



The Clock is Ticking...

Is your business ready for the new workplace laws on 1 January 2010? We urge you not to wait until the last minute to implement the changes.

Do you know which Award currently applies and which Modern Award will apply from 1 January 2010?

Are arrangements in place so that your business will comply with the National Employment Standards when they come into force on 1 January 2010?

Are you keeping the required records and giving employees pay slips?

Are you aware of the options for making an Enterprise Agreement with employees?

Do you understand and are able to comply with the Small Business Fair Dismissal Code if terminating an employee's employment?

Please seek our advice if you have any questions.

Re-instatement: Is it appropriate in all circumstances of unfair dismissal?

For many employers the idea of being forced to re-instate an employee following dismissal is totally undesirable. Further, it doesn't help matters that re-instatement is the first remedy that Fair Work Australia (FWA) must consider upon finding that an employee was unfairly dismissed. Only in circumstances where re-instatement is inappropriate may FWA make an order for compensation.

Loss of trust and confidence is one factor against re-instatement. In *Cvetkovski, Sharari, Kumar v Rail Corporation of NSW (Rail Corp)* [2009] AIRC 429, three employees were dismissed and they made an application for unfair dismissal. The employer, Rail Corp, had opposed re-instatement. Commissioner Harrison, whilst finding that the employees had been unfairly dismissed, did not order re-instatement. The Commissioner was satisfied that the relationship between the parties had broken down to such an extent that it would be inappropriate to order re-instatement. He concluded that there was a clear and irreconcilable loss of trust and confidence. The three ex-employees appealed the decision to the Full Bench seeking re-instatement.

The Full Bench handed down its decision on 6 November 2009, dismissing the appeal. This case shows that re-instatement will not be an appropriate remedy in all circumstances, particularly when trust and confidence has broken down.

Are your employees entitled to redundancy pay under the Federal IR system?

Yes. Under the National Employment Standards (NES), employers from 1 January 2010 will be required to provide retrenched employees with redundancy pay calculated by reference to their period of 'continuous service.'

How should redundancy pay be calculated? Begin by looking at the table at s119(2) of the Fair Work Act 2009 to ascertain how many weeks redundancy pay you will need to pay – this will depend on how long your employee has been 'continuously' employed with you.

Do I need to count the continuous period of service prior to the NES taking effect (i.e. 1 January 2010)? Service prior to 1 January 2010 does not count as service for the purpose of calculating an employee's NES redundancy entitlement, unless the employee had an entitlement to redundancy pay before 2010.

What happens when an employee's pre-2010 entitlement under an employment contract was less generous than the NES redundancy pay? The employer will be obliged to provide the more generous NES entitlement.

What happens when an employee's pre-2010 entitlement under an employment contract was more generous than the NES redundancy pay? Unless the employer amends the employment contract to remove the more generous contractual entitlement, it will still be contractually obliged to provide the more generous entitlement.

...continued over page.

...continued from previous page.

Are your employees entitled to redundancy pay under the Federal IR system?

What happens if an employee is given notice of their termination before 1 January 2010, but the retrenchment doesn't take effect until, on or after that date? The employee will still be entitled to the NES redundancy pay entitlement.

Are there exemptions? Yes. Employers who have fewer than 15 employees are exempt. Similarly, and for example, there is no obligation to pay redundancy pay to casuals, employees on fixed term contract, apprentices.

Application to Fair Work Australia for a variation. From 1 January 2010 employers will be able to make an application to Fair Work Australia for a variation to their obligation to provide redundancy pay:

- Where the employer has obtained "other acceptable employment" for the employee; or
- Where the employer is unable to pay the redundancy amount.

Employers approved for single interest bargaining

Under the Fair Work Act 2009, two or more employers who are "single interest employers" may make one enterprise agreement. What does this mean?

It means that employers can bargain together for an enterprise agreement, but only if they are employers engaged in a joint venture, common enterprise, are related bodies corporate, or they are specified in a "single interest employer authorisation."

In deciding whether or not to make a declaration for a single interest employer authorisation, the Minister (under the *Fair Work Act*) must have regard to the following matters:

- the history of bargaining of each of the relevant employers, including whether they have previously bargained together;
- the interests the relevant employers have in common and whether they are relevant to bargaining together;
- whether the employers are governed by a common regulatory regime;
- whether it would be appropriate for each employer to make a separate enterprise agreement with its employees;
- whether the employers operate collaboratively rather than competitively;
- whether the employers are substantially funded by Commonwealth or State funding.

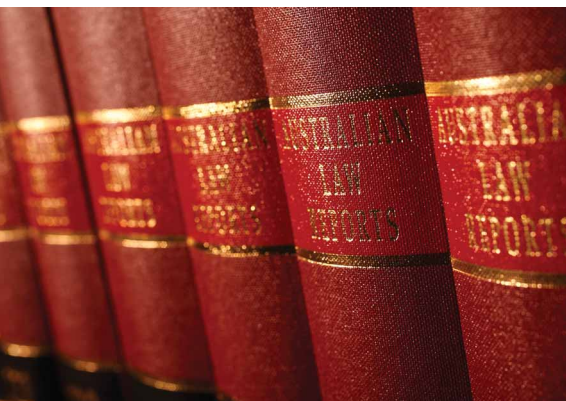
Victorian kindergarten employers and two NSW hospitals have all successfully applied for ministerial approval to be declared "single interest employers".

They were able to show that it was practical for them to continue bargaining collaboratively, given their structures, shared funding sources and regulatory arrangements.

Fair Work Australia approves random drug testing

In a dispute between Caltex and the Australian Workers Union (AWU) over a proposed enterprise agreement, Fair Work Australia ruled that random drug testing is acceptable as opposed to testing on a 'for cause' basis.

Does your current Drug & Alcohol policy need up-dating? Alternatively, do you require our assistance in drafting a Drug and Alcohol policy for your workplace?



To discuss your employment needs please contact a member of our team.

Audrey Mills

Consultant
03 6210 0057
audrey.mills@doma.com.au

Elise Archer

Senior Associate
03 6210 0057
elise.archer@doma.com.au

Andrew Walker

Managing Partner
03 6210 0048
andrew.walker@doma.com.au

Gretel Chen

Senior Associate
03 6210 0058
gretel.chen@doma.com.au

Louisa Jeschke

Lawyer
03 6210 0058
louisa.jeschke@doma.com.au

59 Harrington Street Hobart TAS 7000
telephone +61 3 6210 0000