

Financial Implications of the Fair Work Act

Implication #1 12 months parental leave

Under the NES, all workers within the national industrial relations system (except casuals) will be entitled to apply for up to 12 months unpaid parental or adoption leave once they have performed 12 months of continuous service to their employer. The employee may request an additional 12 months of unpaid leave (bringing the total period of leave up to 24 months) and the employer may not unreasonably refuse this request.

Implication #2 Cashing out of annual leave and paid carer's leave

The NES grant all employees a minimum of four paid weeks of leave per year of service. This is increased to five weeks for shift workers, Modern Awards and Enterprise Agreements may include provisions allowing for the 'cashing out' of unused leave, provided the employee retains a balance of at least four weeks. The NES also grants employees a minimum of two paid carer's and personal leave days per year. These may also be cashed out where an award or agreement allows this, provided the employee retains a balance of at least 15 days. You should carefully check whether you should begin budgeting for these cashing out entitlements now in preparation for their commencement on 1 January 2010.

Implication #3 Payment on dismissal

Under the new Act, employees must be advised of their dismissal in writing and provided with a minimum period of notice – or payment in lieu of that notice – based on continuous service in accordance with the following:

Less than 1 year = 1 week
1 year to < 3 years = 2 weeks
3 years to < 5 years = 3 weeks
More than 5 years = 4 weeks

Employers should set aside sufficient fund to meet these obligations.

Implication #4 Redundancy pay

Traditionally, redundancy pay entitlements have been set out in awards or agreements. However under the new NES, these entitlements are set out in the general law.

The minimum entitlements based on years of continuous service, will be as follows:

1 to < 2 years = 4 weeks
2 to < 3 = 6 weeks
3 to < 4 = 7 weeks
4 to < 5 = 8 weeks
5 to < 6 = 10 weeks
6 to < 7 = 11 weeks
7 to < 8 = 13 weeks
8 to < 9 = 14 weeks
9 to < 10 = 16 weeks
At least 10 years = 12 weeks

As most employees will be entitled to at least these minimum entitlements, it is essential your clients include this potential cost in any restructuring plans. Note that "small businesses" (those with fewer than 15 PTEs) are exempt from this provision so it's critical for you to know whether you are a "big business" or a "small business" for the purposes of applying the NES.

Implication #5 Sham contracting

Sham contracting refers to attempts by employers to disguise a traditional employer / employee relationship as a contracting arrangement in order to avoid payment of work cover, superannuation and other employee entitlements. The new Act makes it clear that sham contracting arrangements will continue to be investigated and prosecuted by Fair Work Australia.

Many employers incorrectly believe that if their employees obtain an ABN they may be treated as a contractor, but this is incorrect.

Fair Work Australia will consider all of the circumstances surrounding the relationship between the business owner/operator and the 'contractee' to determine whether it is really one of employer/employee. Heavy penalties apply to employers who engage in sham contracting practices.

Implication #6 Modern Awards

Modern Awards will replace existing awards when they commence operation on 1 January 2010. These will be largely industry-based and will reduce the overall number of awards from around 4000 to just 130. Importantly, Modern Awards will cover a huge range of employees and many employers remain unaware that their business will be become bound by a Modern Award in just a few months. It is essential that you know what the applicable new Modern Award means for your business.

Remember, Modern Awards are not just concerned with basic pay rates - they also set out other employee entitlements, such as casual and part-time loadings, penalty rates and shift allowances.

All these have the potential to seriously affect a business's bottom line.

Implication #7 The new unfair-dismissal laws

Significant changes were introduced on 1 July 2009 to the rules relating to unfair dismissal. Under the previous legislation, businesses employing fewer than 100 employees were exempt from unfair-dismissal laws, but this exemption has now been abolished.

This means almost all employees are now entitled to lodge an application for unfair dismissal if they feel their dismissal was harsh, unjust or unreasonable and they had worked for the employer for the 'minimum employment period'.

This period is set at 12 months where the employer has fewer than 15 full-time equivalent employees (i.e., it is a 'small business') and six months in all other cases.

If a dismissal is found to be unfair the employer may be forced to either rehire the employee and pay them their lost wages and entitlements or pay the employee compensation.

Compensation is capped at the lesser of 26 weeks' pay or \$54,150 (this being half of the high income threshold). You should ensure you document every important interaction with employees to ensure that you are able to produce records in support of your decision to dismiss an employee.

The new Act also introduced the 'Fair Dismissal Code' which, if carefully followed by a small business employer when dismissing an employee, will result in the dismissal being considered 'fair'.

You should actively use this Code and its checklist every time you dismiss an employee.

Implication #8 Collective bargaining in good faith

Under the Fair Work Act, all negotiations in relation to the creation of new Enterprise Agreements must be conducted in 'good faith'.

To ensure you meet this requirement you should review your current practices and either obtain appropriate training or engage a professional bargaining representative. Obtain appropriate training or engage a professional bargaining representative. Either of these options will require an outlay of funds, but it will be money well spent as failing to bargain in good faith could be extremely costly.

Implication #9 Fair Work Australia

Fair Work Australia (FWA) is the new national industrial relations regulator which replaced the Australian Industrial Relations Commission (AIRC) on 1 July 2009. FWA's powers are broader than those which were granted to the AIRC and include the ability to convene single, compulsory conferences or hearings to resolve disputes. As a general rule employers will be expected to represent themselves. Your clients should ensure they are prepared for the cost implications of such conferences and hearings; which will result from, among other things, the need to thoroughly prepare in advance of the hearing and personally attend FWA offices.

Implication #10 Transfer of business rules

The Fair Work Act introduces a number of important changes in relation to the transfer – that is, the buying and selling of businesses. One of the most important of these changes concerns 'continuity of service'. A new owner of a business may decide not to recognize the period of service performed by employees for their previous employer when calculating their length of service. M determine dismissal entitlements. However, the new employer must inform employees of this in writing before the new period of service commences, otherwise their previous service must still be included in any calculation. You should be wary of this when purchasing a new business as the cost implications of getting it wrong could be quite significant.