



## ***Changes to Industrial Relations Laws that Employers **MUST** Know.***

### **A Guide for Small and Medium Business Owners**

*Robyn Anderson, Managing Director, HR Navigation Pty Ltd*

Managing Your Business is Your Business  
Managing Your People is Our Business:



- Employment Contracts/Agreements
- Workplace Investigation
- Policy Development & Audits
- Dispute Resolution
- Performance Management
- Business Training
- Termination Management
- Mentoring

## 1. Introduction

*On 20th March 2009, the Senate passed laws which will completely re-write Industrial Laws for the employers and employees of Australia. The new legislation will be known as the Fair Work Act and it will come into effect from 1st July 2009. The laws will re-regulate the working relationship between employers and employees. The Fair Work Act will re-open the workplace to third party intervention and restore unfair dismissal laws for many employees. Employers need to consider, very carefully, the following changes and strategise how best to manage the changes for their individual business.*

## 2. Unfair Dismissal

'Work-Choices' exemptions with regard to unfair dismissal are gone, including the exemption to small and medium businesses with fewer than 100 employees. From 1st July 2009, business who fit the definition of a small business will have a twelve month qualifying period in which they can dismiss employees free from unfair dismissal, while those that do not meet the Fair Work definition of a small business will have a six month qualifying period. Note this qualifying period is from the employee's commencement date, it is not a grace period. After the relevant qualifying period, the full strength of unfair dismissal laws will be active.

From 1st July 2009, the threshold used to define a small business for the purposes of applying the unfair dismissal arrangement will be based on the business having less than 15 full time equivalent employees. To determine if your business falls in this definition a business owner will have to perform a "full time equivalent" calculation. This calculation is done by averaging the ordinary hours worked by all employees in the business over the 4 week period immediately prior to the employee's termination, and dividing that by 38, being ordinary weekly hours. This can potentially lead to confusion for businesses, particularly those that have a fluctuating workforce or those that are subject to seasonal factors. These businesses can see themselves falling in and out of the small business definition. From 1st January 2011, the threshold used to define a small business for the purpose of applying the unfair dismissal arrangements will be based on a simple headcount of 15 employees as detailed in Forward with Fairness, Labor's election policy.

Of key concern to businesses with 15 or more full time equivalent employees (inclusive of casual employees) is that they are bundled in the same class as multi-national corporations who have an army of Industrial Relations experts on hand to advise managers. Furthermore, small businesses will have to adhere to the 'Fair Dismissal Code'. This is a checklist in which employers will be required to tick ALL the boxes in order for the dismissal to be deemed fair should it fall outside of the qualifying period. The form includes delicate language like "employer believes on reasonable grounds"; "employees conduct is sufficiently serious" and "valid reason".

Whether or not the employer's belief is reasonable or their reason is valid, or whether the employee's conduct is sufficiently serious, rather than merely serious, can and will be tested by the new super-body, 'Fair Work Australia' (FWA). If employers act in good faith yet in ignorance of changes and/or technical definitions, they will be subject to a range of penalties, including reinstating the employee and paying damages. Employers should consider using independent workplace investigators as an independent party as a buffer in the process to increase the likelihood of proving the decision to dismiss as correct beyond the balance of probabilities.

Employers are not to be allowed legal representation in proceedings related to unfair dismissal except in limited circumstances so employers of all sizes will need to ensure they get good advice to prepare them for potential proceedings and take care to ensure they have comprehensive policies and contracts that will validate that any terminations are not held to be harsh, unjust or unreasonable (i.e. unfair).

### **3. Good Faith Bargaining**

Collective (or as it was once known, Enterprise) Bargaining will be once again given preference. Should it be the case that even a single employee of your business is a trade union member, and convinces the majority of the merits of having a trade union negotiate on their behalf, you will be required by law to negotiate with the union. The Act dictates the good faith bargaining requirements that bargaining representatives are required to meet. These include attending meetings, disclosing relevant information, giving genuine consideration and responding to proposals, and refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining. However, bargaining representatives are not required to make concessions or sign an agreement to which they do not agree.

If the good faith bargaining requirements are not met, a bargaining representative may apply to FWA for a bargaining order. Alternatively, if an employer refuses to bargain and a majority of employees wish to collectively bargain, the employer will be compelled by FWA to bargain in good faith. Bargaining orders can preclude termination, or require reinstatement, of an employee. Failure to comply with a bargaining order can result in pecuniary penalties and other court orders. If serious and sustained contravention, FWA will have the power to make a workplace determination on application of a bargaining representative.

### **4. 'Fair Work Australia' (FWA)**

Fair Work Australia will become the industrial 'quik-e-mart' for Australian employers and employees. This superbody will replace the Australian Industrial Relations Commission, Australian Fair Pay Commission and Workplace Authority. Its powers will include determining unfair dismissal applications, resolving workplace disputes, enforcing good faith bargaining and developing guidelines to assist employers and employees in implementing 'family friendly' work practices. The Workplace Ombudsman will be renamed the Fair Work Ombudsman and will also form part of this super body.

### **5. Role of Trade Union, Trade Union Rights**

Right of entry rules enable permit-holders, normally union officials, to enter workplaces to investigate suspected contraventions of relevant legislation or industrial instruments, and to hold discussions with interested employees. Under Work Choices, these rights were significantly restricted. For example, at workplaces where employees worked pursuant to Australian Workplace Agreements (AWAs), Individual Transitional Employment Agreements (ITEAs) or non-union collective agreements, permit-holders were prohibited from holding discussions with employees. The new Act, however, permits the holding of discussions with employees at such workplaces, so long as the workplace has employees whose industrial interests the permit holder's union can represent. It is irrelevant if the employees are not at that time paid up union members.

Permit-holders also have expanded rights to inspect employee records when they investigate suspected contraventions. Under Work Choices, permit holders could not inspect non-member records. The new Act, however, enables permit-holders to inspect and/or make copies of any records or documents relevant to the suspected breach, irrespective of the nature of the records. As a concession to concerns about the privacy of employee records, the Government will appoint a Privacy Commissioner to ensure workers privacy is maintained. This adds another level of bureaucracy as businesses are concerned about over-zealous unions exploiting the opportunity of unfettered access to non union members pay records for political means.

### **6. Award 'Modernisation'**

Industrial awards are set to be revolutionised. Currently there are over 4,000 industrial awards. By 2010 there will only less than 100. Whilst there is an argument that awards will become simplified, employers will have to ensure their contracts or arrangements reflect the changes in rationalising awards. Failure to respond to changes in the award could mean you underpay or deny entitlements to employees which would have your business at risk of complaints and investigations.

## 7. National Employment Standards (NES)

From 1st January, 2010, new National Employment Standards will be introduced enshrining the rights of employees. The NES include the following:

### 1. The maximum weekly hours of work to 38 hours

The maximum hours per week for an employee will be 38 hours subject to 'reasonable' additional working hours. Averaging provisions may be included in the new 'modern' awards but it is not clear if employers that have award free employees will be able to take advantage of this provision.

### 2. Request for flexible working arrangements

An employee (with 12 months service) who is a parent or has a responsibility for a child under school age will be entitled to request a change of working arrangements in order to assist them to care for a child. This can include change in working hours, change in patterns of work and changes in location of work. If this occurs, employers MUST give written notice of the decision to allow/disallow the request. A refusal can only be on 'reasonable' business grounds. If this is challenged, then the matter can be referred to a third party who has the power to deem that the reasonable business grounds is not sufficient, meaning that you may be required to allow it.

### 3. Parental leave and related entitlements

Employees will have as a minimum, should they choose, 12 months unpaid parental leave, but may request up to 24 months unpaid parental leave from their employer. Again, employers can only refuse on 'reasonable' business grounds.

### 4. Annual leave

Employees will continue to be entitled to 4 weeks paid annual leave per year.

### 5. Personal/Carer's leave and compassionate leave

Subject to any extra entitlement within an industrial award, employees will continue to be entitled to 10 days of paid personal/carer's leave per year and 2 days unpaid carer's leave for each occasion (subject to paid leave being exhausted). The statutory entitlement of 2 days paid compassionate leave per occasion also remains unchanged.

### 6. Community service leave

This is a new statutory entitlement for many employees that are currently award free. An employee will be entitled to be absent from work to engage in prescribed community service activities such as jury service and emergency services duties. This includes travel time and reasonable rest time following the activity.

### 7. Long service leave

Employee rights under state laws are enshrined to ensure they cannot be bargained away.

### 8. Public holidays

An employee is entitled to be absent from work on public holidays and to be paid for their ordinary hours that would have normally been worked at their base rate of pay. An employer is permitted to 'reasonably' request an employee to work on a public holiday. However, an employee may refuse the request if it is not 'reasonable' or if the employee's refusal is 'reasonable'.

### 9. Notice of termination and redundancy pay

The NES will set out the base periods of notice in cases of termination as well as, for the first time, base statutory entitlements to redundancy pay. Employers will need to ensure that any notice periods in existing contracts do not fall beneath the new national standards. Employees over the age of 45 will also have a statutory entitlement to an extra week's termination notice; this is an entitlement that was previously only given in award covered employees and was not in national standards. The statutory entitlement to redundancy pay is also new for many employees. Employers who have less than 15 employees will continue to be excluded from the requirement to pay redundancy pay.

### 10. Fair Work Information Statement

Employers will be required to give each new employee a 'Fair Work Information Statement' which contains information regarding the NES, Modern Awards, the right to freedom of association and the role of FWA.

## 8. Flexibility Agreements

The new 'modern' awards will provide for a level of flexibility via the use of a flexibility clause which will allow an employer and employee come to an alternate agreement regarding:

- arrangements for when work is performed
- overtime rates
- penalty rates
- allowances
- leave loading

However there will be strict conditions for these 'flexibility' agreements and an employee cannot be coerced into signing an agreement nor can it result in an overall reduction in terms and conditions for the employee. In other words the employee must still receive the same as the award or better.

Flexibility Agreements must:

- be set out in writing
- be signed by each party
- state each and every term of the award that is being varied,
- detail in what way the term is varied and
- detail exactly how it does not disadvantage the employee.

Therefore take the common case of incorporating leave loading into an hourly rate, this will need to be the subject of a flexibility agreement and therefore will need to be in writing in the format prescribed by the award. Verbal arrangements or simple one line arrangements in a letter of offer to an employee will not be permissible. Employers are advised to get professional and informed advice to assist them in meeting the stringent requirements of these agreements.

## 9. Practical Implications

Fair Work Australia will not accept ignorance as an excuse for a breach of workplace laws. Furthermore, proving business decisions were 'reasonable' will not be a simple task, particularly if FWA or other third parties review your decisions. Combined with recent changes to the Equal Opportunity Act in Victoria, as an employer you may be forced to change your decision, you could be forced to apologise, pay damages and/or a fine.

Businesses need to not only consider the changes, but ensure that from 1st July, 2009 and beyond they are operating **legally**. Employment contracts and workplace policies are the best defence as are **independent** business cases should your business not be able to accommodate the generous options of leave now available to employees. Business owners need to educate and up-skill themselves in the challenges posed by these changes and work out a 2 year strategy for managing the challenges, or considering outsourcing their human resource/industrial relations functions.

*For a consultation and further information please contact*

*HR Navigation on 1300 669 747*

*[www.hrnavigation.com.au](http://www.hrnavigation.com.au)*

Managing Your Business is Your Business  
Managing Your People is Our Business:



- Employment Contracts/Agreements
- Workplace Investigation
- Policy Development & Audits
- Dispute Resolution
- Performance Management
- Business Training
- Termination Management
- Mentoring