

Australia: Important Changes for Employers

Employers in Australia will need to review and update several of their policies and procedures following multiple key employment law changes that have or will soon become enforceable.

The reforms include the new law of the 'Right to Disconnect', improved rights for independent contractors, privacy changes, sexual harassment, shut-down notices, and wage theft criminalisation.

Below will highlight the most important changes your business needs to be aware of and the measures you should take.

The Right to Disconnect

The new 'Right to Disconnect' laws became effective August 26th, 2024.

The laws are enforceable for all employers other than those with fewer than 15 employees.

Under the new law, employees have the right to refuse out-of-hours contact from their employer, unless the refusal is deemed to be “unreasonable.”

To determine whether a refusal is unreasonable, the following must be taken into account:

- The reason for the contact or attempted contact;
- How the contact or attempted contact is made and the level of disruption the contact or attempted contact causes the employee;
- The extent to which the employee is compensated to remain available to perform work during the period in which contact or attempted contact is made, or for working additional hours outside of the employee’s ordinary hours of work;
- The nature of the employee’s role and the employee’s level of responsibility; and
- The employee’s personal circumstances (including family or caring responsibilities).

In order for employers to make sure that they are in compliance with the new laws, we recommend that you:

- Implement a “Right to Disconnect” policy;
- Update all employment agreements to comply with the new laws and, use available ways to assist with compliance such as building in an availability allowance for those employees who may be required to work regularly outside hours;
- Make sure that employees know how the laws will affect them in practice;
- Provide training to all managers to ensure that they know what is required, how to identify when an employee’s refusal to work outside business hours may fall within their rights under the new laws, and how to manage such situations if and when they do arise.

New protections for independent contractors

Independent contractors gained new protections against unfair contract terms on August 26th, 2024.

For contracts earning below A\$175,000 per year, the Fair Work Commission ('FWC') can intervene in the contract by varying terms they deem to be unfair, or setting aside the contract entirely.

To assess whether a term in a services contract is unfair, the FWC will consider:

- Whether the term imposes a harsh, unjust, or unreasonable requirement;

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- The relative bargaining power of the parties;
- The imbalance of rights and obligations in the contract;
- The necessity of the term to protect legitimate interests of a contractual party; and
- The remuneration comparison with employees or regulated workers doing similar work.

Employers can take several measures to ensure compliance, including:

- reviewing terms of service with smaller contractors to make all terms clear and transparent to avoid misunderstandings; consider removing any terms that could be seen as harsh, unjust or unreasonable, and include only terms that are necessary to protect legitimate interests;
- Ensure the contractor's pay is comparable to that of employees or regulated workers doing similar work; and
- Schedule periodic reviews of contracts to ensure pay and other terms have kept pace with employees or regulated workers performing similar work.

Additional updates

- **Privacy changes:** The government has recently proposed the first phase of significant privacy law reforms. These changes cover several key areas, including safeguards for the overseas disclosure of personal data, new civil penalties, enhanced transparency around automated decision-making, the introduction of a statutory tort for serious privacy breaches, and amendments to criminal law to prohibit 'doxing.' The reforms are anticipated to be enacted in the coming months, with additional proposals expected to follow.

In the wake of the proposals, all employers will need to review their policies on privacy and data protection to make sure that they will comply once the new laws are effective.

- **Sexual Harassment:** since December 2022 all employers have had a positive legal duty to prevent sexual harassment in the workplace. The duty applies all year-round but the Australian Human Rights Commission (AHRC) have recently rereleased their 'Guidelines for Complying with the Positive Duty under the Sex Discrimination Act 1984 (Cth)' (Guidelines) in the wake of a rise in recent cases.

Employers need to be aware of their duties under the law and the positive measures they should have in place across their business.

- **Shut-down Notices:** A shutdown is when a business temporarily closes, such as Christmas and New Year. Since May 2023 Modern Awards have required employers to give at least 28 days' written notice before a shutdown occurs. Thus, employers must decide if they plan to shut down ahead of time, ensuring they meet the 28-day notice period, and provide written notice according to the relevant awards. Employees who do not have enough paid annual leave to cover the whole period can form an agreement with their employer for other options – including using accrued time off, taking annual leave in advance, or taking unpaid leave – for the days not covered. For those employees without enough leave, employers must decide whether to allow a negative leave balance or seek consent for the alternative options. If unpaid leave is considered, the discussion should be approached carefully, with a backup plan in case the employee declines. Since employees have the right to refuse unpaid leave, no penalty should be imposed to avoid violating general protections.
- **Wage theft criminalisation:** From January 1st, 2025, wage theft will be criminalised. Wage theft occurs when an employer knowingly and deliberately underpays employees' wages, superannuation

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or any other allowances and benefits. It has been a long-term, ongoing issue. All employers must ensure correct payment of wages and entitlements, otherwise company directors will face severe penalties, including the possibility of imprisonment. This is important not only because of the upcoming criminal penalties, but also due to the numerous changes to modern awards since 2023, which have necessitated updates to employment agreement templates for many businesses.

Employers who haven't conducted a review of modern awards and employment agreements in the past 12 months should consider doing so now, allowing ample time to address any issues before the January 2025 deadline.

This is a high level general update only. Legal advice should be obtained on specific circumstances.