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Employment Alert

Chop and change? Managing changes to regular rosters and working hours

WHAT YOU NEED TO KNOW

- All modern awards in operation on or after 1 January 2014 and all enterprise agreements made after 1 January 2014 must include a term requiring employers to consult about changes to regular rosters and ordinary hours of work.
- The consultation requirement does not appear to be limited to permanent employees – it could apply to casual employees who undertake regular and systematic work.
- The model consultation term will be read into an enterprise agreement made after 1 January 2014 if the agreement does not address consultation about changes to regular rosters and ordinary hours of work.
- A failure to comply with the consultation term in a modern award or enterprise agreement could result in a number of potential remedies.

WHAT YOU NEED TO DO

- Consult with employees covered by a modern award or enterprise agreement dated after 1 January 2014 before implementing a change to regular rosters, ordinary hours of work or flexible working arrangements.
- Document any discussions or dealings with affected employees about changes to regular rosters, ordinary hours of work and flexible working arrangements to assist in demonstrating that issues raised by employees have been genuinely considered.
- Ensure the consultation clause in an enterprise agreement dated after 1 January 2014 adequately addresses the new legislative requirements. The clause should require the employer to:
  - provide information to employees about the change to their hours of work
  - invite employees to give their views about the impact of the change, including any impact in relation to their family or carer responsibilities; and
  - consider any views given by the employees about the impact of the change.

Have you tried to change employees' regular rosters or ordinary hours of work? This can be a very difficult area, balancing the organisation's operational needs with the preferences of employees, while negotiating the legal potholes along the way.

In the past, particularly in the services, retail and hospitality industries, you might have simply provided notice to affected employees of a pending roster change. However, as of 1 January 2014, following amendments to the consultation provisions in the *Fair Work Act* 2009, you could be required to go to much greater lengths to achieve changes to rosters and working hours.

This *Employment Alert* considers the amendments to the consultation provisions in the FW Act and how this will impact on the operations of employers.

New consultation requirements in modern awards and enterprise agreements

With effect from 1 January 2014 all modern awards in operation *on or after* 1 January 2014 and all enterprise agreements *made after* 1 January 2014 must include a term which requires employers to consult with employees about changes to their regular rosters and ordinary hours of work. This includes consultation with affected employees about any issues the employees raise about the impact of the changes on their family and caring responsibilities.

What does this mean for employers?

Before making any decision to change employees' regular rosters or ordinary hours of work, an employer must consult affected employees who are covered by a modern award or an enterprise agreement made after 1 January 2014.

The question is, are employers required to consult all affected employees about roster changes or is consultation limited to, for example, permanent employees?

The new modern award clause offers some assistance. It provides that employers are not required to consult employees who have "irregular, sporadic or unpredictable working hours". However, this is quite broad and the obligation could still arise for casual employees who undertake regular and systematic work.

How do employers consult?

To consult adequately, an employer must:

- provide information to employees about the change to their hours of work;
- invite employees to give their views about the impact of the change, including any impact in relation to their family or carer responsibilities; and
- consider any views given by the employees about the impact of the change.

These obligations must be included in the consultation term.

Employers should give employees adequate notice about these matters and a reasonable time in which to respond.

It would also be prudent for employers to document any discussions or dealings with affected employees about changes to regular rosters, ordinary hours of work and flexible working arrangements to assist in demonstrating that that the employer has genuinely considered the issues raised by employees.

What are the consequences for employers who fail to comply?

A failure to comply with the consultation term in a modern award or enterprise agreement could result in a number of potential remedies, including:

- a maximum civil penalty of 300 penalty units per contravention for a body corporate (currently $51,000);
- an injunction;
- compensation for the affected employee/s; and/or
- any other order the Court considers to be appropriate.

In addition, if an enterprise agreement dated after 1 January 2014 does not include a term which requires employers to consult about changes to regular hours, the model consultation clause in the *Fair Work Regulations 2009* will be taken to be a term of the agreement. This could have significant undesirable implications for employers who wish to retain features of the existing consultation term in their enterprise agreement.

To avoid this, employers should review the consultation term is during bargaining to ensure it meets the current legislative requirements. Employers should refer to the model consultation clause and the new modern award clause as a guide when drafting or revising the consultation term in an enterprise agreement.

MAKING THE CASE: Insights from Geoff Giudice

When is an employer required to consult an employee about a proposed alteration in hours of work? If the employee is covered only by a modern award it is necessary to ask whether the employee has a "regular roster or hours of work". In most cases this question will be easily answered, but in some cases difficulties will arise. While there is no requirement to consult an employee who has "irregular, sporadic or unpredictable working hours", there may be cases in which working hours are "regular" for short periods but always or often subject to change on the basis of seasonal or other demand type factors. It is not clear how the clause is intended to operate in such cases, and there is a potential liability in not consulting in those cases.

Enterprise agreements are required to include a consultation term. This opens up the possibility of parties more clearly identifying the circumstances in which the obligation to consult arises. It is necessary to be careful, however, that the agreed consultation term complies with s.205 (1A). If the Fair Work Commission finds it does not comply, the model term in schedule 2.3 to the Fair Work Regulations will be incorporated into the agreement in place of the agreed term.

Authors

Marie-Claire Foley
Partner
Perth
T: +61 8 9366 8734
E: marie-claire.foley@ashurst.com

Geoff Giudice
Consultant
Melbourne
T: +61 3 9679 3636
E: geoffrey.giudice@ashurst.com

Julie Mills
Senior Associate
Sydney
T: +61 2 9258 6761
E: julie.mills@ashurst.com

Liz Grey
Lawyer
Melbourne
T: +61 3 9679 3291
E: liz.grey@ashurst.com

Employment contacts

Brisbane	Ian Humphreys, Vince Rogers, James Hall	T: +61 7 3259 7000
Canberra	Paul Vane-Tempest	T: +61 2 6234 4000
Melbourne	Steven Amendola, Richard Bunting	T: +61 3 9679 3000
Perth	Marie-Claire Foley, Rob Lilburne, David Parker	T: +61 8 9366 8000
Sydney	Lea Constantine, Jennie Mansfield, Helen McKenzie, Adrian Morris, Stephen Nettleton, Stephen Woodbury	T: +61 2 9258 6000