

7 April 2017

NAT 005/17

New prescribed wording for the Notice of Employee Representational Rights when enterprise bargaining

SUMMARY

The prescribed wording for the Notice of Employee Representational Rights in the *Fair Work Regulations 2009* has been amended by the Federal Government. The Notice is an important aspect of enterprise agreement-making under the *Fair Work Act 2009*.

It is **essential** that any Notice of Employee Representational Rights issued by an employer **on or after 3 April 2017** is in accordance with the new prescribed wording, or else any enterprise agreement that arises from the bargaining is likely to be rejected by the Fair Work Commission when the agreement is lodged for approval, on the basis that the agreement has not been validly made.

Overview

The Federal Government has amended the prescribed wording for the Notice of Employee Representational Rights in Schedule 2.1 of the *Fair Work Regulations*.

Section 173 of the *Fair Work Act* provides that an employer must take all reasonable steps to give a Notice of Employee Representational Rights to each employee who will be covered by a proposed enterprise agreement.

What is the new prescribed wording?

Section 174 sets out the requirements for the content and form of the Notice of Employee Representational Rights. The *Fair Work Act* requires that the Notice contain the wording prescribed in Schedule 2.1 of Regulations and no other wording.

If the Notice that is issued by the employer does not precisely comply with the prescribed wording, any enterprise agreement that arises from the bargaining is likely to be rejected by the Fair Work Commission when the agreement is lodged for approval, on the basis that the agreement has not been validly made.

The new prescribed wording can be obtained at the following link:

[Notice of employee representational rights – from 3 April 2017 \(Word\)](#)

The Fair Work Commission has published a useful [Guide for Completing the Notice of Employee Representational Rights](#)

When must the Notice be issued?

The Notice of Employee Representational Rights must be issued within 14 days of the “notification time”. The “notification time” is defined in subsection 173(2) of the *Fair Work Act* as the date when the employer “agrees to bargain or initiates bargaining for the agreement”, or the date when a majority support determination, scope order or low paid authorisation in relation to the agreement comes into operation.

If the Notice is not issued within this 14 day period, any enterprise agreement that arises from the bargaining is likely to be rejected by the Fair Work Commission when the agreement is lodged for approval, on the basis that the agreement has not been validly made.

What is the operative date?

The changes only apply to Notices of Employee Representational Rights issued by employers to employees **on or after 3 April 2017**.

Notices issued before 3 April 2017 are not affected by the amendments to the Regulations. For example, if the employer agreed to bargain on 1 January 2017 and the Notice was issued to employees on 10 January 2017, it is not necessary to issue a new Notice even if an enterprise agreement is not reached until June 2017.

Important advice about Notices of Employee Representational Rights

Enterprise bargaining has become a minefield for employers. There are numerous examples of enterprise agreements being rejected by the Fair Work Commission at the approval stage due to an employer's failure to precisely follow the procedural and technical requirements in the *Fair Work Act*.

It is essential to take particular care with the wording, timing and distribution of Notices of Employee Representational Rights. Please note the following:

1. The Notice must be in accordance with the prescribed wording.
2. No additional wording can be on the Notice, other than the prescribed wording, and the additional details that the prescribed wording requires to be inserted.
3. The Notice must not be distributed on company letterhead.

4. The Notice must not be stapled to any other document when it is distributed.
5. If the Notice is distributed to employees by email, the email should relate only to the Notice and should not include any attachments other than the Notice.
6. Notices distributed on or after 3 April 2017 must be in accordance with the new, prescribed wording which is available via the link on the previous page of this Member Advice.
7. The Notice must be distributed within 14 days of the "notification time", as defined in subsection 173(2) of the *Fair Work Act* (see previous page of this Member Advice).

Do you require further advice?

For information or assistance, please contact the **Ai Group Workplace Advice Line** on 1300 55 66 77.

Should you require any detailed advice on enterprise agreements, Ai Group's team of professional workplace relations advisers are available to assist you.



Stephen Smith
Head of National Workplace Relations Policy