FINLAYSONS | ALERT

Workplace

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Industrial and Employment News

WorkChoices: More Change as Compliance Deadline Looms

Many employers will already be aware that the grace period for complying with the WorkChoices record-keeping obligations ends on 27 March 2007.

The Minister for Workplace Relations has recently issued new Regulations which significantly relax employers' time keeping responsibilities. In particular, the obligation to keep a record of employees' start and finish times and daily hours worked now only applies if a penalty rate or loading must be paid for overtime hours actually worked, or if the employee is a casual or irregular part-time worker. This is a pragmatic change which will be welcomed by many businesses.

This Alert is intended as an alert only. It does not purport to be a comprehensive advice. Readers should seek professional advice before acting in relation to these matters.

Despite this relaxation, the WorkChoices requirements continue to impose detailed record-keeping obligations with respect to remuneration, leave entitlements, superannuation, pay slips and termination of employment. In addition, the Office of Workplace Services has recently been very active in investigating alleged breaches of the *Workplace Relations Act*, with a number of high-profile prosecutions also resulting in large financial penalties for employers who have not met minimum employment entitlements required by law. For example, a Canberra restaurant was recently fined $64,000 for underpayments of $4,000 to two foreign workers, while a Sydney juice franchiser was fined $49,000 for underpaying 22 young workers and a Melbourne artistic supplies retailer was fined $33,000 for award breaches totalling $3,611. Penalties at this level are significantly higher than those typically imposed before now, no doubt reflecting WorkChoices' emphasis on compliance and the increased maximum penalties now available under the Act.

Finlaysons recommends employers review their workplace practices to ensure they are fully compliant. To assist its clients, Finlaysons has developed a plain-English checklist designed to assist employers to identify their obligations quickly. The checklist covers key WorkChoices obligations including minimum conditions of employment, the negotiation and termination of workplace agreements, industrial action, record keeping and payslips.

Copies of the checklist can be purchased by contacting any member of our Workplace Team.

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Compensation News

Important Development concerning payments of Compensation to a Solicitor's Trust Account

Last year the Full Court of the Supreme Court delivered its decision in *Scammell & Co v WorkCover* [2006] SASC 258. In their reasons the Full Court concluded that there was no basis upon which a solicitor could claim a lien over income maintenance payments to secure their costs because of the specific provisions of the *Workers Rehabilitation and Compensation Act 1986 (*the Act) and the requirement for payment to be made to a worker for the purpose of satisfying a compensating authority's liability.

Having now considered this judgement in full, it is WorkCover's position that the reasoning of the Full Court applies equally to other compensation payments such as lump sums payable pursuant to sections 42 and 43 of the Act.

WorkCover has now determined that payments should ***only*** be made to a solicitor's trust account if the solicitor had provided an authority and indemnity in the terms recommended by the Law Society as follows:

Irrevocable Authorisation and Indemnity

IN CONSIDERATION *of my solicitors (name of firm) of (address) acting for me with respect to my claim (specify nature) and agreeing to forebear recovery of any legal fees billed to me for work undertaken in relation to my said claim until settlement (specify payment), I, (name of worker),* ***HEREBY IRREVOCABLY AUTHORISE AND DIRECT*** *(The Compensating Authority) to make payment of settlement funds (specify the nature of the particular payment as may be relevant) to the trust account of my said solicitors.*

I HEREBY ACKNOWLEDGE *that such payment wholly discharges the liability of (The Compensating Authority) to me for the said entitlement (specify as above) and* ***I IRREVOCABLY INDEMNIFY*** *(The Compensating Authority) from any further claim, demand or action with respect to such specified payment at any subsequent time.*

WorkCover has also decided that in the event that this document was not provided to a case manager, payment of compensation otherwise payable to a worker should only be paid to a worker's solicitor's trust account if the case

manager was provided with a current signed and witnessed authority and an indemnity from the worker's solicitor in the following terms:

Indemnity

WHEREAS *(The Compensating Authority) will pay compensation payable to (name of worker 'the worker') to (name of firm or solicitor) Trust Account in accordance with the worker's current authority, (name of firm or solicitor)* ***INDEMNIFIES*** *(The Compensating Authority) if the worker seeks payment direct from (The Compensating Authority) at a later time to the extent of the moneys which (name of firm or solicitor) retained for solicitor / client costs (including disbursements) in the event that (The Compensating Authority) is found liable by a Court to pay those moneys to the worker.*

Exempt Employers are not necessarily bound by WorkCover's policy, however we recommend that similar measures are put in place to ensure Compensating Authorities are completely protected from the impact of the Full Court's decision.

Safety News

New OH&S Bill Triples Penalties

The State Government has introduced the *Occupational Health Safety and Welfare (Penalties) Amendment Bill 2006* (SA) into Parliament. The Bill proposes to make three key changes to current OH&S law:

- increase the maximum level of fines for corporations;
- create a new offence of reckless endangerment; and
- expand the liability pertaining to officers.

If passed, the Bill will treble the maximum penalties that can be ordered against a corporation.

The Bill proposes to replace the current section 59 aggravated offence provision with a new offence of endangering persons in the workplace. The amendment removes the requirement that acts seriously endangering the health or safety of another must have occurred both with knowledge AND reckless indifference as to the consequences. It is now sufficient for an offender to be merely recklessly indifferent to possible harm. A breach of this section by a corporation may result in a $1.2 million fine or five years imprisonment for an individual.

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If passed, the Bill will also increase the liability of officers within a body corporate. The draft Section 59C renders an officer *prima facie* personally liable for any contraventions committed by the body corporate. An officer will be liable unless they can establish that they have taken all reasonable and practicable measures to prevent the contravention. An officer includes a member of the governing body of the body corporate, an executive officer, a receiver or manager of any property of the body corporate or a liquidator.

We predict that the current political climate will help steer the Bill safely through Parliament.

It would be appropriate at this time to review all OHS policies within your company and to ensure responsible officers and supervisors are aware of their responsibilities and, where necessary, suitable training provided.

Announcements

Three in a row for Finlaysons in a bright start to the new year

The Finlaysons Workplace team celebrated three victories in February at the Workers Compensation Tribunal.

In *Steenwyk v. Flinders Medical Centre* a worker with a 30 year history of back complaints and accepted claims lost his challenge to a determination that his most recent lower back complaint was a new and discrete injury which did not arise out of or in the course of his employment.

The worker alleged that he aggravated his pre-existing compensable back condition at home when he stood up from a toilet. An independent medical opinion stated that this was a new and discrete injury not associated with his prior injuries. The worker called evidence from his treating surgeon that the two conditions were causally connected. Ultimately the independent opinion was accepted and the worker's claim remained rejected.

In *Dowsett v. The Queen Elizabeth Hospital* a rejection of a worker's claim for injuries sustained whilst riding a scooter in the Hospital's carpark was upheld.

The worker had left her shift without seeking permission from her direct supervisor to accompany a colleague outside to test ride a scooter. The worker

had no experience or licence to ride the scooter and lost control, running into a wall and sustaining serious injuries to her leg.

The worker argued that the colleague, being a senior nurse, was effectively a supervisor and hence her actions were effectively sanctioned by the Hospital. It was further argued on her behalf that this exercise was substantially the same as other staff leaving the work area to have a cigarette or shift their car in the carpark.

His Honour McCouaig DP rejected all submissions made on behalf of the worker and found that the exercise had no connection whatsoever with her employment. In addition, His Honour found that even if a connection was established, the worker was clearly engaged in an unauthorised social activity and her claim would fail on that basis as well.

Finally, in one of the more unusual claims we have encountered, the Tribunal was asked in *Haseldine v. Zinifex* to allow the worker to claim the costs of kennelling his prized Bull Terriers whilst he travelled to Adelaide for treatment as an expense pursuant to s32 of the Act.

The worker made regular trips from Port Pirie to seek treatment and, fearing his dogs may be stolen, he kennelled the dogs at Mallala for the duration of his stay in Adelaide.

Whilst the worker originally agitated for these costs to be included in a Rehabilitation and Return to Work plan, by the time the matter proceeded to hearing the expenses were already incurred and the worker had moved to Adelaide and did not require the kennelling any more.

As a consequence, the worker was only seeking reimbursement for incurred kennelling costs pursuant to s32 of the Act.

Ultimately our submissions that s32 of the Act could not be read as allowing this class of expense was upheld, the worker's claim rejected and our hat-trick of February victories was complete.

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