Employment & Safety Law Update April 2015

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Unpaid interns are on the nose – Federal Court Warning

The practice of unpaid internships, work-experience or volunteering on a trial basis has been around for a long time. However, in recent years there has been growing concern around this practice largely arising from a small minority of employers who have been exploiting the practice.

Earlier this year the Federal Court ruled that one employer's use of unpaid interns was unlawful in addition to being required to pay the minimum wages, the company was fined $24,000. Specific work experience programs through formalised institutionally sponsored work experience (through secondary and tertiary institutions) are not affected. What is clearly in the courts' sights, are employers who engage unpaid interns who undertake real work for a real period of time. The Court said "*when a worker moves beyond merely learning and observing and starts assisting with business outputs and productivity, workplace laws dictate that the worker must be paid minimum employee entitlements*".

It is not uncommon for employers to be approached by very willing individuals who are prepared to work for nothing in internships to gain experience and get a foothold in the industry. This is particularly the case for highly competitive and attractive roles. While the unpaid intern may be willing (at least at the start), the employer is effectively precluded from providing that opportunity without a risk of penalties and a requirement to pay for the work done! Whenever real work is being performed, the employer is required to pay for it!

Time in labour hire may count as service

The Fair Work Commission recently allowed an employee to claim the 3 months work they performed while engaged through a labour hire agency as part of their service in determining whether they were able to file for unfair dismissal. Under the Fair Work Act, an employee must have at least 6 month's service (or 12 months if the employer is a small business with less than 15 employees) to have a lawful right to make an unfair dismissal claim. In the case before the Fair Work Commission the employee had worked for the employer for less than 6 months, but when the time with the labour hire agency was counted it exceeded the 6 months. The Commission found that the act of using labour hire was outsourcing and recruiting the individual was effectively a transfer of business. Without a definitive statement by the new employer that they would not recognise service, then that service transfers to the new employer.

While it is not clear that this was the intention of the legislation, the argument fits within the terms of the Fair Work Act and the decision (unless appealed or overturned) will mean that employers may be liable for the service that accrues during labour hire unless they clearly state that service is not recognised. If the employer is silent on the matter, the employer will be required to use the start of labour hire in calculating the length of service for any decision on eligibility to claim for unfair dismissal.

Requirement to pay leave loading on termination

Employers who have a requirement to pay annual leave loading under their Award, Enterprise Agreement or Contract now find themselves required to pay leave loading on any annual leave accrued at the termination of employment.

Many of the Awards, Enterprise Agreements and Contracts had provided that leave loading would not be paid on the accrued leave at the termination of employment. However in a recent case in the Federal Court, this was successfully challenged as being inconsistent and lesser than the annual leave requirements in the Fair Work Act. Not only has this changed some express words in contracts and awards, but also the traditional views of many in the industry. If you pay leave loading during employment – pay it at the end!

Increasing acceptance of "zero tolerance" for Drug & Alcohol breaches in safety critical roles

In 2 separate cases before the Full Bench of the Fair Work Commission and the Full Federal Court, the right to terminate employment on the basis of failing a drug and alcohol random test in roles where safety is critical has been upheld. This area has been clouded for some time with issues such as the inability to test for "impairment" and the arguments against infringing on personal habits outside of work without a direct impairment at work. This has significantly frustrated employers. The decisions indicate that in workplaces and roles where any impairment could have catastrophic results in safety and health of individuals, a zero tolerance program is acceptable and can be justified by the risk of impairment. Many workplaces that could justify a zero tolerance policy can probably breathe a little easier that their stance has been upheld. Outside of these safety critical areas, the cloud still remains – at least for the moment.

The "opinion" of serious misconduct in a contract is enough.

A recent NSW court held that when a contract of employment stated that employment could be terminated (without notice) when the employer was of the opinion that the employee had committed serious misconduct, proving serious misconduct is not necessary. In dismissals for serious misconduct employers have faced the significant hurdle of proving the conduct was so repugnant that it was entirely inconsistent with continued employment. However, where the clear terms of an employment contract only require that the employer holds an "opinion" that serious misconduct occurred, then all that is required for the employer to prove is that it held that opinion and that this was reasonable. Employers should take advantage of this position and modify standard contracts to only require the opinion of serious misconduct rather than actual serious misconduct.

If you would like to talk about any of these updates and how they may affect your business, or any other employment, HR, IR or safety matter – please give me a call!

Robert Greig, Director & Principal Lawyer
Mobile: 0424 565 320
Web: www.greigs.com.au Email: robert@greigs.com.au