HFW WORKPLACE RELATIONS UPDATE 2022 - THE YEAR AHEAD

FEBRUARY 2022

2021 in numbers

104

applications for the Fair Work Commission to deal with a bargaining dispute were made

466

unfair dismissal applications were finalised by a decision

5,938

general protections applications were made

10,548

unfair dismissal applications settled at conciliation

11

reinstatement orders were made under section 391 of the Fair Work Act 2009 (Cth)

19 out of 4675

applications to approve an enterprise agreement were rejected

2022 – The Year Ahead

Seeking calm waters: Navigating a return to the workplace

The COVID-19 'working from home experiment' has opened many businesses' eyes to the potential pros and cons that can come from working from home. Some of the factors that employers have had to wrestle with include:

1. Issues around employees feeling isolated when working from home, and the impacts on employee mental wellbeing;
2. Ensuring adequate manager check-ins, as well as ensuring employees are reaching out when they require assistance, with open lines of communication; and
3. Identifying and managing cases of unsatisfactory performance when the capacity for face-to-face engagement and improvement has been limited.

While many employees continue to work from home due to the ongoing uncertainty of the COVID-19 pandemic, as a rising percentage of the Australian population receives vaccines for COVID-19, it is possible that many employers may start to explore returning employees to the workplace in 2022. This may be met with some reluctance by employees who have grown used to working from home or otherwise fear for their safety at the workplace in light of COVID-19. As such, in 2022, we anticipate tensions in managing employer and employee expectations regarding from where they should perform their work.

Historically, most jobs have been based at the workplace. Working from home was not an automatic right and, legally, that is still the case.

Instead, the law has developed mechanisms to request flexibility with regards to, among other things, working from home. Specifically, the National Employment Standards (NES) in the *Fair Work Act 2009* (Cth) deliver to certain groups of employees the right to make flexible working arrangement requests if they have completed at least 12 months of continuous service with their employer immediately before making the request. Under the NES, employers may refuse requests to work flexibly (including from home) only on reasonable business grounds. Reasonable business grounds include, but are not limited to, the proposed working arrangements being too costly for the employer; the proposed working arrangements being likely to result in significant loss of efficiency or productivity or otherwise likely to have a significant negative impact on customer service; and there being no capacity to change the working arrangements of other employees to accommodate the proposed working arrangements.

It is also possible that employees may have a basis to request flexible working arrangements under another source, such as under company policy. So, it is important that employers understand all sources under which an employee may request to work flexibly from home, and that they comply with them, when navigating a return to the workplace.

While not a decision under the *Fair Work Act 2009* (Cth), in *Hair v State of Queensland (Queensland Health)* [2021] QIRC 422, a Queensland-based employee, in the position of human resources adviser, submitted a request for flexible working arrangements to work remotely from New South Wales, as her partner was starting a new job and they wished

to relocate. The employee requested that she be able to continue to work remotely on a full-time basis with compressed hours. The employer denied the employee's request to work remotely indefinitely. The employee then made an application to the Queensland Industrial Relations Commission (QIRC).

The QIRC found that the employee was not allowed to work from home indefinitely. Specifically, the QIRC held that it was fair and reasonable for the employer to deny the employee's flexible work request on the basis that face-to-face contact was a requirement of the role. The QIRC held that while an employee may prefer to work in a particular way, this needs to be balanced with the operational requirements of the employer.

Similarly, in *Phillips v Integrated Medical Solutions Group Pty Ltd* [2019] FWC 6225, the Fair Work Commission said that while an employer has an obligation to consider all requests for flexible working arrangements made under the NES, it can reasonably refuse such requests – meaning that an employee is not entitled to demand certain working arrangements.

While remote working as a result of the COVID-19 pandemic may have demonstrated that employees can work efficiently and effectively remotely, these decisions suggest that that alone may not necessarily provide a legitimate basis for employees to work from home indefinitely.

Where to from here?

Employers considering returning employees to the workplace in 2022 should, in the first instance, remain up to date, and comply, with any applicable public health orders that may affect their ability to do so. Absent any such public health orders preventing a return to the workplace, other factors which will be relevant to consider when formulating an approach to take with respect to a return to the workplace include:

- Work health and safety considerations – in particular, what are the safety risks in returning employees to the workplace and how can they be eliminated or mitigated?;
- Impact on employee morale or productivity of a return;
- The employer's business or commercial needs – is full-time work in the workplace needed to meet these? Would a hybrid model work, perhaps with some commonality of days in the workplace for employees who work closely together, say, in a team?
- Allowing for individual circumstances – eg are any employees, or their family members, considered vulnerable should they be exposed to COVID-19? Do any employees have particular circumstances, related to protected grounds under discrimination law, which may need to be considered (such as family responsibilities)? Do any employees have employment contracts which state that they can work from home? Do any employees have flexible working arrangements under the NES pursuant to which they can continue to work from home?

Should you need help with navigating the legal risks and issues as you develop your approach towards a new normal, please do not hesitate to reach out to our Workplace Relations team.

R-E-S-P-E-C-T – Find out what it means at work

In June 2018, the Sex Discrimination Commissioner, Kate Jenkins, and the then Minister for Women, the Hon Kelly O'Dwyer, announced a National Inquiry into Sexual Harassment in Australian workplaces.

The inquiry considered, among other things, the prevalence, nature and reporting of sexual harassment in Australian workplaces. In 2020, the outcomes of the inquiry were published in the Respect@Work report (Report)[1]. Some 55 recommendations were made, aimed at reducing sexual harassment at work and driving change in Australian workplaces, to make them safer and more respectful.

Following the Report's release, the Federal Government developed its response, 'A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces.'

The Roadmap included, among other things, proposals for legislative change, in keeping with the Report having identified complexities in the legal and regulatory frameworks relating to sexual harassment.

In September 2021, some of the proposals for legislative change were enacted, via the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth). Some of the key changes brought about by that amending legislation were as follows:

- Changes were made to the *Fair Work Act 2009* (Cth) to:
  - Expressly include sexual harassment as a valid reason for dismissal when determining whether a dismissal was harsh, unjust or unreasonable;
  - Introduce the capacity for sexually harassed workers to apply for a "Stop Sexual Harassment Order" from the Fair Work Commission, in a similar vein to the "Stop Bullying Order" regime; and
  - Provide for two days' paid (though unpaid for casuals) compassionate leave for where employees, or their spouse or de facto partner, suffer a miscarriage.
- Changes were made to the *Sex Discrimination Act 1984* (Cth) to:
  - Introduce a definition of "harassment on the ground of sex" (section 28AA). This is intended to provide greater clarity around what constitutes sex-based harassment, and to catch harassing conduct about sex which may not of itself be considered sexual in nature, such as intrusive questions about a person's sex life, or sexist comments;
  - Extend sexual harassment protections to volunteers and other unpaid workers, such as interns;
  - Extend the Act to permit complaints by and against Commonwealth, State and Territory judges, members of Parliament, and State and Territory Public servants; and
  - Introduce victimisation provisions.
- Changes were made to the *Australian Human Rights Commission Act 1986* (Cth) to give the President of the Australian Human Rights Commission the discretion to terminate a complaint relating to the *Sex Discrimination Act 1984* (Cth) where it is lodged more than 24 months after the alleged conduct. Previously this discretion could be exercised by the President where the complaint was lodged more than 6 months after the alleged conduct.

Further legislative change is likely to be forthcoming as a result of the Report (noting that the *Parliamentary Workplace Reform (Set the Standard Measures No. 1) Bill 2022* was recently introduced into Federal Parliament).

No doubt the increased scrutiny on workplace sexual harassment matters will also maintain the momentum for further changes in this space. That scrutiny has extended to a debate about whether non-disclosure or confidentiality agreements are appropriate in the settlement of sexual harassment matters, with concerns having been expressed that they perpetuate a culture of silence around sexual harassment and may enable repeat offenders to continue unchecked.

Against this backdrop, employers would be wise to stay alert to further developments in the law in this space. In the meantime, employers should conduct an audit of their policies and processes concerning sexual harassment, and workplace behaviour generally, to ensure that they are adequate. Are they consistent with, and do they address, the recent changes? Are they easy to understand, and do they make clear what is considered acceptable and unacceptable workplace behaviour and the process for raising a complaint?

Periodic training in policies is also recommended, not only to demonstrate the taking of reasonable steps to prevent sexual harassment (or other inappropriate conduct) but also to promote the values and cultural expectations of the organisation.

As has always been the case, employers should ensure that they take all complaints seriously and that they address them in a timely manner, including investigating as appropriate.

HFW is well-placed to assist you with investigations, and to help you to audit your current policies and processes as needed.

Footnotes:

1 Respect@Work: Sexual Harassment National Inquiry Report (2020)

COVID-19 Vaccination Mandates: A double-edged sword for employers

As the Australian Government COVID-19 vaccination program rolled out over the course of 2021, many employers considered imposing mandatory COVID-19 vaccination requirements for entry into their workplaces. No doubt the underpinning logic was that if a vaccinated workforce can reduce, and even eliminate, the threat the COVID-19 pandemic poses, mandatory vaccination may be a sensible work health and safety measure.

However, a requirement by employers that employees be vaccinated to attend the workplace raises several legal issues. First and foremost, it can only be done:

- If a public health order or other law imposes it;
- Where an applicable industrial instrument or contract of employment permits it; or otherwise;
- Where an employer issues a reasonable and lawful direction requiring vaccination.

It is the final ground which has caused employers the greatest angst during the pandemic.

Broadly, whether mandatory vaccination requirements will be lawful and reasonable will be informed by a number of factors, including:

- The nature of the employer's operations (for example, the extent to which employees can work from home, or the extent to which employees need to interact with third parties including members of the public);
- The extent of community transmission of COVID-19 where the vaccination requirement is to be made, and the effectiveness of COVID-19 vaccines against transmission or severe disease;
- The individual circumstances of each employee, including their role and whether they have any valid exemption from vaccination;
- Public health orders and other laws regarding vaccination at the federal or relevant state and territory level;
- Whether mandatory vaccination is justified on work health and safety grounds. Work health and safety grounds may create a justification for particular categories– such as employees performing work that requires them to interact with people with an increased risk of being infected with COVID-19 (e.g. hotel quarantine work), or employees working with people who are especially vulnerable to COVID-19 (e.g. health care or aged care work);
- Whether mandatory vaccination could be rendered unlawful by other laws, such as anti-discrimination legislation; and
- Whether consultation obligations under work health and safety laws and applicable modern awards and enterprise agreements were complied with before mandatory vaccination requirements were imposed.

> "A requirement by employers that employees be vaccinated to attend the workplace raises several legal issues."

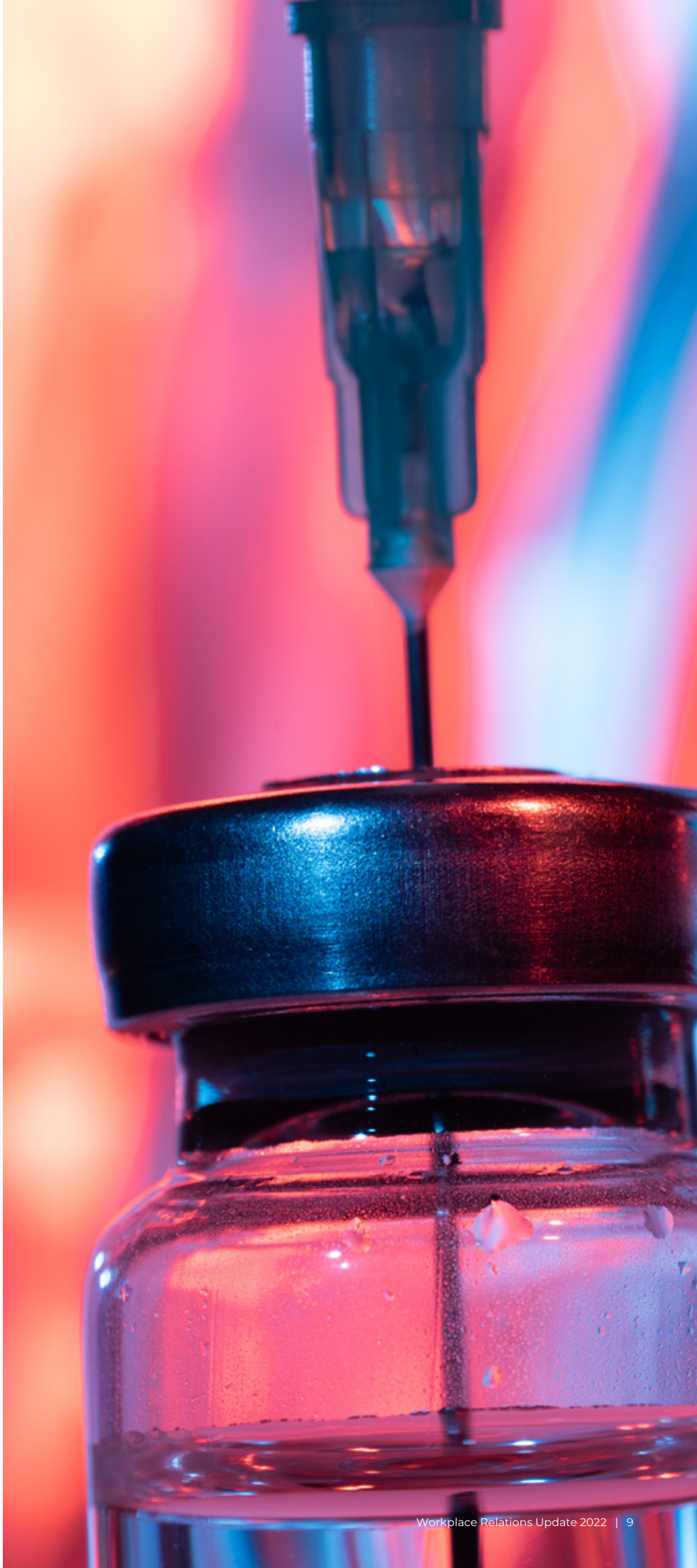
Practically, there is no 'one-size-fits-all' approach to mandatory vaccination. Whether a direction requiring an employee to be vaccinated will be lawful and reasonable will very much depend on the circumstances relevant to the particular employee and employer – a recent decision of the Full Bench of the Fair Work Commission affirmed that "the reasonableness of a direction is a question of fact having regard to all the circumstances, which may include whether or not the employer has complied with any relevant consultation obligations". In that case, the Commission concluded that a policy restricting access to the workplace to vaccinated employees only was not reasonable, principally because the employer failed to effectively consult with affected employees.

Even assuming mandatory vaccination requirements are lawful and reasonable, there will inevitably be a proportion of employees who will refuse to be vaccinated in the face of a requirement to do so. Care should be taken in dealing with these employees – the reasons for non-compliance may vary from having a medical or religious exemption to vaccine hesitancy, and may give rise to various causes of action.

With more cases challenging mandatory vaccination in the workplace and related issues expected to make their way through the Commission in 2022, further guidance and factors to consider when navigating these issues should become available. However, in the meantime, it is important that any mandated vaccination policy at least meet, address or include the following:

- Prior to the introduction of any mandatory vaccination policy, employers should undertake a risk assessment and engage in an appropriate consultation process with employees. As part of this, employers may wish to consider a preliminary, anonymous staff survey to understand the overall rate of COVID-19 vaccination among employees and overall attitudes towards COVID-19 vaccination;
- Allow for exemptions where employees have a legitimate reason for not being vaccinated. Consider requiring supporting documentation from an employee who claims they are unable to be vaccinated;
- Consider viable alternative work arrangements where employees establish a genuine basis for exemption from the requirement to be vaccinated (e.g. permitting employees to work from home or from another location); and
- Ensure any vaccination deadlines imposed on employees are reasonable, and achievable.

HFW can advise you on the options available in relation to mandatory COVID-19 vaccination in your workplace, and work with you to draft a compliant mandatory COVID-19 vaccination policy. Please contact us if you would like to discuss how we can assist your business.



Federal government makes further moves to protect employee superannuation savings

In December 2018, the Australian Government Productivity Commission handed down the Superannuation: Assessing Efficiency and Competitiveness Report (Superannuation Report).

The Superannuation Report found that, at that time, over a third of all superannuation accounts were 'unintended multiples', created when a new default account was opened for a member when they changed jobs or industries and did not close their old account or roll over their existing balance. As a consequence, retirement savings for these members were being reduced due to duplicate fees and insurance premiums being paid on their superannuation accounts.

The Superannuation Report recommended that:

- Default superannuation accounts should only be created for members who are new to the workforce or do not already have a superannuation account (and who do not nominate a fund of their own); and
- The Australian Government and the Australian Tax Office (ATO) should continue to work towards establishing a centralised online service for members to, among other things, facilitate the carrying over of existing member accounts when members change jobs (instead of being paid into the employer default fund).

To address the recommendations, in 2021, the *Superannuation Guarantee (Administration) Act 1992* (Cth) (SG Act) was amended by the *Treasury Laws Amendment (Your Future, Your Super) Act 2021* (Cth) (2021 Your Future, Your Super Act).

What does this mean for your business?

Under the new rules, if an employee commences work on or after 1 November 2021 and is entitled to be paid superannuation, an employer must:

1. Offer the employee choice of superannuation fund by providing the employee with a Standard Choice Form within 28 days of the employee first commencing employment;
2. In circumstances where that employee has not chosen a superannuation fund, request that the ATO identify whether the employee has a stapled superannuation fund (that is, a stapled super account linked, or 'stapled', to an individual employee so it follows them as they change jobs) using the ATO online service; and
3. If the ATO notifies the employer that the employee has a stapled fund, make superannuation contributions on behalf of the employee into that fund.

These rules:

- Also apply to contractors who are paid mainly for their labour and who are employees for superannuation guarantee purposes; and
- Are slightly different with respect to employees who are covered by enterprise agreements, depending on whether the employee is covered by an enterprise agreement made on or after 1 January 2021.

If your business has an enterprise agreement applying to employees, we can advise you on how the rules apply to your business.

Further information on the process for requesting details of an employee's stapled superannuation fund can be found on the ATO website.

Your integrity is key: the 'Great Resignation' and the criminalisation of wage theft

All employers are acutely aware of the anticipated fall out from the 'Great Resignation' as COVID-19 resets employees' expectations about how and where they wish to work, and are experiencing challenges retaining and attracting employees in the current tight labour market. Based on the Reserve Bank's forecasts for falling unemployment and underemployment over the course of 2022, the labour market is only going to get more challenging for employers.

In this environment, no employer can afford to have their integrity questioned. If there are concerns about an employer's integrity, their employees and applicants will simply take up another opportunity with an employer they perceive they can trust.

Today, more than ever, the largest and most well-resourced employers are experiencing significant issues with non-compliance with workplace laws. Many employers have been subject to adverse media coverage and investigations by the Fair Work Ombudsman (FWO) and have been forced to enter into enforceable undertakings with the FWO or have been the subject of litigation initiated by the FWO, where an agreement on the terms of an enforceable undertaking could not be reached with the FWO.

Many well-known employers have underpaid their employees a lot of money. Just to name a few - Woolworths announced in October 2019 that about 5,700 salaried employees had been underpaid; the Commonwealth Bank of Australia announced in December 2019 that it had underpaid about 41,000 employees about $40 million; and Qantas recently entered into an enforceable undertaking with the FWO to pay hundreds of employees, after it self-reported that it had paid some of its marketing and administrative employees in accordance with the terms of individual contracts of employment, rather than the applicable enterprise agreements. The FWO has recently commenced litigation against Woolworths over the issue of major underpayments of salaried employees.

Employers' boards and leadership teams need to ask themselves - how can the largest and most well-resourced employers get it so wrong? How can these employers expect their employees to trust their integrity? Why their governance frameworks around compliance with workplace laws so failed them?

It is not only an issue of integrity; employers and their officers now face criminal prosecution in Victoria and Queensland arising from the commencement of the *Wage Theft Act 2020* (Vic) and *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld). In these jurisdictions, it is now a criminal offence for employers to deliberately/recklessly or dishonestly underpay their employees. In certain circumstances, employers' officers can also be held criminally responsible for underpayments. This exposes employers and their officers to significant penalties as well as custodial sentences.

For example, under the *Wage Theft Act 2020* (Vic) it is an offence for an employer to dishonestly withhold the whole or part of an employee entitlement or authorise or permit another person to withhold the whole or part of an employee entitlement. An employee entitlement is defined to include any amounts payable or other benefits including wages, salary, allowances, annual leave, long service leave, meal breaks and superannuation that is provided for under relevant laws, contracts or agreements. The Act extends the prohibition to officers of an employer. There is a due diligence defence where an employer or officer can establish they exercised due diligence to make the payment prior to the offence. National Australia Bank is facing a prosecution under the *Wage Theft Act 2020* (Vic) for the alleged underpayment of long service leave entitlements of casual employees.

With a Federal election looming by May 2022, employers can expect that the criminalisation of underpayments will be a hot issue that both the Coalition and Labor will promise to address through the introduction of a national wage theft scheme. So employers' boards and leadership teams should anticipate more rather than less regulation in this area in the coming year.

Employers' boards and leadership teams should urgently undertake a comprehensive overhaul of their corporate governance frameworks to ensure compliance with workplace laws. Not only do employers and officers face criminal prosecutions but the risk to their integrity arising from allegations of wage theft will leave them struggling to retain and attract employees in the tight labour market and see them face further labour shortages. HFW is well placed to assist employers overhaul their corporate governance framework to ensure compliance with workplace laws.

Labor introduces 'Same Job, Same Pay' Bill for labour hire workers

In November 2021, the Leader of the Labor Party, Anthony Albanese, moved the Second Reading of the *Fair Work Amendment (Same Job, Same Pay) Bill 2021* (Bill) in the House of Representatives. The Bill seeks to amend the *Fair Work Act 2009* (Cth) to impose:

- A "same job, same pay" obligation on labour hire companies; and
- A number of requirements on how host companies can engage labour hire companies.

According to the Explanatory Memorandum to the Bill, the current labour hire system gives rise to the business model of "wage arbitrage", where a business deliberately sources lower cost labour than would be available under direct employment, leading to substantial worker exploitation. The reduction in labour costs is purportedly achieved by avoiding legitimate regulatory minimum standards, especially those set by enterprise agreements. To tackle this, the Bill aims to "ensure that workers employed through labour hire companies will receive no less than the same pay as workers employed directly – same job same pay".

Who would the obligations apply to?

There are a number of obligations in the Bill which would apply to a 'labour hire business' or a 'host'.

A 'labour hire business' is 'a person who, in the course of carrying on a business, ordinarily supplies a worker or workers to perform work for another person.'

A host is either:

- A national system employer that engages or proposes to engage a labour hire business to supply it with workers; or
- A constitutional corporation, so far as each of the following are met:
  - It engages or proposes to engage a labour hire business to supply workers to work at a workplace;
  - Work is performed at that workplace by employees of an associated entity of the corporation (the associated employees);
  - An enterprise agreement applies to the associated entity and to the associated employees (the associated agreement); and
  - If the work performed (or to be performed) by the workers supplied by the labour hire business was instead performed by the associated employees, the associated agreement would apply to the associated employees.

Same job same pay obligation

The "same job same pay obligation" requires that a labour hire business must provide to a worker pay and conditions which are no less favourable than those which would be required to be paid to:

- An employee of the host:
  - Performing the same duties as the worker; and
  - Working the particular hours of the worker or completing the same particular quantity of work as the worker; or
- If the worker is a casual – the casual loading required to be paid to an employee of the host performing the duties of the worker (or if no such loading is required to be paid, at least 25%).

There are a few exclusions to the "same job same pay obligation" including where the host employs fewer than 15 employees, and where the supply of labour is only temporary (for a period of three months or less either to replace a worker who is on leave, or to cope with a demand for goods and services).

Additional obligations on hosts

The Bill also seeks to impose a number of obligations on hosts to enable the "same job same pay" obligation to be met. Specifically, hosts will be obliged to provide labour hire businesses it engages with all the information reasonably required for the labour hire business to comply with the same job same pay obligation. They will also be prohibited from engaging labour hire businesses unless they agree as part of the terms of engagement to comply with the same job same pay obligation. There will also be a prohibition on hosts entering into a contract with a labour hire business which prohibited the host from offering employment to a labour hire worker.

Once the engagement is on foot, the host will also need to take all reasonable steps to ensure that the labour hire business has complied and is complying with the "same job same pay" obligation. A host must also provide labour hire workers with access to the same training and amenities and collective facilities as the host's direct employees.

Lastly, hosts must provide labour hire workers the same rights as a direct employee over the determination of hours and location of work, including rights to consultation, reply and notice, and must ensure that any information about vacancies in its business are equally made available to labour hire workers working at their workplace.

What does this mean for employers?

In a dissenting report, Liberal and National Senators have flagged concerns that the red tape associated with the Bill would make it harder to employ people, and threaten Australia's economic recovery from COVID-19, at a time when employers are crying out for staff.[1]

It therefore seems unlikely that the Bill in its present form will become law, even if Labor were to win government in this year's Federal election. Certainly, some aspects of the Bill are unlikely to garner support of the crossbench in the Senate as, at the moment, they may lead to ambiguity and complexity.

For instance, the definition of 'labour hire business' is currently very broad. Contractors, such as electricians and plumbers, could inadvertently be caught by the Bill when clearly it is not intended to be directed at them.

There is also uncertainty as to what is meant by 'required to be paid' in the "same job, same pay" obligation. Does it only refer to minimum entitlements imposed by law under statute (such as the National Employment Standards) and applicable industrial instruments, or does it extend to contractual obligations which a host may provide to its employees? This lack of clarity may create issues if not addressed.

Further to this, the additional obligations on hosts are, in some cases, quite cumbersome and uncertain. It is unclear, for example, how a host could provide in practice no less favourable pay and conditions to labour hire workers as it does to direct employees with respect to such things as superannuation etc, in circumstances where there is no direct contractual or employment relationship between those labour hire workers and hosts.

In addition, it is not inconceivable that, by its terms the Bill could blur the legal line between which company is the employer of the labour hire workers.

We will continue to monitor the Bill and any subsequent labour hire legislation, and will provide updates as necessary. In the meantime, if you require any advice about the Bill, please contact a member of our team.

Footnotes:

1 Select Committee on Job Security, Senate of Australia, *Third interim report: labour Hire and contracting* (Third Interim Report November 2021) 119 - 127.

Whistleblower protection laws: is your organisation compliant?

Australia's current whistleblower laws came into effect on 1 July 2019. Following the commencement of these laws, we have seen an increasing number of whistleblower disclosure compliance issues falling squarely on the desk of human resources. Not uncommonly, this arises in the form of a personal work-related grievance raised by an employee that includes a disclosure of some improper conduct by an alleged perpetrator in the workplace against another employee.

For compliance purposes, from 1 January 2020, all public companies and large proprietary companies must have had in place a compliant whistleblower policy that is made available to officers and employees. While only public and large proprietary companies are required to have a compliant policy by law, the whistleblower protection laws apply to all companies.

To be compliant, a whistleblower policy must include certain mandatory content, including information about the protections available to whistleblowers, to whom protected disclosures may be made and how an eligible whistleblower may make a protected disclosure. This means that whistleblower policies will generally end up being more legalistic and technical than many companies may otherwise desire. However, having a compliant whistleblower policy will help to reduce various legal risks arising in connection with managing protected whistleblower disclosures, as the courts will take into account the existence of a compliant whistleblower policy when deciding compensation claims made by whistleblowers who have been subject to a detriment (eg victimisation, bullying or disciplinary action) because they made a protected disclosure.

Unfortunately, it appears that many Australian companies are missing the mark when it comes to compliance. A recent Australian Investments and Securities Commission (ASIC) report on its review of a sample of 102 whistleblower policies drawn from corporate Australia showed that the majority did not fully address the legal requirements. In circumstances where ASIC has also reported that over two years in the immediate post-reform period, ASIC saw a 194% increase in the number of whistleblower reports it received, it appears that too many companies are leaving themselves exposed.

It is good practice for a company to review its whistleblower policy, processes and procedures on a periodic basis. ASIC's Regulatory Guide 270 for companies required to have a whistleblower policy provides that issues to consider when reviewing a whistleblower policy will generally include whether:

1. The scope and application of the policy are appropriate, including if there have been changes to the business;
2. The policy, processes and procedures are helpful and easy to understand;
3. The policy, processes and procedures reflect current legislation and regulations, and current developments and best practice for managing disclosures; and
4. The company's handling of disclosures, and the protections and support it provides for disclosers, need to be improved.

We regularly assist clients to draft and review their whistleblower policies for compliance with the whistleblower protection laws, and to manage and investigate protected whistleblower disclosures.

For the record: What we learned about employee vaccination records during the COVID-19 pandemic

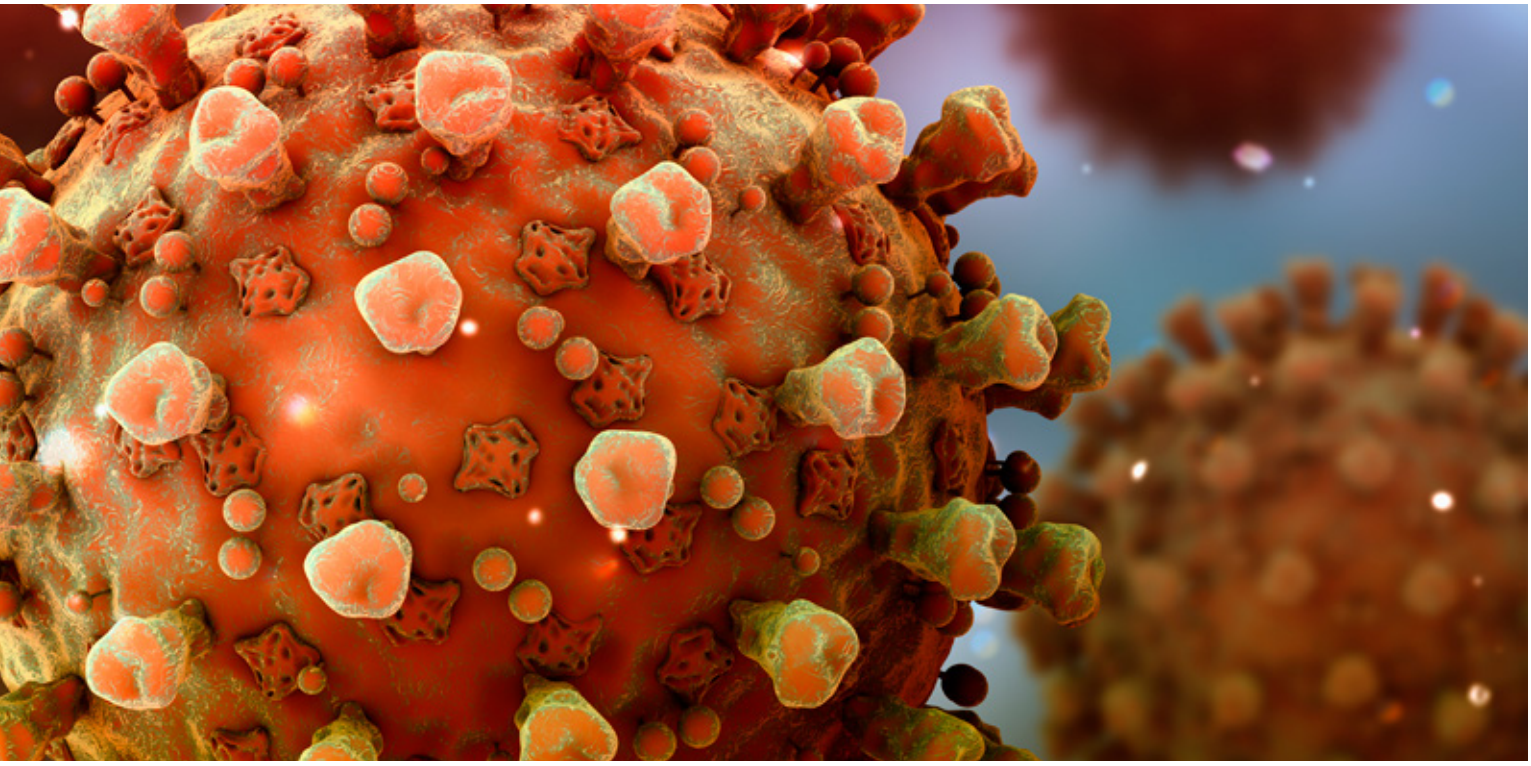
An unexpected by-product of the COVID-19 pandemic has been burgeoning concerns about employers' collection and use of the sensitive personal information of their employees, and in particular, information about an employee's COVID-19 vaccination status.

For private sector employers with over $3 million in annual turnover, this development raises issues of compliance with the *Privacy Act 1988* (Cth) (Privacy Act). Relevantly, the Privacy Act regulates the collection, use and storage of personal information by certain entities. The legislation also imposes stringent requirements in relation to sensitive information about an individual, which includes that individual's health information.

Employers have traditionally sought to rely on the 'employee records' exemption in section 7B(3) of the Privacy Act when dealing with information about their employees. That exemption is enlivened where an employer engages in an act or practice which is 'directly related' to the employment relationship and an employee record that is 'held' by the employer.

As it turns out, the requirement for an employee record to be 'held' by an employer is critical. In *Lee v Superior Wood Pty Ltd (Lee)*,[1] the Full Bench of the Fair Work Commission held that the exemption only applies once an employer has already collected information about an employee – it does not cover records that are yet to be held by an organisation.[2] In addition, in *Lee* the Full Bench suggested that consent to the collection of sensitive information will not be genuine if it is backed up by the threat of disciplinary action.[3] In *Lee*, the Full Bench found that a requirement for an employee to supply their biometric data did not comply with the Privacy Act and so was unlawful.

Lee was later considered by Commissioner Simpson in the lesser-known case of *Knight v One Key Resources (Mining) Pty Ltd*,[4] which was handed down in June 2020. In that case, the applicant alleged he was unfairly dismissed for failing to follow a direction to complete a survey about his travel history and prospective travel plans, which his employer implemented at the outset of the COVID-19 pandemic. He argued the employer had contravened the Privacy Act, relying on *Lee*. Interestingly, not only did the Commissioner find that the information requested in the survey was not 'sensitive information' (and therefore was not afforded the same protection as the biometric data in *Lee*[5]), but that in any event it is likely that that a 'permitted general situation' existed as a result of the COVID-19 pandemic. This meant that the employee's consent to the collection of his personal information would not be required on the basis that the employer reasonably believed the collection of that information was necessary to lessen or prevent a serious threat to life, health or safety of an individual, or public health or safety.[6]



After the Full Bench sidestepped considering the effect of *Lee* on the collection of an employee's vaccination status under the Privacy Act in *CFMMEU v Mt Arthur Coal Pty Ltd*[7], Deputy President Asbury squarely considered the issue in the recent decision of *CFMMEU v BHP Coal Pty Ltd (BHP Coal)*.[8] In that case, the Deputy President distinguished the facts of *Lee*, finding that BHP's requirement for employees to be fully vaccinated against COVID-19 – and specifically to provide evidence of their vaccination status – was a lawful and reasonable direction having regard to the Privacy Act and the right to bodily integrity.

In particular, in *BHP Coal* the Commission upheld the employer's requirement for workers to provide detailed and verifiable vaccination information (including the type of vaccine administered and the date on which an employee had each vaccine dose) and rejected the 'green tick' approach of an employee showing their digital vaccination certificate advocated for by the unions, which it considered 'unworkable'.

However, *BHP Coal* does not lay down a bright line rule – every employer should consider the particular circumstances of their workplace. In particular, employers should be mindful about asking employees to provide vaccination information that contains an employee's individual healthcare identifier (IHI), as IHIs are governed by separate legislation that imposes hefty penalties for misuse and disclosure of that information.[9]

Putting the complexities of the case law aside, the Office of the Australian Information Commissioner (OAIC) has released guidance for employers when collecting, storing and using information about an employee's vaccination status.[10] The effect of that guidance is that employers should only collect information about an employee's vaccination status in particular circumstances where the employee consents and the collection is reasonably necessary to a workplace's functions and activities, or without an employee's consent where authorised under by law (eg a public health order or declaration).[11] The OAIC has cautioned employers about the amount of information gathered and has recommended stringent controls on the storage of that information.

Until recently, the Privacy Act has often been viewed as somewhat of a 'toothless tiger' in the workplace relations space. After the developments in this space during the COVID-19 pandemic, perhaps we should start thinking of the Privacy Act as less of a toothless tiger, and more of a sleeping tiger.

Footnotes:

1 [2019] FWCFB 2946; (2019) 286 IR 368.
2 Ibid, [56].
3 Ibid, [58].
4 [2020] FWC 3324; (2020) 297 IR 379.
5 See Australian Privacy Principle 3 – collection of solicited personal information in Schedule 1 of the *Privacy Act 1988* (Cth).
6 Ibid, [83] – [84].
7 [2021] FWCFB 6059, see esp. [212].
8 [2022] FWC 81.
9 *Healthcare Identifiers Act 2010* (Cth). See also David Johnson, 'Terrible mistake' could send execs to jail over vaccine certificates (2021) *Australian Financial Review*, published 19 October 2021.
10 Office of the Australian Information Commissioner, *Coronavirus (COVID-19) Vaccinations: Understanding your privacy obligations to your staff*, <**https://www.oaic.gov.au/privacy/guidance-and-advice/coronavirus-covid-19-vaccinations-understanding-your-privacy-obligations-to-your-staff**>. See also the Commissioner's 'National COVID-19 Privacy Principles', <**https://www.oaic.gov.au/privacy/ guidance-and-advice/national-covid-19-privacy-principles**>.
11 On this point see eg *Shepheard v Calvary Health Care* [2022] FWC 92, see esp. [49]-[50].

Safety and the gig economy – What's changed?

In late 2020, four food delivery drivers lost their lives on Sydney roads over a period of just three months, highlighting serious safety issues within the food delivery industry.

In response, the NSW Government established a Joint Taskforce into Food Delivery Rider Safety to examine whether changes needed to be made to the industry to avoid future deaths.

The Taskforce's final report was released on 11 June 2021, recommending a number of changes including enhanced reporting of incidents, increased compliance activity by SafeWork, Transport for NSW, and NSW Police and issuing riders with a unique identification number.

Following the Taskforce's recommendations, the NSW government proposed amendments to the *Work Health and Safety Regulation 2017* to introduce measures to improve safety standards in the food delivery industry such as:

- Ensuring food delivery platforms provide riders with personal protective equipment;
- Compulsory induction training; and
- A new penalty system for non-compliant riders who are found to not be wearing high visibility clothing, breaking road rules when riding, or using vehicles that are not roadworthy.

However, the reaction has not been completely positive. According to the Transport Workers Union, the proposed changes target underpaid riders trying to work within an exploitative industry they cannot control, rather than the platforms who engage them.

Gig economy workers achieved a significant victory in May 2021 when the Fair Work Commission (Commission) determined that Diego Franco, a delivery rider engaged by Deliveroo, was in fact an employee.[1]

Mr Franco's supplier agreement had been terminated by Deliveroo due to significantly delayed delivery times. Mr Franco lodged a claim of unfair dismissal, arguing he was an employee rather than an independent contractor.

The Commission ultimately found Deliveroo's ability to implement a significant level of control over the way Mr Franco worked was a strong factor indicating the existence of an employment relationship. Finding that Mr Franco was an employee of Deliveroo, the Commission also found there was no valid reason for Mr Franco's dismissal and the dismissal process was unjust and unreasonable.

Deliveroo appealed. However, the High Court subsequently handed down a decision that effectively stayed the Commission's hand.

On 4 August 2021, the High Court unanimously overturned the Full Federal Court decision in *Workpac Pty Ltd v Rossato*[2], which had determined that an employee engaged on a casual basis was in fact permanent and therefore entitled to paid leave.[3] In doing so, the Court held that the primary consideration in determining how to characterise an employment relationship is by considering the express terms of a written employment contract.

This was a significant decision, as it effectively reset the view from previous case law that suggested in assessing an employment relationship (including whether a worker was really a contractor), the totality of the relationship had to be considered, including the conduct of the parties after entering a contract, rather than giving precedence to the written terms of the contract.

To make things more complicated, soon after, two other decisions were appealed to the High Court where the question of whether the workers involved were employees or independent contractors was a central issue.

In *Jamsek v ZG Operations Australia Pty Ltd*[4], the Full Court of the Federal Court found two delivery drivers, each with nearly 40 years' service who owned and used their own trucks to undertake the work for ZG Operations, were employees rather than independent contractors as stated in their contracts.

In contrast, in *CFMEU v Personnel Contracting*[5], the Full Court of the Federal Court found that a 22-year-old backpacker engaged as a labourer on construction sites was an independent contractor.

As both cases involved the same principles, the High Court confirmed it would deal with them together. The Commission stayed Deliveroo's appeal pending the High Court's decision in *Jamsek* and *Personnel Contracting*.

The High Court handed down both decisions on 9 February 2022. The High Court rejected the finding that the workers in *Jamsek* were employees, determining they were, as their contracts stated, independent contractors[6]. The High Court also overturned the finding in *Personnel Contracting*, determining that the worker was in reality an employee.[7]

Although the workers in both cases were identified as contractors in their contracts, in *Jamsek*, the High Court gave weight to the fact that the contract with the drivers had only been entered into when the company refused to continue to employ the drivers and insisted that the only relationship between the drivers and the company be a contract for the carriage of goods. In contrast, under the relevant contract in *Personnel Contracting*, the labour hire company had the right to determine for whom the worker would work, and the worker promised the company he would co-operate in all respects in the supply of his labour to the company's clients, in return for payment. This level of control over the worker, the High Court found, indicated an employment relationship.

Notably, in both decisions, the High Court followed a similar line as in *Rossato*, stating that where parties have comprehensively committed the terms of their relationship to a written contract that has not been challenged or found to be ineffective, the characterisation of the relationship is to be determined by reference to the rights and obligations of the parties under that contract (the difference being that the rights and obligations in the *Personnel Contracting* contract was more indicative of an employment relationship). In a crucial finding, the High Court also held that unless the contract had been varied or waived, a review of the parties' subsequent conduct was "unnecessary and inappropriate".[8]

The High Court's decisions will no doubt have a major impact on the Fair Work Commission's decision in the Deliveroo appeal once it is reactivated. Commentators are already saying the decisions are a big win for companies such as Uber and Deliveroo and will make it harder for workers in the gig economy to challenge their characterisation as contractors.[9]

Whether this in turn affects the drive to improve safety standards in the food delivery industry remains to be seen.

Footnotes:

1 *Diego Franco v Deliveroo Australia Pty Ltd* [2021] FWC 2818
2 (2020) 278 FCR 179.
3 *WorkPac Pty Ltd v Rossato* [2021] HCA 23).
4 [2020] FCAFC 119.
5 [2020] FCAFC 122.
6 *ZG Operations &Anor v Jamsek & Ors* [2022] HCA 2.
7 *CFMMEU & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1.
8 Ibid, at [18].
9 Andrew Stewart, "High Court rulings on employment relationships "frightening": Stewart", Workplace Express, 9 February 2022.

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- Sexual harassment, bullying and discrimination
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- Contracts, awards, enterprise agreements and policies
- Managing ill and injured workers
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