

Content Area: Employment

INTRODUCTION

Following the 2006 amendments to the *Workplace Relations Act 1996* (Cth) (**Workplace Relations Act**), Western Australian employees may be covered by either state or federal legislation in their employment. Generally, Western Australian employees who are employed by a constitutional corporation or Commonwealth Government agency are now predominantly covered by national legislation in relation to their employment. The majority of other employees continue to be covered by state employment legislation. As such, Western Australia now has a dual system of employment laws. Provisions of the *Equal Opportunity Act 1984* (WA) and *Occupational Safety and Health Act 1984* (WA) still continue to apply to both federal and state employees in Western Australia.

MINIMUM STANDARDS

- Universal Declaration of Human Rights – Articles 23 & 24
- Conventions of the International Labour Organisation
- International Convention on Economic, Social and Cultural Rights
- *Fair Work Act 2009* (Cth) (including the National Employment Standards)
- *Industrial Relations Act 1979* (WA)
- *Minimum Conditions of Employment Act 1993* (WA)
- *Occupational Health and Safety Act 1991* (Cth)
- *Occupational Safety and Health Act 1984* (WA)
- *Equal Opportunity Act 1984* (WA)

POSITIVE DEVELOPMENTS

Fair Work Act General Protections – The *Fair Work Act 2009* (Cth) (**Fair Work Act**) was passed by the federal Parliament in 2009, replacing the *Workplace Relations Act*. Key inclusions in the *Fair Work Act* are general workplace protections for federal employees. Notably, section 340 provides protection for employees who have been discriminated against (including dismissal) by their employer as a result of having a workplace right, exercising a workplace right, or proposing to exercise a workplace right. Also included are section 351 protections preventing an employer from taking adverse action against an employee or prospective employee (including dismissing an employee, injuring them in their employment, prejudicially altering their employment, discriminating between an employee and other employees, or refusing to employ a person) because of a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Fair Work Act Unfair Dismissal Protections – The *Fair Work Act* includes developments in unfair dismissal protections for federal employees. Prior to the introduction of the *Fair Work Act*, employees of businesses with fewer than 100 employees were excluded from making an unfair dismissal claim under the *Workplace Relations Act*. Employees were also excluded from making an unfair dismissal claim where the employee was dismissed for genuine operational reasons, or

for reasons that included genuine operational reasons. Operational reasons were broadly defined to include reasons of an economic, technological, structural or similar nature relating to all or part of the employer's undertaking, establishment, service or business. These provisions had the effect of excluding a significant number of federal employees from unfair dismissal protections.

The Fair Work Act developments include less extensive exclusions from unfair dismissal protections in relation to small business employers and dismissal for operational reasons. A small business is defined under the Fair Work Act as a business employing fewer than 15 full-time, part-time and substantive casual employees, and employees of small businesses are only excluded from unfair dismissal protections where the employer can demonstrate that they have complied with the Small Business Fair Dismissal Code. Employers are no longer protected from unfair dismissal claims against them where they have dismissed an employee wholly or in part for genuine operational reasons, but instead are only protected where they can establish the higher threshold of a genuine redundancy.

Paid Parental Leave – Australia's first ever national paid parental leave scheme came into operation on 1 January 2011. The scheme allows eligible working parents to receive paid parental leave while taking time off to care for children born or adopted on or after 1 January 2011. Eligible parents are entitled to receive up to 18 weeks' parental leave pay, paid at the rate of the national minimum wage (currently \$589.30 per week).

Harmonisation of Occupational Safety and Health Laws – The Department of Commerce, through WorkSafe WA, has been working with Safe Work Australia and other Australian State and Territory jurisdictions to harmonise federal and state occupational safety and health laws. A model Act known as the *Model Work Health and Safety Bill* was developed in 2009 by Safe Work Australia, with input from each Australian State and Territory jurisdiction. Further to this, model Regulations and priority Codes of Practice were developed in 2010. Public comment submissions have been received in relation to the Model Bill and are currently being reviewed. Public comment submissions on the model Regulations and Codes of Practice will be called for and reviewed later in 2011. Commencement of the *Model Work Health and Safety Act*, model Regulations and Codes of Practice is anticipated to occur on 1 January 2012. The harmonisation of OSH laws will achieve consistency for employers and employees across Australia.

NEGATIVE DEVELOPMENTS

Fair Work Act Unfair Dismissal Provisions – Unfair dismissal provisions of the Fair Work Act replaced unfair dismissal provisions of the Workplace Relations Act on 1 January 2010. Under the Fair Work Act, a person has been unfairly dismissed if they have been dismissed in a manner that is harsh, unjust or unreasonable, where the dismissal was not a case of genuine redundancy and where, in the case of a small business, the dismissal was not consistent with the Small Business Fair Dismissal Code. A person is protected from unfair dismissal where they have completed the minimum employment period with their employer and are covered by a modern award or enterprise agreement and/or their annual income is less than the high income threshold.

The introduction of a minimum employment period requires an employee to have worked for at least 6 months in the case of a regular employer, or at least 12 months in the case of a small business employer, before they are eligible to make a claim for unfair dismissal under the Fair Work Act. The minimum employment period limits the number of employees protected by unfair dismissal provisions and can leave many employees without recourse to unfair dismissal claims under the Fair Work Act, even in cases where a fair and just process has clearly not been followed by an employer in effecting a dismissal.

The Fair Work Act has also reduced the time in which an eligible person may lodge an unfair dismissal claim, from 21 days following the dismissal under the Workplace Relations Act, to 14

days following dismissal under the Fair Work Act. While an application may be made for an out-of-time claim under the Fair Work Act, out-of-time claims may only be accepted in exceptional circumstances. For many employees who are unaware of their rights under the Fair Work Act, the 14 day limitation period can provide inadequate time in which to seek legal advice in relation to their dismissal and lodge an unfair dismissal claim. This limits the protections that may otherwise be available to eligible employees in relation to unfair dismissal under the Fair Work Act.

SUMMARY

The major developments in relation to employment security for Western Australian employees in recent times have been as a result of the introduction of the Fair Work Act. In Western Australia the Fair Work Act generally covers employees who are employed by a Commonwealth Government agency and those employed by a constitutional corporation. The Fair Work Act provides positive developments by way of greater protection against discrimination in the workplace for federal employees. The Fair Work Act also provides improved protection against unfair dismissal for federal employees of small businesses or those dismissed for genuine operational reasons. The introduction of a minimum employment period and the introduction of a 14 day limitation period in relation to unfair dismissal claims have limited the protection provided to federal employees who are dismissed in circumstances where a fair and just dismissal process may not have been followed.

CONTACTS AND FURTHER INFORMATION

Employment Law Centre of WA (Inc) – www.elcwa.org.au

Fair Work Australia – www.fwa.gov.au

Fair Work Ombudsman – www.fairwork.gov.au

Department of Commerce/Wageline – www.commerce.wa.gov.au

Equal Opportunity Commission – www.eoc.wa.gov.au

Safe Work Australia – www.safeworkaustralia.gov.au