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eALERT

WORKPACE LAW UPDATE - Changes to the Work Choices bargaining rules and unfair dismissal laws taking effect 1 July next year

The Federal Government's changes to the Federal Unfair Dismissal regime, and to the laws which regulate workplace bargaining, will commence in July 2009 – months earlier than was initially anticipated. The remaining changes to the current *Workplace Relations Act* 1996 (Cth) will come into effect six months later.

Fair dismissal system for small business

The Federal Government will introduce provisions specifically for "small business" in the area of unfair dismissal. A small business will be defined as a business with less than 15 employees. Each full time, part time and long term casual will count as one employee.

Under the proposed laws, employees employed by a business with less than 15 employees will only be able to lodge an unfair dismissal claim against their employer after they have been employed for twelve months. To dismiss someone "fairly" after this twelve month period expires, an employer will need to comply with the Small Business Fair Dismissal Code ("**the Code**").

The Code provides that:

- an employee who is genuinely dismissed because of a business downturn or because their position is no longer required, cannot bring a claim for unfair dismissal; and
- it is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal.

In all other cases, an employer is required to give the employee:

- a valid reason why the employee is at risk of being terminated; and
- a reasonable chance to rectify the problem.

There is, however, no need for multiple warnings.

Fair Work Australia (a government agency) will determine whether an unfair dismissal has occurred. An employee wishing to make a claim will need to lodge the appropriate form with Fair Work Australia within seven days of termination. Legal representation will only be allowed in exceptional circumstances.

Bargaining in Good Faith

As of 1 July 2009, parties engaged in "collective bargaining" will be legally required to do so in "good faith". This requirement was not present under the Work Choices legislation and involves a number of key obligations including:

- attending and participating in meetings at reasonable times;
- disclosing relevant information in a timely manner, subject to appropriate protection for commercial in confidence information;
- responding to proposals made by a party in a timely fashion;
- giving genuine consideration to the proposals of the other parties and providing reasons for their responses; and
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Bargaining must be commenced when there is majority employee support for negotiating an enterprise agreement. If an employer refuses to bargain, employees or their representative can request a direction from Fair Work Australia to determine if there is majority employee support.

Where such a direction is provided by Fair Work Australia, an employer will be required to notify employees within 14 days of their right to representation in the bargaining process.

If bargaining does not occur in good faith, Fair Work Australia will have the power to make orders to ensure bargaining in good faith occurs.

Examples of the types of conduct which may constitute a failure to bargain in good faith include:

- pursuing a claim that is unlawful and which could not therefore be legally included in an agreement approved by Fair Work Australia;
- a refusal by employees to respond to a proposal by an employer about a change to work methods; and
- an employer refusing to meet with the employee's bargaining representative.

Although the Federal Government has yet to provide any details as to the types of orders that Fair Work Australia may make if it determines that a party is not negotiating in good faith, the Government has conceded that compulsory arbitration will not be a feature of good faith bargaining. Further, in circumstances in which an agreement is being varied, the good faith bargaining obligations will not apply.

The 10 National Employment Standards

We take this opportunity to remind you that the ten national employment standards have been finalised and will commence operation as from 1 January 2010. The Standards will provide for the following:

- Maximum weekly hours of work;
- The right to request flexible working arrangements;
- Parental leave and related entitlements;
- Annual leave;
- Personal/Carer's leave and compassionate leave;
- Community service leave;
- Long service leave;
- Public holidays;
- Notice of termination and redundancy pay; and
- Provision of a Fair Work Information Statement, which details the rights and entitlements of employees under the new system and how to seek assistance.

The changes to parental leave entitlements and the introduction of the right to flexible working arrangements, in particular, will introduce greater challenges for employers in responding to employees seeking to access their rights and managing their workforce. These employee requests will need addressing in the correct manner in order to diminish the potential of costly litigation.

Preparation should begin now to ensure managers are adequately trained about the effects of these new provisions upon their commencement, and the responsibilities of employers under the new Standards.

Employers should also undertake a "stocktake" of their employment contracts, policies and procedures to ensure they are in a form that complies with the new regime.

If you would like more detail about the above information or guidance on how to ensure your organisation will be compliant with the new requirements, please contact:

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