



**GLOBAL
EXPANSION
GUIDEBOOK
EMPLOYMENT**

Australia



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INTRODUCTION

Welcome to the 2024 edition of DLA Piper's *Global Expansion Guidebook – Employment*.

GLOBAL EXPANSION GUIDEBOOK SERIES

Many companies today aim to scale their businesses globally and into multiple countries simultaneously. In order to help clients meet this challenge, we have created a handy set of global guides that cover the basics that companies need to know. The *Global Expansion Guidebook* series reviews business-relevant corporate, employment, equity compensation, intellectual property and technology, and tax laws in key jurisdictions around the world.

EMPLOYMENT

As business grows more global, the challenge for in-house counsel and HR professionals responsible for workforce issues and employment law compliance is intensifying. This guide is designed to meet that challenge head on and has been produced in response to feedback from clients in both established and emerging international businesses. We hope it will become an invaluable resource for you.

This 2024 edition of our popular guide covers all of the employment and labor law basics in 63 key jurisdictions across the Americas, Asia Pacific, Europe, the Middle East and Africa. From corporate presence and payroll set-up requirements, language rules, minimum employment rights, business transfer rules, through to termination and post-termination restraints, we cover the whole employment life span.

We have used our global experience and local knowledge to bring you this newest edition of our guide. With over 300 lawyers, DLA Piper's global Employment group is one of the largest in the world, with one of the widest geographical footprints of any global law firm. We partner with our clients, wherever they do business, to find solutions and manage risk in relation to their legal challenges and objectives.

While this guide provides high-level guidance, it is not a substitute for legal advice, and we encourage you to take advice in relation to specific matters. If you wish to speak to any of our contributors, their contact details are set out towards the back.

We hope that you find this guide valuable and we welcome your feedback.

To learn more about DLA Piper's global Employment practice, visit www.dlapiper.com or contact:

Brian Kaplan
Co-Chair, Global Employment practice
brian.kaplan@dlapiper.com

Ute Krudewagen
Co-chair, International Employment practice
ute.krudewagen@dlapiper.com

Pilar Menor
Co-Chair, Global Employment practice
pilar.menor@dlapiper.com

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This is a general reference document and should not be relied upon as legal advice. The application and effect of any law or regulation upon a particular situation can vary depending upon the specific facts and circumstances, and so you should consult with a lawyer regarding the impact of any of these regimes in any particular instance.

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AUSTRALIA



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LEGAL SYSTEM, CURRENCY, LANGUAGE

Common law jurisdiction with employment laws that operate at both the federal and state levels. The official currency is the Australian dollar (AUD). The official language is English.

CORPORATE PRESENCE REQUIREMENTS & PAYROLL SET-UP

A foreign entity can engage employees in Australia subject to business, corporate and tax considerations and proper payroll registrations and injury insurance (ie, workers' compensation) registration. Personal income tax must be paid by employees on their assessable income.

However, employers are obliged to deduct tax from an employee's remuneration (ie, Pay as You Go or PAYG tax withholding) and also to pay 10 percent of their salary – which may gradually be increased over coming years to 12 percent – into the employee's superannuation account, a form of pension system.

PRE-HIRE CHECKS

Required

Immigration compliance.

Other checks may be required depending on industry. For example, for most child-related employment, a Working with Children Check is required.

Permissible

Permitted with the applicant's consent and subject to relevant discrimination laws. Offers of employment may be subject to criminal record checks or medical examination if necessary to determine fitness for the inherent requirements of a particular job.

IMMIGRATION

Foreign nationals must apply for visas to visit, live and work in Australia. Application is through the various immigration programs and visas administered by the Australian Department of Home Affairs (DHA).

The Temporary Skills Short (TSS) visa (subclass 482) may be used by businesses to address skill shortages by engaging foreign nationals to live and work in Australia for 2 years – or up to 4 years in some circumstances – where a suitably skilled Australian cannot be engaged. Caveats or other limits on eligibility may apply. The former Temporary Work (Skilled) visa (Subclass 457) no longer accepts new applications.

HIRING OPTIONS

Employee

Individuals can be recruited on either a full-time, part-time or casual basis (ie, employed by hour or by day) or a fixed-term contract for a limited duration.

Independent contractor

Independent contractors may be engaged directly by the company or via a personal services company.

Agency worker

Agency or temporary workers can be used by some organizations for short periods. Labor hire licensing laws apply in some states or territories which may apply to use of agency workers. Agency staff members are not engaged as employees of the business where they are placed on assignment.

EMPLOYMENT CONTRACTS & POLICIES

Employment contracts

A contract may be oral, but written contracts are strongly recommended. Additionally, all new employees must be given a Fair Work Information Statement (or, for casual employees, a Casual Employment Information Statement) containing key terms as soon as possible after the commencement of employment. Some employees whose work is covered by modern awards – industrial-legislation-based instruments that set minimum pay and conditions – may require a document in writing (eg, a contract or letter of offer) that specifies the modern award that covers them and their classification.

Probationary periods

Permissible. No statutory limit, but 3 to 6 months is common.

Policies

Generally not mandatory, but some policies – especially regarding anti-discrimination and harassment, bullying and occupational health and safety – are strongly encouraged by laws and regulations. Certain corporations may be required by law to have a whistleblower policy in place.

Third-party approval

No requirement to lodge employment contract or policies with or get approval from any third party.

LANGUAGE REQUIREMENTS

No statutory requirements.

WORKING TIME, TIME OFF WORK & MINIMUM WAGE

Employees entitled to minimum employment rights

Most employees are covered by federal minimum employment rights; a minority derive minimum rights from state jurisdictions.

Working hours

For full-time employees, 38 hours a week, although an employer may require an employee to work reasonable additional hours.

Overtime

Overtime payment – or overtime loading – may be required under an applicable award or enterprise agreement. Employees not covered by an award or enterprise agreement must be paid at least national minimum wage for all hours worked.

Wages

National minimum wage for a permanent adult employee as of July 1, 2021 is AUD772.60 per week or AUD20.33 per hour. Casual employees are entitled to a “casual loading” on top of this amount. It may be permissible to pay junior employees a lower amount. The national minimum wage is reviewed annually.

Vacation

Four weeks' paid annual (ie, vacation) leave during each year of service, accruing progressively. In addition, an employee is entitled to be absent from work and receive normal pay on a usual workday that is a public holiday; 8 days in total are observed nationally, with additional public holidays in some states and territories. Untaken annual leave is paid out to the employee on termination of employment. Casual employees are not paid for their vacation or public holidays. To make up for this, they receive extra pay, called casual loading.

Sick leave & pay

Employees are entitled to 10 days of paid personal or carer's leave for each year of service, with untaken leave accumulating from year to year. An employee may take the leave if they are not fit for work because of personal illness or injury, or to provide support to a member of the employee's immediate family who requires care or support because of personal illness, injury or an unexpected emergency. Personal or carer's leave is not paid out on termination of employment. Casual employees are not paid for their sick leave. To make up for this, they receive extra pay, called casual loading.

Maternity/parental leave & pay

Each member of an employee couple – not necessarily employed by the same employer – is entitled to be absent from work without pay for separate periods of up to 12 months (with each employee's leave generally to be taken as a single continuous period) in relation to the birth or adoption of a child, subject to certain conditions and exceptions. As a result, the couple may take up to a total of 24 months' leave between them. However, if only 1 person is taking leave as opposed to both members of the couple, or if 1 member of an employee couple wishes to take more than 12 months' leave, the employee may request a longer period from the employer. The period of extension cannot exceed 12 months less any period of parental leave taken, or intended to be taken, by the other member of an employee couple. Any extended period of parental leave taken by the 1 member of the couple reduces the amount of leave available to the other member of the couple by the same amount.

If both members of the couple are taking unpaid leave, the leave entitlement must be used in 2 separate periods. However, there are exceptions of "concurrent leave" and "keeping in touch" days, where the couple is entitled to take up to 8 weeks of unpaid parental leave at the same time.

A separate legislative paid parental leave scheme exists, entitling eligible employees to 18 weeks' pay at the national minimum wage during their parental leave, to be paid by the government via employers.

DISCRIMINATION & HARASSMENT

The characteristics protected under equal opportunity and anti-discrimination legislation in the various states and territories of Australia, as well as under federal legislation, vary slightly from jurisdiction to jurisdiction. The protected characteristics common to all jurisdictions are race, color, sex, sexual orientation, age, physical or mental disability, marital or relationship status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction, social origin, gender identity, intersex status or trade union membership.

WHISTLEBLOWING

No text yet.

BENEFITS & PENSIONS

Under the Superannuation Guarantee scheme, employers are effectively required to contribute 10 percent of employees' "ordinary time earnings" to employee superannuation funds. There is a minimum monthly wage that should be paid before an employee is entitled to the 10 percent and a maximum contribution base. However, from July 1, 2022, the monthly wage threshold will be removed, meaning all employees – irrespective of their monthly wage – will be entitled to the 10 percent (subject to other eligibility requirements). Most employers make regular contributions to the employee superannuation fund rather than making lump sum quarterly or annual contributions.

Australian law additionally requires that all employers maintain adequate workers' compensation insurance for the benefit of workers injured during the course of their employment.

DATA PRIVACY

Australia has stringent data privacy obligations. As a general rule, personally identifiable data may only be processed if it is required for the performance of the employment contract and constitutes an employee record. Certain acts and practices are exempt from the application of Australia's data privacy laws, but there are strict criteria which must be met for an exemption to apply. Employee records are generally exempt, but this exemption will not apply to documents that come into existence prior to the employment relationship (eg, pre-employment or hire documentation) or to documents relating to any contractors engaged by the business. At the time it collects personal information, the employer is required to provide the individual with a statement setting out the company's obligations under Australia's data privacy laws and the individual's rights. Further restrictions apply for sensitive personal data.

Employee records – with the exception of tax file numbers – are not covered by the Australian notifiable data breach regime, which requires notification to the Office of the Australian Information Commissioner (OAIC) and to affected individuals of any data breach that could result in serious harm. However, the OAIC advises that it is good practice for employers to notify employees affected by a data breach so that they may take protective action.

The monitoring of individuals and their data is covered by various surveillance legislation in each state or territory. Essentially, surveillance of employees is prohibited in sensitive areas, such as washrooms and change rooms, unless the surveillance device is installed pursuant to a warrant or authorization. Surveillance is permitted in public areas if it conforms with relevant legislation. The monitoring of an employee's use of a work computer (ie, emails and internet browsing) is governed by specific laws in some states.

RULES IN TRANSACTIONS/BUSINESS TRANSFERS

At common law, employees cannot be transferred from one employer to another without their consent.

Under the Fair Work Act, there are rules which apply if there has been a "transfer of business." The transfer of business rules apply when there is a connection between 2 employers – including the sale and purchase of all or part of a business, certain outsourcing and in-sourcing arrangements and where the 2 employers are associated entities – and the new employer agrees to employ some or all employees of the old employer within 90 days and there has been no significant change to the work performed by those employees. The main effect of the transfer of business rules is that a transferrable instrument (ie, a collective labor agreement, such as an enterprise bargaining agreement) that covered the employee before the transfer will continue to apply after the transfer and all service is regarded as continuous and accrual of leave benefits transfer with the employee, with some limited exceptions. The Fair Work Commission can make certain orders altering the effect of the transfer of business rules if it deems it appropriate.

EMPLOYEE REPRESENTATION

Any union validly appointed to represent an employee or employees must be recognized and dealt with according to the law. There are generally no employee representatives or works councils.

TERMINATION

Grounds

Termination can be brought about by mutual agreement; upon expiry of a fixed-term contract; by the employer, with or without notice (subject to law); or upon termination (ie, resignation) by the employee.

Who is subject to termination laws

Employees who have completed 6 months of service with their employer (or 12 months in the case of a small business employer with fewer than 15 employees, taking into account any employees of associated entities including foreign entities) and earn less than the high income threshold (currently AUD158,500); or who are covered by a modern award or enterprise (collective) agreement, are generally eligible to make a claim for unfair dismissal.

Prohibited or restricted terminations

Employers are prohibited from taking "adverse action" – including termination – against an employee because the employee has or exercises a "workplace right" or engages in "industrial activity," or because of a protected attribute, such as race, sex, age or disability. Further protections include a prohibition on an employer dismissing an employee because the employee is temporarily absent from work due to illness or injury for fewer than 3 months in a 12-month period.

Third-party approval for termination/termination documents

Not applicable.

Mass layoff rules

Reporting requirements apply where a decision is made to make 15 or more employees' positions redundant, including notifying the relevant government agency and relevant unions.

Notice

Between 1 week and 4 weeks depending on length of continuous employment, although an employment contract, enterprise agreement or applicable modern award may specify a longer notice period. Where an employee is over 45 years of age and has completed at least 2 years' continuous service, they will be entitled to an extra week's notice.

Statutory right to pay in lieu of notice or garden leave

An Employer can usually make a payment in lieu of notice (subject to any applicable enterprise agreement or modern award). No right to garden leave unless specified in the contract.

Severance

The entitlement to severance as a result of a termination by reason of redundancy is based on a sliding scale and calculated by reference to the length of the employee's period of continuous service on termination.

Period of continuous service	Pay

Less than 12 months of service	0
12 months to less than 2 years of service	4 weeks' pay
2 years of service to less than 3 years of service	6 weeks' pay
3 years of service to less than 4 years of service	7 weeks' pay
4 years of service to less than 5 years of service	8 weeks' pay
5 years of service to less than 6 years of service	10 weeks' pay
6 years of service to less than 7 years of service	11 weeks' pay
7 years of service to less than 8 years of service	13 weeks' pay
8 years of service to less than 9 years of service	14 weeks' pay
9 years of service to less than 10 years of service	16 weeks' pay
10 years and over	12 weeks' pay

Note: The scale drops from 16 weeks to 12 weeks. This is a historical anomaly that persists and is usually justified by the employee's entitlement to long service leave after reaching 10 years' service.

A week's pay is generally calculated on the basis of the employee's base rate of pay.

Service prior to January 1, 2010 is only counted if the employee had an entitlement to redundancy pay under another instrument prior to that date.

There are some exceptions to this entitlement. An employment contract, enterprise agreement or modern award may also specify a greater entitlement.

POST-TERMINATION RESTRAINTS

Those that protect the employer's legitimate business interests may be enforced to the extent reasonably necessary to protect those interests in all circumstances.

Non-competes

Typically no longer than 12 months, with some exceptions.

Customer non-solicits

Permissible.

Employee non-solicits

Permissible.

WAIVERS

Enforceable to waive contractual rights. Employees often cannot waive or contract out of statutory entitlements, including entitlements under a modern award or enterprise bargaining agreement.

REMEDIES

Discrimination

If an employee thinks they have been subject to "adverse action," including dismissal, because of a protected attribute, they may make a claim for a remedy under the Fair Work Act. Remedies include compensation and reinstatement; there is no cap on the amount of compensation that can be awarded. A civil penalty may also be ordered.

Compensatory remedies for discrimination may also be sought under federal or state anti-discrimination legislation. Damages for economic loss and general damages for hurt and suffering may be ordered.

Unfair dismissal

If the Commission decides that the employee has been unfairly dismissed, it may order the reinstatement of the dismissed employee (with or without back pay) or, if that is not practicable, the payment of compensation up to a maximum of 6 months' remuneration, or AUD79,250, whichever is less.

Failure to inform & consult

An employer who breaches a consultation obligation under an applicable modern award or enterprise agreement may incur a penalty and be liable to pay compensation.

CRIMINAL SANCTIONS

There are criminal sanctions for breach of relevant work health and safety laws, workers' compensation laws and taxation laws. The Queensland and South Australian labor hire licensing laws and underpayment laws in Victoria and Queensland provide for terms of imprisonment in respect of some breaches.

KEY CONTACTS



Nicholas Turner
Partner
DLA Piper Australia
nicholas.turner@dlapiper.com
T: +61 2 9286 8522
[View bio](#)

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