

# **Employer- Employee Agreements**

## **- A guide**

The Industrial Relations Act (the Act) now provides for a new fairer form of individual employment agreements, known as Employer-Employee Agreements (EEAs). This booklet is designed to help employers and employees understand and develop EEAs. It contains information on the features and requirements for EEAs as well as tools to assist in the process of making an EEA, including a step by step guide and a checklist of registration requirements

### **What are EEAs?**

EEAs are formal written agreements between employers and employees covering working arrangements and pay and conditions. When an employer and an employee sign an EEA the provisions of any relevant award no longer apply, unless the EEA provides for them to do so.

The EEA system has been designed to provide appropriate protections for employees and employers. EEAs must be voluntary agreements and the Act contains provisions to ensure that employees who make EEAs will do so well informed, with genuine choice and without any disadvantage to their employment arrangements.

### **Key Features**

The key features of EEAs are that they:

- Are individual employment agreements
- Replace the provisions of any relevant award
- Are registered by the Registrar of the Industrial Relations Commission
- Are purely voluntary
- Cannot be made as a condition of employment
- Must pass a 'No Disadvantage Test' which ensures that the employee is not overall worse off that they would be under an award
- Can run for a maximum of 3 years

### **When EEAS are an Option**

Employers and employees can make EEAs when they are covered by a State award or in workplaces where no award exists.

Consistent with the emphasis on collective bargaining in the industrial relations system, EEAs cannot be made while an industrial agreement (EBA) applies to an employee's employment. This includes an EBA that has passed its nominal expiry date and has continued in operation.

When an EBA reaches its nominal expiry date, or 30 days prior to expiry, an employer can withdraw from the agreement by giving 30 days' notice to the Registrar of the Commission. After this time, employers can offer EEAs.

There is an exemption for persons with disabilities who can make EEAs whilst a EBA applies under certain specific circumstances. These are outlined on page 5 of this booklet.

EEAs can be made to replace expiring workplace agreements, as long as no EBA exists that would otherwise apply when the workplace agreement expires.

## **EEAs are about Informed Choice**

EEAs are purely voluntary arrangements and no employee can be required to sign an EEA to gain or continue employment. It is unlawful for employers to advertise or offer employment conditional on making an EEA. It is also unlawful to offer a transfer or promotion conditional on the employee making an EEA. This will give employees a real choice of whether or not they sign an EEA.

To ensure employees considering EEAs make an informed choice, employers are required to provide employees specific, detailed information at the time of offering an EEA. A set cooling off period then applies for the employee to consider the information, prior to choosing whether to sign the EEA.

It is the employer's responsibility to provide employees with the EEA document, and an EEA information statement that has been developed by the Registrar of the Industrial Relations Commission. The employer must also provide a plus a copy of any relevant award (or summary of the award approved by the Registrar) and a copy of any enterprise order which covers the employee.

This information must be provided to new employees at least 5 days before the EEA is signed, and 14 days in the case of existing employees. If the employer fails to provide this information, or if the cooling off period is not observed, the EEA will not meet the registration requirements and will not be able to be registered.

*Copies of the EEA information statement will be available from Wageline and the Registrar.*

## **Form and Content of an EEA**

There are a number of requirements for the content of EEAs. These will need to be included in the EEA in order for it to be registered.

EEAs must be written documents that are signed by both parties and witnessed by an independent person. EEAs for people under 18 years of age must be countersigned by

their parent or guardian. EEAs must specify whether the employee is employed on a full-time, part-time or casual basis. The EEA must contain the names of both parties.

EEAs must also include an expiry date, and a dispute resolution procedure to deal with any disputes during the EEA. Each of these is discussed in more detail in subsequent sections.

## **Commencement and Expiry**

For existing employees EEAs commence on the date of registration or any later date specified in the agreement. EEAs for new employees just commencing work start on the date the employment starts or any later date specified in the EEA.

EEAs are able to run for a maximum of 3 years. EEAs must specify a term, and at the end of that term the EEA ceases to have effect. The expiry of the EEA does not impact on the employee's employment. Once an EEA expires, any relevant award or industrial agreement again applies to the employee. If there is no award or agreement, the terms and conditions of the EEA become part of the employee's contract of employment and the pay and working arrangements of the EEA will continue. An EEA will automatically come to an end if the employer sells or transmits the business to another employer.

There is no ability to vary an EEA. However, an EEA can be cancelled at any time, by written agreement between the employer and employee.

## **Registration of EEAs**

The Registrar of the Western Australian Industrial Relations Commission is responsible for the registration of EEAs.

All EEAs must be lodged for registration within 21 days of signing. Any EEAs lodged later than 21 days after signing will be refused lodgement.

The Registrar must not register an EEA for a period of at least 14 days after lodgement. This provides a cooling off period during which time the Registrar determines whether the EEA meets the registration requirements. The Registrar has broad powers to gather information to assist in determining whether an EEA meets all requirements. Either party to an EEA or their bargaining agents can make written submissions to the Registrar to assist in the registration process.

A No Disadvantage Test (NDT) will be conducted on the proposed EEA during the registration process to determine whether the employee is disadvantaged by the EEA. The NDT is outlined in detail in the next section.

If an EEA does not meet the technical content requirements for registration, the Registrar will give the parties an opportunity to amend the EEA. There is no ability for parties to amend deficiencies in the EEA making process that may affect an employee's genuine choice or informed consent. For example, where employers fail to provide

employees with the required information before making EEAs, the EEAs will automatically be refused registration.

A checklist of registration requirements is included on page 10 of this booklet.

The Registrar will either approve or refuse registration of an EEA. If an EEA is refused, the employer or the employee can appeal to the Commission within 14 days of being notified of the refusal. A refusal does not have effect until the end of the period allowed for an appeal, and if an appeal is made, a refusal does not have effect unless the appeal fails.

As EEAs for new employees can commence on the day employment starts, an EEA may come effect prior to registration. If the EEA is not lodged for registration within the required 21 day period, the EEA ceases to have effect at the end of that period. If the EEA is refused registration, the EEA automatically ceases to have effect on the date the refusal comes into effect. In both these cases the employee then becomes subject to any relevant award, or if no award applies, the employee is covered by a contract of employment containing the same pay and conditions as those of the EEA that was refused registration. In this circumstance the employer and employee are entitled to recover any amount that they were entitled to receive or would not have been required to pay during the period between the day when the EEA took effect and the day on which the EEA ceased to have effect.

## **No Disadvantage Test**

A major protection included in the EEA system is the No Disadvantage Test (NDT). All EEAs are required to meet an award based NDT as part of the registration process. This means that EEAs cannot overall disadvantage employees in comparison with the relevant State award or when no such award applies, a comparable State or Commonwealth award. Employers can seek the Registrar's assistance to determine the relevant or comparable award for the purpose of the NDT prior to lodging their EEA for registration.

The NDT takes into account all relevant benefits that an employee would obtain under an EEA as compared to the relevant or comparable award. The NDT ensures that on balance employees are not overall disadvantaged. Both monetary benefits and non-monetary benefits, such as study leave or meal breaks, will be considered.

The conditions of an EEA must also meet all of the minimum conditions of employment. The Minimum Conditions of Employment Act has been recently amended to provide enhanced minimum protections for employees. For information on the minimum conditions of employment, contact Wageline on 1300 655 266.

EEAs will not fail the NDT if they contain reduced wage rates for employees with disabilities who are eligible for the Commonwealth's Supported Wage System (SWS), provided that these rates are not less than those prescribed by the SWS.

The Western Australian Industrial Relations Commission has responsibility for establishing an NDT instrument that sets out the principles and guidelines to be used by

the Registrar when assessing EEAs. At the time of this publication going to print, the NDT instrument was not yet available. Information on the NDT instrument will be included in an insert in this publication once it becomes available, or alternatively employers can contact Wageline on 1300 655 266 ([www.docep.wa.gov.au](http://www.docep.wa.gov.au)) or the Western Australian Industrial Relations Commission on 9420 4444 ([www.wairc.wa.gov.au](http://www.wairc.wa.gov.au)) for more information on the NDT instrument.

## **Dispute Settlement Procedures**

EEAs must contain dispute settlement procedures to deal with any question, dispute or difficulty that arises in the course of employment under the EEA. The dispute settlement procedures must nominate an arbitrator, or allow for an arbitrator to be nominated who is empowered to resolve the dispute. This can be the WA Industrial Relations Commission. Any orders of a private arbitrator can be made enforceable if the arbitrator, on request of one of the parties, lodges them with the Commission.

A model dispute resolution procedure will be developed and be included in the Industrial Relations Commission Regulations. At the time of this publication going to print, the model dispute resolution procedure was not yet available. A copy of the model procedure can be obtained by contacting Wageline on 1300 655 266 or [www.docep.wa.gov.au](http://www.docep.wa.gov.au).

## **Bargaining Agents**

Both employers and employees can appoint a bargain agent to assist with the negotiation and registration of an EEA. Bargaining agents may also represent parties in disputes, including arbitration proceeding under the EEA dispute settlement provisions. Bargaining agents must be appointed in writing. Any person can be appointed as a bargaining agent, including a trade union or an employer association.

## **EEAs for People with Disabilities**

Special provisions apply in relation to EEAs for employees with disabilities. Employees who are eligible for the Commonwealth's Supported Wage System can make EEAs with their employers that provide wage rates lower than the relevant award rate. These EEAs will not fail the No Disadvantage Test on the basis of reduced wage rates.

The Supported Wage System allows the payment of reduced wage rates to employees with disabilities based on their productive capacity. While employers and employees are not required to use the SWS to determine wage rates under EEAs for people with disabilities, the SWS will provide the Registrar with a nationally accepted benchmark against which wage rates are measured for the purposes of the NDT.

Under certain circumstances people with disabilities and their employers can make EEAs while an EBA is in operation. The EBA must not contain supported wage provisions and the employment under the EEA must have been arranged through an organisation that provides employment services for people with disabilities.

Provisions exist for people with mental disabilities to appoint, or have appointed, substitute decision-makers (representatives) to make EEAs on their behalf. The appointment of representatives overcomes potential issues concerning a person's legal capacity to make an EEA.

Representatives may make EEAs on behalf of the people with mental disabilities and do other things in connection with the operation of the EEA. The Registrar is responsible for approving representatives and in certain circumstances the Guardianship and Administration Board may revoke a representative's appointment and appoint a substitute representative.

## **Impact of EEAs on other employment arrangements**

EEAs do not change other key rights and obligations in the workplace. Employees and employers must continue to maintain a safe workplace, and employer obligations for taxation and workers' compensation remain unchanged. Superannuation contributions must also continue to be paid by the employer.

All employers in Australia are bound by provisions in the federal Workplace Relations Act that require employers to give proper notice prior to dismissing an employee. These provisions continue to apply while an EEA is in place. For information on these termination provisions, contact Wageline on 1300 655266 or visit the website.

Employees retain the right to lodge a claim of unfair dismissal in the WA Industrial Relations Commission if terminated while working under an EEA. New provisions for unfair dismissal require the Commission to take into account a probationary period when considering unfair dismissal claims. A formal probationary period can be included as part of an EEA for an employee who is commencing work under an EEA.

## **Prohibited Conduct**

Certain conduct is prohibited in connection with offering and making EEAs. It is unlawful for employers to advertise or to offer employment conditional on the making of EEAs. It is also unlawful to offer a transfer or promotion to an existing employee conditional on the making of an EEA. There is, however, nothing to prevent parties from providing for promotional or transfer opportunities within an EEA.

The Industrial Relations Act contains civil penalty provisions to deal with prohibited conduct in relation to EEAs. These apply to employees, prospective employees and employers. The civil penalty provisions cover a wide of situations, including where employees are dismissed or disadvantaged in employment because they choose not to make an EEA.

## **Public Access to EEAs**

The Registrar of the Industrial Relations Commission is required to keep a record of all EEAs registered. With the exception of employees' names and addresses, the provisions of EEAs on this register made by private sector employers and employees are available for public inspection. However, the parties to an EEA may apply to the Commission to exempt part or all of their EEA for public inspection. The provisions of any EEAs made in the public sector are available public inspection, with the exception of employees' addresses.

## **Record Keeping**

The record keeping requirements for employers and employees working under an EEA are outlined in the Industrial Relations Act. An employer must ensure that details are recorded of:

- The employee's name and date of birth if under 21 years old
- Details of the EEA which applies
- The date on which the employee commenced employment
- For each day the employee works:
  - start and finish times
  - period or periods for which the employee was paid
  - details of any work breaks including meal breaks
- For each pay period:
  - the employee's designation
  - the gross and net amounts paid
  - all deductions and the reasons for them
- All leave taken, whether paid or unpaid
- Any information necessary for the calculation of long service leave
- Any other information that is necessary to show that the employee received all remuneration and benefits payable under the EEA.

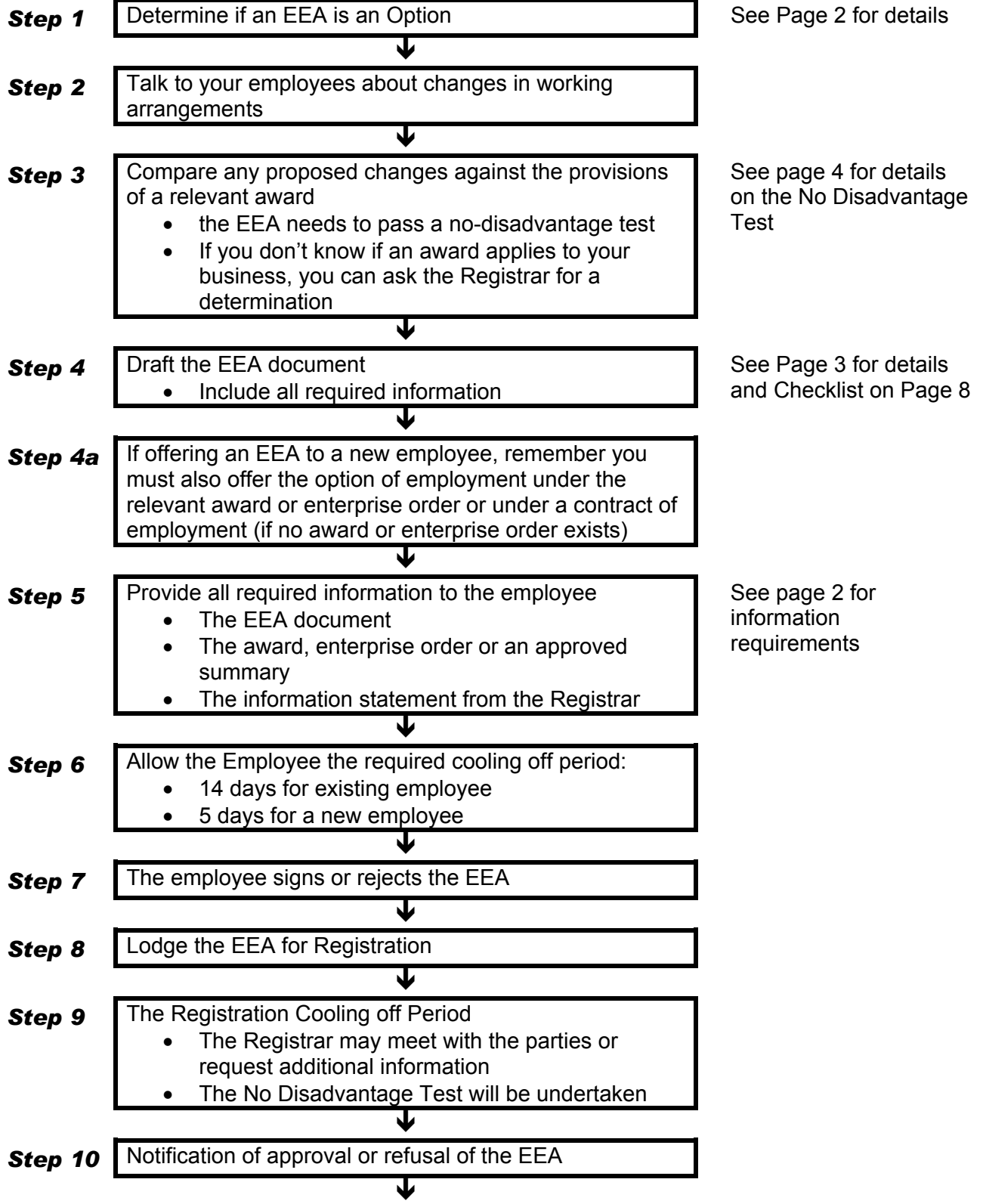
## **Review of EEA System**

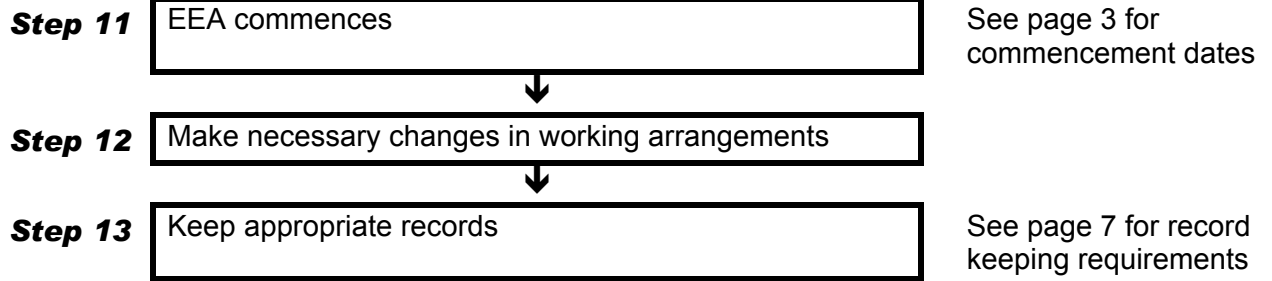
The operation and effectiveness of the EEA system will be reviewed by the Commission 12 months after the commencement of EEAs so as to ensure that it is meeting and protecting the needs of Western Australia's employees and employers.

## **More Information**

For more information on EEAs please contact Wageline on 1300 655 266 or the Registrar's office at the WA Industrial Relations Commission on 9420 4444.

## A Step by Step Guide to Developing an EEA.





## Registration Requirements Checklist

An EEA is in order for registration if

- No industrial agreement (EBA) applies
- It names the employer and employee
- It describes the employee's employment status (ie full-time, part-time or casual)
- It is signed by both parties and witnessed by an independent person
- It is countersigned by parent or guardian if the employee is under 18
- Contains a dispute resolution procedure
- Contains an expiry date not more than 3 years from date of effect
- The employer has properly complied with requirement to provide information to the employee and in the appropriate time frames
- It passes the No Disadvantage Test
- It meets the Minimum Conditions of Employment
- The employer did not offer employment or intimate to a new employee that he/she would be employed only if they agreed to the employment being under an EEA
- The employer did not offer an existing employee a transfer or promotion or intimate to the employee that he or she would be transferred or promoted only if he or she agreed to the employment being under an EEA
- Each party understands their rights and obligations
- No party or no representative was persuaded by threats or intimidation to enter into the EEA
- Each party genuinely wishes to have the EEA registered