FAIR WORK LAWYERS

Return to Work Act 2014
An update

Fair Work Lawyers have maintained a close watch on developments under the *Return to Work Act 2014* (the Act), which came into operation on 1 July 2015. While the Act introduced many changes, most of these have not yet had time for their effect to be properly assessed. This circular focusses on recent developments that have been of interest to clients.

Compulsory reporting of labour hire usage

Clients have received correspondence from Return to Work SA (RTWSA) confirming that businesses that use labour hire will be required to confirm the details of the businesses they use, how many workers are being supplied and the amounts paid. This followed an inquiry into the food processing industry that uncovered widespread non-compliance by labour hire providers in that sector.

While demanding information of this nature unprecedented, RTWSA has broad powers to require information, and this appears to fall within this remit. It is expected that the information will likely be used to 'red flag' both labour hire and host companies for premium compliance audits (which in in turn could lead to payroll tax compliance audits). Failing to provide information could lead to supplementary premium payments or a fine.

Importantly, clients should note that if they contract with an entity who is supposed to be registered with RTWSA but is not in fact registered, they can be made to stand in place for that entity, including in respect of premium calculations and return to work obligations. NB: this is not only labour hire but *any* subcontract arrangement. For this reason, it is vital that businesses ensure they check current registrations for any entities they contract with.

First forced 'return to work' order under Section 18

The South Australian Employment Tribunal (SAET) has handed down its first decision under section 18 of the Act. This is the new provision that allows an injured worker to apply to the Tribunal to force an employer to give them employment.

The decision confirms our earlier concerns about the wide-ranging nature of the provision, including that it applies to workers whether injured before or after the Act commenced, and the SAET has the power to require re-employment of a former employee, even when lawfully terminated and even where there is no particular available role for the employee to occupy. Worryingly, the implication of this decision is that SAET can cut across an employer's safety management decisions.

Employers should take note of this development, especially since the decision confirmed that the reverse onus of proof operates in respect of safety-based decisions. Failing to comply with a s18 order is backed by the threat of penalties up to $50,000 and payment of unpaid wages for non-compliance, along with the unsuccessful employer paying all parties' costs involved in the dispute.

There are strategies that can minimise the risk of a s18 application being successfully prosecuted, and employers must carefully consider these during the injury management processes, and especially before making a decision to terminate any employee who has ever suffered a work-injury.

Change to subcontractor provision of materials threshold

Under the Act, certain subcontractors performing building work are deemed workers for the purpose of the Act, even though they are not employees. One part of this test is the value of materials

provided by the subcontractor. The threshold for the provision of materials, which for many years was 4% or $50 (whichever is the greater), has increased to 4% or $120 (indexed) (whichever is the greater). Importantly, this number is now indexed and will increase each year. NB: the Act prescribes various other occupations that have deemed workers, and clients should carefully consider these too.

2016/17 premiums

The first major marker of the success (or otherwise) of the Act will be the extent to which premium rates either remain stable or reduce. It is expected that the rates and premium calculation for FY2016/17 will be published in mid-May 2016. Clients can expect to receive a hindsight adjustment for FY2015/16 and an initial assessment for FY2016/17 in mid-August. Fair Work Lawyers are still identifying clients who have issues with their assessments. Clients who wish to have their premiums reviewed should contact Fair Work Lawyers as soon as possible after receiving their notices. In most cases, employers only have a 2 month period to seek a review and re-assessment of their premiums.

Employer notice of disputes limited

Employers have the right to be an equal party in a workers compensation dispute before the SAET. However SAET has now ceased publishing employer names in its daily listings (other than for self-insured employers). The result of this is that employers who do not promptly participate in disputes are unlikely to be aware of the proceedings or afforded an opportunity to have a say in the outcome, even if the result of the dispute causes increased premiums for them.

In all cases, Fair Work Lawyers strongly recommend employers seek legal advice about any dispute they are notified of, even for former employees or very old injuries. RTWSA will pay reasonable legal costs for an employer appearing to defend its rights in these disputes, and Fair Work Lawyers provide cost-free advice to clients about the merits of appearing in these disputes. Employers who don't participate in disputes are stuck with whatever outcome that SAET orders or, as is more often the case, whatever outcome that RTWSA and the worker negotiate between them without consideration of employer interests or even any requirement for the employer to be consulted about it.

Need more information

If you would like further information about workers compensation, or require assistance in a workers compensation dispute, please contact the team at Fair Work Lawyers.

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