A GUIDE TO COMPLIANCE WITH THE FAIR WORK ACT

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AGENDA

1. Is your business compliant with the *Fair Work Act 2009*?

2. What to do if you are not compliant?

INSTRUMENTS REGULATING EMPLOYMENT

- Contract of Employment
- Enterprise Agreements
- Modern Award
- Legislation (e.g. Fair Work Act)
- HR Policies
COMPLIANCE OVERVIEW

• Key employer obligations under the *Fair Work Act 2009*:
  • 10 National Employment Standards (NES)
  • Relevant Modern Awards:
    » E.g. Health Professionals and Support Services Award 2010;
  • Any Enterprise Agreement
  • Sham contracting provisions
  • Record keeping obligations

• Employer obligations under the *Fair Work 2009* are upheld by:
  • The Fair Work Commission
  • Federal Courts (Unions, affected employees and the FWO can sue)
COMPLYING WITH THE NATIONAL EMPLOYMENT STANDARDS (NES)

1. Hours
   - Maximum weekly hours of work (38)
   - Rules about additional hours of work

2. Flexible work requests*
   - Employees may request changes to working arrangements in writing
   - Employers have 21 days to respond

3. Parental leave*
   - Generally applicable to non-casual employees who have been employed for over 12 months.
COMPLYING WITH THE NATIONAL EMPLOYMENT STANDARDS (NES)

4. Personal/Carer’s leave and compassionate leave
   • Amount of leave/accrual of leave:
     » 10 days paid PCL per annum, cumulative
     » 2 days unpaid carer’s leave per occasion (casuals included)
   • Circumstances when Personal/Carer’s leave and compassionate leave can be taken
   • Notification and evidence requirements

5. Community service leave
   • Period of entitled community service leave
   • Meaning of ‘eligible community service’
COMPLYING WITH THE NATIONAL EMPLOYMENT STANDARDS (NES)

6. Long-service leave

- Who is eligible? Includes casuals
- How to calculate entitlements:
  - 1/5 month for each year of service,
  - accrues after 7 years continuous service in ACT; 10 years in NSW, unless terminated after 5 years of service
  - no cashing out

7. Public holidays

- Employees entitled to be absent on public holidays
- Exceptions/reasonable requests to work on public holidays
COMPLYING WITH THE NATIONAL EMPLOYMENT STANDARDS (NES)

8. Notice of termination of employment
   • NES notice must be: in writing, in advance, specify date of termination
   • Amount of notice: sliding scale, depending on period of continuous service (+ 1 week extra if over 45 years); this is minimum only
   • Payment in lieu of notice permissible

9. Redundancy pay*
   • Amount: sliding scale depending on service
   • NES Entitlement to redundancy pay: some exclusions
   • NES is minimum entitlement only

10. Fair Work Information Statement
COMPLYING WITH MODERN AWARDS AND ENTERPRISE AGREEMENTS

Modern Award:

- Minimum pay rates, allowances, hours, loadings and penalties, consultation provisions, based on the specific industry (e.g. hospitality, architects, medical practitioners)
- For example: Health Practitioners and Support Services Award 2010

Enterprise Agreements:

- Can be used to replace a modern award
- Specific agreements tailored to specific business needs
- Still needs to meet Award minimum rates of pay and employment conditions ‘B.O.O.T’
COMPLYING WITH POLICIES AND CONTRACTS

WRITTEN EMPLOYMENT CONTRACTS

• Why are they important?
  • In an employment relationship a contract always exists, either verbally or written.
  • In order to ensure that both you and your employee have a clear understanding of what is expected during the term of employment, it is best to have a written contract.
  • A contract can eliminate disputes which may arise at a later date.
CONTRACTS OF EMPLOYMENT

WRITTEN EMPLOYMENT CONTRACTS

• What can be included in an employment contract?
  • An employment contract cannot provide for less than the legal minimum set out in:
    » the National Employment Standards (NES)
    » awards, enterprise agreements or other registered agreements that may apply.
  • Key pro-employer clauses which can be included in contracts.
    » restraint of trade clauses;
    » off-set clauses for over-award entitlements; and
    » employee notice periods
COMPLYING WITH FWA SHAM CONTRACTING PROVISIONS

• What is sham contracting?
  • Representing a contract of employment as a ‘contract for services’ (or independent contracting arrangement)
  • Defence: ‘did not know, and was not reckless’

• What is the difference between an employee and an independent contractor?
  • An employee serves the employer in the employer’s business; an independent contractors carries on a business of their own*
WHAT TO DO IF YOU’VE BEEN NON-COMPLIANT

- Affected employees, their union, or the Fair Work Ombudsman can initiate federal court proceedings to claim compensation and civil penalties for non-compliance with the FWA.

- ‘Compensation’ can include compensation for non-financial hurt.

- Civil penalties are significant: max $10,800 per breach for individual; $54,000 per breach for companies. 6 year time limit.

- Legal costs are generally not recoverable.
HOW TO DEAL WITH THE FAIR WORK OMBUDSMAN

1. Avoid by complying

2. Avoid by correction: voluntary, swift, complete.

3. It must face them:
   - Be cooperative and prompt during any mediation or investigation phase. Be nice.
   - Comply with non compliance notices or seek legal advice if you disagree

4. If proceedings are threatened:
   - Offer enforceable undertaking;
   - Defend as appropriate and make/consider reasonable settlement offers