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NEW 'WORKPLACE RIGHTS' UNDER THE FAIR WORK ACT

The *Fair Work Act 2009* expands employee protections against discrimination and breach of other 'workplace rights'. These provisions come into operation on **1 July 2009**.

In this edition of Employment Alert, we take a closer look at these expanded rights. We also highlight the key features of the recently announced paid parental leave scheme.

Summary of new protections

Discrimination

Employees, job applicants and contractors will have greater protection from discrimination under the 'General Protections' provisions of the *Fair Work Act 2009* ('the FW Act'). Under the Workplace Relations Act ('the WR Act'), only employees were protected from discrimination, and the protection only applied to termination of employment, not where other kinds of action had been taken against the employee.

Workplace rights

Under the FW Act, employees, job applicants and contractors as well as employers and principal contractors will be protected from any 'adverse action' (see below for definition) taken against them for exercising their 'workplace rights' (see below for definition).

Reverse onus of proof

In applications relating to protection of workplace rights and discrimination, it will be presumed that the action was taken for the alleged reason, unless proven otherwise by the respondent. This means, for example, that if an employee alleges that an employer took action for a discriminatory reason, or because the employee had exercised a workplace right, the employer will have to prove that the action was not taken for this reason.

Protection of Workplace Rights

The FW Act provides that a person must not take 'adverse action' against another person because the other person:

- has a workplace right,
- has (or has not) exercised a workplace right, or
- proposes to (or not to) exercise a workplace right,

or to prevent the other person from exercising a workplace right.

This introduces two new terms – 'workplace right' and 'adverse action'.

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'Workplace right' is defined to include:

- (a) An entitlement, role or responsibility under a workplace law, workplace instrument or order made by an industrial body. This could include, for example, rights under OH&S laws, anti-discrimination laws, awards and collective agreements;
- (b) The right to make complaints internally or to a union or to other external bodies;
- (c) The ability to initiate or participate in processes, such as dispute settlement, industrial action, making or terminating enterprise agreements or individual flexibility agreements, or requests for flexible working arrangements.

Workplace rights are similar to some of the existing protections under the WR Act. However, the protections now extend further to include protection of the right to make complaints within the company or to a union and cover participation in processes under workplace instruments (such as agreements).

'Adverse action' includes a wide range of conduct. Examples include:

- (a) Action against an **employee** by an employer, such as dismissal, discrimination, or altering an employee's position to the employee's prejudice;
- (b) Action against a **prospective employee** by an employer, such as refusal to employ, or discriminating in the terms and conditions of employment offered to the prospective employee;
- (c) Action against an **independent contractor** by the principal, such as terminating the contract or refusing to use the contractor's services;
- (d) Action against a **proposed independent contractor** by the principal, such as refusal to engage or discrimination as to the terms and conditions of engagement;
- (e) Action against an **employer** by an employee, such as industrial action or ceasing work;
- (f) Action against a **principal** by an independent contractor, such as ceasing work or industrial action;
- (g) Action against **any person** by a union or employer association that prejudices that other person or involves imposing a penalty.

The FW Act also includes a specific prohibition on employers from taking **adverse action** against an employee or prospective employee, because of the person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

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The WR Act protected employees from **termination** on these grounds (with the exception of carer's responsibilities, which has now been added) but not from other conduct by the employer.

Complaints Process

If the adverse action involves dismissal, the employee will have 60 days within which to bring an application to Fair Work Australia ('FWA') to deal with the dispute. FWA may mediate or conciliate, make a recommendation or express an opinion, but cannot make a binding determination. If the dispute is not resolved, it can be taken to the Federal Court or Federal Magistrates' Court, but only after FWA issues a certificate.

If the adverse action does not involve dismissal, a party may apply to FWA to deal with the dispute (no time period is stipulated for this application in the FW Act), then to the Federal Court or Federal Magistrates' Court.

The court may grant an injunction, order payment of compensation, order reinstatement, and/or impose a civil penalty.

Implications for Employers

The FW Act opens an alternative avenue of disputation in cases of alleged discrimination. Rather than taking a claim to the Equal Opportunity Commission (or its federal equivalent, the Australian Human Rights Commission), employees will be able to go to FWA and then the courts. A reverse onus will be on the respondent to show that the particular conduct was not prompted by discriminatory reasons.

Where a dismissal can be linked with an employee's workplace rights, such as the employee having lodged a complaint or a request for flexible working arrangements, an alternative route for unfair dismissal claims opens up. The employee would have 60 days (rather than the 14 days under the unfair dismissal provisions), and there is no special process for small business employers. If the employee alleges that the dismissal relates to workplace rights, it will be up to the employer to show that this is not the case.

Claims relating to workplace rights and discrimination will also be available in the context of ongoing employment relationships (i.e. where the employee has not been dismissed but has suffered some other detriment e.g. a warning), again with a reverse onus of proof on the employer.

Employers should ensure that all managers are aware of the potential for claims to be made in relation to the wide range of conduct covered by the notion of 'adverse action', and that action other than dismissal of an employee may still give rise to a claim.

For further advice and guidance on these provisions, please contact the Workplace Relations team at Moores Legal.

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PAID PARENTAL LEAVE SCHEME ANNOUNCED

The Federal Government plans to introduce a Paid Parental Leave ('PPL') scheme, for primary carers of a child born or adopted on or after 1 January 2011. Key features announced with the May 2009 budget include:

- The Government will fund a maximum of 18 weeks of PPL, at the Federal Minimum Wage (currently \$543.78 per week), to be taken within 12 months of the birth or adoption;
- Employers will be pre-paid and then will be required to pay the employees;
- PPL will be limited to parents earning \$150,000 or less per year;
- PPL will only be available where the primary carer has been engaged in paid work continuously for at least 10 of the 13 months prior to the expected birth or adoption, and has worked at least 330 hours in those 10 months (an average of about one day of paid work a week);
- The scheme will cover contractors and the self-employed, as well as permanent and casual employees;
- Those who are ineligible for PPL may instead be eligible for current forms of family assistance, such as the Baby Bonus;
- The Government-funded PPL may be additional to any employer-funded paid parental leave already available;
- Initially, there will be no requirement for employers to make superannuation contributions, although this may be reviewed two years after commencement of the scheme.

Full details of the scheme will be announced following a consultation process. The Government plans to introduce legislation in 2010 to implement the scheme.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations contact the Workplace Relations team at Moores Legal.

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