



Module 10

Professional Practice Program Staffing your Practice





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Program completion

The IPA Professional Practice Program has been designed for IPA members in professional practice and for non-practitioners as a refresher Program.

With recognition comes responsibility. The IPA is recognised in legislation as one of the three professional accounting bodies within Australia. This means compliance with the ASIC Act and with regulations and standards set by ATO, TPB, ASIC, APESB, FRC, AASB, AUASB and IFAC.

The regulators, standard setters, government and the public all rely on the professional expertise, competence and ethics of IPA members. Therefore, the IPA has mandated that members moving into professional practice must demonstrate competence in these key areas.

It is compulsory to complete the IPA Professional Practice Program within 6 months of receiving an IPA PPC unless you have completed a Professional Practice Program with Chartered Accountants Australia + New Zealand or CPA Australia within the last 5 years.

The Program consists of self-paced study and a 2 day face-to-face workshop. You should complete the self-paced study before attending the workshop. This will take up to 80 hours, depending on your experience. To successfully complete the Program, you must:

- Attend all sessions of the Program,
- Successfully complete the assessment held at the end of the Program.

The assessment comprises of 30 multiple-choice questions and you are permitted 1 hour to complete the assessment. You may refer to your course materials, but you are not to consult any other person in or outside of the room. There is 1 mark per question and you need to obtain at least 50% to successfully complete the assessment.

If you do not successfully complete the assessment, you will be offered an opportunity to re-sit the assessment. If you are still unsuccessful, you will be required to repeat the 2 day face-to-face workshop and successfully pass the assessment. The IPA reserves the right to cancel a member's PPC in the event a member does not pass the assessment.

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Creating a positive culture is crucial for both the success of a practice and the emotional wellbeing of its employees. A negative workplace culture flows from the misalignment of employer and employee interests, with the outcome of this being conflict, poor relationships, distrust, a lack of commitment from employees, and high staff turnover. Social and financial outcomes also suffer. The costs of poor workplace culture are spread across many diverse areas, such as sickness, absence, worker's compensation, reduced effort, healthcare costs, private insurance costs, and early retirement. Employers can miss the opportunities available to minimize these costs by making improvements to workplace management and the culture.

Poor organizational culture is real, and it is common - most people can talk about a workplace where they were treated poorly, and many people have friends or relatives whose lives have been or are significantly impacted by these problems. Maintaining a positive workplace organizational culture provides an unparalleled opportunity to improve the health of your team and to improve workplace productivity.

Employees who do not feel they are supported or treated fairly tend to harbor negative feelings about their work situation. In response, they are more likely to act in an uncooperative manner. This loss of goodwill towards the employer is particularly evident in the workplace and will result in a reduction in productivity. On the other hand, a supportive environment will mitigate the potential negative impact of stressful or difficult jobs to some extent, and foster cohesive, positive team work.

10.1.1: Benefits of a Positive Practice Culture

Employers have much to gain from actively engaging with their workers, particularly in relation to organizational factors that impact employees' health and wellbeing. For instance, a strong and balanced organizational culture lessens the likelihood of bullying in the workplace - in a cohesive and supported work environment, early reporting is more likely.

Employees who are generally healthy, fit and resilient are less likely to suffer from physical and mental illness. Good mental and physical health impacts wellbeing, which in turn supports productivity, resulting in a competitive advantage for employers. Engaged employees are more likely to come to work or return to work after an injury, are less likely to leave the organization, and are more likely to be open and cooperative. For employers competing for skilled labour, a reputation as an employer of choice can be a significant competitive advantage.

10.1.2: Workplace Bullying

A recent report commissioned by SafeWork Australia (www.safeworkaustralia.gov.au) suggested that 45 per cent of Australian workers had experienced some form of bullying during their working lives. The report found that 10 per cent of those interviewed were currently experiencing workplace bullying. Bullying in the workplace arises from the combination of an aggressive individual and a permissive organizational culture. In some circumstances, the organizational culture may reward traits such as "excellence" or "toughness" that can manifest as bullying.

Workplace bullying is defined as "repeated, unreasonable behavior directed towards a worker or a group of workers, that creates a risk to health and safety". This definition encompasses various forms of bullying which can be grouped into subtle, nonaggressive or unintentional. Subtle forms of bullying behavior are most common, representing 36 per cent of instances. This may include silence, isolation and sarcasm. Public humiliation and criticism follow as the second most common form.

Bullying has a negative impact on employee health within an organization. Bullying can undermine a person's sense of self-esteem, security and stability and can result in the development of mental health issues, such as:

- Debilitating anxiety;
- Post-traumatic stress disorder;
- Depression;
- Irritability;
- Increased physical health complaints.

10.1.3: A Positive Workplace Culture

You can build, maintain and develop a positive workplace culture in your practice by:

- demonstrating strong leadership and setting good examples;
- consistent and regular two-way communication with employees;
- understanding the views, values and motivations of individual employees;
- offering opportunities for professional development and growth;
- recognizing and rewarding effort;
- establishing and building strong teams; and
- caring about your employees.

10.2: Employees vs. Contractors

Whether you operate your practice as a sole trader, partnership or company business structure, you can employ people under a number of categories. Some categories offer more flexibility for workers, while others provide more security for the business.

Choosing to employ people under different categories can maintain flexibility in your workforce while also meeting the needs of the practice. Make sure you choose an employment type that suits the practice and the employee. Each category places a different set of obligations upon you and your staff. Below are the most common employee types:

- full-time - generally, employees work 38 hours per week.
- part-time - employees work less than 38 hours per week, with a guaranteed minimum number of hours.
- casual - employees work hours may vary per week, depending on the work available.
- fixed term - employees are generally employed for a fixed period.

Whether an employee is engaged on a full-time, part-time, casual or fixed term basis it is important to understand the obligations you have to employees as their employer. These obligations are often dictated by the award or individual employment agreement you have with the employee, and can include:

- The expectation of ongoing work / employment;
- Leave entitlements;
- The withholding of PAYG tax;
- The payment of superannuation.

Many organizations also use the services of independent contractors, and as an employer it is important to understand the difference in your obligations to employees and independent contractors, and to be able to distinguish the difference.

10.2.1: Independent Contractors

Independent contractors run their own business, hiring out their services to other organizations.

Unlike employees, independent contractors negotiate their own fees and working arrangements, and can work for a variety of clients at one time. Independent contractors usually have a specific area of expertise, and enjoy providing their expertise to a range of clients, as a way of capitalizing on their knowledge. One common example of an independent contractor is a contract bookkeeper, who undertakes the bookkeeping function for a range of clients.

Independent contractor decision tool:

As an employer it is important to understand your obligations to the people you engage and to determine whether they are regarded as employees or independent contractors for taxation and legal purposes. The Australian Taxation Office provides an “Independent Contractor Decision Tool” to assist with determining whether a person working for you is defined as an independent contractor or an employee:

<https://www.ato.gov.au/Calculators-and-tools/Employee-or-contractor/>

10.2.2: Obligations of Employers to Employees

Legal obligations to employees and other workers come from a variety of sources:

- federal, state and territory laws;
- industrial awards and agreements;
- tribunal decisions;
- contracts of employment (whether written or verbal).

Some of your legal obligations as an employer include:

- paying your employees correct wages;
- providing employees with pay slips;
- reimbursing your employees for work-related expenses;
- ensuring a safe working environment;
- ensuring you have workers compensation insurance for each employee;
- not acting in a way that may seriously damage an employee's reputation or cause mental distress or humiliation;
- not acting in a way that damages the trust and confidence necessary for an employment relationship;
- forwarding PAYG tax instalments to the Australian Taxation Office (ATO);
- making appropriate payments under the Superannuation Guarantee legislation.

10.2.3: Employment Records

If you employ people under a modern award or agreement, you are legally required to keep accurate and complete time and wages records and issue pay slips to each employee. You need to keep each employees' time and wages records for at least seven years and make sure they are always accessible for inspection. The records should be in plain English, easy to read and not altered in any way, unless correcting an error. Employees must also be given a copy of their employment records should they request it. Note that all documentation issued to employees such as pay slips and PAYG Payment Summaries may now be issued electronically.

10.2.4: The National Employment Standards

The National Employment Standards are 10 minimum employment entitlements that must be provided to all employees, apart from casual employees who have limited entitlements under the National Employment Standards. The national minimum wage and the National Employment Standards make up the minimum entitlements for employees in Australia.

On top of the National Employment Standards, an award, employment contract, enterprise agreement or other registered agreement may apply to your employee, and it is important to note that the conditions outlined in any of these cannot be less than those provided within the National Employment Standards, and these agreements cannot exclude the National Employment Standards.

The National Employment Standards are:

1. **Maximum weekly hours** – 38 hours per week (plus reasonable additional hours as agreed);
2. **Requests for flexible working arrangements** – certain employees can request a change in their working arrangements;
3. **Parental leave** – up to 12 months UNPAID leave per employee, as well as the right to request an additional 12 months leave;
4. **Annual leave** – four weeks paid annual leave per year;
5. **Personal/carer's leave and compassionate leave** – 10 days per year paid personal/carer's leave (previously called sick leave), two days unpaid carer's leave and two days compassionate leave (unpaid for casual employees);
6. **Community service leave** – unpaid leave for voluntary emergency management activities and leave for jury service;
7. **Long service leave** – paid leave for employees who have been with the same employer for a long time;
8. **Public holidays** – an entitlement to a day off on a public holiday, unless reasonably requested to work;
9. **Notice of termination and redundancy pay** – varies according to length of service and employee age. A useful notice calculator is located at: www.fairwork.gov.au/ending-employment/notice-and-final-pay;
10. **Fair Work Information Statement** – a document that must be provided to all new employees.

10.2.5: Part Time Employees and the National Employment Standards

Part time employees have the same entitlements as full-time employees under the National Employment Standards, apart from leave entitlements which accrue on a pro-rata basis (% of full-time workload). The normal procedure for calculating leave entitlements for part-time employees is to divide their weekly hours worked by 38 hours (full-time workload). For example, a person who is employed to work 20 hours per week would receive 0.526 of full-time annual leave entitlements (20 days per annum). (20 hours per week /38 hours per week x 20 days per annum =10.54 days).

10.2.6: Casual Employees and the National Employment Standards

Casual employees are usually paid a “casual loading” in lieu of receiving annual leave, personal leave and public holiday pay and are paid on hourly rates. The National Employment Standards which apply to casual employees are limited to:

- unpaid carer's leave;
- unpaid compassionate leave;
- unpaid community service leave;
- to have a day off on a Public Holiday unless reasonably requested;
- the Fair Work Information Statement.

Where there is an expectation of ongoing work for a casual employee and the employee has been employed regularly and systematically for at least 12 months, they have additional entitlements under the National Employment Standards, which are:

- the right to request flexible working arrangements.
- access to parental leave.

10.2.7: Awards, Enterprise Agreements and Individual Employment Contracts

On top of the National Employment Standards, most employees are engaged in accordance with an Award, Enterprise Agreement or an Individual Employment Contract (or a combination of these). These provide more detail as to the terms and conditions of the employer / employee relationship, such as remuneration levels, specific working hours and so on.

10.2.8: Awards

An award automatically applies to employers and employees working in an industry or occupation. There are currently 122 industry or occupation awards that cover most people who work in Australia. For example: most administrative and clerical employees working in the ACT are covered by the ACT Clerks Award (Private Sector) 2010. The Fair Work Ombudsman website contains an award look up function, where employers can identify which award(s) apply to their employees: www.fairwork.gov.au/awards.

10.2.9: Enterprise agreements

An Enterprise Agreement is an agreement that sets out the terms and conditions of employment between a group of employees and one or more employers. Enterprise Agreements are usually implemented by large organisations and negotiated between the employer and several staff representatives with union involvement. For an enterprise agreement to apply to your employment it needs to have been approved by the Fair Work Commission. An agreement will generally override any award that would otherwise apply, although it does need to meet the minimum wage provided in the award.

10.2.10: Individual Employment Contracts

Individual or “Common Law” law employment contracts can also set out wages and conditions for employees who aren't covered by an award or agreement, or to provide conditions in excess of an employee's minimum entitlements. As contracts can be changed and updated at any time, they can provide flexibility to your workforce. However, if you wish to change the terms of an employment contract, you must first have the changes agreed to by your staff. An employment contract cannot provide minimum wages or conditions which are less than those provided in an award, agreement or the Fair Work Act 2009.

10.3: Recruitment

Recruiting staff is an important step when starting or growing your practice. When you decide to employ someone, you need to determine what you want the employee to do, what skills you require from them, and the type of person that is going to “fit” into the culture of your practice.

Also consider:

- employment conditions and entitlements;
- level of pay, based on employee awards and agreements;
- other costs of employment, including skills and training needs, new equipment and facilities;
- the broader strategic goals of your practice.

When recruiting any position it is very important to run a professional, formal recruitment campaign and to invest some time and energy into attracting and engaging an outstanding person. Recruiting staff is a big step as wages are an expensive overhead, and the difference between an excellent staff member and a substandard staff member can have a profound impact on the overall performance of your practice. Recruiting staff should be considered an investment in your practice - an opportunity to grow, to increase performance, and to provide your stakeholders with a better service or client experience.

Before you decide to advertise the job, prepare a job description that defines the responsibilities and functions of the job. This will help you identify the knowledge, experience and skills required for the job as well as the interview questions you might ask. Good recruitment planning followed by structured induction practices will help your new employee start off on the right foot and contribute to the productivity of your practice sooner.

Undertaking a formal recruitment process is also a good opportunity to identify current skills gaps, to look at your business structure and broad goals and to diversify your workplace.

You may also choose to use to partner with a recruitment agency to manage the process on your behalf. As with any supplier it is important to do your research and to partner with a recruitment agent you are comfortable working with and whose values align with those of your practice.

10.3.1: Advertising the Role

You can advertise the job in a variety of ways. These may include placing the ad:

- on your website;
- in local and national newspapers;
- online through a recruitment website such as SEEK;
- in a trade or industry magazine or online publication;
- on social media such as LinkedIn and Facebook;
- and promoting the opportunity using word of mouth, various networks and connections.

There is an art to writing a good job advertisement. The job advertisement should be well written, and should be geared specifically to the audience you are targeting, by using appropriate grammar and an appropriate amount of information about the role.

A good job advertisement should include the following elements:

- information about the organization;
- the duties of the role;
- the skills required;
- the personal requirement of the ideal candidate;
- the reward (remuneration, conditions, environment);
- how to apply (along with a person to contact and a closing date).

Avoid pasting the entire contents of the position description into the job advertisement - 6 concise paragraphs as outlined above is a consistently successful formula.

10.3.2: Conducting Interviews

Before conducting interviews, it is important to shortlist applicants based on their application. You will also need to decide if you will have anyone helping you with the interview process – it can be worthwhile involving a business partner or a trusted external associate to provide another viewpoint.

When interviewing for the position, ensure that the questions you ask are related to the position advertised. You will want to ask questions that help you understand the skills, qualifications and experience of potential applicants as well as their fit within the team. Just as when you advertised the job, you must not use discriminatory language or questions within the interview. When conducting the interview, use a consistent set of questions for each applicant and try to run each interview the same way. This will help you and your when comparing applicants and selecting the right applicant.

10.3.3: Competency Based Interviewing

The current industry leading practice is to interview candidates using a technique known as “Competency Based Interviewing” (also called “structured” or “behavioural” interviews). Competency based interviewing is based upon the concept of linking three parameters – knowledge, skills and attitude. Each question is designed to test one or more specific skills and the answer is then matched against pre-decided criteria and marked accordingly. For example, the interviewer may want to test the candidate's ability to deal with stress by asking first how the candidate generally handles stress and then asking the candidate to provide an example of a situation where he or she worked under pressure.

Competency based interviewing differs from normal interviews (also called unstructured interviews) as normal interviews are essentially a conversation where the interviewer asks a number of questions that are relevant to what they are looking for but without any specific aim in mind other than getting an overall impression of the candidate as an individual. Questions are usually quite random and can also be quite open. For example, a question such as “What can you offer our company?” is meant to gather general information about the candidate but does not test any specific skill or competency. In an unstructured interview, the candidate is judged on the general impression that he or she leaves; the process is therefore likely to be more subjective.

Competency based interviews are more systematic, with each question targeting a specific skill or competency. Candidates are asked questions relating to their behaviour in specific circumstances, which they then need to back up with concrete examples. The interviewer will then dig further into the examples by asking for specific explanations about the candidate's behaviour or skills.

An example of a competency based interview question is:

“This is a busy role which manages high volumes of client contact and manages a number of competing priorities. Can you tell us about a time when you have had to coordinate multiple work outputs with competing deadlines? What strategies did you employ and what was the outcome?”

This question tests organisational skills, working at a fast pace, dealing with stressful situations, providing high quality client service and achieving results.

Utilising a methodology called the “STAR” model can be useful tool to frame competency based interview questions.

The STAR model is:

- **Situation** – Ask the candidate to set the context by describing the circumstance where they used the skills or qualities you are seeking.
- **Task** - What was their role / involvement in the situation?
- **Actions** - What did they do and how did they do it?
- **Results** - What did they achieve? What was the outcome of their actions?

Regardless of the specific position being recruited it is always worthwhile asking a question about communication skills, teamwork and organisational skills as these qualities are important requirements of most jobs.

Another effective technique in assisting to select the best candidate for the position is to conduct a secondary interview with the top one or two candidates. This interview should be much less formal and a completely unstructured interview - at a café for example. This is a good opportunity to meet the candidate in a less stressful environment than the initial interview, and will give you an excellent insight into their potential fit into the culture of your practice, and you should be able to effectively gauge how you would work with the candidate on a day-to-day basis.

10.3.4: Referencing and Background Checking

Following the interview(s), consider contacting the applicant's referees to check any claims made during the interview. This may help in gaining a better understanding on the person's abilities and past experience within the workplace. If possible also conduct the reference check using competency based questions (the same questions asked of the candidate during the interview), and be sure to check the identity of the referee to ensure that the referee is a past immediate supervisor.

It is also important to validate qualifications, conduct skills assessments if appropriate, confirm the person has the right to legally work in Australia (if not a Citizen), to research the candidate online, and to conduct a criminal history check (which can be undertaken through the Australian Federal Police or through an ACIC accredited agency quite quickly and inexpensively).

10.3.5: Achieving the Perfect Fit

The term “fit”, refers to how the candidate’s goals and objectives align with those of the practice – and whether they have the skills and experience that the practice needs at a specific point in time. While each practice is unique, small practices can generally benefit from engaging candidates with the following characteristics:

A track record in client service roles

There are very few roles in small practices (or businesses) which don’t have a client service component – everyone represents your practice to some extent, so look favourably on candidates who have worked in hospitality or retail roles early on in their careers. Even if it was a long time ago, while studying for example, these types of candidates naturally gravitate towards people and enjoy human interaction. Skills developed in hospitality or retail roles include: communication skills, negotiation experience, problem solving ability, teamwork, along with having a client centric approach.

Broad Skillsets

Candidates with narrow skillsets or a very specific area of expertise can often be less versatile, which can be problematic if your practice is rapidly growing or changing – job roles, corporate structures and skill requirements can change dramatically. People who can take on some tasks which fall outside their specific job role can be a huge asset – particularly if someone has the ability to take away some of the peripheral tasks you do as a practice or business owner. Look for candidates who demonstrate versatility, adaptability, the ability to multi-task, and are highly organised.

Emotional intelligence

Emotional intelligence is something that can’t be measured on a CV, however it’s crucial when it comes to the fit of the candidate within your practice. How intuitive are they, what will they be like to work with, and how do their personal goals and values align with those of your business? When interviewing candidates for your practice, think about their overall job suitability, how they have previously shown initiative, and also how they interact with you during the interview.

Results / outcome focussed

Results or outcome focussed people generally understand the commercial reality of being in business - they will want to help the practice to grow, they will look to take on more, and they like working to deadlines. Look for a track record of achievement in previous roles, their personal drive and overall “energy”.

Loyalty

Staff loyalty is very important due to the time and effort involved in recruiting and training a new staff member. Look at a candidate’s employment background thoroughly, put yourself into their shoes, and try to understand their reasoning for leaving previous positions. The other thing to consider is their current relationship with past employers, so be very thorough when conducting references.

10.3.6: Engaging Staff

Once you have decided on the right applicant, you will need to contact them to offer them the position. If not previously discussed, you may discuss the salary, conditions and workplace benefits and entitlements as part of employment. It is important to be aware that a verbal offer is binding, so be very careful in how you go about making the offer. If the employee accepts your offer for the position, you can then go ahead with preparing the formal documentation and offer of employment.

The Fair Work Ombudsman website (www.fairwork.gov.au) has information about what to consider when hiring new staff, as well as a range of template letters and documents to assist you when employing staff.

10.3.7: Employee Induction

Employee induction, also known as “onboarding” is the process of getting new employees adjusted to the social and performance aspects of their new job quickly and smoothly. It is the process through which new employees learn the attitudes, knowledge, skills, and behaviors required to function effectively within an organization. The better that organizations can make new employees feel welcomed into the organization and prepared for their new jobs, the faster they will be able to successfully contribute to the organization’s mission. While all employees experience some type of onboarding, the formality and comprehensiveness of onboarding program varies widely across organizations. For example, benchmarking studies show that organizations considered “best in class” for onboarding have formal (structured) onboarding programs.

Some organizations prefer a more structured and systematic approach to new employee onboarding, while others follow a “sink or swim” approach in which new employees struggle to figure out what is expected of them and the existing norms of their new organization. Onboarding can vary on many dimensions including in its formality, sequencing, scope, and overall level of support.

10.3.8: On-boarding Tools and Best Practices

In onboarding both the “big things” and the “little things” matter. Having a formal orientation program and a written onboarding plan are key best practices. However, other more subtle factors matter as well. Is the new employee greeted warmly on their first day? Does the new employee have a functioning workstation right away? Does someone take them to lunch the first day? The most important day on the job for a new employee is the first day.

Organizational Best Practices for Onboarding:

- Make the first day on the job positive / memorable;
- Design and implement a formal orientation program;
- Be participatory in nature;
- Monitor progress over time;
- Utilize technology to facilitate the process;

- Recognize onboarding takes place over time - use milestones- 30 – 60 – 90 – 120 days on the job;
- Engage key stakeholders in planning.

As part of the onboarding process you should also make new staff aware of the policies and procedures of the practice – as a way of providing clarity when dealing with accountability issues or activities that are of critical importance to the practice, such as, health and safety, legal liabilities, regulatory requirements or issues that have serious consequences.

Maximising the performance of employees, while maintaining high levels of morale and retention, is the key to an organisation obtaining a competitive edge. Coaching is the process that assists employees to deepen their learning and improve their performance. Excellence in performance means regularly and consistently exceeding the performance targets established while meeting the organisation's performance standards.

10.4 Workplace Health and Safety (WHS)

Workplace Health and Safety (WHS), often referred to as Occupational Health and Safety (OH&S) involves the assessment and migration of risks that may impact the health, safety or welfare of those in your workplace. This may include the health and safety of your customers, employees, visitors, contractors, volunteers and suppliers. As a practice owner there are legal requirements that you must comply with to ensure your workplace meets WHS obligations.

10.4.1: WHS or OH&S?

Before 2012, workplace health and safety (WHS) laws were known as Occupational Health and Safety (OH&S) laws. These laws differed across Australian states and territories. To make the laws more consistent across Australia, in 2012 the state and territory governments agreed to develop model laws (WHS Act and Regulations), on which they could base their health and safety laws. More information about the model work health and safety laws on the [Safe Work Australia](#) website.

10.4.2: Benefits of WHS to your Practice

Creating a safe work environment is a legal requirement and critical to the long-term success of your practice. It can:

- help you retain staff;
- maximize employee productivity;
- minimize injury and illness in the workplace;
- reduce the costs of injury and workers' compensation;
- ensure you meet your legal obligations and employee responsibilities.

10.4.3: WHS Obligations for your Practice

As a practice owner you have legal responsibilities to implement health and safety practices in your workplace as soon as you start in business. You need to ensure that your practice doesn't create health and safety problems for your employees, contractors, volunteers, visitors, customers or the public. Knowing and understanding WHS laws and how they apply to you will help you avoid unnecessary costs and damage to your practice caused by workplace injury and illness.

Under Australian WHS/OH&S legislation employers are legally obliged to:

- provide safe work premises;
- assess risks and implement appropriate measures for controlling them;
- ensure safe use and handling of goods and substances;
- provide and maintain safe machinery and materials;

- assess workplace layout and provide safe systems of work;
- provide a suitable working environment and facilities;
- have insurance and workers compensation workers' compensation insurance for your employees.

Though it may cost to implement safe practices and install safety equipment, the effect of not acting can be severe and costly. Complying with WHS requirements can prevent you from being prosecuted and fined, and help you to retain skilled staff. Your legal obligations may vary according to circumstances and industry. You may wish to seek independent legal advice on what is applicable to your situation.

10.4.4: WHS Obligations for Workers

People working in your practice also have work health and safety obligations to themselves and their colleagues. They must:

- comply with instructions given for work health and safety;
- use any provided personal protective equipment (PPE) and be properly trained in how to use it;
- not willfully or recklessly interfere with or misuse anything provided for work health and safety at the workplace;
- not willfully place others at risk;
- not willfully injure themselves.

10.5: Australian Workplace Laws and the role of the Fair Work Ombudsman

10.5.1: The Role of the Fair Work Ombudsman

The Fair Work Ombudsman promotes compliant, productive and inclusive Australian workplaces. The Ombudsman delivers practical workplace relations advice and assistance to the community through promoting a culture of compliance through providing Australian workers and businesses the information and support they need to make good choices in their workplaces. The Ombudsman focuses on early intervention and resolution of workplace issues through the provision of advice and support.

The Ombudsman also monitors, investigates, and enforces compliance with Australia's workplace laws. Free services provided by the Fair Work Ombudsman include:

- a single point of contact for reliable and timely information about Australia's workplace relations system;
- educating people working in Australia about fair work practices, rights and obligations;
- assessing complaints or suspected breaches of workplace laws, awards and registered agreements and some Fair Work Commission orders;
- litigating in some circumstances to enforce workplace laws and deter people from doing wrong in the community;
- building strong and effective relationships with industry, unions and other stakeholders.

The Ombudsman also appoints Fair Work Inspectors empowered to investigate and enforce compliance with Australia's workplace laws and industrial instruments, including:

- provisions of the Fair Work Act, such as terms and conditions of employment and record-keeping and pay slip obligations;
- the National Employment Standards;
- provisions of the Independent Contractors Act 2006, including prohibited conduct in relation to reform opt-in agreements;

- enterprise agreements and agreement-based transitional instruments (including Australian Workplace Agreements, Individual Transitional Employment Agreements, Collective Agreements, and certain other agreements made prior to 1 July 2009);
- modern awards and award-based transitional instruments (including Federal Awards, Notional Agreements Preserving State Awards, State Reference Transitional Awards, and Division 2B state awards);
- orders of the Fair Work Commission.

10.5.2: Services available to Employers

The Fair Work Ombudsman can assist business owners who are confused about their rights and obligations as an employer. This includes advice about pay rates, terms and conditions of employment for employees, record keeping and pay slip obligations, and other rights and obligations under the Fair Work Act. The Fair Work Ombudsman has a range of free templates (such as employment contracts), guides, fact sheets and best practice guidelines available which all comply with the Fair Work Act and are specifically tailored to suit the needs of small and medium businesses. Subject areas include:

- Employing staff
- Pay slips and record-keeping
- Hours of work
- Balancing work and family
- Managing performance
- Managing underperformance
- Ending employment

For more information, please visit: <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides>

10.6: Staff Dismissal

10.6.1: Underperformance

What is underperformance? Underperformance or poor performance can be demonstrated in the following ways:

- inability to perform the duties of the position or at the standard required;
- by not following organisational policies and procedures;
- behaviour that is not acceptable in the workplace;
- by displaying behaviour that is negative and disrupts co-workers.

Discipline is not the same as punishment. Disciplining staff is an effective tool to rectify poor staff performance. No matter how good your organisation's planning and performance management procedures are, there will be occasions where you will need to discipline staff regarding undesirable behaviour.

Underperformance arises for many reasons including:

- because the organisation's workplace policies and procedures are not clear, and the employee does not understand the consequences;
- interpersonal differences and cultural misunderstandings;
- workplace bullying;
- negative experiences of the workplace leading to low morale and lack of personal motivation;
- personal issues, such as family or financial stress;
- lack of positive reinforcement resulting in the employee not knowing if they are performing their duties correctly.

10.6.2: Counselling and Discipline

Individuals who continue to perform below expectations should be counselled and the organisation's disciplinary process should be implemented if necessary. Counselling can be conducted by managers, HR professionals or external consultants. Counselling sessions are most effective if they are run by a person who has been trained in the counselling process. The employee has the right to have a representative, such as a union or workplace representative, in attendance at any counselling sessions.

Schedule a confidential meeting with the employee. Provide the employee with sufficient notice, stating the reason for the meeting and remind them that they may choose to bring along a representative if they wish. Always plan to give yourself and the employee plenty of time for the meeting, as neither party wants to have to leave in the middle of the meeting. Allow enough time for the employee to ask questions and give feedback and make sure that you take notes.

Set and maintain a positive attitude

Your primary reason for attending the meeting is to discuss the reasons for the poor performance and to help the employee to identify ways to overcome them. However, you should always acknowledge the importance of good performance for both the individual and the practice.

Seek clarification.

Ask pertinent questions and stop now and again to get confirmation from the employee that he or she understands the performance problems and your expectations.

End on a positive note.

After the meeting, emphasise the positive outcomes of the discussion, reinforce the fact that the employee is valued by the organisation, and stress that improving the employee's performance is a mutually beneficial goal.

Prepare a written summary.

Having a written summary of the discussion is beneficial. Keep a copy yourself and give one to the employee. This must be kept confidential from other staff. This may also form an essential part of the counselling meeting if the organisation's disciplinary process has been put into action.

Follow up with the employee.

Schedule a follow-up session to check on the employee's progress and amend the action plan where necessary.

10.6.3: Terminating Staff

Where serious misconduct occurs or ongoing poor-performance continues there may be no other course of redress except to terminate the staff member in accordance with legal and organisational requirements. There are many ways to end the employment contract - some are driven by the employer, others by the employee. Regardless of who initiates the process of termination, legislation sets out the process that needs to be followed and details the rights and responsibilities of both parties in all cases.

Termination does not only mean the dismissal of an incompetent employee; it encompasses a broad spectrum of situations from the death of an employee, misconduct, the liquidation of the business, retrenchment and redundancy. Termination can be a legal minefield if it is not conducted in the proper way - employees and employers both have rights and obligations.

The most common reasons for the termination of employment contracts are:

- Breach of the contract which may result in summary dismissal by the employer;
- Termination by notice (under the *Fair Work Act 2009*, an award or other contractual provision) given by an employer when the decision has been taken to dismiss an employee;
- Termination by a contractual provision being fulfilled, i.e. an employee employed for a specified period and that specified period comes to an end;
- Resignation of an employee;
- Termination as a consequence of other events (e.g. abandonment, death of the employee, closure of the business, frustration of the contract);
- Redundancy due to a change in the business situation (e.g. technological change usually involving retrenchment of a number of employees).

10.6.4: Legislation around Termination

There is a wide range of legislation relevant to the termination of employment. The most important piece of federal legislation which governs termination and dismissal is the ***Fair Work Act 2009***. Anti-discrimination legislation exists at the federal and state level in all states and territories. Where an employee is dismissed from employment and the dismissal is based, or even partially based, on one of the prohibited grounds of discrimination, an employee will have access to the remedies available under that legislation (i.e. unlawful dismissal).

If an employee has been dismissed or unfairly treated at work due to discrimination they can complain to the Fair Work Ombudsman or to:

- Fair Work Commission at www.fwc.gov.au;
- Australian Human Rights Commission at www.hreoc.gov.au.

10.6.5: What is Discrimination?

Under Commonwealth workplace law, an employer must not take 'adverse action' against any employee or prospective employee because of the following attributes:

- race;
- colour;
- sex;
- sexual preference;
- age;
- physical or mental disability;
- marital status;
- family or carer's responsibilities;
- pregnancy;
- religion;
- political opinion;
- national extraction;
- social origin.

10.6.6: Adverse Action

The following are all examples of adverse action when taken because of any of the above attributes:

- dismissing an employee;
- damaging an employee's ability to do their job;
- changing an employee's job to their disadvantage;
- treating one employee differently from other employees;
- refusing to employ a potential employee;
- not offering a potential employee all the terms and conditions normally in a job.

There are also certain exceptions, where an action may not be considered discrimination. The Fair Work Ombudsman cannot investigate discrimination claims, if the alleged discrimination:

- is not illegal under any Australian anti-discrimination law where the action is taken;
- is based on the inherent requirements of the job;
- is taken against a staff member of an institution conducted in accordance with religious beliefs in good faith and to avoid injury to the organisation's religious beliefs;

10.6.7: Dismissal

Dismissal situations are generally divided into the following categories:

- Those which warrant instant dismissal (also known as 'summary dismissal') on the first occasion. A dismissal based on a serious breach of contract that demonstrates that the employee does not want to be or intends not to be bound by the terms of the employment contract. An example might be if an employee turns up late on a continual basis, repeatedly turns up to work intoxicated, or has grossly neglected their duties. It is important to note here that the 'burden of proof is the responsibility of the employer in such cases.
- Dismissal caused by repeated violations of a particular rule.
- Where the employer terminates the contract by providing prescribed notice of termination or payment in lieu of notice. Some stringent requirements are placed on employers by the unfair dismissal legislation.
- Redundancy or retrenchment for genuine operational reasons (i.e. economic, technological, structural or a change of a similar nature).
- Constructive dismissal by the employer 'where an employer acts in a manner that indicates they no longer wish to be bound by the terms and conditions of the contract of employment'.

The contract of employment referred to above may be oral in nature or in written form and will contain either express or implied terms and will include a number of duties to which employees are bound. The contract will be underpinned by either an award or common law. Breach of these duties may be grounds for dismissal. Whenever dismissal occurs, the employment contract is terminated and a dismissed employee may have a right to contest the termination of the employment contract.

10.6.8: Summary Dismissal

Because the implications of summary dismissal for an employee are quite drastic, the courts have restricted the right to occasions when employee conduct or intended conduct is of a serious and wilful character.

The following are some of the more common reasons for summary dismissal:

- Misconduct;
- Breach of contract;
- Breach of company policy where the employee can be proven to have known about the existence of such a policy;
- Physical/verbal abuse;
- Disobedience;
- Failure to address performance or behavioural problems;
- Drunkenness;
- Incompetence;
- Neglect of duties;
- Dishonesty/bribery;
- Criminal behaviour;
- Unexplained extended absenteeism;
- Any behaviour in the workplace that obviously endangers the safety of fellow employees or members of the public.

Breaches of this nature must be investigated, procedures and warnings documented, privacy ensured, and allegations clearly proven (i.e. they must not be based on hearsay or perception).

Except for summary dismissal (where no notice is given), employers are not allowed to terminate employees unless they have given the employee sufficient notice or payment in lieu of notice, as per the minimum standards of the enterprise agreement, a common law contract as well as the National Employment Standards and modern awards. In all cases employees should be notified in writing of the employer's decision to terminate their services and the reason for doing so. If an employer does not do this, the termination may be deemed unfair.

10.6.9: Procedures for Termination

Employers must comply with the provisions for terminating employment and provide employees with an opportunity to defend themselves against allegations related to conduct or performance. In the case of a performance related termination, they must be given an opportunity to improve that performance with the assistance of management. The criteria for measuring the success of this performance improvement must be clear, agreed, monitored, coached and within a set timeframe. Otherwise, a termination may be deemed harsh, unjust or unreasonable.

10.6.10: Unfair Dismissal and Unlawful Termination

What is 'unfair dismissal' and what is 'unlawful termination'? What is the difference?

Under the provisions of the *Fair Work Act 2009*, a person has been unfairly dismissed when Fair Work Australia is satisfied that:

- The person has been dismissed;
- The dismissal was harsh, unjust or unreasonable;
- The dismissal was not a case of genuine redundancy; and
- The dismissal was not consistent with the Small Business Fair Dismissal Code (only where the employer is a small business employer - i.e. a small business employer is a business with less than 15 employees based on a head count of total employees, not full-time

equivalent employees).

10.6.11: Making an Unfair Dismissal Claim

An employee can make an unfair dismissal claim if they have:

- completed the minimum employment period, which is one year for employees of a small business and six months if the employer is not a small business;
- are covered by a modern award (or award-based transitional instrument); or an enterprise agreement (or agreement-based transitional instrument) applies to the person; or
- The person is earning less than the high-income threshold.

More information and a copy of the Fair Dismissal Code for Small Businesses can be found at <https://www.fairwork.gov.au/ending-employment/unfair-dismissal#small-business-employers>

10.6.12: Unlawful Termination

The *Fair Work Act 2009* also protects employees from unlawful termination. It provides several reasons for dismissal which are prohibited, such as:

- temporary absence from work because of illness or injury of a kind prescribed by the regulations;
- trade union membership or participation in trade union activities outside working hours or, with the employer's consent, during working hours;
- non-membership of a trade union;
- seeking office as, or acting or having acted in the capacity of, a representative of employees;
- the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- absence from work during maternity leave or other parental leave;
- temporary absence from work to engaging in a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances.

All employees nationally are covered by the unlawful termination provisions of the *Fair Work Act 2009*.

References

AusIndustry, a division of the Department of Industry, Innovation and Science
www.business.gov.au/info/run/employ-people/recruitment-hiring-employees - various online publications;

The Australian Human Resources Institute (AHRI)
www.ahri.com.au - various online and written publications;

The Australian Institute of Company Directors
www.aicd.com.au - various print and online publications

The Fair Work Ombudsman
<https://www.fairwork.gov.au/> - various online publications

The Recruitment and Consulting Services Association (RCSA)
www.rcsa.com.au – various online and written publications;

The Royal Australasian College of Physicians
<https://www.racp.edu.au/docs/default-source/advocacy-library/improving-workforce-health-and-workplace-productivity.pdf> – online publication;

Safe Work Australia
www.safeworkaustralia.gov.au – various online publications

SEEK Australia and New Zealand
www.SEEK.com.au / www://insightsresources.seek.com.au – various online publications;