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OUT WITH THE OLD, IN WITH THE 'MODERN'

The overhaul of awards and unfair dismissal laws

New awards are to be made for every award-based industry and job. Every employer will need to know the new terms and conditions that will apply from 1 January 2010.

Many employees may have new rights to make unfair dismissal claims, under changes which are planned to take effect in less than 9 months' time.

In this edition of Employment Alert, we will describe some key features of the modern award system and give an overview of the new unfair dismissal regime.

Modern Awards

The Government touts modern awards as the second element of its "strong, simple and fair safety net".

The first element of the safety net will be the National Employment Standards ('NES') – 10 basic entitlements which will apply to all employees in the federal system from 1 January 2010. The NES will cover basic entitlements such as leave, hours of work and notice of termination and redundancy pay, as well as a right to request flexible working arrangements.

The second element of the safety net, the modern award system, will also commence operation from 1 January 2010. Modern awards will cover matters such as minimum wages, overtime and penalty rates and may supplement the NES in areas such as leave.

Modern awards will not apply to all employees. They will be restricted to areas which are traditionally award-covered. There will also be a new exclusion of employees with guaranteed annual earnings of more than \$100,000 (pro rata for part-time employees).

The awards are to be drafted by the Australian Industrial Relations Commission ('AIRC') from scratch, and it is expected that each award will have broader coverage, so that overall there should be fewer awards, fewer historical idiosyncrasies and greater consistency between awards.

The AIRC has published 'Exposure Drafts' of 14 awards in priority industries/occupations such as clerical, retail, hospitality, manufacturing and higher education.

Each draft award includes an 'Award Flexibility' clause, under which individual employees and employers will be able to make formal agreements to vary certain award terms to meet "genuine individual needs". However, this will only apply to award terms relating to overtime rates, penalty rates, allowances, when work is performed and leave loading.

Example – Clerks Award

Currently, many Victorian employers are bound by a federal award in relation to clerical employees. From 1 January 2010, this will be replaced by the Clerks – Private Sector Award 2010 ('the Modern Clerks Award'). In fact, the Modern Clerks Award will replace around 40 clerical awards from around Australia.

Some key entitlements in the Exposure Draft of the Modern Clerks Award are:

- Casuals being entitled to convert to permanent employment after 6 months;
- Redundancy pay being extended to small business (the National Employment Standards will provide for redundancy pay for employees of businesses which employ more than 15 employees);
- Superannuation being payable while receiving workers' compensation.

The Workplace Relations Minister, Julia Gillard, has taken up the concerns of employer groups about the inclusion of redundancy pay for small business in all the draft modern awards and has made a formal submission to the AIRC, stating that the redundancy entitlement would cost small business employers an additional \$94.9 million by 2014.

The final version of the Modern Clerks Award is due to be published by 19 December 2009.

Unfair Dismissal

Julia Gillard has announced that the new unfair dismissal laws will commence from 1 July 2009 (assuming that the legislation passes through Parliament). This follows pressure from unions to bring forward the unfair dismissal changes ahead of the rest of the Workplace Relations reforms.

Some details of the reforms were released by way of Fact Sheets (available at www.workplace.gov.au), and in a speech by Julia Gillard at the National Press Club on 17 September 2008. However, the draft legislation has not yet been made public.

The key planks of the new unfair dismissal system will be:

- An entitlement for all employees in the federal system to bring an unfair dismissal claim (under Work Choices, this could only be done by employees in workplaces of more than 100 employees);
- A qualifying period of 6 months to be served before bringing such a claim – this applies to permanent and casual employees of businesses of 15 or more employees;
- Special provisions applicable to small businesses (ie employers with fewer than 15 employees - see below);
- Time limit of 7 days within which to lodge a claim (reduced from 21 days);
- Claims to be decided by Fair Work Australia without public hearings and without legal representation, except in particularly complex matters.

Small Business Fair Dismissal Code

For small businesses, the following special rules will apply:

- Employees have to serve a qualifying period of 12 months before they can bring an unfair dismissal claim;
- If the small business follows the 'Fair Dismissal Code' ('the Code'), the dismissal will be deemed to be fair.

The Code includes brief statements in relation to summary dismissal, 'other dismissal' and procedural matters. Summary dismissal will be fair when "the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal". The Code provides that, for 'other dismissal', the employer must give the employee one warning (including reasons) and a "reasonable chance to rectify the problem".

Although the Fair Dismissal Code appears to be simple, employers may need assistance to determine issues such as:

- Whether or not the Code applies (are they a small business);
- Whether they have "reasonable grounds" for believing the employee should be summarily dismissed;
- What constitutes a "reasonable chance" to rectify a problem with conduct or performance.

Keeping up with the changes

We will continue to monitor the progress of the Workplace Relations reforms and provide updates via Employment Alert. However, employers should also seek advice specific to their organisations, if they are considering:

- Terminations or redundancies, particularly within the next 12 months;
- Entering employment agreements or workplace agreements in award-covered areas;
- Developing policies or employment agreements dealing with matters that are part of the safety net (the NES and modern awards).

Employers may also wish to review the draft modern award relevant to their industry or workforce, with a view to making submissions about the content or coverage of the modern awards.

Moore's Legal can assist employers to determine the likely impact of modern awards on their business, whether they should enter workplace agreements, and whether they should make a submission to the AIRC regarding award modernisation. Moore's Legal can also assist employers in managing employee performance and conduct and advising on termination and redundancy issues.

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 Moore's Legal.

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