HFW

KEY DEVELOPMENTS IN AUSTRALIAN WORKPLACE RELATIONS LAW IN 2018 AND AREAS TO WATCH IN 2019

We look back on some of the key changes, spanning developments relating to vulnerable workers, family and domestic violence leave, enterprise agreement approval, protections for whistleblowers, casual employment, flexible working arrangements requests and proposed reforms ahead of the next federal election.

Each of these developments will be significant for employers in 2019.

Increased vulnerable worker protections

Modern Slavery Act 2018 (Cth)

The key feature of the legislation, passed by the Federal Parliament on 29 November 2018, is that it imposes an ongoing obligation for 'reporting entities' to file a modern slavery statement (Statement). A Statement is required to outline the steps the entity has taken to assess and address risks of modern slavery in its operations and its supply chains during a reporting period.

We anticipate that most reporting entities will be required to prepare and publish their first Statement in 2020 but the obligation may arise as late as 2021.

Of note is that NSW passed its own Modern Slavery Act 2018 (NSW) earlier in the year. Organisations are, however, unlikely to be required to comply with the NSW regime where they are subject to the Commonwealth regime.

If you are a reporting entity and required to prepare a Statement you should consider:

- When your first Statement needs to be prepared.
- What steps you need to take to ensure compliance.

Labour hire industry regulation

Over the last 12 months, QLD, Victoria and SA have introduced labour hire licensing schemes. These schemes make it unlawful to operate as a labour hire services provider without a licence and include strict penalties.

Labour hire licensing in SA commenced on 1 March 2018, however the Government has since introduced legislation to remove the licensing scheme. A licensing regime continues in QLD, and one is due to commence operation in Victoria in 2019.

A continued push for a national labour hire licensing scheme is expected, with the potential introduction of similar schemes in other jurisdictions (most likely NSW and ACT).

You should carefully evaluate whether your operations are caught by the new reforms, and if so, take action to ensure that you're compliant.

Be mindful that you may be covered by a scheme regardless of whether you are actually located in that state.

Family and domestic violence leave

The Federal Parliament passed an amendment to the Fair Work Act 2009 (Cth) that inserts a new minimum entitlement of five days of unpaid family and domestic violence leave per year in the National Employment Standards. The entitlement was made available to all national system employees, including casuals, as of 12 December 2018.

This amendment follows a decision in March 2018 by the Fair Work Commission (FWC) to include an entitlement to unpaid domestic and family violence leave in all modern awards.

Review your policies and procedures to ensure that they reflect the new entitlements and put you in the best position to assist employees experiencing family and domestic violence.

Enterprise agreement approval

The Federal Parliament passed amendments to the Fair Work Act 2009 (Cth) that provide the FWC with discretion to approve an enterprise agreement, despite "minor procedural or technical errors", as long as those errors did not disadvantage employees. The changes commenced on 12 December 2018.

In response, the President of the FWC has referred a number of existing enterprise agreement matters to a Full Bench that will provide some "early clarity" around the operation of the new discretion.

"As of 1 December 2018, all modern awards require that employers discuss a flexible working arrangement request with the employee before responding to the request, and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances."

You should, however, remain vigilant when making enterprise agreements and preparing for them to be approved by the FWC.

Expanded protections for whistleblowers

The Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (Bill) was passed by the Senate on 6 December 2018. The Bill is expected to be passed by the House of Representatives when Parliament resumes in early 2019.

The Bill seeks to strengthen whistleblower protections in the private sector under a single regime in the Corporations Act 2001 (Cth) by:

- Expanding the definition of whistleblower to include former officers, employees and suppliers of goods and services.
- Including a broad scope of the misconduct that may be disclosed by a whistleblower.
- Allowing for anonymous disclosures.
- Enhancing protections, immunities and compensation available to whistleblowers.
- Introducing a requirement that public and large proprietary companies have in place internal whistleblower polices.

You should consider whether your current practices, procedures and policies will be adequate in light of these reforms.

Casual employment

In August 2018, the Full Federal Court confirmed the definition of casual employment for the purposes of the Fair Work Act 2009 (Cth) in WorkPac Pty Ltd v Skene [2018] FCAFC 131 (Skene). The effect of Skene is that employment arrangements that lack the "essence of casualness", being flexibility and a lack of regularity, will not necessarily be casual arrangements even if an employee is treated as such under a modern award or enterprise agreement.
In response to Skene, the Federal Government has:

- Intervened in a separate test case about whether an employer is entitled to offset any amounts owed to a misclassified employee against the casual loading paid to the employee.
- Amended the Fair Work Regulations 2009 (Cth) to provide that where an employer has paid an identifiable casual loading to an employee engaged as a causal, it may potentially be offset against any subsequent claim for entitlements under the National Employment Standards.

You should undertake an analysis of your causal workforce to make sure they are working sporadic hours and are not being given any commitments about ongoing work.

Flexible working arrangements requests

The Full Bench of the FWC handed down the Flexible Work Decision on 25 September 2018. It proposed to insert a new model work flexibility clause to expand employer's obligations when considering requests for flexible working arrangements.

As of 1 December 2018, all modern awards require that employers discuss a flexible working arrangement request with the employee before responding to the request, and genuinely try to reach agreement on a change in working arrangements that will reasonably accommodate the employee's circumstances.

Where an employer refuses a request, the employer must provide details of the reasons for the refusal, including the business grounds for the refusal and how the grounds apply. If an agreement cannot be reached, the employer's written response must state whether there are any other changes in working arrangements that the employer can offer the employee so as to better accommodate the employee's circumstances.

Where to next?

With a federal election due by May 2019, the Australian Labor Party (ALP) has released some of its policy platforms, including its workplace relations platform. Key points from the ALP workplace relations platform include:

- Reversing cuts to Sunday and public holiday penalty rates.
- Increasing penalties for employers who systematically underpay and exploit workers.
- Ensuring workers have a clear right to communicate and meet with their union without interference and providing delegates with paid training leave.
- Introducing ten days paid domestic violence leave in the National Employment Standards.
- Providing parents with 26 weeks paid parental leave at full pay plus superannuation, through a combination of government and employer contributions.
- Including a right of review for unreasonable refusals of requests for changes to working arrangements to meet caring responsibilities.
- Working with State and Territory governments to achieve:
  - a national minimum standard for long service leave;
  - consistent treatment of public holidays; and
  - portability of entitlements through industry-wide schemes.
- Establishing a national labour hire licensing scheme.
- Improving access to multi-employer industry-wide collective bargaining.
- Ensuring that enterprise agreements are genuinely agreed to by a representative cohort of workers.
- Ensuring that enterprise agreements cannot be unilaterally terminated if it would reduce workers' entitlements.
- Preventing certain arrangements used to avoid employment entitlements and extending responsibility for the compliance of workplace laws to corporations who are the economic decision-makers.
- Encouraging the growth of apprenticeships through the introduction of apprentice ratios and quotas in public infrastructure projects.
- Ensuring the Fair Work Act 2009 (Cth) provides appropriate coverage for all forms of work, including gig economy workers.
- Retaining the FWC and the Fair Work Ombudsman, but abolishing the Australian Building and Construction Commission and repealing the Building and Construction Industry (Improving Productivity) Act, including the Code for the Tendering and Performance of Building Work 2016.

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