Notice of employee representational rights

Employer must notify employees

In accordance with s.173 of the Fair Work Act 2009 (the Act) an employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give notice of the right to be represented by a bargaining representative (the notice) to each employee who will be covered by the agreement and is employed at the notification time for the agreement. The notice must be given as soon as practicable, and not later than 14 days after the notification time for the agreement. If the notice is not provided within the prescribed time, the agreement cannot be approved.

Notification time is the time when:

a) The employer agrees to bargain, or initiates bargaining for the agreement; or
b) A majority support determination in relation to the agreement comes into operation;¹ or
c) A scope order in relation to the agreement comes into operation;² or
d) A low-paid authorisation in relation to the agreement comes into operation.³

See Single enterprise agreement date calculator for assistance with legislative timeframes.

The Act states that the notice must contain the content prescribed by the Fair Work Regulations 2009 (the Regulations), must not contain any other content and must be in the form prescribed by the Regulations.

Schedule 2.1 to the Regulations contains the notice template. The Fair Work Commission (the Commission) has held⁴ that there is no capacity to depart from the form and content of the notice template provided in the Regulations. Any departure from the form or content will result in the notice being invalid. For example, an employer should not attach any document to the notice. The purpose of this guide is to assist in the completion of the notice.

¹A majority support determination is a determination made by the Commission that a majority of the employees who will be covered by an agreement want to bargain with the employer, or employers, that will be covered by the agreement.
²A scope order is an order made by the Commission that determines the group of employees that will be covered by an agreement that will cover the employer.
³A low-paid authorisation is an authorisation made by the Commission under s.243 of the Act in relation to a proposed multi-enterprise agreement. The effect of such an authorisation is that the employers specified in it are subject to certain rules that would not otherwise apply (for example, bargaining orders that would not usually be available for multi-enterprise agreements will be available). It also permits the Commission to assist the bargaining representatives for such agreements.
Completing the notice

The notice of employee representational rights can be downloaded from the Enterprise Bargaining page of the Commission’s website.

1. Answer two questions regarding low paid authorisations and individual agreements to ensure the correct version of the notice is used.

2. Download the notice in either Word or PDF format.

3. Insert relevant information into the notice where required, such as the name of employer, name of the proposed agreement and coverage of the agreement.

4. Save a copy of the notice to provide to employees and for lodging with the Commission.

5. The employer should note when and how the notice was provided to each employee; this information is required in response to question 2.3 of Form F17.

NOTE: The employer must provide the notice to all employees who will be covered by the agreement.

➢ The full version of the notice as found in the Fair Work Regulations is at Attachment A.
➢ A table explaining how to complete the notice is at Attachment B.
➢ A sample of a completed notice is at Attachment C.

When bargaining commenced before 3 April 2017

An amendment to the Fair Work Regulations 2009 (the Regulations) affected the form and content of the Notice of Employee Representational Rights (the Notice) which is used during bargaining for an Enterprise Agreement. The amendment to the Regulations commenced on 3 April 2017 and affected the Notice issued to employees from 3 April 2017.

Any Notices issued to employees before 3 April 2017 (pre 3 April 2017 Notice) must have complied with the previous legislation, and there is no capacity to depart from the template that was prescribed in the Regulations at that time.

Any Notices issued on or after 3 April 2017 must comply with the version published on the Commission’s website. The use of the pre 3 April 2017 Notice template on or after 3 April 2017 onward may result in the Commission finding the Notice to be invalid.

Example

You are required to provide your employees with a document called the Notice of Employee Representational Rights (the Notice) no more than 14 days after you decide to commence bargaining.

You decide to commence bargaining on 2 April 2017

If you gave your employees the Notice on 2 April 2017 you must have provided the pre 3 April 2017 Notice. Alternatively, if you chose to provide the notice to employees on or after 3 April 2017 the pre 3 April 2017 Notice will be invalid and you will need to give employees the post 3 April 2017 Notice in schedule 2.1 of the Fair Work Regulations 2009 as available on the Commission’s website.
Attachment A – Full version of Notice of employee representational rights

Extract from Regulation 2.05 of Fair Work Regulations

Schedule 2.1—Notice of employee representational rights
(regulation 2.05)

Fair Work Act 2009, subsection 174(1A)

[Name of employer] gives notice that it is bargaining in relation to an enterprise agreement ([name of the proposed enterprise agreement]) which is proposed to cover employees that [proposed coverage].

What is an enterprise agreement?

An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Commission.

If you are an employee who would be covered by the proposed agreement:

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Commission about bargaining for the agreement.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. You can also appoint yourself as a bargaining representative. In either case you must give a copy of the appointment to your employer.

[If the agreement is not an agreement for which a low-paid authorisation applies—include:]

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union’s status as your representative.

[If a low-paid authorisation applies to the agreement—include:]

Fair Work Commission has granted a low-paid bargaining authorisation in relation to this agreement. This means the union that applied for the authorisation will be your bargaining representative for the agreement unless you appoint another person as your representative, or you revoke the union’s status as your representative, or you are a member of another union that also applied for the authorisation.

[if the employee is covered by an individual agreement-based transitional instrument—include:]

If you are an employee covered by an individual agreement:

If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if:
• the nominal expiry date of your existing agreement has passed; or
• a conditional termination of your existing agreement has been made (this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).

Questions?

If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission.
Attachment B – Instructions for completing notice

<table>
<thead>
<tr>
<th>COMPLETION INSTRUCTIONS</th>
<th>NOTICE TEMPLATE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Do not alter this section.</td>
<td>Schedule 2.1—Notice of employee representational rights (regulation 2.05) <em>Fair Work Act 2009, subsection 174(1A)</em></td>
</tr>
<tr>
<td>In this section insert the name of the employer, the name of the proposed agreement and the proposed coverage of the agreement.</td>
<td>[Name of employer] gives notice that it is bargaining in relation to an enterprise agreement ([name of the proposed enterprise agreement]) which is proposed to cover employees that [proposed coverage].</td>
</tr>
<tr>
<td>Do not alter this section.</td>
<td>What is an enterprise agreement? An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Commission.</td>
</tr>
<tr>
<td>If a low-paid authorisation does not apply to the agreement then include this paragraph and delete the one directly below.</td>
<td>[If the agreement is not an agreement for which a low-paid authorisation applies—include:] If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union’s status as your representative.</td>
</tr>
<tr>
<td>If a low-paid authorisation does apply to the agreement then include this paragraph and delete the one directly above.</td>
<td>[If a low-paid authorisation applies to the agreement—include:] Fair Work Commission has granted a low-paid bargaining authorisation in relation to this agreement. This means the union that applied for the authorisation will be your bargaining representative for the agreement unless you appoint another person as your representative, or you revoke the union’s status as your representative, or you are a member of another union that also applied for the authorisation.</td>
</tr>
<tr>
<td>If the employee is covered by an individual agreement-based transitional instrument then include this paragraph.</td>
<td>[If the employee is covered by an individual agreement-based transitional instrument—include:] If you are an employee covered by an individual agreement: If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if: • the nominal expiry date of your existing agreement has passed; or • a conditional termination of your existing agreement has been made (this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).</td>
</tr>
<tr>
<td>Do not alter this section.</td>
<td>Questions? If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission.</td>
</tr>
</tbody>
</table>

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5 An individual agreement-based transitional instrument is an individual transitional employment agreement (ITEA), a preserved individual State agreement, an Australian Workplace Agreement (AWA) or a pre-reform AWA.
Attachment C – Sample completed notice

The following is a sample only of a completed notice where no low-paid authorisation applies to the agreement and the employee is not covered by an individual agreement-based transitional instrument.

Schedule 2.1—Notice of employee representational rights
(regulation 2.05)

*Fair Work Act 2009*, subsection 174(1A)

AABB Pty Ltd gives notice that it is bargaining in relation to an enterprise agreement (*AABB Pty Ltd Enterprise Agreement 2018–2021*) which is proposed to cover employees that perform clerical work at the AABB Pty Ltd Melbourne site.

**What is an enterprise agreement?**

An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Commission.

**If you are an employee who would be covered by the proposed agreement:**

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Commission about bargaining for the agreement.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. You can also appoint yourself as a bargaining representative. In either case you must give a copy of the appointment to your employer.

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union’s status as your representative.

**Questions?**

If you have any questions about this notice or about enterprise bargaining, please speak to your employer or bargaining representative, or contact the Fair Work Ombudsman or the Fair Work Commission.

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This guide is not intended to be comprehensive. It is designed to assist in gaining an understanding of the Fair Work Commission and its work. The Fair Work Commission does not provide legal advice.