



## **BE PREPARED - FORWARD WITH FAIRNESS IS ON ITS WAY**

**479 working days;** according to the Rudd Government, this is how long employers as constitutional corporations, have to be ready to comply with the Forward with Fairness (FWF) changes. Employers have been put on notice that they have until 31 December 2009 to come to terms with their FWF obligations and adjust their work practices appropriately.

With such a short time frame to institute your eventual responsibilities, there is no time like the present for employers of all sizes to consider taking steps to ensure compliance with all of the changes.

### **WHAT STEPS SHOULD I TAKE?**

With no legislation in place it is difficult to identify all of your obligations under the proposed FWF scheme. However, the Government has now released the National Employment Standards (NES) and been clear in relation to enough aspects of FWF that proactive employers can begin a preliminary audit of their compliance with the scheme and take strategic steps to minimize the impact of FWF on your day to day management practices.

### **WHAT AREAS DO CAN I REVIEW NOW?**

There are at least six areas in which employers can consider their compliance with the FWF scheme:

1. National Employment Standards (NES);
2. Modern Awards;
3. The \$100,000 threshold;
4. Dismissal Provisions;
5. Employment Records; and
6. Abolition of AWAs and ITEAs by 31 December 2009.

### **NES**

The NES have now been finalized and cover 10 basis areas. Because it is the only piece of the FWF scheme that has been finalized this is the primary area of compliance you should look at.

It is advisable to review all forms of employment contracts, HR policies and procedures to ensure that they are consistent with the NES requirements or make the necessary changes and notify employees accordingly. Good faith bargaining, parental leave and redundancy entitlements are all issues that should be considered in light of the NES.

Given many employees work in excess of 38 hours per week, an issue with potential for immediate impact is that employees will have the right to refuse to work "reasonable additional hours" (those in excess of 38 per week) on the basis that an employer's request is unreasonable. After the FWF scheme is implemented you will want to monitor employee reaction to their new right, including how often and in what circumstances they raise refusals.

In preparation for employees to exercise their NES entitlements, it is advisable that employers consider providing training, or at least briefing, your managers to ensure they understand their obligations (documentation requirements, procedures and dispute resolution procedures) and are ready to deal with employee requests for things such as flexible working arrangements or extensions to parental leave.

### **MODERN AWARDS**

The Government has extended the expiry date for NAPSA's to 31 December 2009 to allow the process of completing the modern awards to run into December 2009 before the awards come into operation on 1 January 2010. Whilst the content of the awards is expected to cover 10 areas (in addition to the 10 NES areas), it is anticipated they will be generally standardized and provide guidance in relation to dispute resolution and flexibility clauses. The award consultation process is currently on foot and you ought to consider making submissions to ensure that the Government has an opportunity to review your requests and submissions.

At this stage, it is important to note that the awards will not apply to employees who are earning in excess of \$100,000 per annum. Because of this threshold it is advisable to consider:

1. The expiry date of any current workplace instruments and assess whether it is necessary to devise a new instrument to replace the expiring instrument;
2. Identify which of your employees will be exempt from the award system by virtue of the \$100,000 threshold;
3. Identify which of your employees who are earning less than the \$100,000 threshold will revert to award coverage on the expiry of your current workplace instrument; and
4. Identify which awards (once known) will apply to eligible employees earning less than the \$100,000 threshold.

### **THE \$100,000 THRESHOLD**

The Government has announced not only that there will be a \$100,000 threshold but that it will be indexed each year. This may create issues when it comes to determining whether or not an employee is exempt from the award system because of, for example, wage indexation, a pay review or a promotion.

If you have employees who will be close to the threshold it will be necessary to maintain a monitoring system to identify when or if those employees will become subject to award coverage. Employers should also consider having other employment arrangements in place, such as common law contracts, should an employee's remuneration remove them from award coverage. As with the current system, the alternative employment arrangements for non-award employees will have to ensure that they are no worse off under the new arrangement.

### **DISMISSAL PROVISIONS**

Under the FWF scheme the number of employees eligible to institute claims for unfair dismissal will greatly increase. It is proposed that all employees will be able to make a claim for unfair dismissal with only three exceptions:

1. If the employer employs 15 or less employees, the employee must be employed for at least twelve months;
2. If the employer employs 15 or more employees, the employee must be employed for at least six months; or
3. If the employee is not covered by an award the employee must be earning annual remuneration of less than \$98,200 (this amount is indexed).

Because of the increased risk of employee claims, employers should consider formalizing a dismissal policy. It should be noted that non-compliance with a formalized policy may itself have implications on the employer but the overall aim of the operation of the policy should be fairer treatment of employees and more predictable outcomes.

The Government has announced that small businesses (less than 15 employees) will be covered by a Fair Dismissal Code, although the content of the Code and whether or not it will be binding is yet to be announced.

Regardless of the number of employees you employ, it is advisable to review the Fair Dismissal Code when it is released to gain an insight into the types and nature of policies the Government considers fair in relation to dismissals.

### **EMPLOYMENT RECORDS**

Under the current regime you are required to keep records of an employee's name, employment classification, date of commencement, overtime hours worked, bonus, incentive and commission arrangements and payments, leave accrual and taken details, any agreement to forgo leave, superannuation contributions and reason for termination of employment.

From 1 January 2010 the requirement for employers to record any hours averaging agreement will no longer be required but the obligation may remain in awards or agreements. Additionally, it is good practice to retain a copy of any NAPSAs or agreements which apply to any employee and record that employee's classification under that instrument.

### **ABOLITION OF AWA'S AND ITEAS**

Employers will need to adopt a strategy to phase out these employment agreements on or before 31 December 2009. This means you will need to consider the source of each employee's entitlements (whether NES, award or other) and prepare new employment agreements where appropriate. Being that the content of the modern awards is yet to be determined, your strategy for dealing with employees is especially important in situations where your employees are likely to be under the \$100,000 threshold and be subject to the terms of the modern awards.

### **A LAST INTERESTING POINT**

It is important that you ensure your business is prepared to deal with new employee rights, such as good faith bargaining, on the commencement of the FWF scheme. If there is a union presence in your workplace you can bet they will be prepared to take advantage of their new entitlements.

For more information on how to prepare your business to comply with the Forward With Fairness legislation, then please do not hesitate to contact us.

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