

July 2019

A VISION IN THE WORKPLACE

This edition includes:

- Important changes commencing 1 July 2019; and
- whether your executives and managers could be modern award covered.



Changes commencing 1 July 2019

The following are various changes that may affect your workplace and have come into effect today (1 July 2019).

Union officials right of entry scheme

Recent changes to the *Fair Work Regulations 2009* (Cth) stipulate that from 1 July 2019 right of entry permits held by union officials must include a photo and signature of the permit holder.

The notices of entry given to employers must also include the rules which must be complied with by both union officials and employers whilst the union officials are on site.

Industrial relations Minister Kelly O'Dwyer MP expressed that the changes intend to provide clarification statutory rights and responsibilities, preventing abuse of the right of entry scheme.

"No longer will people be able to misrepresent their identity or falsely claim to be authorised permit holders."

High income threshold and compensation cap

The high-income threshold for unfair dismissal cases will increase to \$148,700 in addition to the compensation limit being \$74,350 for dismissals that occur on or after 1 July 2019.

Annual Wage and Modern Award Review:

The Fair Work Commission has announced a 3% increase in the national minimum wage and modern award wages commencing 1 July 2019.

The new minimum wage will increase weekly wages by \$21.60, to a total of \$740.80 per week (or \$19.49 per hour).

Accordingly, the minimum modern award wages will also increase by 3%.

Employers must implement the increased rates from 1 July 2019.

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New Fair Work Information Statement:

A new Fair Work Information Statement will be published on the Fair Work website on or before 1 July 2019. We remind employers that they are legally obliged to provide an up to date copy of the Fair Work Information Statement each time a new employee commences employment. This can be downloaded by following the link below.

New federal whistleblower laws take effect on 1 July 2019

The whistleblower legislation applies to public companies and to companies with:

- consolidated 'group' revenue in excess of \$50M;
- consolidated gross assets of more than \$25M or more; or
- 100 or more employees at the end of the financial year.

The new laws impose various obligations including the implementation of a whistleblower policy which must be in place before 1 January 2020 or else companies may face fines of up to \$12,600.

If you have any queries about whether any of these changes affect you or how to implement them, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

New Fair Work Information

Sheet: <https://www.fairwork.gov.au/employee-entitlements/national-employment-standards/fair-work-information-statement>



Could your executives and managers be modern award covered?

Typically, managers, directors or other senior employees are not covered by modern awards. However, two recent cases serve as a reminder that employers should exercise caution in assuming their senior employees are not covered by a modern award, so as not to be caught out not providing award entitlements or assuming such employees do not have access to unfair dismissal.

1. Director at a Real Estate Agency

- A property manager was classified as a director by her employer.
- The Fair Work Commission (FWC) considered whether the employee was hired primarily to undertake management duties or a supervisory role.

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- The FWC held that the employee's substantive duties were covered by the *Real Estate Industry Award 2010*, under 'property manager supervisor'.
- It was found that the job title did not match the employee's actual role.

Principal purpose test

In establishing whether an employee is covered by a modern award, the employee's position title will not necessarily matter.

Rather, in reaching its decision in the above case, the FWC examined the nature of the work and determined the principal purpose of the employee's employment by quantifying the time the employee spent performing her various duties and responsibilities as well as a qualitative review of her work.

In carrying out the principal purpose test, the FWC may consider the following non-exhaustive "executive" factors:

- Authority to hire and terminate staff
- Authority to sign contracts on the company's behalf
- Authority to set KPI's and targets
- Engage in shaping the company's policies
- Have budgeting responsibilities

The FWC has referred to the fundamental duty of a manager being "unfettered discretion".

Employers should pay close attention to whether employees with 'manager' as their title actually possess responsibilities and skills synonymous with those of a manager. Illegitimate managerial titles will not exclude the employee from being covered by the award.

On the other hand, the principal purpose test will not be relevant in limited circumstances where the award actually covers managerial roles.

2. CEO of a Community Legal Centre

- The CEO of North Australian Aboriginal Family Violence Legal Service argued she was covered by the *Social, Community, Home Care and Disability Services Industry Award 2010*.
- The employer argued that the principal purpose of the employee's employment was of a managerial nature so she could not be covered by the relevant Modern Award.
- The FWC held that provisions were made in multiple classifications under the award for employees in managerial roles, covering the CEO.

Exceptions to the rule

The FWC accepted in the above case that, although "*this is not the case with most awards*" in which "*it is clear that management roles are excluded*", management roles were "*clearly included*" in the *Social, Community, Home Care and Disability Services Industry Award 2010*.

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There are a limited number of modern awards which contain a classification covering a manager role, including the *Registered and Licensed Clubs Award 2010*, which includes 'club manager' as a classification.

Employers should be abreast of whether there is any award classification for a manager in the relevant modern award for their industry or a senior employee's role. It is crucial that employers do not simply rely on paying employees well above modern award rates – that will not always be sufficient to circumvent modern award obligations and entitlements.

It may be necessary to prepare a Guarantee of Annual Earnings for certain senior employees or to consider implementing individual Flexibility Agreements where appropriate.

If you are unsure as to whether your employees are covered by an award please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

[1] [Muscat v Chase Commercial Pty Limited T/A Chase Commercial \[2018\] FWC 1398](#)

[2] [Cubillo v North Australian Aboriginal Family Violence Legal Service \[2011\] FWA 6818](#)

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