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Employment & Safety Alert
Further Fair Work Act amendments

28 June 2013

Last night, the Senate passed the *Fair Work Amendment Bill 2013* (**Amending Act**) to amend the *Fair Work Act 2009* (**FW Act**). Changes were made to the Amending Act in the past fortnight in order to secure sufficient support to pass through the Senate.

The key changes that the Amending Act will make to the FW Act relate to:

- work/life balance, including:
  - parental leave;
  - requests for flexible working arrangements;
  - consultation about changing rosters or working hours; and
  - transfer to a safe job;
- bullying;
- right of entry;
- arbitration of general protections disputes; and
- technical issues.

The changes will require employers to reconsider aspects of how they manage their workforce.

Parental leave

The parental leave provisions under the National Employment Standards will be amended to allow parents to take concurrent leave of up to eight weeks, which can be taken in separate periods (of generally no less than two weeks at a time). Until now, the concurrent entitlement has been only three weeks.

Employers may need to consider updating their parental leave policies to account for this additional period of concurrent leave, as well as training managers on responding to requests for concurrent parental leave.

Together with the amendments relating to requests for flexible working arrangements and transfer to safe job provisions, the parental leave amendments will commence operation on a date to be fixed, which will depend on parliamentary implementation processes, and is expected to be within six months.

Requests for flexible working arrangements

Flexible working arrangements will be amended to allow more employees to request a change in their working arrangements. Currently, the class of employees who can make such a request includes only employees who are parents or have responsibility for the care of a child under school age or under 18 with a disability. The Amending Act will expand this group, which will now include:

- an employee who is a carer within the meaning of the *Carer Recognition Act 2010* (Cth) – this includes an individual who provides personal care, support and assistance to another who needs it because of:
  - a disability;
  - a medical condition (including a terminal or chronic illness);
  - mental illness; or
  - frailty and age.

- an employee with a disability;
- an employee who is experiencing violence from a member of the employee's family; and
- an employee who is providing care or support to a member of the employee's immediate family or member of the employee's household because that person is experiencing violence from someone in his/her family.

Employers are currently able to refuse a request for flexibility on 'reasonable business grounds', but this term was not defined in the FW Act. The Amending Act changes this, providing an inclusive definition. 'Reasonable business grounds' will now include that:

- the requested arrangements would be too costly;
- there is no capacity to change arrangements of other employees to accommodate the requested arrangements;
- it would be impractical to change the working arrangements of other employees or recruit new employees to accommodate the request;
- the requested arrangements would be likely to result in a significant loss in efficiency or productivity; and
- the requested arrangements would be likely to have a negative impact on customer service.

Employers should ensure that any policies, procedures or application forms that relate to requests for flexible working arrangements are updated to reflect the new classes of employees who can apply for flexibility, while also ensuring that managers are trained in understanding the reasonable business grounds exemption which should guide their decisions in response to those requests.

Consultation

Modern awards and enterprise agreements made or varied after 1 January 2014 will be required to include a provision that an employer must consult with employees about a change to their regular roster or ordinary hours of work and which permits the representation of those employees for the purpose of that consultation.

Once these requirements are implemented, employers considering varying the ordinary hours or rosters of employees must ensure that they consult with affected employees.

Transfer to a safe job

All pregnant employees will be entitled to receive a transfer to a safe job or paid leave if no safe job is available, if they comply with the evidence requirements specified in the FW Act. The previous entitlement only applied to those pregnant employees who had completed 12 months' continuous service with their employer.

Employers should ensure that their parental leave policies and procedures reflect these entitlements.

Stop bullying provisions

The FW Act will be amended to introduce a new remedy for workers who feel that they have been, and will continue to be, subjected to bullying at work. These employees will be able to make an application to the Fair Work Commission (**FWC**) for an order to stop the bullying.

Under the proposed new laws, bullying at work occurs if an individual (or group of individuals) repeatedly behaves unreasonably towards a worker or a group of workers, creating a risk to health and safety.

Workplace bullying does not include *'reasonable management action carried out in a reasonable manner'*. In this respect, the bullying definition is consistent with similar wording found in existing workers' compensation legislation in some jurisdictions.

The FWC may make orders to stop the bullying if it is satisfied that the worker has been bullied at work by an individual or group of individuals and there is a risk that the worker will continue to be bullied.

The FWC will be able to make any orders which it considers appropriate, other than the payment of money.

A person who contravenes a stop bullying order will be subject to the civil penalty provisions under the FW Act.

The FWC must start to deal with an application for a stop bullying order within 14 days after the application is made.

The workplace bullying amendments are due to commence operation from 1 January 2014, rather than 1 July 2013 as had been previously foreshadowed.

In addition to these amendments to the FW Act, Safe Work Australia has also recently released its draft Code of Practice in Responding to Workplace Bullying. This draft Code is open for public comment until 15 July 2013 and it is expected that it will be adopted without further modification shortly after that date.

Employers should ensure that any policies or procedures dealing with workplace bullying are updated to manage and respond to all bullying complaints in light of these developments.

Right of entry provisions

The changes to the right of entry provisions made by the Amending Act are as follows:

- a tea room/lunch room/crib room will be the default area for union discussions if the parties cannot agree on an alternative venue in which to hold meetings;
- the FWC will have the power to deal with disputes regarding the frequency with which union right of entry is exercised for the purpose of holding discussions, if the frequency of entry '*would require an unreasonable diversion of the occupier's critical resources*';
- employers in remote areas will be required to facilitate union right of entry by providing accommodation and transportation at cost, subject to reasonable notice; and
- the FWC will have a power to resolve disputes by conference or arbitration, about whether:
  - the accommodation or transportation is reasonably available;
  - providing the accommodation or transportation would cause the occupier 'undue inconvenience' (a phrase which is unhelpfully not defined); and
  - the request was made within a reasonable period.

Employers will need to ensure that arrangements for union right of entry are compliant with the new provisions of the FW Act, in particular ensuring that obligations in relation to meeting rooms, accommodation and transport are factored into future discussions with any union seeking to exercise its right of entry.

The right of entry amendments will commence operation from 1 January 2014.

Arbitration of general protections claims

The FWC will have a new power to arbitrate general protections and unlawful termination claims, but only where the FWC has issued a certificate that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful **and** the parties notify the FWC that they agree to the FWC arbitrating the dispute.

When arbitrating a general protections dispute, the FWC may only make one of the following orders:

- reinstatement of the person;
- payment of compensation to the person;
- payment of an amount to the person for remuneration lost;
- maintenance of the continuity of the person's employment; or
- maintenance of the period of the person's continuous service with the employer.

The FWC cannot issue a pecuniary penalty in relation to a general protections claim which is heard by way of arbitration.

This change should facilitate faster access by applicants to the resolution of general protections claims, while also providing employers with the opportunity to agree to an arbitration in this forum without the risk of incurring the (potentially substantial) penalties associated with general protections court applications.

Applicants can still elect to have their general protections and unlawful termination claims heard by a court if they elect to do so within 14 days of the FWC issuing a certificate that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful.

The consent arbitration amendments will commence operation from 1 January 2014.

Thomsons Lawyers can assist employers to prepare the necessary amendments to their policies and procedures for the purpose of compliance with these new amendments. We can also assist you with any relevant training updates for key personnel within your organisation.

For further information, please click here to contact our national Employment & Safety team.

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