Fair Work Act

Key changes, fact sheets and checklists

Australian Government

AUSTRALIAN INDUSTRY GROUP

Unfair dismissal

KEY CHANGES

- No exclusions for unfair dismissal provisions based on business size.
- Employee must have 12 months service if they are employed in a business with <15 employees, or 6 months in businesses with 15 or more employees before they can make an unfair dismissal claim.
- Operational reasons are not a feature of the Fair Work Act 2009. However, a dismissal will not be unfair if Fair Work Australia is satisfied it was a genuine redundancy.
- New Small Business Fair Dismissal Code
- A person who has been dismissed has 14 days to make an unfair dismissal application.
- FWA will hold a conference or a hearing in an unfair dismissal case that involves contested facts.
- FWA conferences are informal and are the preferred option in an unfair dismissal claim, but FWA can conduct a public hearing if they consider it would be the most effective and efficient way of dealing with the claim.
- FWA cannot grant appeals from a decision made in an unfair dismissal case unless in the public interest to do so. An appeal on a question of fact can only be made on the ground that the decision involved a significant error of fact.
- These are now dealt with under the General Protections part of the Fair Work Act 2009 which is a separate section of the Act to unfair dismissal
- In some situations, high earning employees will be excluded from unfair dismissal protections. Employees covered by awards or enterprise agreements will have access to unfair dismissal remedies. However, if neither of these criteria applies, a person will only be able to bring an unfair dismissal claim if their annual rate of earnings is less than the high income threshold (which from 1 July 2009 is $108,300, indexed annually).

WHAT ACTION SHOULD EMPLOYERS TAKE?

- ✔ Determine whether you are a "small business" employer
- ✔ Determine whether your employees will have access to unfair dismissal and, if so, which employees
- ✔ Review any new risks versus benefits of various methods of engagement of workers for your business- fixed term, specified task, casual and seasonal
- ✔ Review and amend where necessary employment contracts including probationary/qualifying period clauses
- ✔ Review impact of new "annual rate of earnings" definition for "high income earners"
- ✔ Review and amend where necessary disciplinary and termination procedures - will they meet the "Fair go all round test" or "Fair Dismissal Code"?
- ✔ Educate managers and supervisory staff on the risks of unfair dismissal claims, as well as your disciplinary and termination procedures

Enterprise agreements, Bargaining and Industrial action

KEY CHANGES

Types of Agreements

Under the previous system there were multiple streams of agreement making, including AWAs, ITEAs, union collective agreements, employee collective agreements, union greenfields agreements, employer greenfields agreements and multi business agreements.

The new system has a single stream of enterprise agreements - there is no distinction between union and non-union agreements.

Only new collective agreements are permitted (individual enterprise agreements are only available in some circumstances until 31 December 2009 and greenfields agreements without a union party are not available from 1 July 2009). New concepts of single and multi-enterprise agreements apply.

Content of Agreements

Prohibited content restrictions have been removed and replaced with a new concept of permitted matters, resulting in a wider range of matters that can be included in enterprise agreements.

Permitted matters

- Matters pertaining to the relationship between the employer (or employers) and employees covered by the agreement;
- Matters pertaining to the relationship between the employer (or employers) and employee organisation (or employee organisations) covered by the agreement;
- Deductions from wages for any purpose authorised by an employee covered by the agreement; and
- How the agreement will operate.
- Terms about trade union training leave are able to be included in agreements.

Mandatory matters

- Agreements must include a flexibility term (enabling arrangements to be made with individual employees to vary agreement terms in certain circumstances), and a term requiring consultation with employees about major workplace changes, and some other specified terms

Bargaining process

- Employers must advise employees upon commencement of bargaining that they may appoint a bargaining representative and unions are deemed to be the bargaining representatives of their members unless the employee specifies otherwise
- The concept of a "bargaining period" no longer applies
- Employers, unions and other bargaining representatives must comply with new "good faith bargaining requirements"
- FWA may issue various orders and determinations to facilitate bargaining, including bargaining orders, majority support determinations, scope orders and orders requiring employers in a new "low-paid bargaining" stream to bargain
- FWA has the power to arbitrate and determine an outcome where no agreement has been reached in some circumstances

Approval of Agreements

- New process and requirements for lodgement of agreements with, and approval by, FWA
- The NES will apply to all existing and new agreements from 1 January 2010
- From 1 January 2010 new agreements must pass a new approval test - each employee must be "better off overall" under the agreement compared with the relevant modern award
- After an agreement is made, a union that was a bargaining representative can become covered by the agreement by giving written notice to FWA prior to approval

Industrial Action

Employee industrial action includes matters such as bans and strikes. There are two types of employee industrial action i.e. 'employee claim action' or 'employee response action'.

Employer industrial action is limited to a 'lock out' of employees and can only be taken in response to employee industrial action.

What does protected industrial action mean?

Protected industrial action means industrial action that is permitted in relation to a proposed enterprise agreement. There are heavy penalties for unprotected action.

Other matters:

- Expansion of matters over which protected industrial action may be taken during bargaining i.e. permitted matters
- Protected industrial action may be taken before the nominal expiry date of "conditionally terminated" AWAs/ ITEAs
- Protected industrial action may be suspended or terminated if it is causing or threatening to cause significant economic harm to the parties
- Changes to rules regarding payment to employees during periods of industrial action
- Lock out action now only available to employers in response to employee protected industrial action

WHAT ACTION SHOULD EMPLOYERS TAKE?

- ✔ Pre-WorkChoices certified agreements consider variation / extension before 31 December 2009
- ✔ WorkChoices collective agreements new laws apply to re-negotiations from 1 July 2009:
  - ❑ re-negotiate before nominal expiry date if possible to avoid threat of protected industrial action
  - ❑ consider impact of new bargaining laws on types of agreements available, good faith bargaining obligations, BOOT, new content requirements, union involvement and strategy
  - ❑ develop strategy re: wage outcomes, duration and other terms
- ✔ AWAs/ ITEAs:
  - ❑ consider options for allowing agreements to continue beyond nominal expiry date
  - ❑ determine strategy if employees/union/s seek to negotiate a collective agreement
  - ❑ consider replacement with a collective agreement under new laws and most effective timing
- ✔ No current agreement - compare pros/cons of negotiating a collective agreement versus continuing to apply the award and common law conditions (considering impact of new modern awards from 1 January 2010)
- ✔ Industrial action:
  - ❑ Assess risk and undertake contingency planning for both protected and unprotected industrial action
  - ❑ Avoid agreeing to conditionally terminate AWAs / ITEAs due to exposure to protected industrial action

Union right of entry

KEY CHANGES

- Union officials (with a valid permit) have the right to enter your workplace to hold discussions with employees whose industrial interests the union is entitled to represent and/or to investigate suspected breaches of the Act, an award or enterprise agreement, even if that union is not a party to the applicable award or enterprise agreement in your workplace.
- When investigating a suspected breach, union officials have a new right to access certain employment records of employees who do not belong to their union (where the union has the employees' written consent or a FWA order).
- An entry permit issued under previous laws will continue to have effect. The permit will still be subject to any terms and conditions imposed upon it under the old laws.

WHAT ACTION SHOULD EMPLOYERS TAKE?

- ✔ Identify which union/s have the right to enter your workplace so you are prepared for any unexpected visits and potential demarcation disputes
- ✔ Review your business' current union right of entry practices and procedures are they compliant/ adequate?
- ✔ If you currently don't have any site protocols, consider developing them now
- ✔ Educate all relevant personnel (including managers, supervisors, security and reception) on your procedures and their rights/obligations
- ✔ Communicate your protocols and behavioural expectations to your workforce and the union officials you normally deal with.

Modern awards

KEY CHANGES

- The AIRC will create modern awards to cover all employees who perform work that has historically been regulated by awards.
- New modern awards will operate from 1 January 2010, replacing existing federal awards and NAPSAs
- A significantly reduced number of awards, affecting terms and conditions in some industries /sectors
- Transitional provisions as part of the implementation of modern awards
- Common rule application of modern awards means that certain employees may become award-covered for the first time
- New award obligation to consult with employees/unions on workplace change
- Enterprise awards are to be modernised over the next 4 years; otherwise they automatically terminate
- Individual flexibility provisions to meet employee/employer needs on certain award matters

WHAT ACTION SHOULD EMPLOYERS TAKE?

- ✔ Identify which modern award/s will apply to your business and how their terms and conditions differ from those in the current applicable award/s
- ✔ Assess the financial and operational impacts of any changes in terms and conditions under the modern award/s
- ✔ Consider if any employees will become award-covered for the first time
- ✔ For non-agreement covered employees review existing awards, policies and employment contracts, amend where necessary and provide "written guarantee of annual earnings" as appropriate
- ✔ For agreement covered employees consider the impact of modern award/s in applying the "better off overall test"
- ✔ If an enterprise award applies, review the impact of the award modernisation process
- ✔ Consider preserving existing award terms and conditions through enterprise bargaining before 1 January 2010
- ✔ Understand the award flexibility provisions

National Employment Standards

KEY CHANGES

- 10 National Employment Standards (NES) will apply as legislated minimum conditions to all employees in the federal system from 1 January 2010, replacing the Australian Fair Pay & Conditions Standard (AFPCS)
- The NES include maximum hours of work; annual, personal/carer's, compassionate and parental leave; flexible work arrangements; community services leave; public holidays; long service leave; notice of termination and redundancy pay and fair work information statements
- NES conditions cannot be excluded or reduced by awards or enterprise agreements
- The NES include some important changes to current AFPCS entitlements and some new entitlements including:
  - New rights of parents to request additional unpaid parental leave and flexible working arrangements
  - New rules re: cashing out of leave
  - Notice of termination must be given in writing
  - New calculation of payment in lieu of notice
  - Entitlement to severance pay for all employees including, for the first time, for all award-free employees, subject to certain exclusions
  - Partial preservation of existing award and agreement long service leave provisions
  - Provision of a Fair Work Information Statement by employers to all new employees

WHAT ACTION SHOULD EMPLOYERS TAKE?

- ✔ Assess whether the new minimum employment conditions will impose new obligations on your business
- ✔ Review and amend where necessary your policies and letters of offer / employment contracts
- ✔ Review existing workplace agreements to assess the likely impact of NES
- ✔ Obtain Fair Work Information Statement and ensure distribution as required

General protections provisions

KEY CHANGES

The Workplace Relations Act 1996 contained a range of protection provisions that were scattered throughout the legislation and in some cases duplicated. The Fair Work Act 2009 has consolidated and streamlined related protections into one part of the Fair Work Act 2009. The general protections provisions maintain existing protections in the Workplace Relations Act 1996. However, consolidating the specific protections into broad generally applicable protections means that a number of the protections have been expanded.

There are new "General Protections" provisions dealing with:

- The protection of "workplace rights" such as the benefit of an industrial instrument, the right to initiate proceedings under an industrial law and the right to make a complaint or inquiry. Essentially it is unlawful for a person to take "adverse action" against another person because the other person has a workplace right, has exercised a workplace right, or proposes to exercise a workplace right;
- Protection against discrimination;
- Freedom of association;
- The right to be involved in lawful industrial activities;
- Outlawing union claims for bargaining agents fees;
- Unlawful coercion;
- Misrepresentations; and
- Sham contracting arrangements.

Businesses are exposed to injunctions, financial penalties and compensation orders for breaches.

Claims alleging discriminatory or wrongful treatment under these provisions can be made not only following termination of employment but also as a challenge to demotions and decisionsto refuse to employ or promote individuals

WHAT ACTION SHOULD EMPLOYERS TAKE?

- ✔ Review your recruitment, equal employment opportunity (EEO), disciplinary and termination procedures - do they guard against "discriminatory" or "wrongful treatment"? Amend where necessary
- ✔ Educate managers and supervisory staff on the risks of general protections claims plus your relevant procedures

Transfer of business

KEY CHANGES

- The concept of 'transmission of business' has been replaced by 'transfer of business'. New test for determining whether there has been a "transfer of business" is based on the nature of the work performed by the transferring employee, not the character of the business

What constitutes a transfer of business?

- There will be a transfer of business from an old employer to a new employer if:
  - the employment of an employee of the old employer has terminated;
  - within 3 months after the termination, the employee becomes employed by the new employer;
  - the transferring employee performs the same, or substantially the same, work for the new employer as he or she performed for the old employer;
  - there is at least one of four connections between the old employer and the new employer. The four connections are: an asset transfer; an outsourcing; an insourcing; or that the new and old employers are associated entities.
- Industrial instruments (e.g. awards, collective agreements and AWAs/ ITEAs) of the old employer may apply to the new employer in a much broader range of situations, including where:
  - the employees continue to perform substantially the same work even if the businesses of the old and new employer are quite different
  - work is outsourced or insourced
  - employees move between companies in the same corporate group
- Transmitted instruments no longer automatically terminate after 12 months but will continue to apply until terminated by FWA or replaced by a new registered enterprise agreement
- Changes to rules regarding recognition of prior service for accrued entitlements

WHAT ACTION SHOULD EMPLOYERS TAKE?

- ✔ Examine the likely impact and risks of the new provisions if you are considering:
  - purchasing or selling a business (or part of a business);
  - outsourcing or insourcing any functions within your business e.g. IT, maintenance;
  - operating as an outsource provider, including a labour hire firm; or
  - restructuring within your corporate group involving a transfer of employees from one entity to another
- ✔ Explore options available to avoid or minimise the impact of transfer of instruments
- ✔ Ensure your business will be / is compliant with instruments that will / do apply through transfer of business