LANDER & ROGERS

KEY EMPLOYMENT LAW UPDATES FOR YOUR PRACTICE

INTRODUCTION

In the past year, employment laws in Australia have witnessed a significant overhaul. In this edition, we consider five key reforms and what they may mean for small to medium sized businesses. Our expert guide summarises the key information and timeframes you should be aware of, to ensure compliance.

1) RESPECT@WORK & POSITIVE DUTIES

What is it?

While sexual harassment has been unlawful in the workplace for more than three decades, previously the focus was on responding to complaints. However, employers now have a **positive duty** to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment or harassment on the ground of sex, hostile workplace environments, and victimisation.

As a reminder, sexual harassment is defined as unwelcome sexual advances, unwelcome requests for sexual favours or unwelcome conduct of a sexual nature which a reasonable person would have anticipated the possibility of the person harassed being offended, humiliated or intimidated.

Key Take Aways

Employers must take all reasonable and proportionate measures to ensure that sex discrimination and sexual harassment does not take place in the workplace. What is reasonable will be assessed on a case-by-case basis and depend on:

- the size, nature and circumstance of the business or operations;
- the resources of the employer (financial or not);
- the employer's business and operational priorities; and
- all other relevant facts and circumstances.

The AHRC has published guidance materials for employers to help ensure practical compliance with the positive duty, including seven standards for compliance, which include:

- Leadership - business owners and managers understand their obligations to provide a safe and respectful workplace and take those obligations seriously;
- Culture - employers foster a workplace culture that is safe, respectful and inclusive;

- Knowledge - employers have up to date policies and procedures relating to discrimination and harassment that are communicated to, and understood by, all staff;

- Risk management - harassment and discrimination are properly identified as risks and those risks are managed appropriately;

- Support - support is available and accessible to any staff member who is impacted by harassment or discrimination in the workplace;

- Reporting and response - appropriate options are available for staff members to report discrimination and harassment, and reports are dealt with in a timely, fair and considerate way;

- Monitoring, evaluation and transparency - businesses collect appropriate data to; and

- understand the nature and extent of relevant unlawful conduct concerning their workforce and use the data in a transparent way, to strive for continuous improvement.

2) EXPANDED OBLIGATIONS WHEN RESPONDING TO REQUESTS FOR FLEXIBLE WORKING ARRANGEMENTS

What is it?

Who can request flexible work arrangements?

An employee with regular and systematic employment for at least 12 months can make a request for flexible working arrangements if the employee:

- is pregnant

- is a parent or carer of a child who is school age or younger

- has other carer's responsibilities

- has a disability

- is 55 years or older

- is experiencing family violence

- is caring for or supporting an immediate family member or household member facing family violence.

Requests need to be made in writing and must set out precisely what changes are being sought and why.

Responding to requests

Employers must respond to requests within 21 days. In light of recent changes, employers can only refuse requests for flexible work if:

- the parties have been unable to reach agreement after discussing the request;

- the employer has made genuine efforts to identify an alternative working arrangement they would be willing to make to accommodate the employee's circumstances;

- the employer has considered the consequences of the refusal for the employee; and

- the refusal is based on reasonable business grounds.

Any refusal must be made in writing and must include:

- detailed reasons for the particular business grounds relied upon in refusing the request and how they apply;

- details of any alternative working arrangements the employer would be willing to make to accommodate the employee's circumstances; and

- information about the availability of dispute resolution processes through the Fair Work Commission.

At arbitration, the Fair Work Commission will be able to make orders which may:

- confirm that the employer's business grounds for refusal were reasonable; or

- order the employer to grant the employee's request or make specified changes to accommodate the employee.

Key Take Aways

- Ensure that any policies referring to flexible work are up to date.

- Requests for flexible work must be considered on a case-by-case basis and responses must be provided in accordance with the *Fair Work Act 2009* (Cth).

- It is essential that managers know how to respond or seek appropriate advice before responding to requests for flexible work.

3) BANNING OF PAY SECRECY

What is it?

Employers are now unable to prohibit their employees from disclosing details about their pay to other employees. Under the new section 333B of the *Fair Work Act 2009* (Cth), employees are now able to enquire not only to their own colleagues regarding remuneration details but also the employees of other businesses.

Key Take Aways

- Employers must ensure that all pay secrecy clauses are removed from contract templates.

- Entitlement to pay transparency has now become a workplace right for the purpose of general protection claims. Therefore, employers must not attempt to prevent the exercise of this entitlement.

- It must be noted that the pay transparency is only applicable in the context of '*employees*' and not independent contractors. Therefore, pay secrecy clauses may be retained for independent contractors.

4) LIMITATION ON FIXED-TERM EMPLOYMENT CONTRACTS

What is it?

Employment contracts containing a fixed-term engagement period of more than two years, a renewal of a fixed-term engagement period beyond two years or more than two renewals of a fixed-term contract within a two-year period are now prohibited under Section 333E of the *Fair Work Act 2009* (Cth), unless a specific exception applies to the contract.

The effect of any such employment contracts will be the automatic conversion of the fixed-term employment to permanent ongoing employment.

Key Take Aways

- Employers are cautioned to carefully consider their employment contract templates for any of the prohibited fixed-term contracting conditions.
- It must be noted that certain exemptions exist for these limitations as outlined in section 333F of the Act, including where the employment category is permitted by modern awards, is government funded or the employee's remuneration is above the high-income threshold.

5) RIGHT TO DISCONNECT

What is it?

This new entitlement will allow employees to have the right to refuse all forms of contact, both digital and physical, from their employers outside of working hours, unless this refusal is considered '*unreasonable*'.

For employers with 15 or more employees, the '*right to disconnect*' commences on 26 August 2024.

For employers with less than 15 employees, the '*right to disconnect*' commences on 26 August 2025.

Key Take Aways

Employers are not barred from contacting their employees outside of working hours - the '*right to disconnect*' only provides an avenue for employees to refuse contact outside of working hours, unless the refusal is unreasonable.

Unreasonableness?

Therefore, the key consideration for employers is whether a refusal by an employee will be considered '*unreasonable*'. The unreasonableness of a refusal must be determined on a case-by-case basis, with consideration given to factors, including:

- the reasoning for the contact by the employer;
- whether the employee had personal circumstances such as carer or family obligations;
- the nature of the employee's role;

- the compensation available for conducting additional work beyond working hours, both monetary or otherwise; and

- what level of disruption will be caused to the employee because of the contact by the employer.

Resolution

Think carefully before contacting employees outside of working hours and try to limit such contact to times when it is really necessary. Businesses that regularly need to contact staff outside of their usual hours (for example, "on call" arrangements) should consider implementing a policy and/or ensuring that the level of salary adequately compensates for such additional hours.

Should an employee's assertion of their '*right to disconnect*' be in dispute and there is no resolution within the workplace, intervention by the Fair Work Commission may be sought by either the employee and employer towards a resolution. This intervention may include:

- an order to stop the unreasonable refusal of the contact by the employee;

- an order to stop disciplinary action by the employer for the exercise of the entitlement by the employee; or

- an order to stop contact by the employer to the employee.

Key contacts

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