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Employment law update

9 July 2012

Enterprise agreement "opt-out clauses" are not a safe bet **- put flexibility inside the agreement instead**

Different ways of rewarding high-performing, senior or specialist employees can be eroded when enterprise agreements require all covered employees to be treated in the same way. One solution is to allow some employees to opt out of agreement coverage in return for more attractive individual contracts.

That solution is no longer the safest option, having had mixed responses from Fair Work Australia (**FWA)**. A more complex but safer route is to leave scope in the enterprise agreement itself to provide for minimum pay but "top up" conditions individually, or to pay within bands according to individual performance.

Opt-out clauses disapproved

To expand the capacity to have direct employee engagement and direct reward and recognition, some employers have negotiated enterprise agreements (**EAs)** that allow individual employees to opt-out of coverage altogether and go on to more individually rewarding contract arrangements.

FWA has given conflicting decisions when asked to approve EAs containing these opt-out clauses. Opt-out clauses and individualisation of working conditions are often seen by unions as a return to Australian Workplace Agreements and Work Choices. A number of unions have fiercely resisted the approval of EAs which include opt-out clauses, despite employees having voted to include them.

Most recently, in *CFMEU v New Oakleigh Coal* [2012] FWAFB 5107 the full bench of FWA delivered a split verdict on this issue. The majority decision said that the *Fair Work Act 2009* (the **FW Act**) promotes collective rather than individual bargaining at the enterprise level, and for enterprise rather than individual agreements. The majority found that the rights, obligations and objects that the FW Act are intended to encourage collective bargaining, are undermined by an opt-out provision, and they rejected the application to approve the EA. As a result, opt-out clauses have become more precarious.

Will Individual Flexibility Agreements do the job?

All EAs are required to have a process for implementing "individual flexibility arrangements" (IFAs) in which some conditions can be varied to meet individual circumstances. These IFAs are one method of achieving flexibility, but they mostly achieve only minimal variation of otherwise common conditions, and can be terminated at will in any case.

What will work if opt-out clauses are no longer available?

If an EA covers a key group of employees to whom individualised arrangements are an important consideration, the EA can leave scope for that individualisation to occur.

An EA must ensure an employee is "better-off overall" when compared with the modern award that would otherwise cover an employee. Subject to this test being met, there is no conceptual problem with treating the EA as the safety net of minimum conditions that can be added to in individual cases. A number of EAs modelled on this approach have been approved by FWA. Other EAs modelled on setting wage bands within which employees will be paid according to individual performance have also been approved. These models make performance and individual reward the centrepiece of employment in a way that "bolt-on" performance pay provisions struggle to achieve.

Treating an EA as a safety net of conditions, rather than an instrument to set actual (and identical) conditions for employees, can be done in a number of ways. However there are limits.

In 2005 the Federal Court ruled as unlawful an extreme form of this strategy. A financial institution had introduced a similar style of agreement, but one which had little minimum limitation on the conditions that could be introduced under individualised arrangements within the 'shell' of the overall collective agreement. Another trap to avoid is to ensure that the dispute settlement provision in the EA does not extend to disputes over the terms of individualised arrangements, while still complying with the FW Act requirements for dispute.

Key points

- An EA sets conditions for all covered employees, so to introduce individualised arrangements either the EA coverage must be restricted or the conditions must allow room for flexibility within the EA itself.
- Opt-out clauses may result in FWA refusing to approve an EA – while the current uncertainty around their lawfulness exists, they are a risky proposition.
- Careful drafting may provide an EA that is a true safety net, allowing individualised arrangements to operate. Limits on this strategy need to be kept firmly in mind.
- Expert assistance should be sought whenever the terms of an enterprise agreement are being negotiated to ensure that the approved agreement operates as intended.

Please contact your local Hunt & Hunt team if you have any questions or require assistance in drafting a flexible EA.

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