



## AUSTRALIA: EMPLOYMENT LAW | AUGUST 2024

# NOTHING TO GIG(GLE) AT – NEW PROTECTIONS FOR GIG WORKERS AND ROAD TRANSPORT CONTRACTORS ARE ON THE WAY

*Earlier this year, we published a briefing outlining changes to the Fair Work Act 2009 (Cth) (FW Act) which introduced a new statutory definition of 'employee' and affected the legal distinction between employees and contractors. These changes start to operate on 26 August 2024.*

*In this latest update, we consider the related topic of 'regulated workers' and key legislative changes that will soon introduce more rights for these workers.*

### What are regulated workers?

The FW Act has been amended to provide 'employee-like gig economy workers' who are otherwise contractors and perform work with a digital labour platform operator, and certain contractors in the road transport industry (both **regulated workers**), with greater rights. These changes will also start to operate on 26 August 2024.

These changes are significant, particularly for gig workers performing work on digital platforms (like mobile apps, or websites which allocate labour services, such as rideshare or delivery drivers), who will have the benefit of new protections if they are 'employee-like workers' – which they are likely to be if they have at least two of the following characteristics: (1) if they have low bargaining power in the negotiations for the services contract under which they perform work, (2) they are paid the same or less than employees performing comparable work, (3) they have a low degree of authority over the performance of their work, or (4) they have other characteristics prescribed by the regulations.

### Minimum standards orders

The Fair Work Commission (**FWC**) will have the power to set minimum standards orders for regulated workers. These orders will operate as a safety net and can include terms in respect of matters such as payment terms, deductions, record-keeping, insurance, consultation, representation, delegates' rights, and cost recovery. However, the FWC cannot make minimum standards orders about things such as overtime rates, rostering arrangements, or any terms that would change the nature of the engagement of the worker (such as to one of employment). A contravention of a minimum standards order will attract penalties. The FWC may also make non-binding minimum standards guidelines with respect to the above matters.

In the road transport industry, the FWC may also make road transport contractual chain orders that set standards for certain regulated road transport contractors, road transport employee-like workers and other persons in road transport contractual chains. It may also make non-binding guidelines. The types of terms these orders and guidelines may include are those with respect to payment times, fuel levies, rate reviews, termination (including termination for convenience), and cost recovery. A contravention of a road transport contractual chain order will also attract penalties.

### Unfair deactivations and unfair terminations

The FWC will also have the power to deal with disputes in relation to regulated workers who have been 'unfairly deactivated' from a digital labour platform or 'unfairly terminated' from their road transport services contract. This jurisdiction is similar to the current unfair dismissal system for employees insofar as a valid reason for the deactivation or termination related to capacity or conduct is required, and the FWC must also take into account

whether relevant processes in the Digital Labour Platform Deactivation Code or the Road Transport Industry Termination Code (as applicable, but which are yet to be developed by the Minister) were followed.

Regulated workers will need to meet certain requirements to be eligible to make these claims – including a six-month service requirement and having an annual rate of earnings less than the 'contractor high income threshold', which is a figure to be set by the regulations.

## Collective agreements

The changes will extend access to collective bargaining by introducing a framework enabling digital labour platform operators or road transport businesses to enter into 'collective agreements' with unions, in relation to the terms and conditions on which regulated work is performed. If registered with the FWC, a collective agreement will create legally binding obligations, a contravention of which will attract a penalty. Collective agreements cannot specify terms and conditions that are less beneficial than those set by a minimum standards order.

## Key takeaways

The changes introduce more rights for employee-like gig economy workers on digital labour platforms and regulated road transport industry contractors, by adding a further layer of compliance and regulation for businesses who engage such workers. This represents a significant extension of the regulation of work in the Australian economy.

Businesses that engage regulated workers should:

- carry out a review of their existing arrangements and processes for regulated workers and consider whether they need to be refreshed;
- keep a lookout over the coming months for new codes and regulations being developed (such as the Digital Labour Platform Deactivation Code or the Road Transport Industry Termination Code); and
- stay alert for developments and changes in this regulatory space over the coming months, particularly in relation to the development of any minimum standards orders, minimum standards guidelines or collective agreements.

Please contact any member of the HFW team if you would like advice about how your business can prepare for these changes.

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