Potential Extension of Casual Conversion Rights into National Employment Standards

This week the Federal Government announced new legislation to extend the right to request casual conversion to all regular casual employees.

The introduction of the *Fair Work Amendment (Right to Request Casual Conversion) Bill 2019*, if passed, will extend conversion rights to ***all casual employees*** who have worked on a regular basis with an employer for a period of 12 months or more. This will be inserted into the National Employment Standards (NES).

The intention of the bill is to 'fill the gap' left by the Fair Work Commission decision last year to insert the right to request conversion into 85 modern awards and extend the right beyond just eligible award-covered casual employees.

Who will this change impact?

All regular casual employees engaged by an employer for a period of 12 months will be eligible to request conversion. This includes the following:

- Casual employees covered by modern awards without a casual conversion term;
- Award and agreement-free employees.

Further, the inclusion of casual conversion in the NES means Enterprise Agreements must include a casual conversion term.

What will this mean for your business?

The Bill is intended to ensure all national system employees have access to the right to request conversion.

Regular casuals would be able to request conversion to part-time or full-time employment depending upon their pattern of work over the previous 12 months. For example, if an employee works 16 hours per week on a casual basis for 12 months with the same employer, they will be eligible to request to convert their employment to permanent part-time.

If the employee makes a request to the employer in writing, it can only be refused on reasonable grounds. A written response is required by the employer within 21 days of the request.

What is the current progress of the bill?

As of the 13th of February, a second reading was moved in the House of Representatives.

The VANA Employment Relations Team will continue to update members in relation to the potential changes to casual conversion. Members who have questions in relation to the Bill can phone our expert Telephone Advisory Team for further information on how this may impact their business.

Family and Domestic Violence Leave Update

In August 2018 the Fair Work Commission (**FWC**) updated all industry and occupation awards to include new provisions relating to family and domestic violence leave for all award covered employees.

In late 2018 however, Family and Domestic Violence leave became a federal right for all national system employees, whether covered by a modern award or not, when it was enshrined into the National Employment Standards (**NES**).

Given family and domestic violence leave is now part of the NES, the FWC has delivered a preliminary decision this month, that the model term on family domestic leave in all modern awards should be removed and replaced with:

> ***Clause X. Unpaid family and domestic violence leave***
>
> *Unpaid family and domestic violence leave is provided for in the NES.*

The reason for this provisional view is that modern awards should not reproduce or replicate NES entitlements, but rather simply reference the NES.

However, given that the family and domestic violence leave clause is a relatively new entitlement (which was only introduced into modern awards on August 1 2018) the FWC has formed the **provisional view** that the clause will remain in modern awards until they are replaced by the exposure drafts later this year.

Parties who object to the provisional views have until Wednesday 13 March 2019 to file an objection.

If you have any questions in relation to Family and Domestic Violence leave please phone the VANA Employment Relations Team on

Reminder: Employer Record Keeping Obligations and the Reverse Onus of Proof.

The Fair Work Ombudsman (**FWO**) has this year commenced the first legal action using new reverse onus of proof laws in relation to record keeping obligations. These laws were introduced by *the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* that came into force on 15 September 2017 and require employers to disprove underpayment allegations in court if they have failed to keep adequate time and wages records or issue pay slips.

This case involves a chain of sushi outlets in Queensland which are alleged to have broken workplace laws by failing to keep proper time and wages records and failed to issue pay slips to their employees. They are also alleged to have underpaid staff by nearly $20,000, which has since been paid back to the employees.

The Company faces possible penalties of up to $63,000 per breach and the directors face penalties of up to $12,600 for their alleged involvement in workplace contraventions. We expect to see more of these cases going forward as it only applies to conduct that has occurred since the legislation came into force.

Previously, if an employee made an underpayment claim, employers may have been able to utilise what the FWO called “a loophole”. This loophole allowed employers to avoid facing fines by the FWO if the claim could not be substantiated due to a lack of evidence confirming if the underpayment occurred or not as a result of the employer not adhering to their record-keeping obligations. The employee would need to prove that they had been underpaid if there were insufficient records, which made underpayments harder to prove.

However, with the introduction of the protecting vulnerable workers amendment the onus has been flipped. Employers are required to provide sufficient evidence to disprove the underpayment claim rather than the employee proving the underpayment claim. Should employers fail to keep adequate employee records and cannot disprove the claim, the underpayment claim will be accepted nonetheless. This is a much higher burden than before and up to date records need to be kept ensuring compliance and protect your business with the obligations being reversed.

This is one more example of FWO being given more powers to enforce workplace obligations and protect vulnerable workers in Australia. The FWO has said that they plan to make full use of these new laws in order to protect vulnerable workers so we can expect further prosecutions going forward.

In order to protect your business and reduce liability the following steps should be taken.

1. Undertake an audit of your business to identify non-compliance regarding how employee records are kept and whether your pay slips are complaint with Fair Work Regulations; and
2. Ensure appropriate systems and procedures are in place to keep employee records on file going forward.

To get immediate advice on the best practice way to deal with this situation contact the VANA Employment Relations Team on (02) 9083 0091.

Natural disasters, severe weather and stand down provisions.

With the recent flooding in far north Queensland a number of business the question of natural disasters and stand down provisions of the *Fair Work Act 2009* have become relevant.

We thought it would be a good opportunity to explain the provisions to the members and clarify when employers can lawfully stand down employees under the *Fair Work Act* without pay.

Whilst, casual employees may be sent home early or not rostered on during these times, we understand that for full-time and part-time employees' natural disasters which impact on a business's ability to open its doors can be problematic.

When can an employer stand down employees without pay?

Part 3-5 of the *Fair Work Act* provides details about the requirements about standing down employees without pay.

There are three circumstances in which an employer can stand down an employee without pay.

1. Industrial action (other than industrial action organised or engaged by the employer);
2. A breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown
3. **A stoppage of work for any cause for which the employer cannot reasonably be held responsible** (for example natural disasters including foods or bushfires).

For the final two circumstances it must be for a reason that the employer can't be held responsible. Instances such as a power outage or severe flooding are examples where an employer could stand down employees without pay.

Employers can only stand down employees when they are unable to work, if there are less customers but the employees are still able to fulfil their duties this will not be a valid stand down and employees will need to be paid.

Employees may suffer financial hardship from a stand down and an employer can be flexible and offer that they take annual leave to offset any possible loss of wages. If an employee is already on paid leave they still need to be paid these entitlements and they cannot be stood down.

For any further enquiries regarding the stand down provisions please contact the VANA Employment Relations Team on (02) 9083 0091.