SQUIRE PATTON BOGGS

Potential Legal Risks Arising From Common Business Practices

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In light of significant changes to labour and employment laws over the past 18 months, it is important for employers to take the time to review and update their current contracts, policies and workplace practices. We have summarised the top five potential legal risks arising from common business practices to help Australian employers ensure that they are compliant with recent legislative developments.

1. Maximum Hours of Work and "Reasonable Additional Hours"

Under the *Fair Work Act 2009* (Cth) (*FW Act*), employers are prohibited from requesting or requiring full-time employees to work more than 38 hours per week, unless those additional hours are reasonable.

When considering whether additional hours are reasonable, section 62(3) of the *FW Act* provides a list of factors which are to be considered, such as:

- Whether there would be a risk to the employee's health and safety
- The employee's personal circumstances
- If the employee is entitled to overtime (or is paid a level of remuneration that reflects an expectation of working additional hours)
- The usual pattern of work in the particular industry
- The employee's role and level of responsibility

Some employers require their staff to work a standard working week of 40 or more hours, which is more than the maximum of 38 hours under the *FW Act*. If this was challenged by an employee, and the employee's weekly hours do not significantly exceed 38 hours (i.e., 40 hours per week), the employer may have grounds to argue that the additional hours are reasonable, considering factors such as the nature of the industry, the employees' role and level of responsibility and their level of remuneration. However, if employees are being required to work additional hours that are significantly more than 38 hours per week, and this is occurring on a regular basis, there is a potential risk that an employee could successfully argue that the additional hours are unreasonable. This may manifest via a complaint to the Fair Work Ombudsman or union alleging that the employer has acted in breach of the National Employment Standards (NES) in the *FW Act*, specifically the maximum hours requirement under section 62.

While there have been some breaches of reasonable hours claims by unions (the highest profile is the Financial Sector Union's Federal Court test case against NAB over alleged unreasonable additional working hours – currently still before the Federal Court), enforcement claims by the Fair Work Ombudsman's office are less common.

The *FW Act* has been recently amended to significantly increase civil remedy penalties for contraventions of the NES, to a maximum of 300 penalty units (AU$93,900) for individuals and 1,500 penalty units (AU$469,500) for body corporates.

2. Requiring Employees to Work on Public Holidays

Similarly to above, pursuant to section 114(2) of the *FW Act*, an employer can "request" an employee to work a public holiday where reasonable. In March 2023, the Federal Court confirmed in the decision of *CFMMEU v OS MCAP Pty Ltd [2023] FCAFC 51* that employers cannot automatically schedule employees to work on public holidays, with the Court determining that the reference to a "request" in section 114 is distinct from a "requirement". The Court held that any request for an employee to work on a public holiday should be made in the form of a question leaving the employee with the right to refuse the request, rather than as a unilateral demand.

However, the Court also held that an employer could require employees to work on public holidays as long as:

- The employer has made a request for an employee to work on a public holiday
- That request is reasonable
- The request is made in circumstances where an employee's refusal is not reasonable

Section 114(4) of the *FW Act* sets out the factors that are to be considered in assessing whether an employer's request or an employee's refusal are reasonable, which are similar to the factors applied under section 62(3) in relation to reasonable additional hours.

So, if it is an employer's normal practice to require staff to work on public holidays, this may potentially be in breach of the NES in light of the *OS MCAP* decision*. Therefore, if an employer needs employees to work on public holidays, it should issue a request to the employee in advance, and then if the employee refuses the request, assess whether the employee's refusal is reasonable based on the factors in section 114(4). (If the refusal is deemed to be unreasonable in the circumstances, the employee can then be directed to work on the public holiday).

If employees are regularly required by an employer to work on public holidays (as opposed to being requested to work), there is a risk that if this is challenged by an employee, the employer could be deemed to be in breach of the NES, specifically section 114 of the *FW Act*.

> * The *OS MCAP* decision exposed flaws in the way BHP deducted leave on public holidays across its entire Australian workforce, leading to the company's admission that it has to backpay more than AU$400 million to almost 30,000 employees dating back to 2010

3. Requests for Flexible Working Arrangements

As of 6 June 2023, the *FW Act* was amended to expand employees' rights under the NES to request flexible working arrangements (FWAs) (including work-from-home arrangements).

Under section 65A of the *FW Act*, employers are now required to respond in writing to employees within 21 days of a request, and employers may only refuse a request if:

- They have discussed the request with the employee and genuinely tried to reach an agreement with them about making changes to their working arrangements
- The employer has had regard to the consequences of the refusal for the employee
- There are reasonable business grounds for refusing the request

If the employer refuses the request, they must provide a more detailed explanation in writing for their grounds for refusal. This response needs to include:

- Details of the reasons for the refusal
- The particular business grounds for refusing the request
- How those grounds apply to this request
- Any changes that the employer would be willing to make that would accommodate the employee's circumstances to any extent
- Outline that any unresolved dispute may be referred to the Fair Work Commission.

The *FW Act* now also provides a dispute resolution process for employees who have had their request refused, or where the employer has not provided a written response to the request within 21 days. Employees who can't resolve the dispute at the workplace can seek conciliation before the Fair Work Commission. The Commission has the power to deal with the matter as it considers appropriate, including through mandatory arbitration.

If an employer adopts the position that it will refuse most requests for FWAs (including requests to work from home), regardless of the circumstances, this may be problematic in light of the recent legislative changes. Unlike previously, employees can now challenge a refusal of a FWA request, and the Fair Work Commission can potentially overrule an employer's decision if it does not agree that the employer had reasonable business grounds to refuse.

This is potentially a significant area of risk for an employer if its default position is to say no to FWA requests, in that it could now be faced with Fair Work applications challenging this. This may result in the employer having orders imposed on it by the Commission to allow a FWA, if the Commission deems that the employer did not have reasonable business grounds to refuse a request. Accordingly, we would recommend that requests for FWAs are considered on a case-by-case basis.

4. The Right to Disconnect

Under other recent changes made to the *FW Act*, as of 26 August 2024, employees will also have a right to refuse to monitor, read or respond to contact or attempted contact (such as phone calls and emails) from their employer or work-related third parties outside working hours, unless such refusal is unreasonable.

This will also be a workplace right under the *FW Act*, which means employers are prohibited from taking adverse action against an employee because of that right (i.e., it will be unlawful for an employer to take or threaten disciplinary action against an employee, dismiss an employee or treat an employee differently than other employees because they have reasonably refused to respond to out of hours contact).

Again, the *FW Act* sets out factors that are to be considered in assessing whether an employee's refusal to respond to out of hours contact is reasonable, including the reason for the contact or attempted contact, how the contact is made and the level of disruption it causes for the employee, the employee's personal circumstances (including family or caring responsibilities), the nature of the employee's role and the employee's level of responsibility and the extent to which the employee is compensated for remaining available.

This means that if an employee is regularly called upon outside of their normal working hours, resulting in substantial additional work and time for that employee, the employee can elect to refuse to respond to out-of-hours contact from 26 August 2024 and their employer cannot take any form of disciplinary action against the employee for refusing to respond, unless the refusal to accept contact can be shown to be unreasonable.

If a dispute arises, the parties must first attempt to resolve the dispute at a workplace level, but if those discussions are unsuccessful, either party may apply to the Fair Work Commission to make an order either to stop the unreasonable refusal from the employee, stop the unreasonable contact from the employer or stop the employer from taking certain actions because of a belief that the employee's refusal was unreasonable.

Again, if there is an expectation by an employer that staff will respond to emails and phone calls out of working hours, this may result in increased disputes after 26 August if some employees object to this. Importantly, if an employer takes action against an employee who refuses to respond to out-of-hours contact, there is a risk the employee could make a general protections application, given this will be recognised as a "workplace right" under the *FW Act*. The employer could also potentially be involved in disputes in the Commission over whether an employee's refusal to respond was reasonable in the circumstances.

5. Positive Duty to Prevent Workplace Sexual Harassment, Sex Discrimination and Victimisation

From 12 December 2022, employers have had a positive duty under the *Sex Discrimination Act 1984* (Cth) (*SD Act*) to take reasonable and proportionate measures to eliminate workplace sexual harassment, sex discrimination and related victimisation, as well as to not expose workers to a workplace environment that is hostile on the ground of sex.

What measures are considered "reasonable" for the employer depends on such factors as:

- The size, nature and circumstances of the employer's business
- The employer's resources (including financial resources and otherwise)
- The practicability and cost of the required measures
- Any other relevant matter which may include the workplace culture, levels of worker supervision, geographic location and any known risks

The Australian Human Rights Commission has provided employers with some guidance on how to satisfy the positive duty in the form of seven standards. The standards recommend taking steps to:

- Ensure that employees in leadership roles understand their obligations under the *SD Act*
- Foster a culture that is respectful and inclusive and values diversity and gender equality
- Educate and train employees on respectful behaviour, and their rights and obligations under the *SD Act*
- Regularly assess the risk of unlawful conduct occurring and take risk-based approach to prevention and response
- Ensure appropriate internal and external support is available for all employees
- Ensure that there are procedures and policies for consistent and timely response to reports of sexual harassment and discrimination
- Monitor and evaluate the nature and extent of unlawful behaviour occurring, and the effectiveness of the measures in place to prevent and eliminate the behaviour

Employers need to be aware that the duty to prevent sexual harassment in the workplace is also captured under work health and safety legislation in each State and Territory (WHS Law) which requires employers to ensure, as far as reasonably practicable, the health and safety of workers. This duty extends to eliminating or minimising psychosocial hazards that can pose a risk a risk to workers' physical and mental health, which includes sexual harassment. So, employers can potentially be held liable under both the *SD Act* and WHS Law if they do not take sufficient measures to address the risk of sexual harassment in the workplace.

As of 12 December 2023, the Australian Human Rights Commission is now empowered to enforce employers' compliance with the positive duty by conducting inquiries, issuing and applying to the courts to enforce compliance notices, and entering into enforceable undertakings with businesses. In addition to any action from the relevant safety regulator, employers should be mindful of potential reputational damage that may be caused by non-compliance with the positive duty if this results in complaints of sexual harassment, discrimination, related victimisation or a hostile workplace culture.

While it may be common practice for employers to focus on the response to complaints and reports of sexual harassment and discrimination, the positive duty under the *SD Act* requires employees to have a more proactive and holistic approach in terms of taking reasonable steps to prevent and eliminate any risk of sexual harassment, discrimination and related victimisation. To achieve this, employers should proactively monitor and assess the potential risks that may exist in their workplace, provide training in relation to respectful workplace behaviour (particularly for senior leadership) and ensure there are policies and procedures in place setting out the process for reporting incidents of sexual harassment and how they will be responded to.

The Labour & Employment team at our firm can assist and advise on reviewing and updating contracts, policies and procedures and maintaining compliance with developments in Australian labour and employment law.

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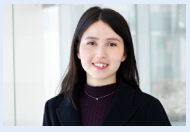

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