Article Information

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Employment Law in Motion: Updates and Insights

With 2024 wrapping up, we have put together a brief summation of changes introduced this year and changes yet to come. The landscape of employment law is evolving with significant shifts towards increasing employee rights and adding to specific safety requirements. Key updates include the right to disconnect, changes to casual employees' pathways to permanent employment, regulation of road transport contractors, and an increased focus on managing psychosocial hazards.

Right to disconnect

A key point of discussion this year has been the introduction of the 'right to disconnect'; a new workplace right for employees to reasonably refuse outside-of-hours contact by their employers. The right to disconnect came into effect on 26 August 2024 for most employees (and will come into effect on 26 August 2025 for employees of small businesses).

Under the new section 333M of the Fair Work Act, employees have a right to refuse to monitor, read or respond to contact (or attempted contact) outside their working hours, unless doing so is unreasonable. It is important to note the right to disconnect is not a prohibition on employees from attempting contact.

Employers are reminded that this does not mean that all contact outside of hours is prohibited, but care should be taken to ensure that such contact is reasonable. Emily Haar and Aneisha Bishop took a closer look at the considerations for what is an 'unreasonable' refusal by an employee in their insight on Closing the Loopholes earlier this year.

The Fair Work Commission has jurisdiction to hear a dispute about the right to disconnect in circumstances where an employee has exercised their right not to respond to contact by their employer and the employer believes the refusal is not reasonable (or there is another disagreement about the right to disconnect). The right to disconnect is also a workplace right under the existing general protections laws and adverse action must not be taken against employees for reasonably exercising this right.

The scope of the limitation on contact out-of-hours will become clearer once the Fair Work Commission and Courts start to deal with disputes involving an employees' exercise of the right.

Key Takeaways

Employers will want to consider reviewing and updating:

- employment contracts and position descriptions, to ensure employees are on notice of any out-of-hours contact expected of them, and to ensure such contact is appropriate;
- policies and procedures that may relate to out-of-hours contact including reasonable hours of work and communicating in the workplace;
- training for managers and supervisors on the right to disconnect and any updated processes; and
- informing employees or contractors overseas or in different time zones of how they may have to consider the right to disconnect of their coworkers when dealing outside of the employees' work hours.

Casual Conversion: Employee Choice Pathway to permanent employment

The existing casual conversion scheme will be replaced with a new 'Employee Choice Pathway', which will become available for most casual employees on 26 February 2025.

Casual employees who have been employed for at least six months and believe they no longer meet the casual employee definition will be able to seek permanent employment by providing written notice to their employer. Employers will be required to consult with the employee before responding to the notice, discussing the implications of the change. After consultation and within 21 days, employers must either accept or reject the change by notifying the employee in writing.

If accepted, the change is to be implemented from the employee's first pay period after the acceptance, unless the employer and employee agree to another commencement date (which should also be captured in writing).

Employers can only reject the conversion on one of three grounds:

1. if the employee still meets the definition of a casual employee;
2. if there are fair and reasonable operational grounds, such as significant changes required in the business's work organisation, major impacts on business operations, or necessary changes to employment conditions to comply with existing rules (e.g., awards or agreements); or
3. accepting the conversion would cause a non-compliance with a recruitment or other selection process required by law.

Key Takeaways

If not already in place, employers will want to consider implementing new processes to ensure Employee Choice notices are considered, consultation occurs and a written response is provided within 21 days.

For those of you who are podcast-inclined, Emily Haar discussed these changes in February this year. Have a listen to episode #37 of the Employment Relations Podcast here.

Regulated workers and businesses and the road transport industry

Changes to the regulation of road transport contractors and 'employee-like' (or 'gig') workers was another key framework introduced on 26 August as part of the second Closing the Loopholes bill passed in February this year.

Emily Haar and Aneisha Bishop have provided a comprehensive explanation of these changes in their insight on Closing the Loopholes (No.2).

As part of these changes, the Fair Work Commission is taking a central role in the regulation of the road transport industry. The Commission now has the authority to make minimum standards orders (legally binding) or guidelines (non-binding) in consultation with the people and bodies affected by the orders and with the newly established Road Transport Advisory Group. The Commission also has the authority to regulate contractual chains within the road transport industry, through issuing orders or guidelines to set (among other things) payment times, fuel levies, rate reviews, termination and cost recovery standards.

The first applications for minimum standard orders were lodged by the Transport Workers' Union on 28 August 2024 to cover certain employee-like workers and regulated independent contractors. A further contractual chain application was lodged on 26 September 2024 for a contractual chain order relating to payment terms, a prohibition on the use of set-off terms, and a compulsory rate review term, among other things. All four applications have been listed for an in-person conference before the Commission's Expert Panel on 29 November 2024.

Psychosocial hazards

In recent years, there has been increasing recognition and concern for the psychological welfare of employees in workplaces Australia-wide, with legislators and regulators focusing on eliminating psychosocial hazards from the workplace.

Psychosocial hazards are those that arise from or relate to work, and may cause psychological and physical harm. Common psychosocial hazards include job demands, poor support, bullying, harassment (including sexual harassment), and conflict. Earlier this year, Safe Work Australia reported that mental health conditions have accounted for an increased amount of serious workers' compensation claims; approximately 9% in 2021-22, representing a 36.9% increase since 2017-18.[1] The most common causes named in these claims were harassment and/or bullying, work pressure, and exposure to workplace

violence. Safe Work Australia opined that this trend could be attributed to destigmatisation and increased awareness of mental health conditions.[2]

In May 2024, New South Wales regulator, SafeWork, released a new Psychological Health and Safety Strategy 2024–2026, under which it has announced that there will be an increased focus on compliance in high-risk and large businesses. As part of this strategy, SafeWork will conduct Psychosocial WHS Checks during its visits of any businesses with 200 or more workers, and has expressed an intention to take regulatory action against businesses who have failed to consult with employees in compliance with the *Work Health and Safety Act 2011* (NSW).

As a relatively new area of law, there have been very few prosecutions of employers who have failed to meet their obligations to manage and eliminate psychosocial hazards in the workplace. In Western Australia, WorkSafe WA announced in October 2024 that it has charged the Department of Justice with a Category 1 breach of its duties under WHS laws, for failing to implement procedures to tackle inappropriate workplace behaviours, including bullying, harassment, sexual harassment and victimisation. WorkSafe had previously issued the Department of Justice with an improvement notice, but alleges that the Department has failed to comply with the notice, even after it was granted an extension of time. The matter has not yet been heard by the Court but as the first case to consider the scope of a PCBU's duty to eliminate psychosocial hazards, the Court's decision, once released, should be of interest to all employers – not only those in Western Australia.

Key Takeaways

Whilst each state and territory has its own Work Health and Safety laws, with some intricate differences in how regulators may approach psychological hazards in the workplace in each jurisdiction, employers would do well to review their Work Health and Safety policies and practices to ensure that they have sufficiently considered psychosocial health and safety risks at work and importantly, that they have consulted with their employees about those risks. PCBU's are expected to be proactive about taking all reasonable steps to eliminate psychosocial hazards by identifying hazards, assessing the degree of risk, and managing those risks by implementing appropriate countermeasures.

What's upcoming?

Wage theft:

Starting **1 January 2025**, intentional underpayment of wages by employers will become a criminal offence.

An employer will be liable if they are required to pay an amount to an employee and intentionally engage in conduct that results in their failure to pay those amounts. This new offence applies only to intentional underpayments occurring after these provisions take effect, including those that are part of a course of conduct that began before the provisions took effect. Employers are liable if they fail to pay wages or other benefits, such as superannuation, as required under the Fair Work Act or an industrial instrument. The intention to commit wage theft will be considered a criminal offence.

Under the new laws, a serious contravention can occur with a 'knowing or reckless' contravention, rather than the previous requirement of 'knowing and systematic'. This change aims to strengthen the enforcement of wage theft laws and ensure greater accountability for employers.

For further insight into these changes, Emily Haar, Chris Hartigan and Jack Bourke discuss what 'wage theft' means for employers in the Employment Relations Podcast episode #38, which is available to listen here.

Unfair Deactivations and Terminations of Contract for Regulated Workers:

To support the changes introduced to the regulation of road transport contractors and 'employee-like' workers, starting from **26 February 2025**, the Fair Work Commission will be able to accept applications from eligible persons for unfair deactivations or unfair terminations of contract.

Regulated road transport workers who have performed work under a services contract for a period of 6 months after 26 August 2024, will be protected from unfair termination.

Employee-like workers who perform work thorough a digital labour platform (an app) or under a service contract managed through an app, who have been working for a period of at least 6 months after 26 August 2024, will be protected from unfair deactivation.

In both instances, the Commission will look at whether there was a good (valid) reason for termination, by reference to the worker's capacity or conduct. They will also look at whether any processes under the Road Transport Industry Termination Code or Digital Labour Platform Deactivation Code (whichever is relevant) were followed, and anything else relevant to the claim.

Similarly to existing general protections (involving dismissal) and unfair dismissal applications, regulated workers and contractors will have 21 days from termination or deactivation to make an application to the Commission, and will only be eligible if they earn less than the Contractor High Income threshold.

Fair Work Commission Powers:

Effective **26 February 2025**, the Full Bench of the FWC will be empowered to establish model terms that can be adopted in enterprise agreements. The FWC must make model terms covering individual flexibility arrangements, consultation processes, and dispute resolution. The model terms will not override existing terms and will not automatically apply to all enterprise agreements that meet the requirements of the *Fair Work Act 2009* (Cth), but can be adopted by parties during the enterprise agreement negotiation process, if they choose to do so.

If you have any questions about how these changes may impact your workplace, please get in touch with our Employment & Labour team.

[1] Safe Work Australia, *Psychological Health and Safety in the Workplace* (Data Report, February 2024), 29.

[2] Ibid, 5.