Information Sheet

Employment Law in Western Australia: An Overview

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Employment of all workers in Australia is governed by a complex relationship of federal and state legislation, as well as common law. In some areas, especially workers' compensation and superannuation, regulation can extend to the relationship between principals and independent contractors.

The various pieces of legislation relevant to Western Australia make provision for:

- a process to determine minimum wages and a safety net of terms and conditions of employment (the award process);
- the regulation of employer and employee associations;
- equal remuneration for work of equal value;
- minimum leave entitlements, for such areas as annual leave, parental leave, sick leave and carer's leave;
- minimum termination entitlements;
- regulation of workers' compensation and occupation health and safety;
- minimum entitlements to superannuation contributions;
- prohibitions against unlawful discrimination;
- prohibitions against unlawful termination of employment;
- a framework for collective bargaining and the arbitrated resolution of industrial disputes; and
- minimum notification and consultation entitlements in circumstances of redundancy or workforce restructure.

Unlawful discrimination in employment includes discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer responsibilities, pregnancy or potential pregnancy, religion, political opinion, industrial activity, national extraction and social origin.

The *Fair Work Act 2009* (Cth) (FW Act) is the primary federal act which deals with industrial and employment related matters. The FW Act applies to all 'national system employers' in Australia; the most common type of national system employer is a constitutional trading corporation. The FW Act provides for protections from unfair dismissal for employees, protection for the low-paid, balance between work and family life and the right to be represented in the workplace.

The FW Act provides a minimum safety net for employee entitlements, made up of 10 National Employment Standards that apply to all National System Employees, and modern awards that contain specific terms and conditions for certain industries or occupations.

With the introduction of the FW Act, there was an emphasis placed on collective bargaining in good faith at the enterprise level, which coincided with a phasing out of individual bargaining (i.e. bargaining between an employer and an individual employee for an agreement). When agreements are made under the FW Act, the employees that are covered by them are required to be 'better off overall' in respect of the terms and conditions of the agreement, which cannot provide for a lesser entitlement when compared to an applicable modern award that would cover the employee were it not for the agreement.

The *Industrial Relations Act 1979* (WA) (IR Act) is the primary state act dealing with industrial and employment issues, and applies to employers that are 'non-constitutional corporations' (i.e. partnerships, sole traders, unincorporated associations and some trusts). The IR Act creates and provides the jurisdiction for the Western Australian Industrial Relations Commission (WAIRC) and other derivative statutory tribunals. It also regulates the operations of employee and employer organisations, prescribes statutory offences and regulates against activities discouraging freedom of association.

The IR Act provides for the making, registration and variation of state awards by the WAIRC. State awards provide for minimum wages and conditions and bind all employers and employees in the industries or occupations covered by the award. Unlike federal awards, state awards may cover any matter that can be defined as an "industrial matter", as that term is defined in the IR Act.

The IR Act also provides for the making of collective agreements between unions and employers, applicable at a workplace level. These agreements are known as "Industrial Agreements". The IR Act also provides for individual work arrangements, known as "Employee Employer Agreements" (EEAs). An EEA cannot disadvantage employees in comparison with applicable or equivalent awards. Though the IR Act provides for both individual and collective bargaining, there is a legislative preference for collective over individual bargaining.

Underpinning the terms of employment of all employees of non-constitutional corporations in Western Australia is the *Minimum Conditions of Employment Act 1993* (WA) (MCE Act). The MCE Act sets down minimum entitlements for such matters as rates of pay, leave, significant employment change and redundancy, keeping of records and public holidays. These entitlements are implied into the contracts of employment of all Western Australian employees employed by non-constitutional corporations.

The above is a general description of the structure of industrial and employment legislation applicable in Western Australia. Legislative arrangements are complex and comprehensive and are augmented by extensive common law principles. Not all important issues are listed, however, three important considerations for potential employers are as follows:

Extensive rights for employees in relation to unlawful and unfair dismissal

These exist in both state and federal legislation. In regards to an unfair dismissal, a relevant tribunal can deem the termination of an employee's employment unfair, irrespective of whether that termination was legal. Remedies including reinstatement, back pay and compensation are available to relevant tribunals upon a finding of unfair dismissal.

Legislative provisions prescribing the transfer of negotiated, arbitrated or accrued rights upon the sale of a business

This issue is particularly relevant for employees employed by national system employers. These provisions, known as "transfer of business" provisions, mean that an employer taking over a business may be forced to employ transferring employees under the terms agreed with, or applicable to, the previous employer. However, the effects of the transfer of business provisions can be reduced by the adoption of an appropriate strategy.

Legislative rights in relation to Freedom of Association

Both state and federal legislation contain protections for employees who suffer some detriment as a result of their choice to belong, or not belong, to a union or employee organisation. Similar protections are directly available to the unions and/or employee organisations. The relevant legislative provisions are broad, and care must be taken when dealing with unions or where an employee's membership or non-membership of a union is a relevant consideration in the actions or strategies of an employer. Statutory penalties apply for a breach of these provisions.

☎ Employers requiring further information can contact CCI's Employee Relations Advice Centre on (08) 9365 7660, email advice@cciwa.com or visit CCI's website at www.cciwa.com.

Like to know more?

Our **Employment Law Fundamentals for HR Professionals** training course is designed to help those responsible for HR in the business ensure compliance with employment law.

For more information, click here.

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