On August 13, 2020, 11 years after the enactment of the Fair Work Act 2009 (Cth) (the “FW Act”), Australian employers received guidance from the High Court regarding how to count the entitlement to “10 days” of personal leave per year of employment, as required under Section 96 of the FW Act.
The High Court determined that employees’ leave entitlement is equivalent to the average of employees’ “ordinary hours” of work over the course of a two-week period (i.e., 1/26th of the ordinary hours of work in a year) and not 10 “working days” of paid leave per year. This decision likely will have far-reaching implications for all Australian employers, particularly those with a workforce that works outside the parameters of the ordinary 9-to-5 workday, five days per week.

Until this decision, uncertainty about how to count employees’ “ordinary hours” of work led to inconsistent practices when calculating the leave entitlement, particularly across different industries where employees work flexible schedules.

Statutory Context

Section 96 of the FW Act provides the amount of leave to which employees are entitled. Specifically, Section 96 provides that “[f]or each year of service with his or her employer, an employee is entitled to 10 days of paid personal/carer’s leave.” The leave entitlement “accrues progressively during a year of service according to the employee’s ordinary hours of work, and accumulates from year to year.” This leave is intended to protect employees against loss of earnings by reference to ordinary hours of work when they are incapacitated by illness, injury, or need to provide care to family.

Factual Background & Procedural History

Two Mondelez Australia Pty Ltd. (“Mondelez”) employees worked 36 hours per week. These employees worked 12-hour shifts, three days per week. Mondelez provided these employees with 96 hours of personal leave per year of service, equivalent to eight 12-hour days of personal leave.

In August 2019, the Full Federal Court determined that these employees were entitled to 120 hours of personal leave per year (i.e., 12-hour working days multiplied by 10 days per year). Under this approach to calculating the personal leave entitlement, full-time employees working 7.6-hour shifts five days per week would have received less personal leave (76 hours of personal leave (i.e., 7.6-hour working days multiplied by 10 days per year) than employees who worked longer shifts across three days.

The Full Federal Court’s decision followed a “working day” interpretation (i.e., accounting for the hours worked in each individual day) rather than a “notional day” interpretation (i.e., the average daily ordinary hours based upon a five-day workweek) of the FW Act. Following the Full Federal Court decision, the High Court granted the parties leave to appeal the decision.

High Court of Australia’s Decision

The High Court overturned the Full Federal Court’s decision and rejected the 10 “working day” construction of the FW Act. For the purposes of calculating “10 days” of leave entitlement, the High Court provided that a “day” or “10 days” must be calculated by reference to employees’ ordinary hours of work in two standard five-day workweeks. One “day” refers to a “notional day,” consisting of 1/10th of the
equivalent of employees’ ordinary hours of work in a two-week period. Because work patterns do not always follow two-week cycles, the entitlement to “10 days” of paid personal/carer’s leave can be calculated as 1/26\(^\text{th}\) of employees’ ordinary hours of work in a year.

The High Court stated that the “working day” interpretation of the FW Act was inconsistent with the FW Act’s objectives and language. The High Court emphasized that the purpose of the FW Act is to provide “fairness, flexibility, certainty, and stability” for both employers and employees. The principle of fairness also applies between employees. The High Court stated that the “notional day” interpretation meets the FW Act’s objective of protecting employees against loss of wages by guaranteeing that employees’ accrued leave entitlement does not vary based upon the pattern of hours of work. Therefore, employees who work 36 hours per week are entitled to 72 hours of personal leave, regardless of how many days the employees actually worked that week. In addition, the “notional day” interpretation helps to ensure that part-time employees do not accrue more personal leave than those working full-time.

**Looking Ahead: Implications for Employers**

The High Court’s decision clarifies how employers, particularly those with a workforce consisting of part-time employees and shift workers, may comply with the FW Act. Employers should review and update payroll systems as necessary, especially if current payroll systems are based upon the previous Full Federal Court interpretation of a “day.” In addition, employers should review their current accrual levels to ensure that they are correct. If accrual levels are incorrect, this could lead to employees’ having accrued less or more personal/carer’s leave than they are entitled to and/or receiving the wrong amount of pay when on personal/carer’s leave.

Although the High Court did not address annual leave in detail, it is likely that the FW Act’s annual leave provisions (provided for in Section 87) that entitle employees to “4 weeks” of annual leave should be calculated similarly, based on employees’ “ordinary hours” of work.

The High Court’s decision, however, will not affect employees covered by enterprise agreements or contracts of employment that provide for a different leave entitlement under the FW Act, depending on the language of such contracts.

©2022 Epstein Becker & Green, P.C. All rights reserved.

National Law Review, Volume X, Number 260