



EMPLOYMENT | DECEMBER 2023

REGULATED LABOUR HIRE - SAME JOB, SAME PAY LAWS HAVE COMMENCED

As we have previously let you know, the Federal Government has tabled the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth), which has been referred to the Senate Education and Employment Legislation Committee due to report back on 1 February 2024. However, in a surprise early Christmas present the Federal Government had agreed to split the Bill and as a result the regulated labour hire reforms have now been passed by both Houses of Parliament and have become law.

In this third update on the Bill, **Rush Jayaweera** considers the **regulated labour hire reforms**.

What has changed?

Where:

- there is a labour hire arrangement in place for an employer to supply one or more employees to a host (**Regulated Host**) to perform work for the Regulated Host; and
- an industrial instrument other than a modern award (e.g., enterprise agreement) applies to the Regulated Host; and
- the Regulated Host is not a small business employer,

the Fair Work Commission (**FWC**) has the power to make an order which requires the labour hire employer to pay the labour hire employees no less than the full rate of pay to which they would have been entitled under the Regulated Host's industrial instrument (**Order**). The full rate of pay includes bonuses, loadings, allowance, overtime, and penalty rates.

Whilst an Order can be made at any time, it cannot take effect prior to 1 November 2024.

Exclusion of Service Contracts

The FWC cannot make an Order if the performance of the work relates to the provision of a service rather than the supply of labour (**Service Contract**). In determining whether the work relates to the provision of a service (i.e., a Service Contract), the FWC must have regard to:

- the involvement of the labour hire employer in matters relating to the performance of work;
- the extent to which the labour hire employer directs, supervises or controls the labour hire employees when they perform the work;
- the extent to which the labour hire employees use the systems, plant, or structures of the labour hire employer to perform the work;
- the extent to which the labour hire employer is subject to industry or professional standards or responsibilities in relation to the labour hire employees; and
- the extent to which the work is of a specialist or expert nature.

Who can apply for an Order?

The following persons can make an application to the FWC for an Order:

- the labour hire employees;
- the employees of the Regulated Host;
- a union entitled to represent the above employees; or
- the Regulated Host.

What factors must the FWC consider before making an Order?

The FWC can only make an Order if it is satisfied that it is fair and reasonable in all the circumstances to do so, having regard to a range of factors including:

- the pay arrangements that apply to the employees of the Regulated Host and the labour hire employees;
- the historical industrial arrangements between the Regulated Host and the labour hire employer;
- the corporate relationship between the Regulated Host and the labour hire employer including whether they are related bodies corporate or engaged in joint venture or common enterprise; and
- the terms and nature of the arrangement under which the work is performed including the period for which the arrangement operates, the location of the work, the industry in which the Regulated Host and labour hire employer operate, and the number of labour hire employees involved.

Are there any exemptions?

Labour hire employees performing work for a Regulated Host for 3 months or less will fall outside the scope of an Order. However, the FWC has the power to extend or reduce an exemption period in exceptional circumstances. An Order will also not apply to labour hire employees employed under a training arrangement (e.g., apprenticeships).

What are the obligations of Regulated Hosts?

A Regulated Host must:

- share information with the labour hire employer about how the rate of pay for labour hire employees should be calculated;
- advise the labour hire provider if an industrial instrument relating to an Order is replaced etc;
- notify any tenders in connection with the supply of labour that they may become subject to an Order; and
- make an application to extend an Order to a new labour hire employer.

Anti-avoidance

Several anti-avoidance measures, backed by civil penalty provisions, have been introduced to make it unlawful for a Regulated Host or labour hire employer to set up a scheme which has the sole or dominant purpose of preventing the FWC from making an Order or avoiding the application of an Order. These provisions apply retrospectively from 4 September 2023.

Key take aways

An employer which uses a labour hire employer to supply labour to perform work for the employer should:

- carefully review the arrangement with the labour hire employer to determine whether they fall within the scope of the new laws (i.e., does the Service Contract exemption apply); and
- if the arrangement falls within the scope of the new laws, consider the risk of the labour hire employer being subject to an Order; and
- if the labour hire employer is subject to an Order, consider the implications of such an Order on the business operations and the contractual arrangement in place with the labour hire employer.

Please contact a team member if you have any questions or would like to know more about the proposed changes.

We take this opportunity to thank you for your support throughout 2023 and wish you and your families a wonderful, safe and joyous Christmas and New Years.

All the best.

For more information, please contact the author(s) of this alert.



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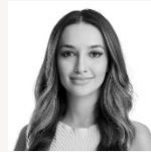
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