

Employment Law Alert

May 2011

Numerous reports have been released in recent years about the amount of accrued leave Australian employees have 'in hand'. Whilst many companies regularly encourage staff members to take their leave before it accrues too much, what happens when the employment of one of those employees is terminated?

A recent review of leave loading by the Fair Work Ombudsman has resulted in a new position on leave loading paid upon termination – one that you need to be aware of!

This alert provides the latest information and we will keep you posted on any further developments.

For further information please contact our Employment Law Team on 02 9635 6422.

Leave Loading: Are you getting it right?

This is a new wrinkle of which Payroll needs to be aware.

In NSW, employers have traditionally adopted the position that leave loading is not to be paid on any leave that is paid out on termination, as opposed to leave actually taken during the course of employment, because when leave is paid out it is technically not "taken".

However, the Fair Work Ombudsman has recently reviewed this issue and has concluded that the terms of the Fair Work Act mean that leave loading must be paid when accrued leave is paid out on termination of employment.

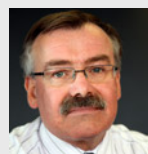
Furthermore, this is still the case even though some modern awards specify that leave loading is not payable in those circumstances because the Act 'trumps' the provisions of modern awards.

Failure to pay leave loading would therefore be an underpayment (and would have been so back to 2009, though as the amounts are likely to be small and most ex-employees will not be aware of this issue, the likelihood of back-claims is small).

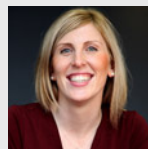
Since FWO announced this position, several employer groups have objected to this interpretation and the inconsistency with some modern awards, and there have been further

consultations regarding dealing with this issue. As yet there has been no outcome from this process, so the appropriate course for employers is to pay leave loading on accrued annual leave paid out on termination of employment, and keep an eye out for further information from FWO on this issue. We will cover any change to this position in a future Alert.

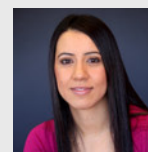
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