MAJOR CHANGES TO THE AUSTRALIAN EMPLOYMENT LAW LANDSCAPE ARE IMMINENT

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Australia Labor, Employment, and Workplace Safety Alert

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On 21 May 2022, the Australian Federal Government changed with the election of the Australian Labour Party. During the election campaign, the new government proposed to conduct a summit to bring together employer, business, union and government leaders to explore mechanisms to improve wages and boost productivity.

The new Government's Jobs and Skills Summit will be held on 1 and 2 September 2022 in Canberra. We have outlined what we think might come out of the Summit and what it could mean for U.S. clients with a workforce in Australia.

AREAS OF FOCUS

The Summit will explore five high-level themes:

- Maintaining full employment and growing productivity;
- Boosting job security and wages;
- Lifting participation and reducing barriers to employment;
- Delivering a high-quality labour force through skills, training and migration; and
- Maximising opportunities in the industries of the future.

These themes are expanded upon in an Issues Paper released by Treasury last week – available here.

The Government has indicated that it will be looking to identify changes that can be made by way of legislative amendment in the short term, with the Minister for Employment publicly stating that he intends to introduce "as many measures as possible" in a single bill later in this year after the Summit.

DO WE KNOW WHAT THE OUTCOMES ARE LIKELY TO BE?

Although this involves an element of "crystal ball gazing," the Government has been quite explicit in terms of the changes that it wants to make to some aspects of employment regulation. Those items include:

1. Greater protections and entitlements for employees who are engaged on a casual basis. In particular, we think it is likely that the Government will look to:
    - Amend the *Fair Work Act 2009* to narrow the circumstances in which an employee could be properly regarded as a casual employee; and

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- Limit the number of consecutive fixed term contracts that an employer can offer for the same role to 24 months' total duration.

2. Amending the *Fair Work Act 2009* to include greater protections, and possibly introduce some statutory entitlements (such as carer's leave), for individuals who are not employees but who are engaged in "employment-like" forms of work, with a particular focus on individuals who are engaged to perform work in the gig economy.
3. Taking action to reduce the number of situations in which individuals are employed or engaged to perform the same work but are remunerated differently. We expect that the primary focus of this "same job, same pay" approach will be on the disparity in pay based on gender, but that steps may also be taken to reduce the difference in remuneration received by labour hire workers compared to directly employed employees.
4. Increasing the sanctions that can be imposed against employers who engage in, or are involved in, deliberate underpayment of workers (commonly branded as "wage theft") and potentially criminalising such conduct.
5. Amending the *Fair Work Act 2009* to prevent (or substantially curtail) the ability of an employer who is engaged in collective bargaining from unilaterally applying to the national employment tribunal, called the Fair Work Commission, to terminate a collective bargaining agreement, which is an instrument containing terms and conditions of employment that is negotiated at the workplace level and approved by the Fair Work Commission. From time to time, employers have, during bargaining, applied to the Fair Work Commission to terminate an existing collective bargaining agreement while bargaining for a replacement agreement is occurring. The Minster for Employment recently stated that "on face value, I cannot see how this tactic can possibly be justified."
6. There has also been a consistent emphasis by the Government on wanting to re-invigorate collective bargaining as a means for setting employment terms and conditions (including potentially through industry-based bargaining) and relaxing some of the legislative restrictions which heavily curtail the ability of employees to go on strike or take other forms of industrial action.

Although the Issues Paper stresses the need for Australia's migration system to complement the domestic workforce while also delivering enhanced economic and social outcomes over the long term, it is difficult to identify any particular changes that the Government may wish to make to the migration system. However, what is clear to us, based on the migration work performed by our Australian team, is that steps will need to be taken to reduce the current level of delay in processing applications for skilled visas. At present, it is not uncommon for the application process to take more than 12 months.

WHAT DOES THIS MEAN FOR YOUR BUSINESS WITH A WORKFORCE IN AUSTRALIA?

The Government is likely to move quite quickly to initiate and implement reform shortly after the Summit concludes. It will therefore be important for your organisation to closely monitor developments to ensure that you remain compliant with Australian employment laws.

The key points for your legal and HR teams to be thinking about at this stage include:

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- Given the current level of delay in visa processing times, consider taking steps to bring forward any planned visa applications. The Australian team includes a number of migration specialists who can speak to you about the process involved in taking such steps (and any other migration law issue relation to the movement of personnel into Australia);
- Do some mapping of your casual employees, fixed and maximum term employees and the extent to which they utilise labour hire in Australia, so that they can more readily assess the implications of legislative change once the proposed legislation is introduced into Parliament;
- If you hold any concerns about potential underpayments or not having provided employees with their full entitlements you are best to take a proactive approach to achieving wage compliance, we recommend you seek advice from our Australian LEWS team who regularly assist employers with underpayment issues; and
- If you have a collective bargaining agreement that you will shortly be renewing or that you are considering terminating, seek advice from the Australian LEWS team without delay.

Please don't hesitate to reach out if you have any questions. We will continue to provide update to our U.S. clients as more details of legislative reform becomes available over the coming months.

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