INDUSTRIAL RELATIONS UPDATE

December 2018

Domestic Violence Leave now in the NES

As expected, the parliament has enacted changes to the National Employment Standards to include five days per annum unpaid family and domestic violence leave. This means that regardless of whether the work place is covered by a modern award or an enterprise agreement, provided the various preconditions are met, the entitlement applies to all national system workplaces.

The entitlement is available in full at the beginning of each year but is not cumulative. It becomes 'available' at the commencement of the legislation (which should be shortly once the Bill receives royal assent) for all existing employees in a particular workplace as there is no qualifying period of employment. Part timers and casuals are entitled to this leave in full as well. To work out the twelve month periods for casuals, the legislation stipulates the first date the casual employee ever worked for the employer is the anniversary date for the purposes of this leave.

Employees are entitled to access this leave if they are experiencing family and domestic violence and they need to take some particular action to deal with it, and they need to do that during their normal working hours. An example would be an employee who works the same hours as the magistrates' courts, and has a matter set down during those hours.

The leave can be taken in one continuous run of five days or one or more days separately. Any other combination (e.g. half a day) is subject to the employer's agreement. Employees, if they are requested by their employer, must provide evidence of any claim for this leave. Once a claim has been made and, if required, evidence of entitlement provided, the employer is obliged to take steps to ensure the matter is treated confidentially.

Some states have, or could have, legislation covering leave for victims of crime. This federal legislation makes clear that if that local leave applies, it does so in *addition* to the NES. This legislation also contains a special provision permitting applications to vary enterprise agreements, made before this legislation comes into affect, to remove any uncertainty or difficulty relating to the interaction between the enterprise agreement and this new Standard.

Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018

Unsure of your Public Holiday obligations over the Christmas/New Year Period?

Are you obliged to observe part holidays in your location?

Don't sweat. Simply give us a call on (02) 9231 2088

One week in lieu maximum

Where an employee terminates their employment without giving the requisite notice, in many situations, it is available to the employer to deduct from that employee's final pay, payment in lieu of notice. The standard scale has been in widespread use, which allows up to four weeks pay, depending on the length of service, to be deducted.

But a full bench decision earlier this year as part of the Four Yearly Review, has restricted the amount an award dependent employee can have deducted from their pay to one week, regardless of the employee's length of service.

This is an example of a change that can easily slip under the radar where awards are being changed, especially now when they are not going to be part of a widely publicised Review (see story overleaf). And in this case, the FWC made the change on its own volition, no one asked for it.

Parliament Finally Acts!

In a shocking new development out of Canberra, politicians have actually fixed some problems with the Fair Work Act. Analysts are still checking to see if this was due to inadvertence or perhaps early Christmas cheer, but whatever the reason, it's good news for a change.

The amendments to the legislation include allowing the Commission to ignore trivial irregularities in paperwork associated with the enterprise agreement approval process. Avid readers of *IR Update* will recall notorious stories about problems with the Notice of Representational Rights over the years. Examples included deal breaking problems like putting the Notice on company letterhead, or stapling some helpful additional information about the process to the Notice. Or, *quelle horreur*, putting the Fair Work Ombudsman phone number on the Notice instead of the FWCs.

Now, Commission members have finally been entrusted to see these 'irregularities' for what they are - petty, inconsequential matters that make absolutely no difference to the employer and employees who have come to a settlement.

Bargaining is in great decline. Just over two million employees are covered by EBAs now, out of a workforce north of nine. Unfair dismissal claims outnumber EBA approval requests by three to four times. It really ought to be the other way round. So anything that makes bargaining easier is welcome.

There are still substantial problems with the jurisdiction, not least the requirement that every single employee in the enterprise be better off, even where overwhelmingly the workforce as a whole is. But at least it's a step in the right direction to removing irritating red tape and at last acknowledging the stupidity of restricting experienced members of the FWC from exercising discretion.

Other amendments will see the end of the Four Yearly Reviews of modern awards. This will be welcomed by industrial organisations due to the extensive resources they expended on these Reviews. But it will mean employers need to monitor the award system more regularly than ever. Without the legislative hurdle of the four year terms of the Reviews, it is open now for any party to apply to vary a modern award at any time.

Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Legislation

Flexibility Requests Provisions Updated by FWC

The anticipated changes to modern awards about requests for flexible working hours have been finalised with effect from 1st December this year. The awards require an employer to discuss and genuinely try to reach agreement with a flexible working arrangement request from an employee, where the employee is a parent or has responsibility for the care of a child who is of school age or younger, is a carer or has a disability. It includes an employee over 55 or who is experiencing domestic violence.

If the employer can't agree to the request, then a written reason(s) for that must be given to the employee within 21 days of the request being made. Also, that written response must include advice about whether or not the employer can offer any alternative proposal to that which the employee requested, and if so, what that alternative is.

Review of modern awards – Family Friendly Work Arrangements [2018] FWCFB 6863 (20 November 2018)

From the team at First IR we wish you

Merry Christmas

& Happy New Year

First IR will close around noon EDT 21/12 and re-open at 9am EDT 7/1

If you need anything, just email us

We've appreciated your business in 2018,
we look forward to doing more of that in 2019