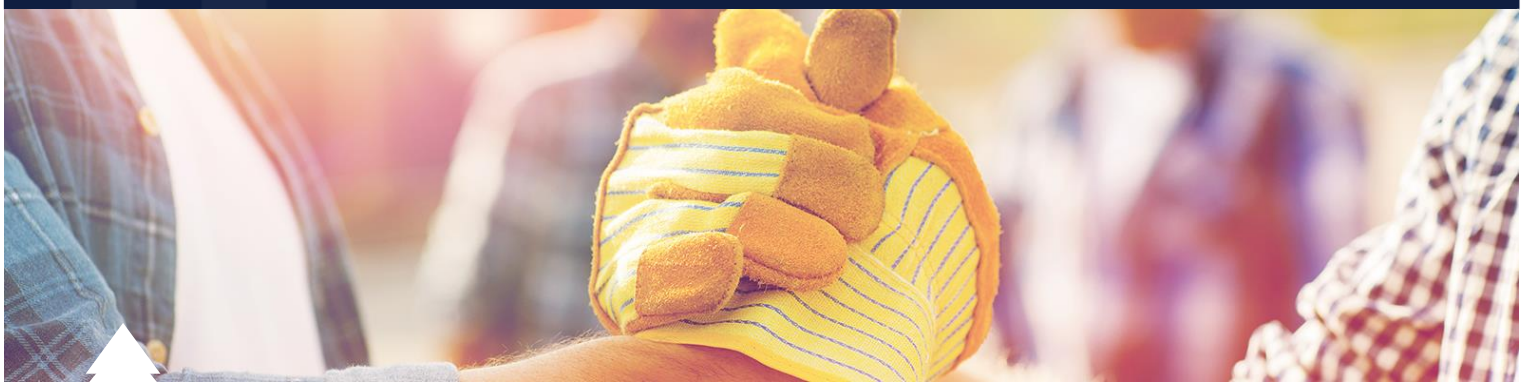

RESTRAINTS ON LABOUR FLEXIBILITY: WHAT ALL BUSINESSES NEED TO KNOW

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Two major developments occurred in 2017 for the labour hire industry, and those engaging labour hire:

- A mandatory licensing scheme is set to be introduced in Queensland, impacting any business that engages with temp agencies, or any form of labour hire.
- Contractors who deploy their employees to their clients' sites also need to consider developments in the unfair dismissal jurisdiction, clarifying the steps they need to take when dealing with employees who have been excluded from their client's sites.

Licence to hire required

On 8 September 2017 the Queensland Parliament passed the *Labour Hire Licensing Act 2017* (Qld) (the **Act**). The Act establishes a mandatory labour hire licensing scheme for the labour hire industry in Queensland regulating labour hire businesses, and those who engage them. It is said to respond to a Parliamentary Inquiry into the practices of labour hire.

Massive fines can apply to businesses (up to $365,000) and individuals (up to three years' imprisonment) who engage with unlicensed companies providing labour hire services.

WHO PROVIDES "LABOUR HIRE SERVICES?"

There is a very broad definition. Someone provides "labour hire services" if, in the course of carrying on a business, the person supplies, to another person, a worker to do work.

Potentially, this could include any service company or contractor engaged to perform packages of work (although there is a specific exemption for subcontractors in the construction industry).

It doesn't matter if:

- the worker is an employee or not;
- the worker is supplied directly or indirectly;
- a contract is entered into between the worker and the provider, or the provider and the person to whom the worker is supplied; or
- who controls the worker's work.

WHAT THE ACT COVERS

Key aspects of the Act include:

- **Licensing** - requiring labour hire operators to be licensed. Licensees need to satisfy a "fit and proper" person test to establish that they are capable of providing labour hire services in compliance with all relevant laws and that the business is financially viable. License fees apply.

- **Regulation of engagement** – people who engage labour hire providers can only engage with licensed providers.

- **Reporting obligations** – licensees must report regularly on labour hire and associated activities, and in relation to compliance with relevant laws.

- **Offences and Penalties** – for non compliance with the Act. Maximum penalties is 1034 penalty units ($126,044) or three years' imprisonment for an individual, or 3000 penalty units ($365,700) for a corporation. Providers who don't pay staff correctly may have their license revoked.

- **Establishment of a compliance unit** – for awareness, monitory and enforcement functions

The Act commences on **16 April 2018**. Current labour hire providers will have 60 days to apply for their license after that time.

South Australia and Victoria have followed suit. There is currently no regulation at a Federal level.

TIPS FOR BUSINESSES

Businesses should:

- Consider if they are engaging with a "labour hire" provider, and if so
- Consider revising procurement practices to ensure you only engage licensed providers.

Labour hire providers should:

- Ensure they meet the criteria for licensing
- Apply for their license within 60 days after 16 April 2018
- Review wages of staff to ensure employees are being paid correctly.

Terminating at the direction of your client?

Recent decisions of the Fair Work Commission have clarified the steps contractors need to take when dealing with employees who have been excluded from their client's sites.

In *Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243 (***Modec***), the employee (employed by a labour company) was excluded from site following a safety incident. The employer could not continue to employ the individual (with any other client) and so dismissed him.

The Full Bench determined the employee had not been unfairly dismissed when he was removed from site at the direction of the host employer (in accordance with a contractual right to do so) after a "near miss" incident. The Full Bench found that the removal from site was akin to the employee no longer having the capacity to perform the inherent requirements of his role.

Importantly, in that case the Full Bench found the employer conducted its own investigation into the allegations made by the host employer, attempted to reassign the employee (although unsuccessfully) and provided the employee with an opportunity to respond to the fact his employment was then going to be terminated.

Modec was considered by another Full Bench this year in *Tasmanian Ports Corporation Pty Ltd t/a Tasports v Mr Warwick Gee* [2017] FWCFB 1714 (***Tasports***).

In this case, the host employer directed the employer to remove the employee from site due to alleged issues in relation to Mr Gee's conduct. He was ultimately dismissed because of that removal. The Full Bench distinguished *Modec* because:

(1) The host employer did not have a legal right to require Mr Gee's removal from the worksite;
(2) The host employer was not able to substantiate the allegations against Mr Gee and the employer did not attempt to uncover whether there was a valid reason for the direction; and
(3) The employer failed to adequately explore alternative options of redeployment for Mr Gee.

The Full Bench made it clear that a labour hire company cannot rely on its contractual relationship with a host employer to contract out of the unfair dismissal protections in the FW Act.

The need to conduct an investigation, even in respect of casual employees, was also raised in *Manisha Kumar v Australia Personnel Global Pty Ltd* [2017] FWC 5661.

Ms Kumar was employed on a casual basis. The host employer lost confidence in Ms Kumar's capacity to undertake tasks due to alleged ongoing issues with punctuality and attendance. Ms Kumar was dismissed on the grounds of her incapacity to perform work at the host employer's premises.

However, Ms Kumar was not given an opportunity to respond to the allegations against her. The Commission found the employer did not properly investigate the allegations made against Ms Kumar, nor did they take reasonable steps to engage with her and seek alternative work. Accordingly, Ms Kumar's dismissal was unfair.

LESSONS FOR EMPLOYERS

Where an employer is faced with the exclusion of an employee from a client's site, before dismissing the employee, the employer should consider:

- Whether there is a contractual right for the client (the host employer) to exclude the employee
- Whether you agree with the allegations and that warrants dismissal. As pointed out in *Tasports,* the distinction is important, because where an employee is dismissed based on an endorsement of an allegation of misconduct by the host employer, the dismissal may be conduct based rather than capacity based
- Consider whether redeployment is appropriate and available
- Notify the employee of the process and outcome.

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