

Your Options under the Fair Work Act 2009

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Agenda - Five Fundamental Changes

- Modern Awards
- National Employment Standards
- Agreement Making
- Unfair Dismissal
- Workplace Rights / Discrimination and Adverse Action



Modern Awards

- Commence 1 January 2010
- Set minimum terms and conditions for national system employees
- Apply to employers within a given industry or on the basis of the occupational category



Why do employers need to think about modern awards?

- Expanded coverage of awards
 - e.g. management
- Increases in rates (will apply even if an Enterprise Agreement applies)
- Registered and Licensed Clubs Award 2010
 - Base rates
 - Allowances
 - Penalty rates
- Penalties for contravention up to \$6,600 for individuals and \$33,000 for corporations



Why do employers need to think about modern awards?

- Increases/introduction of new penalties and allowances
- Hours restrictions
- Minimum rest breaks between shifts
- Dispute resolution clauses
- Consultation on major workplace change
- Meal allowances
- Clothing, equipment and tools allowances
- Uniform allowance (including laundering)
- Restrictions on default superannuation fund
- Vehicle allowance
- Working late/early/away from usual place of work allowances
- Leave loading
- Salary packaging



Awards, the NES and Common law contracts

- Registered and Licensed Clubs Award 2010
 - Base rates
 - Allowances
 - Penalty rates
- Awards and NES necessarily interact with common law contract
- A common law contract cannot override an award even if you are paying above award rates



National Employment Standards

- 10 legislated minimum conditions
- Commence operation 1 January 2010
- Penalties for non compliance



National Employment Standards

- Maximum weekly hours of work
- Flexible working arrangements
- Parental Leave
- Annual Leave
- Personal/Carers Leave
- Long Service Leave
- Public Holidays
- Notice of termination
- Redundancy pay
- Provision of a Fair Work Information Statement



How the new safety net will impact all agreements (from 1 January 2010)?

- The NES will apply to all employees – no matter what instrument they are covered by
- When calculating NES entitlements
 - generally service prior to 1 January 2010 will count as service for the purpose of calculating NES entitlements
 - with redundancy, pre 1 January 2010, service will only count where the employee had a right to redundancy pay immediately prior to 1 January 2010
- Agreement covered employees must still be paid at least the relevant minimum rate of pay



What options are available?

- Individual Flexibility Agreements
 - Model flexibility clause in awards
 - Genuine agreement/no coercion or duress
 - Employee must be better off
 - Timing?
 - Terminable on 28 days
 - Vary application of terms of the award, overtime rates, penalty rates, when work is performed, allowances and leave loading



What options are available?

- High Income Guarantee
 - \$108,300 (indexed)
 - Including salary and fixed payments
 - Does not include variable payments such as incentives and bonuses or compulsory super
 - Timing?
 - 12 month period
 - Must give notice of consequences
 - Pro rata for part-time



What options are available?

- Set off clauses
 - Over a specific period not the entire employment
 - Does not prevent award coverage, simply provides for a 'lump sum' payment to be offset against an award entitlement
 - Payments earmarked for a specific purpose cannot be offset against another kind of award entitlement
 - No clear legal position statement issued by FWO



What options are available?

- Enterprise Agreements
 - BOOT/NDT
 - Voting process
 - Overrides award
 - All in approach

Managing your workforce

- What are your options?
 - NES, award, common law contract and set off clause?
 - NES, award, common law contract and individual flexibility arrangement?
 - NES, award, enterprise agreement and common law contract?
 - NES, award, common law contract and high income guarantee?



Plan Plan Plan!

- What do you want to achieve?
 - What changes do you want and/or need?
 - What efficiencies do you want to gain?
 - What current or future terms and conditions may cause you problems?
 - Reduction in casual labour costs?
 - Do you have issues with absenteeism?
 - Does the span of hours suit your business?
- Prioritise



Plan Plan Plan!

- What are your business risks
 - Union relations – are they there at all?
 - What is the tolerance for industrial action?
 - What are your contingencies
 - What is the real risk
 - Do you have compliance risks (AFPCS/Award/NES)?
 - Do you have obligations to consult?
 - Compliance with FW Act requirements



Agreement Making

- 3 types
 - Single enterprise agreement
 - Multiple enterprise agreement
 - Greenfields agreement
- Unions will be the default bargaining agent for many employees
- Obligations to bargain in good faith
- Enterprise agreements must be approved by FWA and will come into operation on approval



Agreements

- The new agreement-making provisions became operative on **1 July 2009**.
- The FW Act establishes a process for making 'enterprise agreements' with significant changes to:
 - the bargaining process
 - employee representation
 - the approval process
 - the role of FWA
 - the content included in enterprise agreements



Bargaining Representative

- Bargaining representatives (BRs) are the people who do the negotiating
- They represent the parties and act on their behalf during the negotiation and making of the proposed agreement
- As the employer, if you initiate bargaining or agree to bargain you are automatically a BR
- Who else is a BR?
 - Any person can be a BR is appointed by an employee who will be covered by the proposed agreement
 - The relevant union will be automatically be a BR for an employee who is a member of a union, unless the employee chooses otherwise



What can be included in agreements?

An agreement may now only contain **permitted matters**.

These include:

- matters pertaining to the relationship between an employer and the employees who will be covered by the agreement;
- matters pertaining to the relationship between the employer(s) and employee organisations covered by the agreement;
- deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and
- how the agreement will operate.

What must be included in agreements?

The following terms must be included in all enterprise agreements:

- a **nominal expiry date** for a maximum of 4 years;
- a **dispute settlement term** that allows an independent external body to settle disputes;
- a **flexibility term** that enables employees and employers to agree to vary the effect of the agreement in relation to a particular employee;
- a **consultation term** that requires employers to consult employees about major workplace change;
- **rates of pay** in the agreement cannot provide for less than the base rate payable under the modern award or the national minimum wage order.



What must not be included in agreements?

- Discriminatory terms
- Terms that breach freedom of association provisions
- Bargaining service fees to unions
- Alternative unfair dismissal remedies
- Right of entry provisions which are inconsistent with the FW Act
- Terms that purport to authorise industrial action during the life of the agreement



Pre-approval process

- Employees must have been notified of their representational rights on prescribed form and in time limits
- Cannot ask for employee approval until at least 21 days later
- Employees must be provided with a copy of the proposed agreement at least **7 days prior** to the approval process
- The employer must take all reasonable steps to ensure the terms and effect of the agreement are appropriately explained to employees who will be covered



Approval process

- An agreement is made when a majority of employees who cast a valid vote approve the agreement
- If it is approved by the employees the BR must apply to FWA for approval



No disadvantage test given...the BOOT

- The Better Off Overall Test will apply from 1 January 2010
- FWA will apply the Better Off Overall Test: (for EAs)

“for the purposes of determining whether an enterprise agreement passed the BOOT, if a class of employees to which a particular employee belongs would be better off if the agreement applied to that class then if the relevant modern award applied to that class, FWA is entitled to assume, in the absence of evidence to the contrary, that the employee would be better off overall if the agreement applied to the employee.”

- FWA will apply a different Better Off Overall Test: (for Greenfields)

*“A greenfields agreement passes the BOOT if FWA is satisfied, that **at the test time, each prospective** award-covered employee for the agreement would be better off overall if the agreement applied, than if the modern award applied to the employee.”*

- Modified No Disadvantage Test will apply until 1 January 2010



Treatment of existing industrial instruments

- **Continuation of instruments**
 - All existing WR Act instruments will continue as **“transitional instruments”** until they are terminated or replaced by a FW Act instrument
- **Rules governing variation and termination of old agreements**
 - The circumstances in which transitional instruments can be varied will be limited.
 - The clear exception being pre-reform certified agreements that can continue to be varied and extended until 31 December 2009.



Treatment of existing industrial instruments (cont.)

- Collective agreement-based transitional instruments will be able to be terminated in the same way as enterprise agreements under the FW Act – by agreement, or after the nominal expiry date if not contrary to public interest.
- Individual agreement-based transitional instruments (including AWAs and ITEAs) will be subject to new uniform rules that allow them to be:
 - terminated by agreement at any time;
 - terminated by either party unilaterally after the nominal expiry date (termination takes effect 90 days after approval from FWA);
or
 - terminated conditionally on an enterprise agreement covering the employer and the employee coming into operation.



Unfair Dismissal

- Small business
 - Less than 15 employees (FTE)
 - Small Business Dismissal Code
 - 12 months minimum employment period
- Employee is protected from Unfair Dismissal if
 - Served the minimum employment period (6 months except for small business)
 - Employed under an award or agreement or earns less than \$108,300 (indexed annually)



Unfair Dismissal

- Employee has not been dismissed if:
 - Employed for a specified period, season or task and that has been completed;
 - Employed only for the duration of a training arrangement;
 - Demoted but no significant reduction in remuneration or duties
- Genuine redundancy exclusion
- Casual employees must have been employed on a regular and systematic basis and have a reasonable expectation of ongoing work
- Remedy is reinstatement or compensation



Workplace Rights/EEO/Discrimination

- Prohibited to take adverse action against a person in relation to a workplace right
- Workplace right is broad eg right to use a grievance or disciplinary process
- Adverse action is a detriment eg termination, demotion, lost opportunity to work overtime??



Workplace Rights/EEO/Discrimination

- Prohibited to take adverse action because of protected grounds e.g. race, age, sex, disability
- Includes threatening to take action
- Can be investigated by Unions or Fair Work Ombudsman
- The party accused must prove that the action was not done because of a prohibited ground



Summary - Five Fundamental Changes

- Modern Awards
- National Employment Standards
- Agreement Making
- Unfair Dismissal
- Workplace Rights / Discrimination and Adverse Action



Questions



Deacons
Australia

Deacons Australia joins
Norton Rose Group

01.01.10

Two major legal practices
Norton Rose Group and Deacons Australia
are joining forces from 1 January 2010

Thank you

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