WORKPLACE WRAP – SEPTEMBER UPDATE

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Australia Labour, Employment and Workplace Safety Alert

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CASUAL CONVERSION – TIME TO BE READY TO MAKE OFFERS

Earlier this year, the Australian Federal government introduced broad changes to laws relating to casual employment which included a requirement for employers to offer permanent employment to eligible employees.

As part of these new provisions, by **27 September 2021**, employers will need to identify all casual employees who have been employed since before 27 March 2021 and assess whether they are eligible for casual conversion. Employers will need to identify:

- **If they are eligible:** employers must make an offer to these employees in writing to convert their casual employment to part-time or full-time employment. This offer must be made within 21 days of the assessment, and employees must respond to this offer within 21 days of receiving it.
- **If they are not eligible:** because it is determined that these employees do not meet the eligibility criteria, employers must still write to relevant employees explaining why an offer will not be made. This must be done within 21 days of making the assessment, but by no later than 27 September 2021.

Factors that must be taken into account in this assessment are:

- whether the employee has been employed for at least 12 months, and
- whether the employee has worked a pattern of hours on an ongoing basis for at least the last six months that they could perform as a permanent employee without significant adjustment.

Even if these criteria are met, employers may still decline to make an offer of permanent employment if there are reasonable grounds to do so including that it is reasonably foreseeable that in the next 12 months, the casual employee will no longer have a job, the hours will be significantly reduced, or the hours of work will be significantly varied and cannot be accommodated within the employee's availability. Reasonable grounds can also include that making an offer would not comply with a recruitment or selection process required by or under a Commonwealth, State or Territory law.

A number of modern awards previously included casual conversion provisions that permitted requests for casual conversion after six months, rather than one year. While a number of unions argued that this arrangement was more beneficial for workers and should apply instead of the new statutory scheme, the Fair Work Commission last week released draft determinations which indicate that the new arrangement, considered as a whole, is more beneficial for workers. This suggests that to the extent that modern awards previously permitted casual conversion, notably requests after six months, they will be modified to operate consistently with the statutory casual conversion scheme.

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The deadline of 27 September 2021 is the first step in the casual conversion process. Employers will have ongoing responsibilities to complete similar assessments for all casual employees as they reach their 12-month service mark. Following that initial assessment, casual employees have the right to request to be considered for casual conversion every six months. We recommend that employers put in place procedures to ensure that the 12-month deadline now in place for all casual employees is not missed.

RESPECT @ WORK ACT PASSES – BUT NO EXPRESS POSITIVE DUTY

On 2 September 2021, the Australian Government passed the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (the Act).

The Act received royal assent on 10 September 2021, which means the amendments set out in the Act have officially come into effect. In a previous article, we summarised the key amendments that the Act sought to impose, which can be accessed here.

While the new provisions are generally regarded as a step in the right direction, some have criticised the amendments as a missed opportunity. Some of the common criticisms raised by key stakeholders, before the Act passed both houses, were that the amendments should have included a positive duty on employers under the Sex Discrimination Act to take reasonable measures to eliminate sex discrimination, sexual harassment and victimisation, in addition to existing work health and safety (WHS) duties.

Others suggested that the amendments should have increased powers to the Fair Work Commission (FWC) to award compensation or impose penalties and for the Sex Discrimination Commission to commence investigations into problematic workplaces.
Even without an express positive duty existing in the Fair Work Act, employers need to keep in mind that they still have an obligation under their existing WHS duties to ensure, insofar as reasonably practicable, the health and safety of workers. This includes in relation to sexual harassment and the risks to health and safety that it poses.

Now that the Respect@Work Act has come into effect, it will be interesting to monitor how effective the amendments are at addressing the issues raised by the Respect@Work Report, and how popular the FWC's new anti-sexual harassment jurisdiction is in practice.

VACCINES AND THE WORKPLACE – AN EVER-EVOLVING ISSUE

It seems that we are constantly receiving further updates in relation to vaccines and the workplace. Over the past few weeks, a number of employers have announced plans to mandate that their workers be either partially or fully vaccinated to attend work, and are starting to put policies in place in anticipation of the long-awaited return to workplaces.

Roadmaps Out of Lockdown for Victoria and New South Wales

In Victoria and New South Wales, governments have intervened and, in accordance with Chief Health Officer recommendations, directions have effectively made vaccination mandatory in a number of industries. In particular, as of 11.59 pm on Thursday 23 September 2021, all Victorian construction workers and residential aged care workers will need to provide evidence to their employer that they have had their first dose of a COVID-19 vaccine (or that they have made a booking to have their first dose by 2 October 2021). These requirements follow in the

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footsteps of New South Wales, where essential workers living or staying in specified Local Government Areas (LGAs) are required to provide evidence of vaccination (or a negative Rapid Antigen Test result) in order to leave their LGA for work.

Victoria and New South Wales have now both announced their roadmaps to deliver the national plan to "freedom" when the states reach certain vaccine targets.

At the time of writing, New South Wales is expected to reach its 70 percent double-dose target around 8 October, ahead of Victoria reaching 70 percent around 26 October 2021.

When Victoria reaches 80 percent of persons over 16 years **with a single dose** (anticipated 26 September), workers must continue to work from home, and only workers on the **Authorised Provider and Authorised Worker (APAW) List** may leave home to work. This position remains unchanged until 80 percent of those over 16 years are **fully** vaccinated (anticipated 5 November), where the roadmap provides that workers should work from home if they can, or go to work **if they are fully vaccinated**.

Vaccination Policies in the Workplace

Due to the escalating spread of the highly contagious Delta variant, it is becoming increasingly evident that measures that were effective in staving off the virus in 2020 are failing. The ultimate risk of COVID-19 for employers is that an employee contracts the virus in the workplace and dies. Such events have already begun to be scrutinised by WHS regulators.

To date many employers have chosen to strongly encourage (or even incentivise) employees to get vaccinated with many have been reluctant to take the next step to mandate vaccines in the workplace. However, with community transmission increasing in Victoria and still high in NSW, and the opening up of workplaces, a key feature of the national rollout, we are seeing many employers now reconsidering their position.

The decision to mandate vaccines in the workplace should be considered carefully and involves a number of steps:

- Employers should conduct a tailored risk assessment, to determine the risk of COVID-19 transmission in the workplace, and whether their current control measures to eliminate or minimise the potential hazards arising from this risk are sufficient to discharge their WHS obligations.
- In terms of whether such a mandate will be a reasonable and lawful direction, this will depend on the individual circumstances of each employee to be assessed on a case-by-case basis, and the circumstances and nature of the particular workplace.
- If employers choose to introduce a mandatory vaccine policy or intend to collect and/or store sensitive information such as vaccination status, they will also need to take into account of privacy considerations, and ensure that any current privacy policies and collection statements are up to date, or create such policies if they do not already exist.
- Consideration must also be given to the enforcement of the policy, and the potential consequences of an employee refusing to comply with the directions. This will include employers considering whether they are prepared to dismiss an employee for failure to follow a lawful and reasonable direction, or, in some industries, determining how long it will be viable for an employee to work from home.

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- Employers will also need to consider what exemptions to the policy are appropriate such as medical contraindication and consider how such exemptions will be dealt with when raised by employees.

Further Government Orders in Relation to Mandatory Vaccines Likely

Notably, the Victorian Government has left itself considerable scope to mandate vaccines in other industries ahead of the 80 percent fully vaccinated target, and has flagged that along with the Chief Health Officer it would be working to "make a properly legally defendable decision under the Act about which groups of people will have to be mandatorily vaccinated".

The one thing that is certain is that this area will continue to evolve, but for now it seems that increasing community transmission has brought a turning of the tide in a number of industries, and we await further guidance in relation to mandatory vaccinations.

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