

December 2009

NEW YEAR'S REVOLUTIONS

Getting ready for the brave new world of work

2009 has been a tumultuous year for workplace relations. The Fair Work Act 2009, in large part, commenced on 1 July 2009 while provisions relating to modern awards and the National Employment Standards (NES) will come into operation on 1 January 2010. Additionally, all states other than Western Australia have recently handed back their industrial relations powers to the Federal Government, resulting in the Fair Work Act 2009 applying to all employers and employees (other than employees of state bodies) across Australia.



In this Employment Alert, our last for 2009, we offer employers a short checklist of some issues they may wish to consider in preparing for the new world of work.

1. The new safety net

- (a) This comprises:
 - (i) **Minimum wages** which will be set by the minimum wages panel of Fair Work Australia whose first wage setting decision will apply as of **1 July 2010**;
 - (ii) The **NES** which will replace the Australian Fair Pay and Conditions Standard with effect from **1 January 2010**; and
 - (iii) **Modern awards** which will replace federal and state awards with effect from **1 January 2010** although there is now a gradual implementation of the award rates over a 5 year period starting **1 July 2010**.
- (b) The **NES** comprises:
 - (i) Maximum weekly hours of work (38 plus reasonable additional hours);
 - (ii) Right to request flexible working arrangements if an employee has at least 12 months service and is either the parent/carer of a child under school age or a child under 18 with a disability. A right to request flexible working arrangements can only be rejected by an employer on reasonable business grounds. We have discussed flexibility in the workplace in a recent [Employment Alert](#);
 - (iii) 52 weeks parental leave with an option to extend for a further 52 weeks which can only be rejected by an employer on reasonable business grounds;
 - (iv) Annual leave of 4 weeks paid leave per annum. Annual leave can be cashed out if an employee is award or agreement free or if the applicable award or agreement makes provision for cashing out. In either case, the employee must still be left with at least 4 weeks accrued annual leave. The NES has particular rules relating to an employer's right to direct an employee to take annual leave;
 - (v) Personal/carer's leave of 10 days paid personal/carer's leave per annum, unpaid carer's leave of 2 days per occasion and 2 days paid compassionate leave per occasion;
 - (vi) Community service leave – the NES has rules relating to when community service leave can be taken eg to assist as a volunteer at an emergency service or jury service leave;
 - (vii) Long service leave – as per state laws;
 - (viii) Public holidays

- (ix) Notice of termination and redundancy – the NES restate the minimum notice of termination periods which apply and which are based on length of service. The NES also stipulates that redundancy pay in accordance with a particular table must be paid if the employer has 15 or more employees (note: only service after 1 January 2010 is taken into account for redundancy pay unless the employee has a prior entitlement via an award, agreement, contract, policy or practice);
 - (x) Fair Work Information Statement – this should be given to all new staff after 1 January 2010. See the [Fair Work Information Statement](#) which has just been released.
- (c) Modern awards

It is crucial for employers to identify which modern awards will apply to their business as of **1 January 2010** and how those awards will impact on them.

To soften the financial impact of modern awards, the Australian Industrial Relations Commission decided on 2 September 2009 to include transitional provisions in all modern awards providing for a gradual implementation of the award rates relating to:

- Minimum wages;
 - Casual or part-time loadings;
 - Weekend, public holidays and evening penalties;
 - Shift allowances,
- over a 5 year period starting **1 July 2010**.

Should you need assistance in identifying which modern awards apply to your business, let us know and we can assist you.

2. New agreement making rules

- (a) No Individual Transitional Employment Agreements (ITEAs) can be concluded after **31 December 2009** although Australian Workplace Agreements (AWAs) and ITEAS in existence as at 31 December 2009 will continue past their nominal expiry dates until terminated or replaced (ie there is no drop dead date for these instruments);
- (b) New rules exist for enterprise agreements (ie collective agreements made at enterprise level) as of **1 July 2009** and in particular, the parties are required to engage in good faith bargaining. Fair Work Australia is empowered to make a range of orders should one side not comply with their obligations regarding collective bargaining;
- (c) From **1 January 2010**, new enterprise agreements will be assessed by Fair Work Australia using the Better Off Overall Test which will assess the agreement against the applicable modern award and the NES.

3. New transfer of business rules

If you are involved in buying or selling a business or part of a business, or outsourcing a function previously performed by the business, it is crucial to be aware of the new transfer of business rules which apply as of **1 July 2009** and which set out the instruments (ie agreements and awards) which transmit to the new owner and in what circumstances.

4. Unfair dismissal provisions

New unfair dismissal rules came into operation on **1 July 2009** – we have set these out in detail in a recent [Employment Alert](#). A Small Business Fair Dismissal Code applies to employers of fewer than 15 employees.

There has been a substantial increase in unfair dismissal cases since 1 July 2009.

Recent cases decided by Fair Work Australia demonstrate the following trends:

- (a) If an application is made outside the 14 day period, exceptional circumstances must be advanced as to why the late lodgement should be condoned, failing which the application will be rejected. Fair Work Australia has rejected applications which have been only 2 days late on the basis that no exceptional circumstances were advanced for the late lodgement;

- (b) Where employees are dismissed for poor performance, they must be made aware of their poor performance and warned that if it continues, it could lead to their dismissal. An employee whose sales performance was poor but who was not warned that this could result in his dismissal, was recently awarded 9 weeks pay by Fair Work Australia;
- (c) Similarly, employees who are dismissed for failing to comply with an employer's policy or procedures must be aware they could be dismissed for failure to comply.

5. New general protections

The Act has some complex new provisions that protect employees, prospective employees, employers, independent contractors and principals from:

- (a) Adverse action being taken against them because they have a workplace right;
- (b) Being discriminated against.

Employees are also protected from being dismissed for a temporary absence from work due to ill health or injury.

The general protections provisions came into operation on **1 July 2009**. In a general protections dispute, where an employee has been dismissed, he or she must lodge their application to Fair Work Australia within 60 days but no time limit applies for any other complaint.

Implications for employers

Employers need to review this checklist and be familiar with the new rules and requirements. It is critical for employers to know which modern awards apply to their business as of 1 January 2010 and to understand the financial implications of those awards.

Additionally, employers may need to review and revise their standard contracts of employment/letters of appointments, HR policies and manuals to ensure compliance with the Fair Work Act 2009.

For specific advice and guidance on these matters, contact the Workplace Relations Team at Moores Legal.

We wish our readers a Merry Christmas and a Happy New Year!

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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