STEVENS & ASSOCIATES LAWYERS

March & April 2025

A VISION IN THE WORKPLACE

Our March & April edition of Vision includes:

- Recent decisions by the Fair Work Commission ordering employers to accept flexible working arrangement requests;
- Labor Government commits to 'blanket ban' on non-compete clauses for lower income earners; and
- New laws passed in NSW providing additional protections to gig workers.

The Fair Work Commission Orders Employers to Accept Flexible Working Arrangement Requests

The Fair Work Commission (**the FWC**) has made several recent orders requiring an employer to implement a flexible work arrangement (**FWA**) following a refusal of an employee's request under "reasonable business grounds''. In making these orders, the FWC determined that the objectives of the *Fair Work Act 2009* (Cth) (**the Act**) and corresponding National Employment Standards (**the NES**) supersede any written terms contained in the employee's contract or enterprise agreement.

The recent decisions of *Kent Aoyama v FLSA Holdings Pty Ltd* [2025] FWC 524 and *Anthony May v Paper Australia Pty Ltd* [2025] FWC 799 demonstrate the FWC's power to override an employer's commercial considerations in relation to a FWA.

Requests for Flexible Working Arrangements

Under section 65 of the Act, employees who have completed at least 12-months of continuous service may request a change in their working arrangements in certain circumstances, such as pregnancy, parent or carer responsibilities or disabilities.

In accordance with the Act, an employer may refuse a request provided that certain requirements have been satisfied. These requirements include whether the employer has made a "genuine attempt to reach an agreement

with the employee to accommodate their circumstances", whether the employer has regard to the "consequences of their refusal of the FWA request on the employee", and where the refusal of the FWA request is on "reasonable business grounds".

"Reasonable business grounds" captures a variety of circumstances which may justify an employer's refusal of a FWA, including cost, capacity, practicality and productivity considerations.

***Kent Aoyama v FLSA Holdings Pty Ltd* [2025] FWC 524**

In this decision, the employee, Mr. Kent Aoyama (**Mr. Aoyama**) made a formal FWA request to his employer, FLSA Holdings Pty Limited (**FLSA Holdings**) due to increased parent responsibilities. Informally, Mr. Aoyama had an agreement with FLSA Holdings to work from home on Tuesdays and Thursdays. In his formal FWA request, Mr. Aoyama sought to add an additional day to this informal arrangement and work from home an additional day each fortnight (**the FWA Request**). After meeting with Mr. Aoyama, FLSA Holdings refused his FWA Request on the basis that during Mr. Aoyama's working hours he was expected to perform his contractual duties "without distraction", including providing care for a young child. During this meeting, FLSA Holdings also raised several complaints they had received from clients concerning Mr. Aoyama's performance whilst working from home, namely the disruption of baby noises whilst he took calls.

In arbitrating the dispute, Commissioner Sloan of the FWC considered FLSA Holdings' refusal of Mr. Aoyama's FWA request on the basis of "reasonable business grounds". The FWC determined that FLSA Holdings had not provided compelling proof that there would be any material bearing on efficiency or productivity and ordered that FLSA Holdings accept Mr. Aoyama's FWA Request. Commissioner Sloan also noted that FLSA Holdings' argument that approving the FWA request would create an unfavourable precedent with the business was unconvincing, and that this argument failed to take into account the overriding purpose of the provision and therefore the circumstances of individual employees.

***Anthony May v Paper Australia Pty Ltd* [2025] FWC 799**

In this decision, the employee, Mr. Anthony May (**Mr. May**), made a FWA request with his employer, Paper Australia Pty Limited (**Paper Australia**) to

accommodate for his parent responsibilities. Mr. May previously had a 13-year informal arrangement with Paper Australia, which allowed him to work a flexible start and finish time one shift a week. However, in July 2024, Paper Australia informed Mr. May they were ending this informal agreement on the basis that it did not comply with the Opal Australian Paper Maryvale Mill Mechanical Maintenance & Engineering Store Enterprise Agreement 2024 (**the Enterprise Agreement**).

In August 2024, Mr. May made a formal FWA request which proposed adjustments to his rostered hours throughout the week, as well as a variation to his start and finish time on a Thursday. Paper Australia rejected Mr. May's formal FWA request on the basis of "reasonable business grounds", in particular, that it failed to comply with the Enterprise Agreement's requirements regarding workers' four-day week rotating rosters.

In making its decision, the FWC considered whether Paper Australia's rejection of Mr. May's FWA request on the basis of non-compliance with the Enterprise Agreement constituted "reasonable business grounds". In rejecting Paper Australia's argument, Commissioner Yilmaz noted that where there is any inconsistency between an enterprise agreement and the NES, the NES will prevail where it provides for a more beneficial term. Further, the FWC found that Paper Australia's refusal of Mr. May's FWA request was not based on "reasonable business grounds" and ordered that Paper Australia accept Mr. May's FWA request.

Key Takeaways

These decisions demonstrate that where an employer's refusal of a FWA request, on the basis of "reasonable business grounds"" must be sufficiently substantiated, including an adequate consideration of an individual's circumstances.

Moreover, where there is inconstancy between an employee's employment agreement or any relevant enterprise agreement and the NES, the NES will prevail where it provides for a more beneficial term, and therefore, any refusal of a FWA request on this basis will not be substantiated.

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

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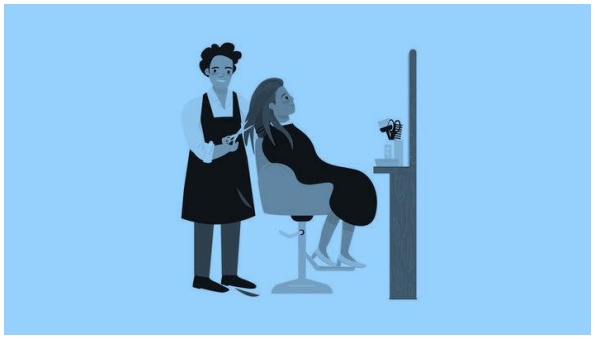


Labor Government Proposes 'Blanket Ban' for Non-Compete Clauses for Lower Income Earners

In a recent development, the Albanese Labor Government has proposed the introduction of legislation which will create a 'blanket ban' on non-compete clauses in employment contracts for workers earning less than the high-income threshold, currently being $175,000.00 (indexed annually) (**the Proposed Ban**).

Non-Compete Clauses

Non-compete clauses are clauses found in an employment contract which impose restrictions on an employee's ability to commence employment with a competitor of the former employer, either in the same or similar industry for an ordinarily prescribed a period of time and with a prescribed geographical. Non-compete clauses have typically been justified by employers to protect their legitimate business interests, including trade secrets and client relationships.

Reasons for the Proposed Ban

The Proposed Ban follows findings from a recent study by the e61 Institute (**the Study**) which found that the increased use of non-compete clauses in employment agreements, particularly for lower income earners, has contributed to low wage growth, reduced bargaining power and impeded job mobility. The Study also found that in many instances these non-compete clauses were too onerous on employees and were ultimately unnecessary or disproportionate to protect any legitimate interests of the business. Further, it was found that almost 1 in 5 Australians were subject to non-compete clauses in their employment contracts.

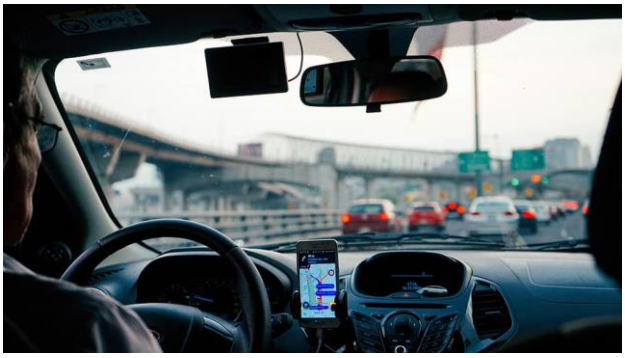
The Labor Government anticipates that workers in the hairdressing, childcare and construction industries will benefit from the Proposed Ban. However, small business owners have expressed

their concerns with the Proposed Ban, stating that the use of non-compete clauses provides an important safety net to small business owners to retain clients and that the removal of non-compete clauses disincentivises small businesses to hire and invest in staff.

Key Takeaways

Should the Albanese Government win the Federal Election it will introduce legislation to enforce this Proposed Ban. Employers may be forced to consider these upcoming changes when drafting employment agreements and considering the enforceability of non-compete clauses against employees if Labor is re-elected.

If you have any questions about non-compete clauses and how they may impact you as an employer or employee, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.



Gig Worker Protection Laws Passed in NSW

The Minns Government has proposed legislation, being the *Industrial Relations Amendment (Transport Sector Gig Workers and Others) Bill 2025* (NSW) (**the Bill**), which aims to extend certain provisions of the *Industrial Relations Act 1996* (NSW) (**the Act**) to give protections to transport sector gig workers engaged in contracts of carriage by providing these workers with access to the NSW Industrial Relations Commission (**the IRC**). The Bill has now passed through both Houses of the New South Wales State Parliament.

The Bill is complementary to Federal legislation, in particular, recent reforms to the *Fair Work Act 2009* (Cth) which introduced minimum standards for workers in the gig economy. Minister for Industrial Relations, Sophie Cotsis, stated that the Bill "*does not seek to replace the new Federal jurisdiction or*

to duplicate the important work that has taken place federally" and that instead, the Bill seeks to provide extra protections to gig economy workers in the road and transport industry, such as rideshare workers.

Changes Introduced by the Bill

The Bill aims to provide gig economy workers in the road and transport sector in NSW with additional protections, namely, access to the IRC. As such, the Bill will allow the IRC to make determinations with respect to contracts and agreements that regulate the pay and conditions for gig economy workers in this industry. The Bill also seeks to modernise existing provisions under Chapter 6 of the Act which relate to the road transport industry and introduce new enforceable standards across supply chains to ensure the recovery of costs incurred, such as the reimbursement of tolls.

Key Takeaways

The Bill will enable eligible gig workers, such as rideshare workers, in the road and transport sector and/or their representative, to apply to the IRC for contract determinations to regulate or bargain for their pay and conditions. Consequently, it is important that businesses ensure that under any agreement engaging gig workers in the road and transport industry, the conditions and pay under the agreement meet the standard of "*fair and reasonable*".

If you have any questions about the Bill and how these changes might impact you as a worker or a business, please do not hesitate to contact Nick Stevens, Josh Hoggett, Evelyn Rivera or Ayla Hutchison.