DYHRBERG DRAYTON
EMPLOYMENT LAW

Employment Standards Legislation - What you need to know

The Employment Standards Legislation Act came into force on 1 April 2016. It hopes to encourage fair and productive workplaces by:

- Eliminating 'zero hours contracts' and other unfair employment practices
- strengthening the enforcement of employment standards
- extending parental leave to more workers and increasing the flexibility of the scheme

Zero hour contracts and availability provisions

'Zero hours' contracts are not allowed. An employer can only require an employee to be available for work if requested, without an obligation to provide work, if the:

- employment agreement contains guaranteed hours of work
- employer has 'genuine reasons' based on reasonable grounds for the availability provision and the number of hours of availability
- employer reasonably compensates the employee for their availability

An employee is entitled to refuse to perform work in addition to any guaranteed hours if the employment agreement does not contain an availability provision that provides for reasonable compensation. An employer must not treat an employee adversely for refusing to perform work on this basis.

Last minute cancellation of shifts

Where an employment agreement requires the employee to undertake shift work, the employer must specify in the employment agreement, a reasonable period of notice and reasonable compensation for cancelling a shift. Reasonable notice must be given before the start of the shift. When considering what is 'reasonable notice' employers must consider:

- the nature of their business and the employee's work
- whether they have any ability to control or foresee proposed cancellations
- likely effects of cancellation on the employee
- whether there are any agreed hours (including guaranteed hours)

In determining whether compensation is reasonable, the parties will need to consider the contractual length of notice, the pay the employee would have received for working the shift, and whether the employee incurred any preparatory costs.

No unreasonable restrictions on secondary employment

Under the new laws employers cannot restrict secondary employment unless they have a 'genuine reason based on reasonable grounds' to do so. For example, to protect commercially sensitive information, intellectual property or commercial reputation, or to prevent a real conflict of interest. However, these amendments do not limit or affect the law relating to restraint of trade provisions.

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Strengthening enforcement of employment standards

The Employment Court has been given further powers to compel employers to meet minimum standards: minimum wage, annual holidays and written employment agreements requirements.

- Declarations of breach in relation to breaches of minimum entitlements that are serious.
- Pecuniary penalty orders may be sought by a Labour Inspector. Maximum penalty of $50,000 for an individual, and the greater of $100,000 or three times the financial gain for a body corporate.
- Compensation orders for serious breaches of minimum entitlement provisions to compensate employees who have suffered, or are likely to suffer, loss or damage as a result.
- Banning orders may be made against a person which also opens the door for individual liability. The order could 'ban' the person from entering into an employment agreement as an employer, being an officer of an employer or being involved in hiring or the employment of employees.

Labour Inspectors will also be able to share information with other regulators, and request information to substantiate an alleged breach, or where records required by law do not exist or are incomplete.

Wages and time records

Currently employers must keep wage and time records which must include the name of the employee, their address, and the kind of work which the employee is usually employed. Employers will now need to keep further information in writing, or in a manner that allows the information to be easily accessed and converted into written form, such as the number of hours worked each day in a pay period, and the pay for those hours. Infringement notices will be introduced for clear-cut breaches.

Changes to the Wages Protection Act 1983

From now on employers will need to consult with employees before making a specific deduction, even if the employee has given general consent to lawful deductions in their agreement. Even if there is consent, a deduction must not be unreasonable. For example, a deduction to cover losses caused by a third party through breakages or theft would likely be unreasonable – ie petrol station "drive-offs".

Minimum wage

The minimum wage in the Minimum Wage Act 1983 increased from 1 April 2016 to $15.25 per hour.

Amendments to the Parental Leave and Employment Protection Act 1987

The changes made to the parental leave scheme aim to better reflect current work and family arrangements, provide more flexibility and choice, and support parents' attachment to work. The amendments include:

- Extending entitlements to a wider group of 'primary carers' than just biological and formal adoptive parents (subject to meeting the same work-related criteria as birth mothers and adoptive parents).
- Enabling workers to take unpaid parental leave flexibly, so that it need not be taken in one continuous block. The amendments will allow the employee to take the unpaid leave flexibly, or return to work for a period of time

and take the remainder of their unpaid leave later in the year.

- Introducing voluntary 'Keeping in Touch' hours in the paid leave period. Workers can work up to 40 hours during the 18 weeks of paid leave. This could assist with maintaining skills, attending training, and completing handover. The baby will need to be at least 4 weeks old for this to apply.

Extending unpaid leave to workers who have been with their employer for more than 6 months but less than 12. These workers will be eligible to unpaid leave up to a total period of 6 months. Employers can choose to give their employees 12 months' job-protected leave.

In addition, paid parental leave has been extended from 16 weeks to 18 weeks effective from 1 April 2016.

What should you do

Compliance with the new standards will be required immediately – from 1 April 2016 for new employment agreements, however, a transition period of 12 months will apply for existing employment agreements.

- Review existing employment agreements (consider how clearly they state the hours and days of work).
- Consider whether the company needs an 'availability' provision, and if so, why, what basis etc.
- Update employment agreement templates to ensure compliance.
- Review restrictions prohibiting secondary employment and the clause in the employment agreement.
- If employees undertake shift work you should review your business practices and provisions in your employment agreements. Systems should be in place for notification of shift cancellations.
- Review time and wage record systems to ensure full compliance.
- Consult before making deductions from wages.
- Train staff, ensure Board and officers are aware of the requirements and potential liability.

Please let us know if you would like our assistance in reviewing your employment agreements or advice regarding any of the changes.