

## The Fair Work Act

*Note: this information is based on a VECCI briefing attended in April 2009*

Effective 1<sup>st</sup> July 2009 the Australian Industrial Relations Commission will be changing its name to Fair Work Australia. The focus moving forward will be on collective agreements. The previous change focused on individual agreements through the implementation of Australian Workplace Agreements. Awa's are therefore on their way out.

Effective 1<sup>st</sup> July 2009 the following changes will take place:

- AIRC will become Fair Work Australia.
- Unfair dismissal rights will be restored to all workers (including those working for SME's with less than 100 employees).
- A revamped bargaining and agreement making process will be enforced.

Effective 1<sup>st</sup> January 2010 the following changes will take place:

- New minimum conditions will be implemented (The National Employment Standards – note: not all of these standards will be new).
- New Modern Awards will be implemented.

By 1<sup>st</sup> January 2010 this means that “Work Choices” will be gone and the Fair Work Act will be in!

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### **The Unfair Dismissal Laws (effective 1<sup>st</sup> July 2009)**

In the current state, the Australian Industrial Relations Commissions receives approximately 30 unfair dismissal claims per week. Eight to ten years ago this was approximately 115 per week.

The major change with respect to the Unfair Dismissal Laws will be for employers with 100 employees or less. In the past they have been exempt from unfair dismissal claims. Effective 1<sup>st</sup> July 2009, this changes.

The new unfair dismissal laws cover:

- All employees no matter the size of the company they work for.
- All employees covered by an enterprise agreement.

- All other employees earning less than \$106,400 package per annum (this will be adjusted annually to reflect the high income threshold at the time).

However, the new unfair dismissal laws do include qualifying periods that must be met by the employee before a claim can be made:

- If the employer has less than 15 FTE employees – 12 months service is required to qualify.
- If the employer has 15 or more FTE employees – 6 month service is required to qualify.

To calculate the number of FTE employees:

- Count the total number of hours worked in a 4 week period (to obtain an average per week).
- Divide by 38 hours (minimum weekly hours that can be worked).
- Equals the number of employees considered to be in the business.

Preferential treatment is given to employers with less than 15 employees.

- A Small Business Dismissal Code will be adopted. This will include steps to follow to ensure dismissing an employee is 'safe'.

An unfair dismissal is classified as:

- When an employee has been dismissed and the dismissal was 'harsh, unjust or unreasonable'.
- When an employee has been made redundant however it was not a case of a 'genuine redundancy'.

Employees who can not claim for unfair dismissal include:

- An employee engaged for a specified period of time or a particular task.
- An employee involved in a training arrangement (eg on an apprenticeship or traineeship).
- An employee who has been demoted providing it doesn't involve a significant reduction in remuneration or duties and the person remains employed by the employer.

When determining if the dismissal was 'harsh, unjust or unreasonable' Fair Work Australia will take into consideration:

- Was there a valid reason for the dismissal i.e. performance or conduct endangering themselves / others?
- Was a reasonable timeframe provided?
- Was the employee given the opportunity to have an independent third party present at any discussions that took place?

- Was the employee given any warnings prior to dismissal?
  - Employers will no longer be required to provide a minimum of 3 warnings. The number of warnings provided however must be reasonable based on the issue at hand.

Genuine redundancy:

- Effective 1<sup>st</sup> July 2009, it is not a genuine redundancy if the employee could have been redeployed to a subsidiary company or related business owned by the same company.
- In the event of an unfair dismissal claim being made on the grounds of it not being a genuine redundancy, the process undertaken by the employer to research possible opportunities in subsidiary companies or related businesses owned by the same company must be proven by the employer.

Unfair dismissal claims must be made within 14 days of the dismissal occurring (previously 21 days).

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### **The National Employment Standards (effective 1<sup>st</sup> January 2010)**

There will be ten new employment standards implemented that represent minimum conditions that can not be bargained or reduced. These minimum standards will override any Awards that provide lesser entitlements.

#### 1. Maximum weekly hours

- There is no change to the maximum weekly hours worked.
- Maximum weekly hours will be based on 38 hours per week.
- Employers can request / require reasonable additional hours to be worked.
- When considering what is deemed to be reasonable, take into consideration:
  - OH&S risks.
  - How much notice is provided.
  - Will the employee be paid for the additional hours (this does not infer penalty rates will be paid – refer to the Award or any other agreements in place to determine if penalty rates are required).
  - What are the personal circumstances of the employee.
- Employees can refuse if the additional hours are deemed to be unreasonable.
- Additional hours can be included on an averaging basis.

#### 2. Parental leave options for both parents

- Both parents will be entitled to take up to 12 months unpaid parental leave but not at the same time (apart from the first three weeks after the birth when both parents are entitled to have the same time off).

- The total amount of parental leave taken by both parents must not exceed 24 months (it can be shared by both parents or used by only one).
- 12 months service is required before an employee is entitled to parental leave (long term casuals are also entitled to parental leave).
- The parent on the first 12 months of parental leave can seek to have that extended by a further 12 months but this needs to be requested in writing 4 weeks prior to the end of the first period of leave.
- Employers can refuse the extension of leave citing 'reasonable business grounds for refusing'. This may include the fact that they play an integral part in the business or that they will be difficult to replace.

### 3. Flexible work options for both parents

- Parents who are required to care for school aged children or children under 18 years with a disability can request flexible work arrangements. This is a right to request not a guarantee it will be granted.
- 12 months service is required prior to the request being made.
- The request must be made in writing and the employer must respond within 21 days.
- Employers can refuse the request if there is 'reasonable business grounds'.

### 4. Annual leave

- There is no change to annual leave entitlements.
- Remains at 4 week annual leave per annum (except shift workers who are entitled to 5 weeks annual leave).
- Employers can ask employees to take their annual leave if the request is thought to be 'reasonable', for example when the business closes down (i.e. over Christmas) or when there is an excessive amount of annual leave accrued.
- Annual leave loading may still apply but this is according to the Award or Agreement in place. Leave loading is not catered for in the minimum standards.

### 5. Personal / carers / compassionate leave

- This is three separate entitlements.
- Personal leave accrues at 10 days per annum for full time employees (pro-rata for part time). This can also be used as Carers leave for the immediate family only. Carers leave is classified as leave that is due to unforeseen circumstances eg illness not school holidays!
- Once the 10 days personal / carers leave has been used, employees are entitled to 2 days unpaid carers leave on each occasion following that time.
- Employers can ask for reasonable proof e.g. a medical certificate or statutory declaration.
- Employees are entitled to 2 days compassionate leave on each occasion of a death or serious threat to life.

## 6. Community service leave

- Employees are entitled to community service leave which is unpaid if they are engaged in 'eligible community service activity'. This must be deemed to be reasonable.

## 7. Public holidays

- There is no change to public holiday entitlements.
- Employees are entitled to the days in the area where the employee works.
- Employers can ask their employees to work but this may be refused if the request is not reasonable.

## 8. Long service leave

- There is no change to long service leave provisions.
- In Victoria employees are entitled to pro-rata long service leave if they have been in a role for 7 years or longer.

## 9. Termination / redundancy

- The major changes to requirements in regards to termination include:
  - o Employers must provide their employees with written notification of their termination.
  - o The notice period is based on a scale of length of service (eg 5 years = 4 weeks). An extra week is added for employees over the age of 45 years.
  - o Employees are not bound by the same notice period. Refer to Award or Agreement in place to determine their notice period to the Employer. *(Note: this is likely to change before the minimum standards are implemented on 1<sup>st</sup> January 2010).*
- The major changes to minimum requirements in regards to redundancy include:
  - o The introduction of a new scale of payments based on length of service. This will include a maximum of 16 weeks pay for 9 years of service.
  - o However, this does not apply if the business has less than 15 employees (based on headcount not fte)
  - o If there is currently no provision for redundancy in an employee's contract (and they do not fall under any Award), the length of service will be treated as commencing from 1st January 2010.

## 10. Fair work information statement

- This is a statement that all employers will need to provide to their employees. The Government will prepare the statement and send it to employers to distribute.

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