



Superannuation in the National Employment Standards

What has changed?

The *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* amends the *Fair Work Act 2009* (the Act) to insert a right to superannuation in the National Employment Standards (NES).

Employers are already required to pay the superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* if they do not make contributions to a superannuation fund for the benefit of their employees. The entitlement to superannuation in the NES will align with and refer to superannuation legislation and there would be no contravention of the NES provision where an employer has met their obligations under such laws.

Including superannuation in the NES ensures that most employees covered by the Act have an enforceable right to superannuation. Currently, employees covered by a modern award or enterprise agreement that includes a requirement for superannuation contributions can apply to a court to enforce such a term, including through a claim in the small claims court. These legislative changes ensure more employees have this workplace right. An employee organisation or a Fair Work Inspector can also apply to enforce such a term for the employee's benefit.

What do these changes mean?

These changes expand the number of national system employees with a workplace right to superannuation who are able to take action in court to recover their unpaid superannuation.

The Australian Taxation Office (ATO) still has primary responsibility for ensuring compliance with the superannuation guarantee and associated obligations. All employees will continue to report superannuation underpayments to the ATO.

The Fair Work Ombudsman will continue to be able to refer matters of unpaid superannuation to the ATO and, in appropriate circumstances, pursue unpaid superannuation in a complementary role to the ATO, under both the new NES entitlement and pursuant to a term of a modern award, enterprise agreement, or other industrial instrument.

The changes provide that an employee cannot use the new NES entitlement to recover unpaid superannuation through the courts if the ATO has already commenced legal proceedings to recover effectively those same amounts of unpaid superannuation.

When will these changes come into effect?

These changes come into effect on 1 January 2024. This aligns the NES entitlement with the requirements under superannuation legislation for employers to make contributions on behalf of employees on a quarterly basis in order to avoid liability for the superannuation guarantee charge.

For more information on the Protecting Worker Entitlements package visit:

www.dewr.gov.au/protecting-worker-entitlements