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WORKPLACE VIEW

September 2013

Fair Work Act Gets a Whole Lot Friendlier

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The well publicised anti-bullying measures included in the most recent amendments to the *Fair Work Act 2009* (Cth) (**FW Act**), were only one of the important changes made in the amending Act. In this edition we look at the new changes made to promote family friendly workplace practices – some of which commenced on 1 July 2013, well ahead of the 1 January 2014 start date for most of the other changes. There are three key strands to the family friendly measures.

1. Right to Request Flexible Working Arrangements (from 1 July 2013)

The right to request flexible working arrangements under section 65 of the FW Act has been significantly expanded in scope and further clarified. Employees with the right to request flexible working arrangements has been broadened, from people caring for either children under school age or those with a disability, to also include:

- parents of school age children;
- carers;
- workers with disability or over 55; or
- workers experiencing domestic violence.

To avoid any doubt, the amended provisions clarify that an employee who is a parent may request to work part-time to assist in the care of a child.

There is also new guidance on what constitutes *reasonable business grounds*, being the basis upon which an employer can reject a request for flexible working arrangements. A new (non-exhaustive) list describes *reasonable business grounds* to include when:

- the flexible work arrangement is too costly;
- there is no capacity to make the requested change;
- it is impractical to change the working arrangements of other employees;
- there is likely to be a significant loss in efficiency or productivity; or
- there is likely to be a significant negative impact on customer service.

2. Leave During Pregnancy and After Birth or Adoption (from 1 July 2013)

A number of minor changes/clarifications have been made in relation to the parental leave provisions – so that work is safer during pregnancy and leave is more flexible:

- pregnant employees with **less than 12 months** service will now have access to the right to transfer to a safe job and unpaid special maternity leave under the revised sections 80-82 of the FW Act if they meet the specific requirements;
- to avoid any doubt, the amendments clarify all pregnant employees can take accrued paid leave rather than unpaid special maternity leave, if they so choose;
- any period of unpaid **special maternity leave** will no longer be offset against the period of parental leave; and
- there is an expanded entitlement of up to eight weeks concurrent unpaid parental leave for a couple as well as more flexibility in when this leave can be taken (under sections 70-80 FW Act).

Did you know? …

Although an employer is prohibited from paying wages to employees participating in protected industrial action, the High Court has recently confirmed that the employer is still required to ensure employees continue to receive non-monetary benefits. This could include, for example, continuing to provide employees with food and accommodation for the duration of any protected industrial action which will have particular significance for employers of FIFO workers.

CFMEU v Mammoet Australia Pty Ltd [2013] HCA 36

3. Consultation to Change Hours (to commence 1 January 2014)

The genuine **consultation of employees** required under the consultation clause included in modern awards and enterprise agreements (sections 139 and 205 FW Act respectively), will include proposed changes to normal hours of work. While employers must already consult with employees about major workplace change, to avoid any doubt, future consultation clauses will expressly require employers to consult with employees when seeking to change an employee's regular roster or ordinary hours of work.

What should employers do?

Employers should ensure they are familiar with the statutory entitlements of employees with family and carer responsibilities, including the right to request flexible working arrangements and the pregnancy and parental leave entitlements which form part of the National Employment Standards.

With respect to the right to request flexible working arrangements, while the new guidance on what constitutes reasonable business grounds is yet to be tested, the wording of the amended provision implies a higher bar has been set for employers before they can legitimately reject a request.

To avoid breaching the standards and risking civil penalties, employers should review their employment agreement templates and policies to ensure they are compliant with the amended Fair Work provisions.

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CLIENT NOTICEBOARD

Client Quiz

The first correct entry emailed to isla.rollason@squiresanders.com will win a copy of our '2013 Good Food Guide' (delivery within Australia only).

Which of the following grounds of discrimination is not currently unlawful under federal Australian law:

(a) discrimination on the grounds of national origin;

(b) discrimination on the grounds of unspent criminal record;

(c) discrimination on the grounds of gender identity; or

(d) discrimination on the grounds of family responsibility.

Legislation Update

Legislative Instrument	Status	Key Proposed Changes
Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Regulation 2013	Received royal assent on 28 June 2013 and commenced on 1 August 2013	Regulations amend the Sex Discrimination Act 1984 by widening the scope of the Act to include discrimination on the grounds of: • sexual orientation; • gender identity; and • intersex status. Acts which would otherwise constitute discrimination are exempt if the conduct is in direct compliance with others laws prescribed by regulation.
Fair Work Amendment (Arbitration) Bill 2013	Lapsed	The Bill proposed amendments to the *Fair Work Act 2009* to enable the Fair Work Commission to deal with disputes through alternative dispute resolution, but was not passed before the end of the Parliamentary term.

Employer Reminder

Garden leave provisions are often overlooked but can provide a very useful tool for an employer to protect its business from a departing employee. If the employee's employment contract contains a garden leave clause, the employer will usually (depending on the clause contents) be entitled to direct the employee not to attend the workplace and not contact key clients, employees or suppliers during the notice period, while continuing to owe obligations of good faith to the employer. If used in conjunction with post termination restrictions, garden leave provisions may effectively further increase the period of time a departing employee (typically at executive level) is prohibited from competing with the employer.

Events

Squire Sanders Perth 2013 Australian Labour and Employment Breakfast Series

PERTH

- 23 October 2013 "Redundancy Refresher"
  Level 21, 300 Murray Street, Perth

SYDNEY

- 4 September 2013, "Managing Unwell Employees"
  Level 101 Macquarie Place, Sydney

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