LOOPHOLES LAWS OPEN FOR BUSINESS: ARE YOU READY FOR 26 AUGUST 2024?

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Australia Labour, Employment and Workplace Safety Alert

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Yet more changes are ahead for employers as key elements of the Federal Labor Government's *Fair Work Legislation Amendment (Closing the Loopholes No 2) Act 2024* (the Act) take effect on 26 August 2024.

Employers should take immediate steps to prepare for these changes, which:

- Change the definition of casual employment (again) and change casual conversion laws.
- Introduce the right to disconnect for all employees.
- Update the interpretation of employee versus independent contractor.
- Introduce the right for non-employees—gig workers, transport workers and independent contractors—to have the Fair Work Commission (FWC) determine certain aspects of their workplace conditions.

Below is a summary of these changes and how to prepare for them.

CASUAL EMPLOYMENT

Definition of Casual

The new definition of casual employment is a return to the broader test used prior to 2021 and will likely bring greater certainty for employers. The changes will also ease the administrative burden on employers as the onus on initiating the conversion process shifts to the employee.

While the employment relationship was previously characterised by an *absence of a firm advance commitment to continuing and indefinite work* for employees entitled to casual loading, the new test focuses on:

- "The real substance, practical reality and true nature" of the employment relationship.
- Whether the employer can elect to offer or not offer work (and whether this occurs in practice).
- Whether the employee can elect to accept or reject work (and whether this occurs in practice).
- Whether full-time and part-time employees perform the same kind of work.
- Whether there is a regular pattern of work (although that is not definitive).

The new test considers both the employment contract and the way in which the contract is performed. It also acknowledges that the employment relationship may be founded on mutual understanding or expectation. There are additional requirements for academic teaching staff to be deemed as casuals.

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In a welcome move providing greater certainty for employers, if an employer engages a person who would be considered a casual employee under the new test, any subsequent change to the relationship, including the transition to permanent employment, is prospective and cannot be retrospective.

If a person were a casual employee prior to 26 August, then they will remain a casual employee when the new laws take effect without having to meet the new definition.

Once engaged as a casual, an employee cannot be converted to another form of employment unless:

- They request to convert, and the request is granted.
- The FWC makes an order for conversion.
- An industrial instrument gives rise to conversion.
- They accept an offer of permanent employment.

This means that a casual employee cannot retrospectively claim benefits of permanent employment such as leave entitlements, public holiday pay, or redundancy pay.

Casual Conversion

Existing provisions are being replaced, to the effect that:

- There will be no more requirement on employers to *offer* casual conversion to new employees after 12 months.
- Employers must continue to offer conversion to existing employees until *26 February 2025*.
- Casual employees now have the right to request to convert to permanent employment after six months if they consider that they no longer meet the tests of being a casual employee.

What Should Employers Do?

Employers should examine their casual employment contract templates to ensure they align with the new definition of casual employment.

Employers will also have a new obligation to provide casual employees with a Casual Information Statement not only at the commencement of employment but also after six months and then every 12 months on an ongoing basis.

RIGHT TO DISCONNECT

The new laws relating to a "right to disconnect" actually take the form of a provision allowing employees to refuse out of hours contact from employers.

From 26 August 2024, employees may refuse to monitor, read, or respond to contact or attempted contact from an employer or a third party about work outside of their working hours unless the refusal is unreasonable. This right will not apply to small businesses until 26 August 2025.

The right to disconnect does not prevent employers from attempting to make contact with employees outside of normal working hours, nor does it prevent employees from contacting one another, including across time zones.

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Whether an employee's refusal to respond is unreasonable will be assessed on a case-by-case basis with reference to the following factors:

- The reason for the attempted contact.
- How the contact or attempted contact is made and the level of disruption it causes to the employee.
- The extent that the employee is compensated for remaining available during the period that contact is made or attempted.
- The extent that the employee is compensated for working additional hours outside of the employee's ordinary working hours.
- The nature of the employee's role.
- The employee's level of responsibility.
- The employee's personal circumstances (including caring and family responsibilities).
- Other factors such as patterns of behaviour.

The FWC can deal with a dispute about the right to disconnect, and while it must conciliate the dispute, it will only be able to arbitrate if both parties are agreeable. If the FWC arbitrates, it may:

- Prevent employees from continuing to unreasonably refuse to respond.
- Prevent employers from taking disciplinary actions against an employee for exercising their right to disconnect.
- Prevent employers from continuing to require the employee to monitor, read, or respond to contact.

The right to disconnect will be a workplace right such that an employer must not take adverse action against an employee (e.g., demotion or dismissal) due to their exercise or proposal to exercise this right.

The right to disconnect will now be inserted into all modern awards. The FWC has drafted a proposed clause governing the right to disconnect. This clause, which will be inserted into awards on 26 August, currently states that:

- Unless it is unreasonable to do so, an employee may refuse to *monitor*, *read*, *or respond* to contact or attempted contact from:
  - Their employer *outside of the employee's working hours*; or
  - A *third party* if the contact or attempted contact *relates to their work* and is *outside of the employee's working hours*.
- An employer *must not directly or indirectly prevent* an employee from exercising their right to disconnect under the Act.

The modern award clause also includes guidance on how standby and emergency roster changes will be treated under the new laws. It remains to be seen how this clause will be interpreted and whether out of hours contact with modern award covered employees should be limited to these circumstances.

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The FWC will issue guidance materials but has indicated that it will wait until it has dealt with some disputes under the new provisions.

What Should Employers Do?

- Communicate with employees about what is expected in terms of out of hours work.
- Incorporate their expectations regarding out of hours work in position descriptions and employment contracts.
- Clearly set expectations for all employees including managers via training and policies.

CHANGING INTERPRETATION OF EMPLOYEE

In a change that will take away much of the certainty that has existed for employers since 2022, we will see a return to the 'multifactorial test' when determining whether a worker is an employee or independent contractor. Applying this test will involve an examination of the entire relationship between the parties.

Previously, the terms of the contract were the primary indicator of whether a person was an employee or a contractor.

From 26 August 2022, employers will no longer be able to rely on the wording of the contract to determine the true nature of the relationship between them and workers. Rather, differentiating between the two will involve an assessment of the real substance, practical reality, and true nature of the parties' relationship. Regard will be had to factors such as the degree of control, remuneration, and hours of work.

In a significant shift in the law, there will be an ability for companies and contractors to "opt out" of the new provisions with the principal (i.e. the company) now having the ability to invite their 'contractors' to agree that they will be subject to the pre-August 26 test of what constitutes employment versus contracting. The opt out provisions will only be open to contractors whose income is above a high-income threshold, which has not yet been determined. However, even where contractors agree to be assessed under the old test, they can revoke their consent at any time.

The provisions make it clear that the changes are not intended to interfere with definitions of 'contractor' in the tax, superannuation, and workers' compensation contexts.

The provisions outlawing sham contracting—where an employment arrangement is misrepresented as an independent contracting arrangement—were amended on 27 February this year. As a result of these amendments, it will be a defence to allegations of sham contracting if the employer *reasonably believed* it was a contract for services—i.e., an independent contracting arrangement.

What Should Employers Do?

Employers should promptly assess their independent contracting arrangements with reference to the multi-factorial test to ensure that they are not exposed to a finding that the arrangement is in fact an employment arrangement.

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THE NEW WORKPLACE RIGHTS OF GIG WORKERS AND TRANSPORT WORKERS

By the nature of their engagement, gig workers engaged by digital platforms and road transport workers are not employees and are therefore not subject to the workplace laws contained in the *Fair Work Act 2009* (Cth).

Despite this, from 26 August 2024, the FWC will be empowered to make either binding minimum standards orders or nonbinding minimum standard guidelines governing these workers. This may include standards in relation to payment terms, deductions, working time, record keeping, insurance, consultation, representation, union delegates' rights, and cost recovery but not rostering and overtime.

Notably, contractors performing digital platform work will be able to challenge a decision that 'deactivates' them from the digital platform in what will effectively be a form of unfair dismissal claim for gig workers.

THE NEW WORKPLACE RIGHTS OF INDEPENDENT CONTRACTORS

In another significant change introducing new rights for contractors, where independent contractors i.e., nonemployees consider that their contract contains an unfair contract term, they will be entitled to seek a remedy in the FWC.

The FWC may consider a range of factors when determining if a term is unfair, including parties' bargaining power; any significant imbalance between the parties' rights and obligations; whether the term imposes a harsh, unjust, or unreasonable requirement; and whether the services contract as a whole provides for remuneration less than that applicable to an award employee doing comparable work.

By way of remedy, the FWC may make an order setting aside all or part of a services contract or amending or varying all or part of a services contract.

What Should Businesses Do?

Businesses engaging independent contractors should review their conditions of work and should consider as a minimum whether their contractors receive remuneration that is less than comparable award covered work.

WHERE TO FROM HERE?

The changes taking effect next week are broad ranging and will significantly change current employment practices. Businesses would be well placed to conduct a thorough review of their current contracting arrangements including a review of how they are using casuals and contractors to ensure they are complying with the new laws.

It is also timely to confirm expectations with employees regarding out of hour contact.

A failure to adapt working arrangements to the new laws could result in significant penalties.

Please reach out to your K&L Gates contact if you need assistance conducting this review.

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