Federal Government Proposes More Fair Work Act Changes

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Earlier this week, the Federal Government introduced the *Fair Work Legislation (Protecting Worker Entitlements) Bill 2023* (Cth) (Bill) into the Parliament of Australia (Parliament).

The reforms proposed by the Bill focus on making unpaid parental leave (UPL) entitlements more flexible, providing additional rights to employees in relation to superannuation entitlements, and confirming that migrant workers are entitled to the benefit of the *Fair Work Act 2009* (FW Act) regardless of their immigration status.

Contrary to expectations, the Bill does not propose any changes to the process for the four-yearly reviews of modern awards (although we expect that changes to that process will be introduced into Parliament later this year).

Below is a summary of the key proposed changes.

**UPL**

The proposed changes relating to UPL entitlements are intended to provide greater alignment with the *Paid Parental Leave Act 2010* and provide employees with significantly more flexibility as to how they utilise their entitlements.

Flexible UPL was introduced into the FW Act in 2020 and allows employees to take a portion of their parental leave in a more flexible manner, including via single-day absences.

The Bill proposes to broaden access to UPL by:
- Allowing parents to commence UPL at any time in the 24 months following the birth or placement of their child.

- Increasing the amount of flexible UPL from 30 days to 100 days (or a higher number of days if prescribed by regulation).

- Giving pregnant employees the option to take flexible UPL during the period commencing six weeks before their child’s expected birth date.

The date at which the employee must have completed 12 months’ service in order to qualify for UPL has been simplified, being the expected birth date of the child (for birth-related leave) or the date on which leave is to commence (in any other circumstance).

In addition, it is proposed that employees be allowed to take flexible UPL before and after a period of continuous UPL.

To promote shared caring responsibilities between parents, the Bill also seeks to remove the concept of “concurrent leave” and allow employees to take UPL at the same time without limitation.

**NES ENTITLEMENT TO SUPERANNUATION**

The Bill will make superannuation contributions one of Australia’s National Employment Standards (NES). This does not introduce additional superannuation obligations for employers, but it rather incorporates employers’ existing obligations under the *Superannuation Guarantee (Administration) Act 1992*.

The effect of these amendments will be to introduce new enforcement mechanisms in respect of superannuation contributions that are intended to complement the Australian Tax Office’s (ATO) existing regulatory powers.

As a NES entitlement, a failure to make compliant superannuation contributions would be a contravention of a civil penalty provision of the FW Act. This would allow employees, registered employee organisations (e.g., unions) or the Office of the Fair Work Ombudsman to bring court proceedings in order to recover allegedly underpaid superannuation contributions, with payment to the employee’s superannuation fund to be the usual (but not the only) form of compensation. Applicants would also be able to seek civil penalties for such alleged underpayments.

The NES entitlement will only apply to the superannuation guarantee charge percentage (currently 10.5%). Where employees have a separate entitlement to superannuation contributions calculated at a greater rate, they may enforce those entitlements through separate mechanisms (e.g., a contravention of enterprise agreement or breach-of-contract claim).

Specific provisions preventing multiple actions have been included such that where the ATO has commenced action in respect to employers with a superannuation shortfall, proceedings cannot be brought in respect to this new NES entitlement. It is the intention of the NES to give employees the ability to recover unpaid superannuation in a way that is complementary but additional to the ATO’s role.

**GREATER PROTECTIONS FOR MIGRANT WORKERS**
The Bill seeks to clarify that migrant workers, regardless of their immigration status, are entitled to the benefits of the FW Act. This includes entitlements under the NES and all other entitlements conferred by the FW Act or a fair work instrument.

It means that a breach by a migrant worker of the *Migration Act 1958 (Cth)* (Migration Act) would not affect the validity of a contract of employment or a contract for services for the purposes of the FW Act. This would include an individual not having work rights for the purposes of the Migration Act, breaching a condition of his or her visa, or not being entitled to remain in Australia in accordance with a visa. In those circumstances, although there may be consequences due to noncompliance with the Migration Act, the individual would still be entitled to the protections of the FW Act when performing work.

**INTERACTION BETWEEN ENTERPRISE AGREEMENTS AND WORKPLACE DETERMINATIONS**

To avoid any doubt, the Bill proposes to amend the FW Act to make clear the interaction between a workplace determination and an earlier enterprise agreement. If an enterprise agreement applies to an employee in relation to particular employment, and a workplace determination comes into operation that covers the employee in relation to that same employment, the enterprise agreement ceases to apply to the employee in relation to that employment, and it can never apply to the employee in relation to that employment again.

**DEDUCTIONS FROM EMPLOYEES’ PAY**

The Bill proposes to expand the circumstances in which employees can authorise employers in writing to make lawful deductions from their pay (noting that such deductions must be principally for the employee’s benefit).

If the Bill is passed in its current form, the following additional rules would apply to those deductions:

- For a single deduction, the employee’s authorisation must specify the amount to be deducted.

- For multiple or ongoing deductions, the employee’s authorisation must specify whether the deductions are for a specified amount or for amounts as varied from time to time. Such deductions should not be for the direct or indirect benefit of the employer.

- Any variation in a specified amount of a deduction must be authorised by the employee in writing.

These changes would apply in respect to written employee authorisations made six months (or later) after the Bill commences operation, to allow time for employers and employees to review their current arrangements and for employers to update payroll systems as required.

This is the second tranche of FW Act changes proposed by the Government within a six-month period. Workplace Relations Minister Tony Burke has foreshadowed that “more controversial parts” of the Australian Labor Party’s election promises will be dealt with in legislation in the second half of the year, including “same job, same pay” provisions and reform relating to gig economy workers.