W+K UPDATE

Addressing gig economy loopholes may lead to new exposures for insurers

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At a glance

+ On 4 September, the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 was introduced to Parliament.
+ The Bill aims to close loopholes that undermine pay and conditions and to improve work health and safety laws in the Commonwealth jurisdiction, including for gig economy workers.
+ The Bill forms part of the wave of workplace changes being proposed by the Albanese Government.
+ While there are many positive outcomes expected from the proposed reforms, they also have the potential to create new exposures for insurers and businesses.

Background

According to a recent ABC news article, "The government asserts that a lack of standards around gig workers has contributed to unsafe work conditions, and estimates at least 13 gig workers have died on Australian roads in recent years."[1] It's a tragic statistic, and one not likely to be ignored by regulatory authorities, such as SafeWork NSW and WorkSafe Victoria, particularly as it is estimated that there are over 250,000 workers in the industry.[2]

One of the most concerning areas of the gig economy involves food delivery service. This sort of work is historically poorly paid, which can lead to workers taking safety 'short-cuts' to meet their financial needs. Many food delivery riders also start working with an international drivers licence that may or may not meet Australian safety driving standards.

While there is no requirement for their skills to be verified under Australian law for their initial stay, not holding the relevant licences in the state in which they are working heightens their safety risks.

Additionally, some delivery rider platforms appear to have few checks and balances in place for inducting riders before they start work, further adding to the risk.

[1] https://www.abc.net.au/news/2023-08-31/minimum-pay-rates-for-gig-workers-more-safety/102798638

[2] Actuaries Institute, *The Rise of the Gig Economy and its Impact in the Australian Workforce* (Green Paper, December 2020) p 5.

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The proposed reforms

A key issue with gig economy workers is that they are effectively unregulated compared to traditional employees who enjoy the benefits of minimum statutory entitlements under the *Fair Work Act 2009*, Modern Awards or Enterprise Agreements. The Government introduced the Fair Work Legislation Amendment (Closing Loopholes) Bill on 4 September 2023 to help address this issue.

One of the proposed key changes is to create a new category of employment, which sits between that of an employee and contractor. The legislation is expected to only apply to certain gig economy workers who are supported by digital platforms, such as Uber Eats.

Another significant proposed change is that these workers will be guaranteed a minimum amount of pay while on a job. This will support more flexible working and will create obligations for platforms to ensure that workers are being paid no less than the guaranteed minimum.

In creating a mechanism to determine how the guaranteed minimums are set, the Fair Work Commission will be delegated power to make this determination by way of a 'minimum standards order', much like the Annual Wage Review process. If the legislation passes through Parliament, this power will commence from 1 July 2024.[3]

Much like an enterprise agreement, the proposed reforms also provide a mechanism for gig economy workers and respective businesses to enter into a 'collective agreement' for groups of workers.[4]

Some key expected outcomes of the proposed legislative reforms are that workers:

1. will not fall significantly behind in minimum earnings compared to employees
2. will not be incentivised to take risks while on the job that could result in serious injury or death, and
3. will enjoy more flexibility in the hours that they work where they would not have to work a greater number of hours to maximise their earning potential comparable to an employee.

> To mitigate the risk of liability exposures, insurers should ensure their customers operating in the gig economy comply with all relevant work, health and safety laws and regulations.

Reform-driven exposures

While there are many positive outcomes expected from the proposed reforms, they also have the potential to create new exposures for insurers and businesses. For insurers, it will be important to get ahead of these potential risks.

For example, the proposed reforms may lead to a rise in health and safety prosecutions against gig economy operators, especially operators who manage online platforms. To mitigate the risk of liability exposures, insurers should ensure their customers operating in the gig economy comply with all relevant work, health and safety laws and regulations. This may involve businesses reviewing and evaluating their processes and procedures to ensure they comply with the law and manage the risk before it materialises.

We will continue to monitor these workplace developments and provide updates as they arise.

[3] Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) cl 249.
[4] Ibid.

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