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NEWSLETTER

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Employment Update

The employment law landscape is an area of reform that the National Government has targeted since taking office. Listed below are some of the recent changes and proposals for change in employment law that may affect you.

Definition of Serious Harm

The Minister of Labour, Hon. Kate Wilkinson, announced in December 2009 that the Government proposed to amend the definition of serious harm under the Health and Safety in Employment Act 1992.

The definition of serious harm is important as an employer or person in control of a workplace must, where serious harm has occurred, report this immediately to the appropriate authority - the Department of Labour, The Civil Aviation Authority or Maritime New Zealand.

The proposed definition of serious harm will contain three main categories of harm:

- *Trauma injury* – physical harm arising out of a single accident or event and defined by the degree of physical incapacity,
- *Acute illness or* injury – requiring treatment by a medical practitioner and caused by exposure to workplace hazards, and
- *Chronic or serious occupational illness or injury* - physical or mental harm requiring hospital admission, in-patient surgery, or able to be confirmed by a specialist medical diagnosis.

It is expected that the proposed definition will be clearer and easier to use and will remove the gaps in coverage of certain types of harm or hazard which currently exist.

Report on Workplace Deaths

In December 2009 the Government ordered a report into workplace deaths. At that time there had been 31 workplace deaths in 2009 - all of which were men.

Most of the deaths remain under investigation. The Department of Labour has been asked to identify whether there are any common underlying causes and whether employers had failed to meet their obligations to keep employees safe.

Holidays Act Review

The review of the Holidays Act 2003 was received by Minister of Labour Hon. Kate Wilkinson in December 2009 and the Government intends that proposals for change will be introduced to a select committee for comment this year.

Some of the proposals may include:

- the opportunity to trade 1 week of annual leave for cash,
- a change in the method of calculating holiday and sick leave entitlements, and
- the transfer of public holidays to another day.

Watch this space for further updates!

Rest and Meal Breaks

Since 1 April 2009 employees have been entitled to compulsory rest and meal breaks after a certain number of hours of work. Many workplaces met or exceeded the compulsory minimums, however for some workplaces the compulsory prescription of rest and meal breaks presented difficulties and significantly affected their workplaces.

The Rest Breaks and Meal Breaks Amendment Bill, while maintaining an entitlement to rest and meal breaks, proposes that:

- employers and employees may agree on the timing of the breaks rather than the timing being prescribed by legislation,
- employers may not have to provide a complete break from work duties in situations where the employee is a sole attendant, and
- where a break cannot reasonably be provided the parties may agree that time off is given at an alternative time, for example an employee may start later or finish earlier in the day.

The Government hopes that this relaxation of the requirements will provide employers with the flexibility to schedule their rest and meal breaks in a way that best suits their industry.

Family Court - Early Intervention Programme

New procedures will be introduced to the Family Court in March 2010 following the implementation in 2008 and 2009 of two successful pilot programmes in selected Family Court Registries. These procedures are to be known as the National Early Intervention Program and are designed to allow Family Court matters to be resolved in a more timely and cost effective matter.

Cases in the Family Court will now be allocated a 15 minute Judicial Conference in a Judge's chambers within 14 days of the matter being filed. The purpose of this Judicial Conference is to immediately classify all cases as either urgent or intractable. This will determine how the cases are dealt with from the time they are filed in the Family Court.

Urgent Cases

Urgent cases are defined as those involving significant risk of harm or of an emergency situation developing. Urgent cases will be allocated a 60 minute hearing within 14 days of the Application being filed in the Family Court. The purpose of the initial 60 minute hearing for urgent cases is to determine the issues that need to be resolved together with any potential risks of harm to either the parties or their children. During the hearing the Judge will question whether there is any threat to either party and/or their children.

If matters are unable to be resolved during the initial 60 minute hearing the Judge will make specific orders about the type or nature of evidence to be filed. These directions are intended to significantly reduce the volume of evidence filed in Family Court matters. If a final hearing is required, this will be focussed on addressing the specific issues previously identified by the Judge.

Intractable Cases

Intractable cases are those where it is unlikely that the parties will reach agreement because both parties are entrenched in their position. In cases involving children, a lawyer will be appointed to represent their interests as soon as a defence is filed. Parties will then be directed to attend counselling within 6 weeks of the application being filed in the Court. This counselling will be closely monitored by Judges to ensure that parties are engaging in the process. Parties will then proceed to either a Judge or Counsel led mediation within 12 weeks.

If matters are unable to be resolved at the mediation, parties will proceed to a 45 minute hearing. Once again the Judge will question the parties in an attempt to quickly define the issues before moving on to investigate whether those issues will be able to be resolved.

More complex or intractable cases that are not able to be resolved at the 45 minute hearing will be allocated a half day hearing within 2 - 4 weeks of the short hearing date.

The aim of these new procedures is to reduce the cost and time delay experienced by parties to disputes heard in the Family Court by focussing on the specific issues and evidence.

Franchise Agreements

Franchising is a business model in which one business (the franchisor) allows a separately owned business (the franchisee) to use their systems, brand name and other intellectual property rights in return for royalties and other considerations. The advantage for a franchisee is that they get the benefit of a proven and tested business model. According to *Franchise Information New Zealand* around 80% of franchised businesses still operate after 5 years compared with only 20% of independently started businesses. The franchisor, on the other hand, is able to expand their business without providing the capital and taking on the risk.

The association between the parties is symbiotic. The franchisee relies on the franchisor and the other franchises to maintain the reputation of the brand. The document that gives rise to the relationship is the franchise agreement which sets out the conditions upon which the franchise is to operate. The franchise agreement sets out the :

- fees to be paid, both upfront and ongoing,
- duration of the agreement and renewal rights,
- intended territory or market,
- dispute resolution procedure, and
- rules relating to the on-sale of the franchise.

In order to assist the franchisee and to ensure consistent quality of service amongst franchises there is usually a franchise manual that provides operational details. This manual contains the business model, with most agreements requiring strict adherence to it.

Fundamentally, franchise agreements should be approached like any other contract and need to clearly reflect the arrangement between the parties. Clauses that are unnecessary to the functioning of the relationship need to be carefully examined by an independent lawyer, preferably one with franchise experience. Many franchise agreements, particularly with large firms, are non-negotiable. Prospective franchisees should be prepared to decline to sign contracts that contain onerous and one-sided terms.

There are a number of common pitfalls within franchise agreements. For example, the franchisee needs an exclusive territory within which the franchisor may not grant any other franchise licenses. Clauses that allow reduction of this territory by the franchisor are common and should be considered carefully. Also, the franchisor should specify the steps they will take to protect the intellectual property rights being paid for. The exact method of calculating the royalties needs to be specified as well as penalties for late payments. Clauses that allow for early termination are very common and need to be clearly understood. Agreements that limit the liability of the franchisor to the franchisee are cause for concern, particularly when related to obligations for marketing, training, and disclosure statements in the negotiation phase.

There is no specific franchise legislation to protect franchisees, however around half of franchisors abide by a self regulating code of conduct that aims to “promote high standards of franchise conduct” and does offer some protection against unreasonable and unfair conduct on the part of the franchisor.

Real Estate Agents Act 2008

The Real Estate Agents Act 2008 came into force on 17 November 2009, replacing the 1976 Act and introducing a new regulatory regime. The Act’s purpose is to promote and protect consumers’ interests and “promote public confidence in the performance of real estate agency work”. Some of the important changes under the new Act are outlined below.

Real Estate Agents Authority

A Real Estate Agents Authority (“Authority”) has been established as an independent Crown entity to replace the Real Estate Agents Licensing Board. It will be responsible for such matters as licensing, receiving complaints, disciplinary action, regulating standards, and consumer information. The Associate Minister of Justice Hon. Nathan Guy has stated that the public will now be able to access the Authority to gain impartial and easy to understand information and that the Authority will provide a robust, transparent complaints and disciplinary process.

Licensing

Every person engaged in real estate agency work must apply for a license on a yearly basis. There will be a public register of licensees that will record whether the licensee has been disciplined in the last three years. This will allow consumers to make informed choices when choosing an agent.

Code of Conduct

The Authority will establish a Code of Conduct that will set minimum standards of behaviour by which all licensees must abide.

New Complaints and Disciplinary Processes

The Authority will establish Complaints Assessment Committees, as required, to more effectively deal with complaints and investigate allegations about licensees. Each committee will have three members and will investigate complaints, make determinations about complaints, promote resolution of complaints, lay and prosecute charges before the Real Estate Agents Disciplinary Tribunal, refer complaints to other agencies where appropriate, as well as inform complainants about decisions and publish decisions.

Real Estate Agents Disciplinary Tribunal

The Real Estate Agents Disciplinary Tribunal (the "Tribunal") has been established, and is independent of the Real Estate Institute with members being appointed by the Minister. The Tribunal will hear and determine claims brought by a Complaints Assessment Committee and will hear any subsequent appeals against the Committee's decisions.

The hearings are to be held in public and appeals of Tribunal decisions will be heard in the High Court. The Tribunal may:

- suspend or cancel a license,
- impose a fine of up to $15,000 in the case of an individual or up to $30,000 in the case of a company,
- order agents to pay compensation of up to $100,000 or have their license cancelled or suspended.

Disclosure Obligations

Real Estate Agents are now required to provide certain information to clients such as disclosing conflicts of interest, and making disclosure of all discounts and rebates the agent will receive.

Agents must provide an approved guide to clients who are entering into agency agreements or agreements for sale and purchase. The guide will provide a plain language explanation of the document and the implications of signing it.

Agency Agreements

Clients must be given a copy of an agency agreement within 48 hours of signing. In the case of a sole agency agreement the client will now have a cooling-off period, until 5pm of the day following signing, to elect to cancel the agreement.

Snippets

Court Ordered Mediation for Civil Disputes

The Government announced in November 2009 that it will carry out a pilot scheme in the High Court in Auckland that will see parties referred to court-ordered private mediation for civil disputes.

The pilot scheme will consist of 50, one-day mediations carried out by private mediators. A panel of between 12 and 15 mediators, who hold legal qualifications and current practicing certificates, will be established.

Currently mediations are carried out by Associate Judges, however the Government would rather see Associate Judges spend time on cases that require judicial attention rather than mediating disputes.

A review of the scheme will take place after the pilot scheme has ended. If court-ordered private mediations prove successful, they may become the best way to deal with civil disputes.

The Government will be looking keenly at the outcome of the use of private mediators. The scheme has the potential to significantly increase the speed and quantity of civil cases dealt with in the High Court.

Twittering in Court

In a recent case in an Australian courtroom an instance of 'tweeting' was reported for the first time.

Two journalists tweeted, which gave rise to outrage on the one hand and acceptance on the other, in particular from the presiding Judge who said that "twittering can serve to inform the public in a more speedy and comprehensive manner than may be possible through traditional methods".

The issue surrounding the use of tweeting is that jurors are able to read the posts. Therefore, it is the content of tweets that is at issue. If the tweeting delves into commentary on the issues raised during a trial, or the demeanour of witnesses, then that may become problematic as it could affect the outcome of the trial.

Notwithstanding the merits of the arguments on either side of the twittering debate, it looks like tweeting is here to stay and raises the question of whether tweeting should be embraced and jurors educated about the potential risks and misuse of tweeting. However, equally, jurors should be encouraged not to twitter their time away outside of trial!

If you have any questions about the newsletter items, please contact us, we are here to help.