WOTTON KEARNEY

Workplace & Safety Guide

2025

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Introduction

Wotton Kearney's 2025 Workplace & Safety Guide offers a comprehensive and professionally curated overview of key areas in employment, industrial relations and safety law, tailored to support businesses and HR professionals in navigating the complexities of today's workplace. With continuous legislative developments and shifting workplace norms, staying abreast of employer obligations and employee rights is paramount. This guide is designed to provide clear insights and practical guidance on prevalent issues in these legal areas.

The guide covers critical topics such as workplace safety, underscoring the importance of proactive risk management and adherence to work health and safety (WHS) regulations to mitigate potential liabilities. It also addresses the issue of workplace bullying, a significant concern that necessitates well-defined policies and timely interventions to foster a respectful and safe working environment.

Employment contracts and workplace policies serve as the foundation of the employer-employee relationship, delineating mutual expectations, obligations and rights. Our guide outlines the recent changes to the *Fair Work Act 2009* (Cth) (**FW Act**) such as the changes to fixed and maximum term contracts, and everything your organisation needs to know about rates of pay and set off clauses. It also delves into the various policies employers need to have in place in order to comply with their legal obligations.

Enterprise bargaining is another key focus, offering businesses a structured approach to negotiating terms and conditions of employment with employees or their representatives. Effective enterprise bargaining can enhance workplace flexibility, improve employee satisfaction and support long-term business goals. Managing labour hire risks is also essential in today's environment, where many businesses rely on external labour providers. Our guide highlights best practices for mitigating risks associated with labour hire arrangements, including ensuring compliance with relevant legislation and maintaining clear accountability between host employers and labour hire providers.

Finally, we provide an overview of the current legislative landscape, with an emphasis on recent amendments and upcoming reforms that may affect business operations.

We hope your organisation finds this guide useful and informative. Please do not hesitate to reach out to our team of experts if we can provide further detail on any of the topics or to arrange a confidential discussion on a case your company or insured is experiencing.

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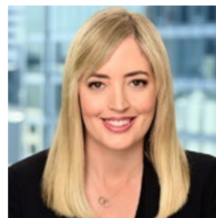

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Employment Litigation

If you're running a business, you might run into two types of legal issues: unfair dismissal and general protections claims.

Unfair dismissal is what it sounds like – firing someone in a way that's not fair. But general protections claims are a bit trickier. They cover situations where an employee feels they've been treated badly, even if they weren't actually fired. And, with some recent law changes, these claims can also include cases where someone has been mistreated because of their experience with family or domestic violence.

Fair Work Commission: How it all starts

Most unfair dismissal and general protections claims kick off at the Fair Work Commission (**FWC**). Usually, the FWC sets up an initial conciliation conference to try and sort things out quickly and smoothly for everyone involved.

However, if things aren't handled the right way, general protections claims can escalate to the Federal Court of Australia or the Federal Circuit and Family Court of Australia. When that happens, it can become a long, expensive process for both the insurers and the employers – even if they have a solid defence.

Responding to Claims: Staying on top of it

The FWC gives employers tight deadlines to respond to unfair dismissal and general protections claims so it is crucial to let your broker and insurer know as soon as possible. Our team work within these deadlines everyday and if required, can manage this for you/ your business, meet the FWC's requirements, and assist you to build the best possible defence

Our team can also evaluate the validity of any claim from the start. If there's a chance to get the claim dismissed on jurisdictional grounds, we'll take action. If the claim is valid, we'll guide you through the process, prepare the necessary responses, and represent you at the FWC conciliation to aim for a favourable settlement.

WK expertise

Unfair dismissal and general protections claims can feel like a shock, but our team of experts is here to help. We'll guide you through the process, making sure we find a resolution that fits both your business needs and legal obligations.

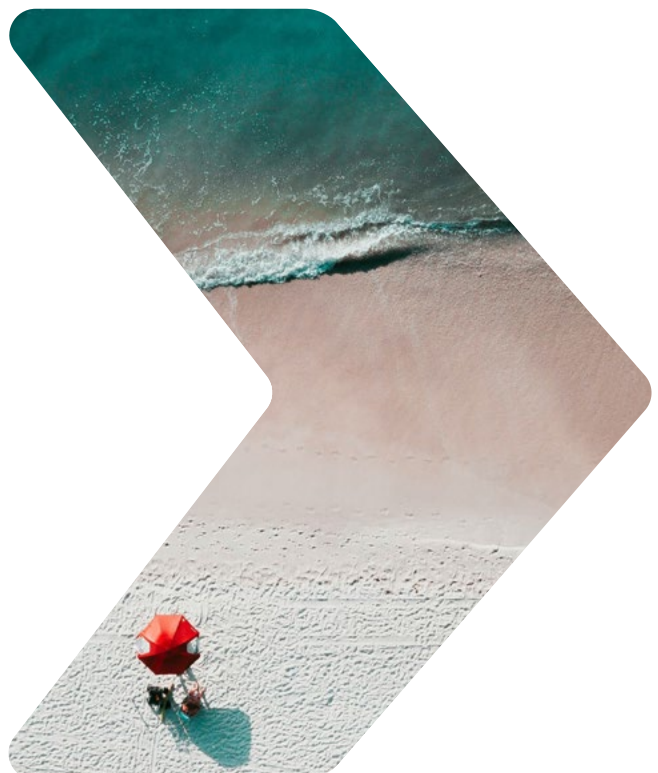
Respect@Work

Commencing on 12 December 2022, Respect@Work introduced a new set of rules for employers.

The new positive duty

This new duty requires employers to take reasonable and proportionate steps to eliminate unlawful conduct like discrimination, sexual harassment, and victimisation as much as possible. The Australian Human Rights Commission (**AHRC**) now has the power to monitor and check if employers are complying with these rules.

Our team helps employers make sure they're meeting this new obligation. This includes offering practical advice on things like consulting with your workforce, reviewing work environments, and assessing whether certain workers might be at greater risk. The AHRC has also published guidelines on how to comply with the positive duty, and we can help you follow them.



Hostile work environment on the grounds of sex: Understanding the risks

The Respect@Work amendment also made it clear that creating a hostile work environment based on sex is illegal. We regularly collaborate with clients to identify and prevent behaviours that could contribute to a hostile work environment.

Sexual harassment and sex-based harassment: What has changed

The Respect@Work amendment lowered the bar for what counts as sex-based harassment. Now, it doesn't need to be "seriously" demeaning – just demeaning.

In cases of sexual harassment, damages are often awarded, and these amounts are rising as society becomes more aware of the harm caused. Employers can be held responsible for their employees' actions unless they can prove they took all reasonable steps to prevent it.

Our team assists employers in defending against sexual harassment claims and, where possible, advises on how to prevent these issues from arising in the first place.

Discrimination in the workplace

Discrimination occurs when someone is treated unfairly or less favourably than others because of certain characteristics, such as their race, gender, age, disability, religion, sexual orientation, or family responsibilities. In Australia, both federal and state laws prohibit discrimination in the workplace to ensure fair treatment for all employees. Employers have a legal obligation to provide an environment free from discriminatory practices, where decisions are based on merit and not influenced by personal biases or prejudices.

Workplace discrimination can take many forms. It might involve denying someone a promotion because of their gender, refusing to hire a qualified candidate due to their age, or creating policies that disadvantage employees with disabilities. Discrimination can also occur indirectly, such as enforcing work hours that are unsuitable for employees with family responsibilities without a valid business reason.

Making a discrimination claim & the Human Rights Commission process

If an employee believes they have been discriminated against, they can lodge a complaint with the AHRC or the relevant state or territory commission. Complaints can be submitted online, and no legal representation is required to initiate the process.

Once a complaint has been received, the AHRC assesses whether it falls under its jurisdiction and involves unlawful discrimination. If accepted, the next step is conciliation. This is a key part of the AHRC's approach to resolving discrimination complaints. It is an informal, confidential, and voluntary process designed to help both parties reach an agreement without resorting to formal legal proceedings. The primary aim is to facilitate open dialogue, allowing both the complainant and the respondent to express their perspectives, understand each other's positions, and explore potential solutions.

If a discrimination complaint is not resolved in the AHRC conciliation, it can be terminated by the AHRC and the complainant can then choose whether they wish to lodge proceedings in the Federal Court of Australia or the Federal Circuit and Family Court of Australia. New legislative amendments have commenced in the discrimination space to the effect that if the applicant is successful at Court, they are automatically entitled to payment of their costs. If the respondent wins, they will generally not be entitled to their costs unless an exemption applies.

Workplace & Safety – Incident Management & Investigations

When an incident happens

Workplace & safety incidents can happen out of the blue and have serious consequences, so they need immediate attention.

Incidents can range from simple trips-and-falls to more serious cases involving fatalities, and they might also involve members of the public.

Penalties

Penalties for safety incidents vary by state and territory but can run into millions of dollars. Some jurisdictions even have laws that allow for imprisonment in cases of industrial manslaughter. Courts take these cases very seriously, and penalties are only getting tougher.

State or Territory Regulators

If something happens at your workplace that requires urgent medical attention, especially if an ambulance is called, you may need to notify the State or Territory Regulator.

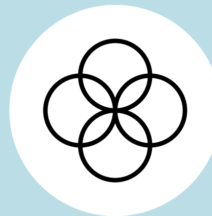
Our experienced team handles all types of safety incidents, from the moment they're reported until everything is resolved, including conducting complex investigations.

Each state and territory regulator has broad, coercive powers. When notified of an incident, they'll visit the site, conduct interviews, and demand documents.

If you're involved in this process, you're entitled to legal representation, and we're here to help. We'll advise you on how to respond to the regulator, make sure relevant experts are briefed, and guide you through the often tricky litigation process.

More importantly, our team provides ongoing training and advice to help employers and directors meet their due diligence obligations. This includes creating safe work systems, managing incidents, implementing safety reporting mechanisms, and fostering a safety-first culture. We offer regular training and advice to ensure you're meeting these obligations.

Workplace & safety can be challenging and complex, but it doesn't have to be overwhelming. Our team is here to help you navigate it all, from training, to complying with due diligence requirements, and responding to incidents when they arise.



National Regulators

New South Wales
SafeWork NSW

Victoria
WorkSafe

Queensland
Workplace Health and Safety Queensland (WHSQ)

South Australia
SafeWork SA

Tasmania
WorkSafe Tasmania

Northern Territory
NT WorkSafe

Western Australia
WorkSafe WA

Bullying

Workplace Bullying: Why it matters and what to do about it

Bullying at work "is where a person or group of people repeatedly behave unreasonably towards another worker or group of workers, and the behaviour creates a risk to health and safety". It's considered a psychosocial hazard, which means it can damage someone's mental well-being and lead to long-lasting issues. The stress from bullying can cause anxiety, depression, PTSD, and sleep problems, and it can even lead to physical health problems like muscle injuries, chronic illness, and fatigue.

For businesses, bullying doesn't just hurt people – it affects the bottom line. Productivity drops, handling complaints takes time and resources, and insurance premiums can increase as a result.

What isn't bullying?

Reasonable management action that is carried out in a reasonable way is not bullying. Employers can manage work tasks, address poor performance, or take disciplinary action as long as it's done in a reasonable way.

For instance, if a worker raises bullying concerns during a performance review process, raising performance criticisms of themselves do not constitute bullying, provided they are accurate and raised in a reasonable way. However, the employer should still closely review any bullying allegations raised and determine whether to formally investigate them. Our experienced Workplace & Safety team can guide employers through these processes, including any investigations.

What counts as bullying?

Workplace bullying is when one or more workers repeatedly act in a way that causes distress and a risk to well-bing. The conduct can take the form of words or actions. Some examples of bullying can include:

- Harassing someone;
- Acting unpleasantly towards other workers or groups of workers;
- Office banter that goes too far;
- Spreading rumours;
- Making rude comments or gestures to another worker or groups of workers;
- Interfering with personal property or equipment;
- Physically hurting someone;
- Taking advantage of a position of power;
- Excluding someone from work activities; and
- Pressuring someone to behave inappropriately.

> “Many workplaces have policies and processes to prevent and respond to bullying. Where it is safe, use these to try and resolve the problem (sometimes called a ‘grievance’) before coming to the Commission. When a worker asks the Commission for help to stop bullying at work, this is the start of a legal process”.
>
> **Fair Work Commission**

Prevention is key

The best way to deal with workplace bullying is to stop it before it starts. Regular training and awareness sessions for workers can go a long way in preventing bullying. Having a clear, accessible anti-bullying policy in place is also crucial. This policy should outline exactly what workers can do if they feel bullied.

Our team can help by providing training for your employees and reviewing, advising and updating your company’s anti-bullying policy to make sure it’s effective.

If bullying does occur, workers have the option of seeking help through the FWC. If a worker reasonably believes they’ve been bullied at work, they can apply to the FWC for an order to stop it. The Commission can make any order it thinks is appropriate to prevent further bullying, but it won’t include orders for financial compensation.

Employment Contracts & Workplace Policies

Recent changes to the *Fair Work Act 2009* (Cth), known as the Closing Loopholes amendments, mean it's a good time for employers and insureds to review their employment contracts and policies for compliance and to ensure best practice. Our team helps clients with these reviews and can simplify some of the more complex details.

Employment Contracts

What has changed with fixed and maximum term employment contracts?

Fixed and maximum term employment contracts were previously a common phenomenon across various industries, particularly where it was unknown whether the role was needed permanently or there was otherwise a desire for labour flexibility.

The Closing Loopholes legislation has significantly curtailed an employer's ability to continue with longer term fixed and maximum term employment contract models.

Unless an exemption applies, from 6 December 2023, fixed or maximum term contracts must generally be for a term of 2 years or less (including any extensions or renewals). A contract cannot include the option or right to extend more than once, even if the total period is less than 2 years.

Some of the exemptions include:

- emergency or temporary situations, such as filling parental leave positions;
- employees earning above the high-income threshold (currently $175,000) in the year the contract is entered into (pro-rata for part-time employees);
- work involving a distinct and identifiable task that requires specialised skills;
- work funded by a prescribed government funding scheme, where the funding is payable for more than 2 years, but there is no reasonable prospect of the funding being renewed after that period;
- higher education employees – i.e. those covered by the *Higher Education Industry – Academic Staff Award 2020* or the *Higher Education Industry – General Staff Award 2020*. This exemption currently ends on 1 November 2025; and
- organised sport – i.e. employment contracts between employers specified under the *Fair Work Amendment (Fixed Term Contracts) Regulations 2023* and athletes, coaches, match officials or performance support professionals. This exemption currently ends on 1 November 2025.

Rates of pay and set off clauses

Underpayment claims continue to be a hot topic in the employment landscape, with the Closing Loopholes amendments strengthening penalties and consequences of non-compliance with minimum pay rates.

Importantly, from 1 January 2025, the intentional underpayment of wages by employers will become a criminal offence.

There are a number of ways an employer can protect itself in this context, these include:

- ensuring you are paying your employees equal to or over their minimum entitlement under any applicable modern award or enterprise agreement;
- include a well drafted set off clause in the employment contract. Such a clause confirms that amounts paid to the employee in excess of their minimum entitlements can be off set against entitlements under any applicable modern award or enterprise agreement. Your set off clause should be specific as to what entitlements (such as overtime, annual leave loading and the like) can be set off under the set off clause; and
- ensure the amount employees are being paid is enough to account for any overtime hours being worked and ensure employment contracts are clear as to when overtime hours are authorised and unauthorised.

Workplace Policies

Employers need effective workplace and safety policies in place to comply with their legal obligations.

The policies should be relevant to your workplace and genuinely adhered to in practice. A healthy compliance environment should include ongoing training for employees and managers on their policy obligations and relevant legal updates. Here are the key policies every workplace should have:

Anti-discrimination & harassment policy

Since December 2022, organisations and businesses have a positive duty to eliminate, so far as possible, discrimination on the grounds of sex in a work context, sexual harassment and sex-based harassment in connection with work, conduct creating a workplace environment that is hostile on the grounds of sex and related acts of victimisation.

Having a best practice workplace policy covering these issues is an important way to show that proactive and meaningful action is being taken to prevent the prohibited conduct from occurring.

Workplace & safety policy

A sensible and tailored workplace & safety policy is critical for a business or organisation to show that it has complied with its duties under workplace & safety legislation to protect the health and safety of workers, so far as reasonably practicable.

In many jurisdictions, workers also have specific obligations under legislation to cooperate with reasonable workplace & safety policies or procedures at the workplace.

Whistleblower policy

A whistleblower policy provides protections for persons who call out forms of misconduct or legal breaches, including keeping their identity or identifying information confidential, and protection from detrimental action being taken against them for making the whistleblower disclosure.

Under the *Corporations Act 2001* (Cth), public companies, large proprietary companies and corporate trustees of registrable superannuation entities must have a whistleblower policy.

Other companies should still have a grievance procedure for employees to follow in the event of any work complaints.

Modern slavery policy

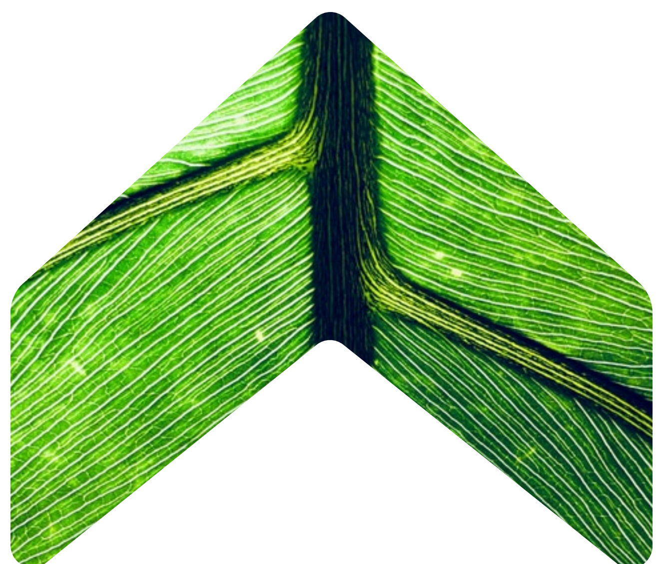
Modern slavery reporting is required under the *Modern Slavery Act 2018* (Cth) for entities who are based or operating in Australia and have a consolidated revenue of at least $100 million for the financial year reporting period.

A modern slavery policy supports the businesses' commitment to reporting on and eliminating modern slavery from their supply chains.

Privacy policy

A privacy policy is required for any Australian Government agency (including the Norfolk Island administration) or other organisation covered by the *Privacy Act 1988* (Cth) (**Privacy Act**). The non-Government organisations covered include organisations with an annual turnover more than $3 million, with some exceptions.

A privacy policy sets out how the organisation handles the personal information of employees and third parties. The Privacy Act includes an employee records exemption in respect of employee information, however this exemption only applies once the employee records are actually collected (i.e. Privacy Act requirements must be adhered to prior to collection).



Workplace surveillance policy

An appropriate workplace surveillance policy is required in some cases under legislation. For example, in NSW the *Workplace Surveillance Act 2005* (NSW) requires any blocking of emails or Internet websites to occur in accordance with an employer policy that has been notified in advance to the employee.

Industrial update

Our team provides expert guidance on enterprise agreement bargaining and managing labour hire risk, critical in light of recent notable amendments to the FW Act 2009 (Cth) throughout 2023 and 2024. Here's an overview of some of the key updates:

Enterprise bargaining

An enterprise agreement is an agreement made at enterprise level that sets out the terms and conditions of work for employees, for a period of up to 4 years from the date the enterprise agreement is approved. For an enterprise agreement to be approved be approved by the FWC, the FWC must be satisfied that employees (and prospective employees) would be better off overall if the enterprise agreement applied than if the underlying modern award applied. The better off overall test (**BOOT**) is applied as at the date the approval application is lodged with the FWC.

Why opt for enterprise agreements?

An employer may choose to implement an enterprise agreement because it provides greater flexibility to tailor things like shift times, breaks and classification structures to the operational needs and realities of the company, compared to strict application of the relevant modern award.

The amendments to the FW Act have also brought about changes to the multi-enterprise bargaining framework. Since 6 June 2023, unions have had the ability to apply to the FWC for authorisations to force employers to bargain for multi-enterprise agreements (i.e. enterprise agreements covering multiple employers, where the employers have sufficiently common interests). This forced bargaining approach is likely to produce enterprise agreements that are more favourable to employees, with higher pay rates.

An employer cannot be forced to bargain for a multi-enterprise agreement if there is already an enterprise agreement in place that is within its nominal term.

Accordingly, some employers have chosen to negotiate single enterprise agreements with employees on their own terms, to avoid being "roped in" to a broader industry multi-enterprise agreement.

Other legislative amendments in the enterprise bargaining space include:

- for enterprise agreements made on or after 6 June 2023:
  - the FWC can amend an enterprise agreement after it has been lodged, where the FWC considers the enterprise agreement does not pass the BOOT;
  - the FWC can reconsider an enterprise agreement that has already been approved (if there is a change in circumstances or relevant matters were not previously considered); and
- since 27 February 2024, multiple franchisees of the same franchisor can now bargain together for a single enterprise agreement, where they carry on similar business activities under the same franchise.

Same job, same pay orders

Labour hire employees are employed by an external party and supplied to a host employer on an as needed basis. The Closing Loopholes amendments to the FW Act have brought about strengthened protections for labour hire workers, to ensure they have greater pay parity with the host's employees, in line with pay rates for host employees under relevant enterprise agreements or other employment instruments.

An application can now be made for labour hire employees to receive a protected rate of pay no less than what they would receive under the relevant employment instrument if they were employed directly by the host employer. The earliest effective date for an order is 1 November 2024.

On 1 July 2024, the FWC made its first regulated labour hire arrangement order in *Application by the Mining and Energy Union* [2024] FWCFB 299. The order entitles hundreds of labour hire workers to receive pay rises equal to the full rate of pay for equivalent employees under the *Callide Mine Union Enterprise Agreement 2021*.

Further detail on same job, same pay orders is provided in the "Current Legislative Landscape" on the following page.

Current Legislative Landscape

Casual employees

There have been significant changes in the employment relations landscape in recent years. One of the most significant changes to employment law was the introduction, and subsequent amendments, to the definition of casual employment. Other significant changes include new laws to regulate gig economy workers and implementing the right to disconnect.

The new definition of a casual employee is centred around two key elements:

- The presence of a 'firm advance commitment' to ongoing work, that is, an agreement that the employee will continue to have work in the foreseeable future; and
- The worker being entitled to a casual loading or specific casual pay rate under an Award, registered agreement, or employment contract.

Whether a worker qualifies as a casual is determined by how the contract is carried out and the behaviours of both the employer and employee post-agreement.

Right to disconnect

The right to disconnect laws mean that employees have the 'right' to refuse to read, monitor and respond to contact from work outside their working hours unless doing so is unreasonable. This includes contact from a third party, such as suppliers or clients, in addition to contact from their employer. While this legislation doesn't prohibit anyone from making contact with a worker – through methods such as calls, emails, texts, Microsoft Teams messages – it empowers employees with the right to disconnect from any 'unreasonable contact' outside of their designated working hours.

Support for employers:
Wotton Kearney is available to guide employers in setting appropriate policies regarding after-hours communication.

Contractors and gig economy protections

Employers and insurers in the gig economy and road transport space need to be aware that there is a new framework for protecting gig economy workers. The new laws convey significant new protections of two types of independent contractors:

- digital platform workers doing employee-like work, including those in the gig economy; and
- regulated road transport contractors.

This is a major change as the FW Act traditionally held the objective of creating laws in respect of employees. The minimum standards provide orders and guidelines concerning payment terms, deductions and insurance.

To obtain the coverage and protections afforded by the new laws, there are certain eligibility requirements that a person must meet, including being a party to a services contract, performing the significant majority of the work and not performing any of that work as an employee.

Access to Fair Work jurisdiction

The FWC will also have new powers under the FW Act to deal with disputes over 'unfair deactivation' of an employee-like worker or 'unfair termination' of a road transport contractor's contract.

If the FWC finds that there has been an unfair deactivation or termination, it can make orders against the business to reinstate the workers or a monetary order to the worker because of the deactivation or termination. These powers extend to making 'road transport contractual chain orders' in relation to matters such as payment times, fuel levies and termination.

Eligibility requirements still apply to these workers and any contractors that earn over the contractor high-income threshold cannot apply. Further, for an unfair termination of a road transport worker's contract, the maximum compensation will be 26 weeks' pay or half the contractor high income threshold. For an unfair deactivation of an employee-like worker, a worker could be entitled to the amount of money lost between the point of deactivation and the point of reactivation to the digital platform.

Labour hire employees

The 'same job, same pay' legislation means that employers utilising labour hire workers may face significant legal risk if their business does not take steps to ensure they understand their obligations. The aim of this legislation is to address pay disparity between labour hire workers and direct employees of a business and prevent employers from undercutting bargained wages by engaging labour hire workers. As noted in the "Enterprise Agreements" section of our Workplace and Safety Guide, labour hire employees can now apply to the FWC to seek a Regulated Labour Hire Arrangement Order (**RHLAO**).

An RHLAO is an order that labour hire employees be paid equivalent to or more than what they would receive under a host employer's enterprise agreement or other employment instrument.

RHLAOs will only be granted by the FWC if it is satisfied that:

- an **employer** (i.e. the labour supplier) supplies or will supply, either directly or indirectly, one or more employees of the employer to perform work for a regulated host (i.e. host employer);
- the **host employer's** covered employment instrument would apply to the labour hire worker if they were directly employed by that host employer; and
- the host employer is **not** a small business employer.

Relevant factors to consider in the context of a 'same job, same pay' application include whether the labour hire employees and host employees attend the same meetings, perform the same work, are given work and equipment in the same way and/or follow the same policies and procedures.

The definition of 'covered employment instrument' is complex, but includes:

- an enterprise agreement;
- a workplace determination;
- a determination under section 24 of the *Public Service Act 1999* that applies to a class of APS employees in an Agency;

- an instrument made under any law of the Commonwealth (other than the FW Act), or of a State or Territory, that provides for the terms and conditions of employment for a class of national system employees; and
- any other instrument relating to the employment of a class of national system employees made under a law of the Commonwealth (other than the FW Act) or a State or Territory and is prescribed by the *Fair Work Regulations 2009*.

The means that a labour hire supplier (i.e. the agency) can be ordered to pay a minimum rate that is at least equal to the conditions of the host employer (i.e. the labour supplier's client).

Where an application has been made with the FWC, these have started to take effect from 1 November 2024.

Additional Prohibitions & Protections

Wage theft prohibitions

Wage theft continues to be a significant concern for both employers and insurers, as a new, stricter regime is introduced. Employers who intentionally underpay their employees now face potential criminal charges, with penalties reaching up to $7.825 million. Importantly, this law also extends to individuals, who could face up to 10 years in prison.

However, the offence does not apply in cases of underpayments related to superannuation, long service leave, victim-of-crime leave, or jury duty payments. It also does not cover unintentional underpayment or mistakes in calculations. The maximum penalties under the new offence are as follows:

- a maximum of 10 years in prison;
- if the court can determine the underpayment, the greater of 3 times the amount of the underpayment and $1.565 million; or
- if the court can't determine the underpayment, $1.565 million.

This new offence is a vexed issued for insurers in light of the elements of the criminal offence which may not attract coverage. At present, insurance coverage for penalties involving wage theft have not been prohibited.

Importantly, the wage theft laws will only apply to intentional underpayments that occur after 1 January 2025. This also includes situations where an employer continues a course of conduct that began before this date.

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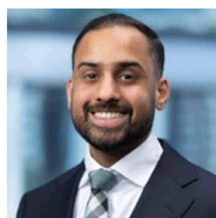

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