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AUGUST 2018

A VISION IN THE WORKPLACE

In our August 2018 edition of *Vision in the Workplace* we examine the unanticipated exit of Foodora from the Australian Market and the prevalent issue of employee misclassification. We also consider the introduction of unpaid Family and Domestic Violence leave entitlements for 2.3 million employees nation- wide. Finally, we re-iterate the need for Employer's to maintain accurate and up to date records as a Caltex franchisee is charged the highest penalty ever imposed for this breach.

Foodora Flees Australian Market

It has been widely reported that food delivery company Foodora Australia Pty Ltd (**Foodora**) recently closed its Australian operations. Foodora's closure had created great uncertainty over two significant cases recently brought against Foodora for alleged use of sham contracting to underpay its workers. The two cases were expected to be pivotal in the ongoing battle over whether food delivery workers are classified as employees instead of independent contractors.

However, in breaking news as of today, 3 September 2018, the Fair Work Ombudsman (FWO) has dropped their prosecution of Foodora, being a sham contracting case in the Federal Court of Australia (**FCA**).

The FWO's decision was perhaps surprising given that the Australian Taxation Office (**ATO**) and Revenue NSW recently investigated Foodora and formed the view that their workers are classified as employees at common law. The purpose of their investigations was to determine whether Foodora owed outstanding superannuation and payroll tax respectively. The classification of Foodora workers as employees by the government bodies has been labelled "*highly significant*" by experts. It is also likely to have influenced Foodora's decision to exit the Australian market, given that they were aware of the investigations (and possibly its likely findings) prior to announcing the company's closure.

In today's breaking news, the FWO has elected not to continue with its prosecution of Foodora in the FCA after the company's recent retreat into voluntary administration. The FWO's case had claimed that Foodora engaged in sham contracting when it misrepresented to its workers that they were classified as independent contractors when they were in fact employees. The FWO conducted analysis and identified several factors which suggested an employer-employee relationship.

The case was anticipated to be a significant test of the 'gig economy's' employment relationships in Australia, potentially effecting numerous companies, including UberEats. The 'gig-economy' industry classifies workers as independent contractors, avoiding paying

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minimum wages. However, the FWO argued that these workers are truly employees and deserve to be protected by minimum wages and conditions under the Fair Work Act 2009 (Cth).

The second case against Foodora, which remains active, may yet still have a significant impact upon the 'gig economy' in Australia. A former Foodora worker, Mr Klooger (**the Applicant**) has commenced unfair dismissal proceedings in the Fair Work Commission (FWC). The Applicant alleges that despite signing an Independent Contractor agreement prior to working for Foodora, he was in fact an employee and is therefore entitled to pursue an unfair dismissal claim.

The Applicant claims that the significant control Foodora held over his work and the "*time-based payments*" he received were indicative of employment. Foodora dismissed the Applicant after he refused to surrender control of a worker's chat group to the company. The case is still being heard before the FWC, although given the FWO's unwillingness to prosecute Foodora it is possible that the FWC may also drop their case.

However, if Foodora chooses to not fight these proceedings, or fights and loses, it could establish a new precedent on the rest of the 'gig economy' market in Australia. It begs the question; can these emerging 'gig economy' companies survive without being able to classify and pay their workers as independent contractors?

If you have any further questions regarding whether to classify workers as independent contractors or employees, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

New Family and Domestic Violence leave entitlements

Earlier this year, the Fair Work Commission Full Bench (**FWCFB**) ruled on updating all industry and occupation awards to include a clause enabling most employees to take up to 5 days of unpaid family and domestic violence leave (**FDV Leave**) per year.
As of 1 August 2018, 2.3 million Australian employees under Modern Awards now have access to the FDV Leave. Both permanent and casual employees are entitled to FDV leave which renews every 12 months, although does not accumulate if not used. The FDV leave entitlements apply to all employees covered by a modern award, excluding those covered by enterprise awards and State reference public sector awards.

What is family and domestic violence?

The definition of Family Domestic Violence under s 4AB of the *Family Law Act 1975* (Cth) was updated in 2011 and widened the definition to include coercion and control, which do not always involve physical violence or threats. As outlined in the FWC's decision,

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FDV means '*violent, threatening or other abusive behaviour by a family member of an employee that seeks to coerce or control the employee and that causes them harm or to be fearful*'. This incorporates physical, psychological, emotional or sexual violence which may involve threats, repeated degradation, humiliation or other abusive behaviour inducing fear. It may also include socially isolating the family member or denying them of their financial autonomy.

Taking the unpaid leave

Employees can use the FDV Leave entitlement when they need to do something to deal with the impact of Family Domestic Violence they are experiencing, and which is impractical for the employee to deal with outside of work hours.

Notice and evidence requirements

When taking the Leave under the new clause, the employee must advise their employer as soon as practicable and may do so after FDV leave has actually started. Employees are also required to inform their employer of the expected period of leave and provide evidence if requested by their employer.

Types of evidence stipulated by the Fair Work Ombudsman can include:

- documents issued by the police service;
- documents issued by a court;
- family violence support service documents; or
- a statutory declaration

An employer may request this evidence for leave taken for as little as 1 day or less and it must '*convince a reasonable person that the employee took the leave to deal with the impact of family and domestic violence*'.

Confidentiality

Employers have a duty to take all reasonably practicable steps to keep information relating to an employee's situation confidential.

Employers may only disclose such information if:

- it is required by law; or
- it is necessary to protect the life, health or safety of the employee or another person.

Information provided about Family Domestic Violence involving an employee is highly sensitive and should be treated with due care.

Future changes?

In Australia, one in three women will be affected by domestic violence. There have been arguments from the Australian Labor Party (**ALP**) and Unions to introduce 10 days paid domestic violence leave. However, on examination of the submissions and evidence the Fair Work Commission concluded that five days unpaid leave was a "*fair and relevant minimum safety net entitlement*". There is scope for change to this entitlement in the future as the ALP have promised to ensure every worker has access to ten days of paid domestic violence leave if elected.

If you require any assistance in adjusting employment contracts in light of the new clause, satisfying evidentiary requirements or handling sensitive information relating to FDV leave, please contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

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Record Fine for former Caltex Franchisee

A recent decision by the Federal Court of Australia (**FCA**) has demonstrated the importance of accurate and up to date record keeping, particularly relating to the payment of employees. The FCA has recently imposed a fine of almost $100,000 on a former Caltex franchisee (**Mr Dagher**) who was found to be falsifying the wage records of migrant workers.

As part of an FWO audit, Mr Dagher was ordered to produce all relevant employment contracts and payslips. Upon reviewing these documents, the FWO became concerned that the company records were inconsistent with the actual amounts paid to employees. During the court proceedings, Mr Dagher admitted that the reason for these inconsistencies was that he had falsified documents and records.
The FCA imposed the highest ever penalty for record-keeping and payslip breaches of $16,038 personally for Mr Dagher and $80,190 for his company, Aulion.

These penalties were 90% of the maximum available penalty, serving as a warning that higher penalties for record keeping breaches are now both possible and likely under Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (**the Act**) which was introduced in September last year.

The proceedings against the franchisee were initiated after the 2017-18 Fair Work Ombudsman (**FWO**) investigation into 25 Caltex stores relating to underpayment and non-compliance. Only 6 of the 25 stores investigated were found to be compliant, reflecting a non-compliance rate of 76% for the franchisees.

The investigation found that 17 of the 23 franchise operators were from non-English speaking backgrounds, with minimal knowledge or experience of Australian workplace laws. This had made low-skilled employees more vulnerable to exploitation in a competitive market. The increased sanctions in the Act aimed to offer greater protection to this category of worker. Fair Work Ombudsman Natalie James stated:

“Caltex should have recognised this in its business model by ensuring franchisors properly understood their obligations and conducted monitoring to assure itself that obligations were being met.”

As a result of these findings Caltex has made a commitment to bring all of its petrol stations under company control by 2020. If you have further questions relating to employer obligations involving keeping accurate and up to date wage records please contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.