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Legal Solutions newsletter

workforcelegalsolutions

New facsimile number

Workforce Legal Solutions has a new facsimile number: **(03) 9563 5667**. Our telephone number remains unchanged.

Mediation services

Did you know that Paula is an Accredited Mediator under the National Mediator Accreditation System? Paula has also become a Practitioner Member of LEADR - Association of Dispute Resolvers.

Mediation services can be provided at the client's workplace and is an effective way of assisting parties that are in a dispute. Mediation facilitates negotiation between parties by isolating the issues in dispute and then developing options for their resolution so that parties develop a solution to the dispute. Parties participating in a mediation are said to be more satisfied with the resolved outcome as they have owned the process and negotiated their own solution with the assistance of the mediator.

Should you have a dispute between staff members or a staff member and a manager within your organisation, please contact Workforce Legal Solutions to discuss the provision of our mediation services as an alternative mechanism to resolve disputes within the workplace.

Fair Work Act 2009

Please find outlined below a general overview of the provisions of the new *Fair Work Act 2009*.

We will provide fact sheets, detailing more information on these new provisions over the coming months.

The *Fair Work Act 2009* ("the Act") passed through Parliament on 20 March 2009 and received the Royal Assent on 7 April 2009.

1. Fair Work Australia

A new institution called Fair Work Australia ("FWA") will create a 'one-stop shop' on workplace relations and will replace the current Australian Industrial Relations Commission, Australian Fair Pay Commission and the Workplace Authority from 1 January 2010.

FWA will have the power to vary the awards, make minimum wage orders, approve agreements, determine unfair dismissal claims and make orders on good faith bargaining and industrial action.

Office of the Fair Work Ombudsman

From 1 February 2010, the Office of the Fair Work Ombudsman will replace the;

- Workplace Ombudsman; and
- Australian Building & Construction Commission.

This Office will appoint Fair Work Inspectors to assist employers, employees and organizations to comply with the new workplace relations laws and to take steps to enforce it through the court system.

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2. National Employment Standards

National Employment Standards ("NES") will replace the Australian Fair Pay and Conditions Standard ("AFPCS") and consist of ten minimum standards that will apply to employees from 1 January 2010.

The NES include:

- Maximum weekly hours of work—38 hours plus reasonable additional hours
- Requests for flexible working arrangements to assist an employee to care for a child
- Parental leave of 12 months' unpaid leave that can be extended for a further 12 months
- Annual leave of four weeks or five weeks for shift workers with accrual based on ordinary hours
- Personal/Carer's leave (ten days plus two days unpaid) and Compassionate leave of two days per occasion
- Community service leave including entitlement to be absent from work during period of voluntary community or emergency service and jury service leave
- Long service leave—based on award or agreement provisions
- Public holidays
- Notice of termination and redundancy pay; and
- Fair Work Information Statement—must be given to new employees about the NES, modern awards, and other entitlements of employees.

Terms of modern awards must not exclude any provision of the NES.

Under the transitional instrument (*Fair Work Transitional Provisions and Consequential Amendments Act* 2009), where an existing workplace agreement is detrimental to an employee when compared to the NES, the term of the agreement is of no effect.

3. Modern Awards

Will be based on ten NES and may include ten minimum conditions of employment tailored for the particular industry.

Includes minimum wages, types of employment arrangements for when work is performed, overtime and penalty rates, annualised salary, allowances, leave related matters, superannuation, and procedures for consultation, representation and dispute settlement.

Employees who have guaranteed earnings of more than $100,000 pa pro-rata will not be covered by modern awards, but can still be covered by collective agreements. Earnings must be guaranteed in writing and agreed by employee in advance. Earnings not guaranteed in advance such as performance bonuses will not be included in guaranteed earnings. Non-monetary benefits such as a car and laptop can be included where their value can be calculated.

The high income threshold will be indexed annually from 27 August 2007 and adjusted in July each year.

These provisions are expected to commence from 1 January 2010. In addition, modern awards will be reviewed on a four yearly basis by FWA with the first review expected to take place 2014. An interim review will take place in 2012.

4. Unfair Dismissal

The changes to unfair dismissal came into effect as of 1 July 2009.

Businesses with more than 15 full-time equivalent employees: employees must serve six months' qualifying period before they can make an unfair dismissal claim which includes casuals who have regular and systematic employment.

Businesses with less than 15 full-time equivalent employees: employees must serve 12 months' qualifying period before they can make an unfair dismissal claim and employers must follow Fair Dismissal Code to ensure dismissal is not unfair.

Employees are excluded from making a claim if the dismissal was a "genuine redundancy" in that the employer no longer required the job to be performed by anyone due to changes in the operational requirements and the employer has complied with any obligation in a modern award or

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enterprise agreement that applied to consult about the redundancy. It is not considered a genuine redundancy if it was reasonable in the circumstances for the person to be redeployed within the organisation or associated entity of the employer.

Special arrangements will apply for small business with fewer than 15 full-time equivalent employees until 1 January 2011. From 1 January 2011, the special arrangements will apply to small businesses with fewer than 15 employees based on headcount. Other features of the unfair dismissal provisions include;

- Application for unfair dismissal must be made within 14 days
- Informal approach is taken where FWA will ascertain the facts, making inquiries and having discussions with employers/employees; holding conferences in attempt of mediated resolution
- Full public hearings where complex issues are involved; and
- Remedy will be the reinstatement of the employee unless it is not in the interests of the parties or compensation capped at six months.

5. Bargaining in Good Faith

The new bargaining system came into effect on 1 July 2009.

'Good faith' bargaining requirements must be met by bargaining representatives. These requirements are;

- Attending and participating in meetings held at reasonable times
- Disclosing relevant information in a timely manner
- Responding to proposals by other parties in a timely manner
- Giving genuine consideration to proposals from other parties and giving reasons for responses to proposals
- Refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.; and
- Recognising and bargaining with the other bargaining representatives for the agreement.

A bargaining agent can apply to the FWA for a bargaining order when another party is not meeting these requirements. A bargaining order specifies actions necessary to ensure good faith bargaining.

A bargaining representative can apply for a serious breach declaration where there has been serious and sustained contravention of bargaining orders. The effect of the declaration is that after 21 days, the FWA is required to make a bargaining related workplace determination which essentially means they can arbitrate the matter in issue.

Majority Support Determinations

Where an employer has not agreed to bargain, the bargaining representative of an employee can apply to the FWA for a majority support determination. The FWA can determine this by using whatever method appropriate such as ballot or petition. The FWA must issue a majority support determination if the majority of employees who will be covered by the agreement want to bargain with the employer.

Where FWA determines a majority employee support for enterprise bargaining or where the employer has agreed to bargain, the employer will be required to notify employees within 14 days of their right to be represented in bargaining.

Scope Orders

When a bargaining representative has concerns that bargaining is not progressing efficiently or fairly, or it considers that the agreement will not cover appropriate employees, it can apply for a scope order. A scope order can limit or expand the scope of an enterprise agreement that is being negotiated.

The transitional provisions do not carry over bargaining or protected industrial action under the *Workplace Relations Act* to the new system. However, FWA will be able to take into account the history of bargaining between the parties.

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6. Collective Agreements

New laws governing enterprise agreements came into effect as of 1 July 2009.

Two types of agreements are provided for, including a single-enterprise agreement ("SEA") or a multi-enterprise ("MEA"). Greenfield agreements can still be made for a genuine new enterprise.

Where an employer agrees to bargain, initiates bargaining; or a majority support determination or scope order comes into operation, the employer must provide notice to all employees that they can be represented by a bargaining agent.

For agreements to be approved, it must be satisfied that:

- Employer and employees genuinely agree to the agreement
- Employees are **better off overall** by entering into the agreement in comparison to the modern award; and
- Terms of the agreement do not contravene the NES.

7. Protected Industrial Action

Rules came into effect as of 1 July 2009.

Protected industrial action will only be available during collective bargaining if it has been approved by a majority of employees in a mandatory secret ballot.

Employees and/or their bargaining agents must provide the employer three days' written notice of intention to take protected industrial action.

Where protected action is taken that results in the complete withdrawal of labor (in the form of a strike) an employer must withhold payment for the actual period of the industrial action.

When employees take protected action by performing only part of their duties (partial work ban), the employer can choose, after notifying the employees, to make full payment or dock part of the employee's wage proportional to the duties the employee has refused to perform.

8. Right of Entry

When entering for discussion purposes to investigate a possible breach of the Act or a fair work instrument, unions must comply with the following provisions:

- Union official must hold a valid right of entry permit issued by FWA, which can only be issued to a "fit and proper person"
- The permit holder must give 24 hours notice before entering and entry can only occur during working hours
- The permit holder must set out the basis on which entry is made, detailing relevant pats of union rules that give union right to represent the employee; and
- A permit holder must comply with any reasonable request from an employer that discussions or interviews take place in a particular part of the premises and that they take a particular route to reach that location, and must comply with any OH&S request.

Union officials will be able to look at, and copy the employment records of employees only where those records are relevant to the suspected breach being investigated.

Non-member records will not be inspected or copied by a permit holder unless the non-member gives written consent or FWA agrees.

9. Freedom of Association and other Workplace Rights

The current freedom of association, unlawful termination and other miscellaneous protection provisions were combined into a new set of general protections and came into effect on 1 July 2009.

Under these protections, it will be unlawful for a person to take adverse action because another person has, or exercises a workplace right. Adverse action includes dismissal, discrimination, refusing to employ a person, or prejudicially altering the position of a person.

Fair Work Ombudsman

Has produced 11 Best Practice guides to assist employers to make better use of the provisions of the *Fair Work Act*.

Please go to the Workforce Legal Solutions' website at www.workforcels.com to be taken to the link for these guides.

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