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ALERT

GOVERNMENT ANNOUNCES MORE CHANGE TO WORKCHOICES

On Monday 13 November 2006, the Federal Government announced some significant changes to the WorkChoices legislation. The changes will be effected through amendments to both the Workplace Relations Act 1996 (WR Act) and the Workplace Relations Regulations 2006 (Regulations).

Summary of Changes

In summary, the proposed amendments will:

- limit the accrual of annual leave and personal/carer's leave under the Australian Fair Pay and Conditions Standard (Standard);
- change the payment rule for personal / carer's / compassionate leave and for leave for pregnant mothers for whom no safe job is available;
- allow the cashing out of personal/carer's leave, subject to certain requirements
- provide for protection of redundancy entitlements in workplace agreements for up to 12 months after they are terminated;
- provide a right to stand down employees where work is unavailable due to factors outside an employer's control; and
- further amend the record-keeping requirements to reduce the administrative burden on employers.

The changes to the record-keeping requirements will only require amendment of the Regulations—this can be achieved fairly quickly. However, the other changes will require amendments to the WR Act, and may not occur until early next year.

Leave Under the Standard

Accruing Annual and Personal/Carer's leave

The Federal Government proposes to amend the rules relating to the accrual of annual and personal/carer's leave under the Standard so that paid leave will not accrue for hours worked above 38 hours per week. This will require an amendment to the WR Act.

The proposal responds to concerns from employers that employees might accrue paid leave entitlements where they work regular overtime.

Payment for Personal/Carer's Leave

Many employers have expressed concern about the payment rule under the Standard for:

- personal/carer's leave;
- compassionate leave; and
- leave for pregnant employees for whom a safe job cannot be found.

The Standard currently provides that an employee is entitled to be paid the amount the employee would reasonably expect to have earned had they been at work. This might include penalty rates, shift allowances, rostered overtime, commissions and similar payments.

The proposed amendment would change the payment rule so that an employee must be paid their basic periodic rate of pay when on leave. This is the same rule that applies for payment of annual leave under the Standard, and will require an amendment to the WR Act.

Cashing Out Personal/Carer's Leave

Currently, cashing out of personal/carers' leave during the term of employment under the Standard is prohibited.

It is proposed to amend the WR Act so that employees can cash out accrued personal/carers' leave, subject to some safeguards:

- an employer and employee must agree to cash out the leave in writing; and
- a full-time employee must have at least 15 days of personal leave left after cashing out.

It is unclear whether cashing out will only be possible through a workplace agreement (as is the case for cashing out annual leave under the Standard), or whether all employees will be able to cash out personal/carers' leave.

Importantly, there will be no right for an employee to have personal/carers' leave cashed out—an employer would have to agree to it and has the right to withhold consent.

Protection of Redundancy Entitlements in Agreements

A proposed amendment to the WR Act would provide that redundancy entitlements in a workplace agreement continues to apply for up to 12 months if an agreement is terminated by the employer.

The new rules would apply to workplace agreements (made under Work Choices) and pre-reform agreements (certified agreements, Australian workplace agreements and preserved state agreements) where an employer:

- unilaterally terminates a workplace agreement after its nominal expiry date has passed on 90 days' notice; or
- successfully applies to the Australian Industrial Relations Commission for an agreement to be terminated, where it is not contrary to the public interest.

The preserved redundancy entitlements would apply for 12 months, but will cease if a new workplace agreement is lodged within that period. They will only apply to employees employed at the time the agreement was terminated.

The definition of 'redundancy' would be limited to terminations at the initiative of the employer because of operational requirements or insolvency. In practice, this definition would cover most redundancies.

There will be a requirement to notify employees that their preserved redundancy entitlements continue where an agreement is terminated. Such preserved redundancy entitlements will also bind a new employer on a transmission of business.

Right to “Stand Down” Employees

Currently, employers may be unable to stand down employees where work is unavailable due to factors outside the employer’s control unless there is an express right to do so in an industrial instrument or contract. This can mean that an employer has to continue to pay an employee when there is no work, or dismiss the employee. A proposed amendment to the WR Act would include a default stand down provision. It would apply where:

- work is unavailable due to factors outside the employer’s control; and
- the employer does not otherwise have a right to stand down the employee (under a contract or industrial instrument).

This type of provision is not unusual in many existing awards but the amendment will apply a “stand down” right to all types of employees.

Amendments to Record-keeping Requirements

Further amendments will be made to the Regulations to streamline the record-keeping requirements for employers.

Many employers have expressed concern at the requirement to record an employee’s total hours worked and start and finish times. The Government amended the Regulations in June 2006 to limit the types of employees for whom these records must be kept (in particular, limiting its application to employees earning less than \$55,000 per annum).

The new amendments would require employers to record only those hours for which an employee is entitled to be paid overtime or penalty rates, rather than all hours worked. An important exception is that employers will continue to have to record hours for all casual and irregular part-time employees, where they are paid on an hourly basis. The amended Regulations have yet to be made.

Earlier amendments extended the time for employers to ensure that their systems comply with the record-keeping requirements to 27 March 2007. Employers cannot be prosecuted for breaches of the record-keeping and payslip requirements until after that date.

Implications for Employers

- The fine detail of the changes will not be clear until draft legislation is presented to Parliament and amending Regulations are made.
- Employers will need to familiarise themselves with the changes, in particular those relating to the Standard and the record-keeping requirements which will apply to most employees.

This article has been prepared for clients of FCB and is a guide only. For further

information, please contact one of our Partners in Sydney on (02) 9922 5188 or Melbourne (03) 9614 3900

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