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LAWYERS

Industrial Relations & Employment Alert

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Workplace Relations Act 1996 – December 2006 amendments

Further amendments to the *Workplace Relations Act 1996* have been passed by Parliament and received Royal Assent on 11 December 2006. In most cases, the amendments took effect on 11 December 2006. However, some of the amendments have retrospective effect from 27 March 2006. Amendments to the *Workplace Relations Regulations 2006* were also made on 13 December 2006.

We summarise below the key amendments and highlight some of the more significant changes for employers.

Preservation of redundancy entitlements

Where a workplace agreement is terminated unilaterally by the employer, the parties to that workplace agreement will continue to be bound by a redundancy provision that was included in the workplace agreement as if the workplace agreement had continued operating. The redundancy provision continues to be binding, in relation to an employee, until the earliest of:

- 12 months from the time the workplace agreement ceased operating;
- the time when the employee ceases to be employed by the employer; or
- the time when another workplace agreement comes into operation in relation to the employee and the employer.

In a transmission of business, a preserved redundancy provision will become binding on the new employer in respect of transferring employees and the new employer will be bound by the redundancy provision in respect of a transferring employee until the earliest of:

- 12 months from the time the relevant workplace agreement ceased operating;
- the time the transferring employee ceases employment with the new employer; or
- the time when another workplace agreement comes into operation in relation to the transferring employee and the new employer.

Similar provisions also exist where a pre-reform certified agreement, a pre-reform Australian workplace agreement (AWA) or a preserved State agreement are terminated.

Stand downs

The Act now enables an employer to stand down an employee where the employee cannot usefully be employed during a period because of:

- a strike;
- a breakdown of machinery; or
- a stoppage of work for any cause for which the employer cannot be held responsible.

An employer can only rely upon these provisions in order to stand down an employee:

- if there is no relevant contract of employment or industrial instrument providing for stand down in these circumstances; or
- if stand down provisions in a relevant contract of employment or industrial instrument require the employer to obtain authorisation for the standing down from the Australian Industrial Relations Commission, a State industrial authority or other person or body.

An employer may deduct payment for the period during which the employee is stood down but the employee's continuity of service is not broken and the stand down period counts as service for all purposes.

If an employer stands down an employee other than in accordance with the Act or a relevant contract of employment or industrial instrument, the employer may be subject to a civil penalty or, on application by the employee, the Federal Court or Federal Magistrates Court may grant an injunction requiring the employer to cease the unauthorised stand down.

Australian Fair Pay and Conditions Standard

There are several amendments to the Standard. In summary, the key amendments are as follows:

- an employer will only contravene the maximum hours of work provisions if the employer requests or requires an employee to work more than 38 hours per week and the employee works those hours;
- the regulations may exclude a certain class of employees from the definition of shift worker for the purpose of the annual leave provisions;
- the base number of weekly hours for calculating annual leave and personal leave entitlements is the employee's specified hours, up to a maximum of 38 hours per week;

- an employee can, by agreement with the employer, elect to cash out some or all of the paid personal/carer's leave he or she has accrued provided that a provision in a relevant workplace agreement entitles the employee to do so and the employee does not go below the protected amount of paid personal/carer's leave which, for a 38 hour full-time employee, will be 15 days; and
- where an employee is absent on personal leave, the employee must be paid at a rate that is no less than the employee's basic periodic rate of pay. An employee absent on personal leave no longer has an entitlement under the Standard to be paid an amount equal to what the employee would have expected to earn if he or she had been at work.

Other amendments

One other key area of amendment relates to the relationship between pre-reform federal agreements and preserved State agreements and the Australian Fair Pay and Conditions Standard.

It was previously the case that the Standard did not apply at all if an employee's employment was subject to a pre-reform certified agreement or AWA, a section 170MX award or a preserved State agreement. The amendments have changed this position.

It is now the case that where an employee's employment is subject to one of these types of instrument, the Standard will only *not* apply in relation to a *matter* if the instrument deals with that matter in relation to the employee.

Matter is defined as one of the key entitlements under the Standard – basic rates of pay and casual loadings, maximum ordinary hours of work, annual leave, personal leave and parental leave.

These amendments apply with retrospective effect from 27 March 2006, although no civil penalty can be imposed for a breach that occurred before 11 December 2006.

Some ambiguity remains around how comprehensively an agreement must deal with a matter in order to oust the operation of the Standard. For example, it is not clear whether a pre-reform certified agreement which contained provisions about paid personal leave but not unpaid carer's leave or compassionate leave would be considered to deal with the matter of personal leave.

These amendments mean that employers will need to check the terms of relevant agreements to ensure that they deal with all matters covered by the Standard. If they do not, employers will need retrospectively to apply relevant aspects of the Standard to employees.

Regulations

The *Workplace Relations Regulations 2006* have also been amended. The key changes aim to streamline the record keeping requirements and make them less onerous for employers.

One particular area of change is in relation to the obligation to record an employee's hours of work. It is now the case that an employer only needs to record hours of work when the employee is entitled to overtime or other penalty rates for overtime hours actually worked. The employer must record either the number of overtime hours worked by the employee each day or when the employee started and ceased working overtime hours. Employers are still required to keep records of hours worked by casuals and irregular part-time employees when such employees are guaranteed a basic periodic rate of pay.

There is no longer a requirement that employers keep a record of, or provide on payslips, details of the instrument under which the employee derives entitlements of employment or the employee's classification under such an instrument.

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