style="list-style-type: none"> - These are usually past or current employers, but they can also be anyone who is able to provide details about the person's character, education or suitability for the

¹³ Australian College of Commerce and Management, 'Legal, Medical and Recordkeeping Courses' <https://accm.edu.au/for-employers/courses/legal-medical-records/>.

¹⁴ Australian Government Australian Apprenticeships, 'Employer Incentives', <https://www.australianapprenticeships.gov.au/aus-employer-incentives>.

¹⁵ Fair Work Ombudsman, 'Work experience and Internships', <https://www.fairwork.gov.au/starting-employment/unpaid-work/work-experience-and-internships>.

¹⁶ See Law Society of South Australia, 'Unpaid Work Experience Guidelines', https://www.lawsocietysa.asn.au/pdf/EP_Unpaid%20Work%20Experience%20Guidelines.pdf.

¹⁷ Fair Work Ombudsman, 'Unpaid Work', <https://www.fairwork.gov.au/tools-and-resources/fact-sheets/unpaid-work>.

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	<p>job.</p> <ul style="list-style-type: none"> - Be aware that some applicants may be reluctant to have their current employer know that they are applying for another job. • Decide that you want to ask the referees. <ul style="list-style-type: none"> - Before you contact the referee, you should consider what you want to ask or verify, or what the referee may be able to provide clarification on. - You can use this template to assist you to compile suitable questions. • Contact the referees. <ul style="list-style-type: none"> - Consider the best time to contact the referees. You may need to arrange a specific time with them before conducting the reference check. • Choose a successful applicant and offer them the position <ul style="list-style-type: none"> - Use the information that you have collated during the reference check, as well as their application and interview, to help you pick the best person for the job. <p>3B. Preparing the employment contract</p> <p>Employers must provide their employees with contracts that reflect and comply with workplace laws.</p> <p>The employment contract should be entered into before the employee starts work. Employers can provide the successful applicant with a formal letter of offer and contract, which they can sign and return before commencing in the position.</p> <p>The contract should cover areas that are not covered by the <i>Fair Work Act 2009 (Cth)</i> or an Award (if applicable). In addition to the entitlements listed in 2C above it should include terms specifying:</p> <ul style="list-style-type: none"> • where the work will be performed; • who the employee reports to; and • what benefits will be provided in addition to salary/wages, such as: <ul style="list-style-type: none"> - cost of practising certificate; - membership fees for the relevant law society / association; - mobile phone/laptop; and/or - Continuing Professional Development (CPD) costs. <p>If you are not an employment lawyer, or not confident in preparing employment contracts, you are encouraged to seek legal assistance from a lawyer who specialises in this area.</p> <p>It is otherwise noted that some law societies and professional</p>

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	<p>associations provide members with employment law advice with membership and/or practising certificate renewals. You may consider contacting your law society and/or professional association to inquire about whether such a service is offered.</p> <p>3C. Payslips</p> <p>Each employee must be provided with a pay slip within one working day of 'pay day'. Payslips must contain certain information, such as the pay rate, any loadings, any deductions and the superannuation contributions.</p> <p>For more information about what information should be included in a payslip, including a payslip template, the Fair Work Ombudsman's website has some helpful resources.</p> <p>3D. Record-keeping</p> <p>Employers must keep a record of their employees' time and wages for at least 7 years, which must be provided to Fair Work Inspectors or the employee upon request. The Fair Work Ombudsman's website also has some helpful information about what is required.</p> <p>It is further noted that some awards require rosters to be maintained, indicating the work hours and breaks for each employee. A roster template can be here.</p> <p>A record of the employee's leave taken and leave balance must also be kept. Sample leave records and application forms can be found at here.</p> <p>Employers also need to maintain records on tax and superannuation payments. More information can be found on the Australian Tax Office's website.</p> <p>3E. Policies</p> <p>All employers have a responsibility to make sure that their employees, and people who apply for a job with them, are treated fairly.¹⁸ To ensure that employees are not discriminated against, harassed or bullied, workplaces should develop and implement practices to address inappropriate workplace behaviour and respond to complaints effectively.</p> <p>Employers should consider developing policies addressing:</p> <ul style="list-style-type: none"> • discrimination, harassment and victimisation;¹⁹

¹⁸ Australian Human Rights Commission, 'Workplace discrimination, harassment and bullying', <https://humanrights.gov.au/our-work/employers/workplace-discrimination-harassment-and-bullying>.

¹⁹ See, for example, Law Society of New South Wales, *Workplace Guide and Model Discrimination and Harassment Policies*, https://www.lawsociety.com.au/sites/default/files/2021-05/LS3498_PAP_Workplace-guide_2021-05-13.pdf.

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	<ul style="list-style-type: none"> • workplace bullying;²⁰ • cultural awareness and diversity;²¹ • occupational health and safety (including in respect of remote working); • complaints/grievance handling processes and procedures;²² • supervision;²³ and • flexible working arrangements.²⁴ <p>Several legal organisations and law societies have resources to assist employers in developing workplace practices and policies to effectively educate employees and respond to complaints regarding workplace bullying and harassment.</p>
<p>Step Four –</p> <p>Induction and training</p>	<p>4A. Induction</p> <p>Employers must give to each new employee the ‘Fair Work Information Statement’ before, or as soon as practicable after, the employee starts working.²⁵ A downloadable copy of the form and more information can be found here. Employers must also provide a copy of the Casual Employment Information Statement to every new casual employee.²⁶</p> <p>4B. Training</p> <p>As part of providing a safe and healthy workplace, employers should ensure that employees receive regular training about workplace health and safety and their responsibilities.</p> <p>You should take steps to make sure you understand and manage the key areas of risks to workplace health and safety, which include psychological as well as physical risks to safety.</p> <p>The State and Territory WHS bodies have further information about this training that is specific to your jurisdiction:</p>

²⁰ Safe Work Australia, *Guide for preventing and responding to workplace bullying*, <https://www.safeworkaustralia.gov.au/doc/guide-preventing-and-responding-workplace-bullying>.

²¹ See, for example, Law Society of New South Wales, *Cultural Diversity Guidance*, https://www.lawsociety.com.au/sites/default/files/2021-10/LS3641_PAP_CulturalDiversityGuidance_2021-10-18.pdf.

²² See, for example, Law Society of New South Wales, *Workplace Guide and Model Discrimination and Harassment Policies*, https://www.lawsociety.com.au/sites/default/files/2021-05/LS3498_PAP_Workplace-guide_2021-05-13.pdf.

²³ See, for example, Law Society of New South Wales, *A Quick Guide to Supervised Legal Practice*, https://www.lawsociety.com.au/sites/default/files/2021-07/LS3549_LIC_SLP-quick-guide_2021-07-19.pdf and Victorian Legal Services Board Commissioner, ‘Guidelines for Supervisors’, <https://lsbc.vic.gov.au/lawyers/practising-law/professional-obligations/guidelines-supervisors>.

²⁴ See Law Council of Australia ‘Flexible workplaces in the legal profession’, <https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/flexible-workplaces-in-the-legal-profession>.

²⁵ See Section 125, *Fair Work Act 2009* (Cth).

²⁶ See Section 125B, *Fair Work Act 2009* (Cth).

Step	Description
	<ul style="list-style-type: none"> • Australian Capital Territory: Work Safe ACT • New South Wales: SafeWork NSW • Northern Territory: NT WorkSafe • Queensland: Workplace Health and Safety Queensland • South Australia: SafeWork SA • Tasmania: WorkSafe Tasmania • Victoria: WorkSafe Victoria • Western Australia: WorkSafe WA <p>Legal workplaces should also ensure that that their employees receive appropriate training for their respective roles, including in respect of any CPD. For more information about CPD obligations, the Continuing Legal Education Association of Australia has a useful page outlining obligations for each State and Territory.</p> <p>Other areas of recommended training include:</p> <ul style="list-style-type: none"> • sexual harassment; • workplace bullying; • discrimination (including age, sex, disability, race and other factors); • cultural awareness and competency; and • unconscious bias.
<p>Other useful resources</p>	<ul style="list-style-type: none"> • For a more detailed checklist on the steps to follow in hiring employees provided by the Australian Government, visit the business.gov.au website. • The Fair Work Ombudsman website offers a free online course which provides general guidance on hiring and inducting a new employee. • You can evaluate whether you are meeting your obligations as a Small Business employer through the Fair Work Ombudsman’s ‘Small Business Checklist’. • For an overview of problems that might occur in the workplace and how to prevent or solve them, visit the Fair Work Ombudsman’s website. • Visit ‘Help for Small Business’ at the Fair Work Ombudsman’s website for further helpful resources, including templates, online training courses, fact sheets and guides. • State and Territory law societies provide a range of resources and services which can assist employers, such as the Queensland Law Society’s Workplace Conduct Advisory Service and the Legal Services Award 2020 Compliance Guide for Employers. Check your individual law society’s website for resources and services which may be available.