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Employment Law Update

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Personal Liability of HR Managers – Accessories under the Fair Work Act?

The Fair Work Ombudsman (FWO) is looking well beyond the traditional defendants in cases dealing with underpayments or sham contracting. This is a quite conscious policy (see speech by the FWO, Natalie James, 4 November 2016), aiming to get beyond the employer in the strict legal sense, to the people in the employer's organisation who are responsible, and to external parties who are knowingly involved in infringements.

The basis for liability of individuals, and organisations other than the direct employer comes from s550 of the Fair Work Act, which makes a person knowingly involved in a contravention liable for that contravention. The FWO has been increasingly bold in the way that it prosecutes accessorial liability. The first people in line are, of course, the directors of the employer. But beyond that the FWO has taken proceedings against HR managers and parties in the employer's supply chain, and has given clear indication that external advisers – lawyers, accountants, IR specialists, could be prosecuted.

In the case of *FWO v Centennial Financial Services* [2011] FMCA 459), an HR Manager was found liable for his company's sham contracting (by converting employees into contractors and then evading entitlements) and penalised $3,750. His argument that he just did what he was told by the director of the company didn't succeed: he did have a lower level of responsibility (reflected in the penalty), but he had an independent obligation not to be involved in the sham contracting, which he knew, or should have known, was illegal.

More recently, a labour hire company supplying workers to Crown Casino in Melbourne made deductions from wages paid to employees for administration charges and meals, and when the FWO made enquiries, produced falsified records to hide the deductions. The OH&S and HR Coordinator was penalised $9,920 (about two-thirds of the director's penalty). The deliberate nature of the conduct (the deductions, and especially the false records), and the fact that the HR Coordinator should have known the deductions weren't legitimate, undermined the HR Coordinator's case for leniency.

And it is not only penalties that the FWO is after. In a recent case (*FWO v Step Ahead Security Services* [2016] FCCA 1482), a director of the company (with form for non-compliance with workplace laws) liquidated the company when the FWO started proceedings about unpaid entitlements. The FWO sought, and obtained, orders that the director not only pay $51,400 in penalties, but also that he himself pay the unpaid entitlements of nearly $23,000.

In the supply chain, there have been well-publicised cases involving Coles and Woolworths taking responsibility for the terms on which their trolley collecting contractors pay their employees, and the franchisee of Yogurberry chain has been held to account for underpayments by one of its franchisees, and required to undertake audits across its network to identify any other infringements. In recent weeks, it has also been reported that Caltex is being investigated in connection with wages paid by its service station operators. The pace of this approach to enforcement seems likely to increase.

So what should you do if you find an underpayment situation or other compliance problem in your business?

From an individual point of view, you should be raising the issue and putting your concerns on record, and seeking to fix the problem. You should dissociate yourself from the conduct in question, and if resolution is not possible, you may need to reconsider your position with the organisation. From the organisation's point of view, if the problem can be readily fixed, it should be. If it can't, consider contacting the FWO to apprise them of the problem and what you are doing about it, and get their support and cooperation in resolving the issue.

If you need advice on an underpayment or compliance issue, contact Stephen Booth, Anna Ford or Lisa Qiu on 9895 9208.

What is a "457 visa" and what is the process for obtaining one?

The terms "working visa" and "457 visas" are well known but unsurprisingly, unless you have undergone the process yourself as an employer or migrant employee, very few understand the processes required to obtain such visas. You may be surprised at just how complex the process can be!

A working visa is the general umbrella term used to describe the two most common visas which allow people the right to work in Australia – the working holiday visa (subclass 417) and the temporary work (skilled) visa (subclass 457).

Getting a working holiday visa is a relatively straightforward process that generally doesn't involve the employer having to provide documentation in support of the application for the working holiday visa. The application is completed by the visa applicant and if obtained, allows the visa applicant to remain in Australia for up to 12 months, generally working up to six months with each employer.

The 457 visa on the other hand, from the employer's point of view, is a more involved process. The 457 visa is suitable for skilled workers who can perform certain roles which the company has difficult recruiting for domestically.

To be able to employ overseas workers to work for an Australian company on a 457 visa, there are three stages, each one requiring an application to be lodged with the Department of Immigration and Border Protection (DIBP).

First stage: sponsorship application

Once lodged and approved, the sponsorship application will provide the company the status of a "standard business sponsor" which is a status the company needs to have if it is to sponsor and employ any overseas workers on a 457 visa. Once obtained, the sponsorship is generally valid for three years.

Second stage: nomination application

The nomination application requires the company to lodge an application to nominate a particular position to be filled by an overseas worker. For a nomination application to be approved, the DIBP needs to be satisfied, amongst other things, that:

- the company has complied with its training requirements for the duration of the sponsorship (such as training expenditure equivalent to 1% of gross payroll for each year of the sponsorship or 2% of gross payroll in payments allocated to an industry training fund);
- the nominated occupation is an occupation specified on the Consolidated Sponsored Occupations List;
- the terms and conditions of the nominated occupation would be greater than the temporary skilled migration income threshold (TSMIT) (currently $53,900) and are no less favourable than the terms and conditions that would be provided to an Australian citizen or Australian permanent resident for performing equivalent work at the same location;
- if there is no Australian citizen or Australian permanent resident performing equivalent work at the same location then the DIBP will look at various sources of information such as the Fair Work Act, any relevant Modern Award, and labour market data from job advertisements, the Australian Bureau of Statistics, unions and employer associations, to determine the minimum terms and conditions of employment that would be provided to an Australian citizen or permanent resident to perform equivalent work in the same workplace. The DIBP will need to be satisfied that the minimum terms would include a salary above the TSMIT.

What is a "457 visa" and what is the process for obtaining one? cont.

Visa application

Once the nomination is granted it is valid for 12 months. During those 12 months, the nominated employee (visa applicant) must apply for the 457 visa. For a visa application to be approved, the DIBP, needs to be satisfied, amongst other things, that:

- the occupation is genuine and the visa applicant's intention to perform the occupation is genuine;
- the visa applicant has the skills, qualifications and employment background necessary to perform the nominated occupation. To satisfy itself that the visa applicant has the skills, qualifications and employment background necessary to perform the nominated occupation, the DIBP will look at a range of factors including any formal qualifications, on-the-job training, work experience, employment references and perhaps a formal skills assessment by a body such as the Trade Recognition Australia;
- the visa applicant can meet the English Language Requirements (unless their base salary is more than $96,400);
- the visa applicant is of good character; and
- the visa applicant has adequate arrangements for health insurance during the period of their intended stay in Australia.

Once the visa is granted, it is valid for up to four years.

If the DIBP isn't satisfied that the above requirements are met, the visa will likely be refused. It is therefore important that your applications be "decision ready", that is, that they are supported with the correct information and evidence that the DIBP requires when making its decision to either grant or refuse a visa.

If you need assistance with employing a worker on a 457 visa, contact Lisa Qiu, Lawyer and Registered Migration Agent, in our Employment and Business Migration Team on 02 9895 9208.

Reasonable notice – could your employees make such a claim on termination?

What is reasonable notice?

In circumstances where the terms of an employment contract don't specify a notice period on termination, or where an employee has an employment contract that is out of date (for instance, it relates to a previous position held by the relevant employee), an employee may be able to claim that is an implied term in their employment that they are due "reasonable notice" (usually anywhere from one to 12 months' pay) on termination.

In deciding what "reasonable notice" would be in a given case, the courts take into consideration a range of factors related to the particular employee's circumstances, including:

- level of seniority;
- size of salary;
- length of service;
- professional standing and age; and,
- degree of job mobility.

Some recent decisions have raised a question about whether the principle of reasonable notice is applicable in circumstances where Modern Awards and or the Fair Work Act provide for a minimum period of notice. For example:

Brennan v Kangaroo Island Council [2013] SASR

In this case, the South Australian Supreme Court held that reasonable notice may not be implied in circumstances where an employee is covered by a Modern Award which prescribes a period of notice on termination.

Kuczmarski v Ascot Administration Pty Ltd [2016] SADC

In this case, the South Australian District Court held reasonable notice may not be implied in circumstances where an employee has the benefit of the notice periods set out in the Fair Work Act /National Employment Standards (NES).

However, the most recent decision and the current leading authority, is *McGowan v Direct Mail and Marketing Pty limited [2016] FCCA*, which held:

- the notice provisions in the Fair Work Act are intended to provide a minimum period of notice only;
- by paying the minimum period of notice under the Fair Work Act, employers will have satisfied the NES and not be liable for a breach of those standards, but that does not exclude the possibility of an employee making a reasonable notice claim; and,
- employers can only be obliged to provide reasonable notice beyond the requirements of the NES in circumstances where a person's contract of employment is silent or makes no reference to notice.

Reasonable notice – could your employees make such a claim on termination? cont.

What does this mean for you?

You can't simply rely on the notice provisions in any applicable Modern Award or those specified in the Fair Work Act to avoid the possibility of a reasonable notice claim. Rather, you need to specify in writing in the employment contract, the amount of notice applicable to each employee on termination, even if that merely repeats the NES standard.

What can you do to avoid a reasonable notice claim?

- check your employment contracts to make sure they specify a notice period on termination;
- check that all employees have employment contracts; and,
- check that all employees have employment contracts that match the position they are currently performing (that is, they aren't out of date).

If you need assistance with the review, or assistance generally bringing your employment documentation up to speed and legally compliant – contact our Employment Law & Business Migration Team on 02 9895 9208 to conduct an audit of what you have and what you need!