



Addressing anomalous consequences of the small business redundancy exemption in insolvency contexts

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* amends the *Fair Work Act 2009* (the Act) to address an anomaly in the operation of the exemption for small business from providing employees with redundancy pay under the National Employment Standards (NES). The amendments will mean that the existing exemption will not apply to employers that are bankrupt or in liquidation, and which have downsized due to insolvency to become a small business employer. This will ensure that employees terminated due to the insolvency of their employer retain their entitlement to redundancy pay if their employer was not a small business prior to insolvency.

What has changed?

The changes will address an anomaly which causes some employees of employers – that are bankrupt or in liquidation – to miss out on a NES entitlement to redundancy pay which would have otherwise been payable at the end of their employment. This occurs when an employer downsizes due to insolvency to fewer than 15 staff, becoming a small business employer exempt from providing redundancy pay to employees under the NES.

There will be no change to how the small business redundancy exemption currently applies to viable small businesses, including those that have restructured from a larger employer and are continuing to trade. It will only change how the small business redundancy exemption applies to employers that are bankrupt or in liquidation.

What do these changes mean?

This change means that employees will no longer be disadvantaged if they are made redundant later than other employees during the insolvency process, including if they are directed by an insolvency practitioner to assist with the wind up of their insolvent employer.

When will these changes come into effect?

These changes commenced on 15 December 2023.

The changes will not apply to terminations of employment that occurred prior to commencement, or if terminations that caused the employer to become a small business employer occurred prior to commencement.

For more information on the Closing Loopholes legislation, visit: <https://www.dewr.gov.au/workplace-relations>