

The year 2023 has seen a number of significant changes to Industrial Relations and WHS legislation. Several of the changes have already occurred; still others will be implemented this year.

To assist you the MTA has provided the summary below from

1. **Superannuation contributions are now one of the National Employment Standards (NES):**

Although employers were already obliged to make compulsory employee super contributions under the *Superannuation Guarantee (Administration) Act 1992 (Cth)*, the inclusion of super contributions in the NES means this entitlement is now also enshrined in the NES and employees can now take legal action under the FW Act for unpaid or underpaid superannuation.

2. **Reoccurring/ongoing salary deductions:** Employees can now provide their employer with an authorisation to make recurring salary deductions and/or authorise ongoing deductions for an amount which changes from time to time, rather than a new written authorisation being required each time the amount varies. Employee authorised deductions must still be in writing and be for the benefit of the employee only. Employees may withdraw their authorisation in writing at any time.

3. **Labour hire workers may be entitled to the same pay conditions as employees of their host employer:** Employees, unions and host employers can now apply to the Fair Work Commission for orders that a labour hire worker receive the same pay and conditions as they would receive under the host employer's enterprise agreement or other industrial instrument.

4. **New discrimination protections:** Employee victims of Family and Domestic Violence (**FDV**) have been afforded stronger protections against discrimination in the workplace. It is now unlawful for an employer to take adverse action (including dismissal) against an employee because that employee is, or has been, experiencing FDV. Members should be aware that this protection is also afforded to potential employees experiencing FDV. These people include person who have been made an offer of employment but not yet started in their employment. .

5. **New small business redundancy rules for insolvent businesses:** Under the new rules, employees of non-small businesses (being those businesses with fifteen (15) employees or more) which become small businesses during a winding up period may still be entitled to redundancy pay, overcoming a previous loophole which made these employees ineligible.

6. **Union workplace delegates have new rights and protections under the FW Act:** Under the changes, workplace delegates are now entitled to do the following:

- represent the industrial interests of members in the workplace (including in disputes with employers);

- have reasonable communications with members in the workplace; and
- have reasonable access to the workplace to represent their industrial interests.

Workplace delegates also now have general protections, meaning that employers may be subject to penalties if they:

- unreasonably fail or refuse to deal with a workplace delegate;
- knowingly or recklessly makes false representations to a workplace delegate; or
- unreasonably hinder, obstruct or prevent a workplace delegate from exercising their rights.

Members who have not had experience with Union Delegates should contact the ER Team to obtain guidance as to what limits Union Delegates have in communication with their employees in the event of being contacted by a Union Representative.

- 7. Work Health and Safety (WHS) Entry Permits:** Officials assisting a state WHS authority are no longer required to hold an entry permit under the FW Act. This change is subject to review in 9 months.
- 8. Changes affecting protected action ballots in enterprise agreement bargaining:** Protected action ballots will now only be effective if employers and their bargaining representatives (if any) and employee bargaining representatives participate in a compulsory conciliation or mediation conference.
- 9. Changes to WHS and workers' compensation:**
 - the Asbestos Safety and Eradication Agency will also include silica; and
 - workers' compensation claims processes for first responders experiencing PTSD have been streamlined.

Later in 2024 more changes to the FW Act and WHS law are set to take effect, including:

- 10. The criminalisation of industrial manslaughter (1 July 2024):** This has been introduced in the Commonwealth WHS Act to align Commonwealth WHS laws with amendments to the model WHS legislation and so will only apply to employers/entities covered by Commonwealth WHS laws. However, all states other than NSW and Tasmania, have existing industrial manslaughter offences. The NSW Government has flagged that it will introduce industrial manslaughter under the *Work Health and Safety Act 2011* (NSW).
- 11. The criminalisation of intentional wage underpayments (1 January 2025):** The intentional underpayment of wages by employers will become a criminal offence, with companies facing penalties of up to three times the amount of the underpayment, if a court can determine it, or \$7.825

million, whichever is greater. Individuals can also be imprisoned for up to 10 years; be fined either three-times the amount of the underpayment, if the court can determine it, or up to \$1.565 million, whichever is greater; or be both fined and imprisoned.

The legal test for what is “intention” has been watered down so that almost all employers are at risk of prosecution even in the event that an employer is utilising a third party service provider to operate their payroll. To have a better understanding of what the legal test looks like Members are encouraged to contact the ER Team for further advice.

Further changes are also expected later this year, with the Education and Employment Legislation Committee tasked with inquiring into the reforms contained in the *Fair Work Act Legislation Amendment (Closing Loopholes No 2) Bill 2023* and delivering a report by 1 February 2024. In summary, the *Closing Loopholes No 2 Bill* contains reforms which relate to the following:

- Casual employment, including sham arrangements. The Bill proposes a very complicated definition of what is a “casual” employee. Again Employers will be exposed to underpayment claims if the employee turns out to be classified not as a casual. This is despite what might have been agreed to at the commencement of the employment relationship.
- Enterprise agreement bargaining for multiple franchisees and intractable bargaining workplace determinations.
- Penalties for civil remedy provisions in the FW Act.
- Definitions of employment, and
- Regulated workers (e.g. gig workers and transport industry workers) and independent contractors.

If any member has a question or query surrounding these complicated changes then please contact the ER Team at www.eradvice.com.au or (02) 90169000