STEVENS & ASSOCIATES LAWYERS

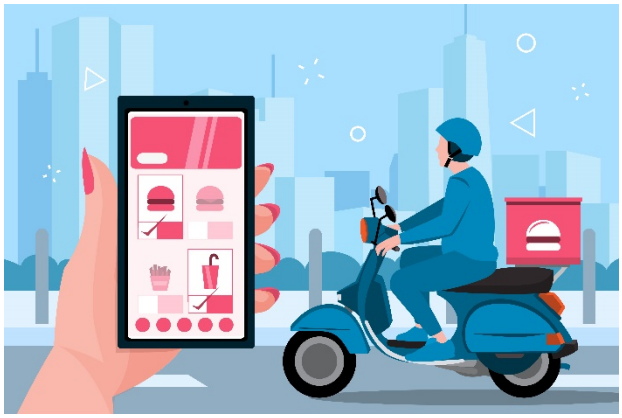
August 2024

A VISION IN THE WORKPLACE

Our August edition of Vision includes:

Several important changes to the *Fair Work Act 2009* (Cth) will commence on 26 August 2024, as introduced by the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth). The amendments will affect a number of significant changes to Australian workplaces, including:

- Changes to definitions and protections for independent contractors;
- Changes to casual employment laws; and
- A new workplace right to disconnect for employees.



Changes to Definitions and Protections for Independent Contractors

The Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth) has introduced several important changes for independent contractors. These changes include a new definition of employment, the expansion of the powers of the Fair Work Commission (**FWC**) to deal with unfair terms in services contracts and the introduction of new frameworks providing minimum standards to protect independent contractors.

1. The definition of 'employment'

A new definition will be introduced to the *Fair Work Act 2009* (Cth) to assist in determining whether a worker is an employee or an independent contractor, and whether a party is a principal or an employer. In defining the relationship, the real substance, practical reality and true nature of the working relationship must be considered. This expands on the previous test to encompass all aspects of the working relationship, including the terms of the contract and how the contract is to be performed in practice.

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2. Unfair terms in contracts

Independent contractors will now be able to apply to the FWC where they believe their services contract contains an unfair contract term. This expands the powers of the FWC to determine if a term of the services contract is unfair, and make a subsequent order to set aside, amend or vary all or part of the contract. In determining whether a term is unfair, the FWC will consider the parties' relative bargaining power, whether the term imposes harsh, unjust or unreasonable requirements, and what employees performing the same or similar work would receive. Contractors earning above the contractor high income threshold (yet to be determined) cannot apply for this remedy.

3. Minimum standards of protection

A new minimum standards framework has been introduced to protect the interests of certain workers in the gig economy. The protections will apply to independent contractors considered 'employee-like' workers performing digital platform work and independent contractors in the road and transport industry, known as 'regulated workers'. These new laws will introduce collective agreements for regulated workers, expanding access to collective bargaining. Regulated workers will also have the right to be represented by workplace delegates. Moreover, the FWC will have powers to deal with disputes involving the unfair deactivation or termination of a regulated worker.

Consequences

Applying these new definitions may see that existing working relationships will be characterised differently, resulting in different rights and obligations for both parties affected. This will be particularly important where there is a discrepancy between the terms of the contract and the practical performance of the contract. As such, employers and principals must be aware of the new rights and remedies available to independent contractors to ensure compliance.

If you have any questions about these changes, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.

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Changes to Casual Employment Laws

Several changes to casual employment will be introduced by the Fair Work Legislation Amendment (Closing Loopholes No. 2) Bill 2023 (Cth) which endeavour to create fair treatment for casual employees (**the Changes**).

Summary of the Changes

1. Definition of Casual Employees

The new definition of a casual employee will focus on the absence of an employer's "firm advance commitment to continuing and indefinite work", and any entitlement to casual loading or a specific casual pay rate under an award, registered agreement or employment contract.

Whether there is a firm advance commitment will require an assessment of the "real substance, practical reality and true nature of the employment relationship", and several other "factors" including whether the employer can offer or not offer work to the employee (and whether this is happening), whether the employee can accept or reject work (and whether this is happening) and whether the employee has a regular pattern of work even if it changes over time due to, for example, reasonable absences because of illness, injury or other leave.

2. Casual Conversion Process

The current procedure for casual conversion to full or part-time (permanent) employment will be replaced by a new "employee choice pathway." If a casual employee believes that they no longer satisfy the requirements of the new casual employee definition, provided that they have been employed for at least 6 months (12 months if employed by a small business), the casual employee may provide written notice to their employer to change to permanent employment, subject to a select number of exclusions. An employer must consult with the employee and

provide its response within 21 days upon receipt of such a notice.

An employer may reject a casual employee's request for casual conversion only if the employee still meets the definition of a casual employee, accepting the change would mean the employer will not comply with a recruitment or selection process required by law, or there are "fair and reasonable operations grounds" for not accepting the notification.

Compliance

From 26 August 2024, employers will also be required to provide a new Casual Employment Information Statement (**the Statement**) to casual employees prior to the commencement of employment, after 6 and 12 months of employment and then after every 12 months of employment (small business employers will only have to provide the Statement prior to the commencement of employment and after 12 months of employment).

Preparing for the Changes

To ensure compliance with the *Fair Work Act 2009* (Cth), employers need to review their policies, procedures and employment contracts.

Employers should also be aware that it cannot take certain actions to avoid their obligations or an employee's rights to change to permanent employment, and casual employees are also protected against adverse action by an employer because they have exercised a workplace right.

Staying informed and prepared will help both employers and employees navigate these new regulations effectively.

If you have any questions about the changes to casual employment and what they could mean for you as an employer or employee, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.

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A New Workplace 'Right to Disconnect' for Employees

From 26 August 2024, employees will have a legal right under the *Fair Work Act 2009* (Cth) to refuse to monitor, read or respond to contact or attempted contact from their employer outside of their working hours, unless the refusal is unreasonable (**the Right**). The Right also applies to any contact or attempted contact from third parties that relates to work matters made outside of the employee's work hours.

The Right contemplates calls, texts, emails, Microsoft Teams messages and any other unreasonable communication by an employer after hours. Small business employers will be exempt from the operation of the Right provisions for 12 months from their commencement date, up to 26 August 2025.

The Meaning of 'Unreasonable' Refusal

Several factors must be considered when determining whether an employee's refusal is unreasonable. This includes:

- The reason for the contact;
- Whether the employee is compensated or paid extra for:
  - Being available to be contacted to perform work within a specific period, or
  - Working additional hours outside their ordinary hours of work;
- The nature of the employee's role and level of responsibility;
- The employee's personal circumstances including family or caring responsibilities; and
- Other matters may also be considered.

In addition to the Right, an employer will also be prohibited from taking adverse action against an employee who also exercises the Right. In these circumstances, any adverse action by an employer may give rise to general protections proceedings by an employee.

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Employer Responsibilities

1. **Guidelines and policies:** Employers should create and enforce clear guidelines that define what constitutes reasonable after-hours communication. These guidelines should specify the circumstances under which employees can be expected to respond to work-related matters outside regular hours.

2. **Training and awareness:** Employers must ensure that both management and employees are aware of these new rights and obligations. This includes training on when after-hours communication is deemed necessary and how to handle such situations.

3. **Workplace culture:** The legislation encourages the development of a workplace culture that respects employees' personal time. Employers should foster an environment where the Right is respected and supported.

If you have any questions about the Right and what the new provisions could mean for you or your business, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.