WORKDYNAMIC AUSTRALIA

2024-2025 End of Financial Year Update

Update	Key takeaways/actions to consider
Bonus payments Employers commonly use bonus payments as an employee retention, performance and motivation tool. Bonus payments are commonly structured with deferral and forfeiture conditions, so that: • They are paid out at a future point in time. • They will be forfeited if the employee resigns prior to the bonus payment date. In a recent Federal Court decision[1], two ex-employees successfully challenged the bonus clauses in their employment contracts. The clause purportedly allowed their employer to pay 50% of their bonus payment in 7 months' time, and would be forfeited upon their resignation. When the employees resigned, the employer withheld their unpaid bonus amounts. The Court found that it was unlawful under the *Fair Work Act 2009* (Cth) to defer bonus payments that had been already earned by the employees for 7 months, and to then withhold the payment on their resignation. This is because "amounts payable" to an employee, such as 'earned' bonuses must be paid "in full", "in money" and "at least monthly".	While the case is currently under appeal, it offers the following valuable takeaways for employers: • Make sure bonus payments are documented in writing, and before the commencement of employment/the performance period. • Carefully review all bonus arrangements with deferral and forfeiture arrangements to ensure they are appropriately drafted to reflect that an employee's entitlement to a bonus does not arise until the relevant point in time.
Incorporation of employer policies into employment contracts Following a recent High Court decision[2], employers must be mindful that if their employment contracts include reference to specific disciplinary or termination procedures, failure to adhere to these procedures may amount to a breach of	It can be a 'double-edged sword' when deciding to incorporate or not incorporate policies and procedures into employment contracts. To minimise risks to exposure of similar claims by employees, here are a few action items that employers should consider:

[1] *Wollermann* v *Fortrend Securities Pty Ltd* [2025] FCA 103.

[2] *Elisha v Vision Australia* [2024] HCA 50.

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contract of employment, and expose them to claims for compensation for a psychiatric injury.
 	
Whilst this case heavily turned on its own facts, it represents a significant shift in the law regarding an employee's ability to seek damages associated with the manner of their dismissal.
	• Review employment contracts to ensure that policies and procedures are not unintentionally incorporated as terms of the contract of employment.
	• If policies are intended to be binding, ensure that this is expressly stated, and carefully assess any associated legal risks.
	• Review disciplinary processes to ensure procedural fairness to employees and consistency with organisational policies and procedures.
	• Provide training on disciplinary processes to managers and HR departments, which addresses the need to:
	  • maintain accurate and detailed records of termination and disciplinary processes; and
	  • clearly communicate the reason(s) for termination to the employee.
	• Be mindful of the psychosocial impact that an investigation, disciplinary process or termination can have on an employee and provide adequate support to employees (e.g. offer of a support person, a nominated HR contact to raise questions or concerns with).

Non-compliant termination payments It is not uncommon for employers to make termination payments (including annual leave, payment in lieu of notice, and redundancy pay) on the next payroll cycle, or an agreed date (such as within 7 or 14 days) in the case of an agreed exit. There have been two recent court decisions which establish that: • Termination payments of statutory entitlements must be made on an employee's last day of employment. • The court is strictly enforcing technical breaches related to late termination payments and is awarding financial penalties against employers for those breaches.	Depending on the circumstances of a termination, it can be operationally and administratively challenging for employers to process termination payments of an employee's last day of employment. Here are some strategies to ensure compliance with this obligation: • Review existing payroll processes, particularly where they are automated, to ensure payments can be made on the last day of employment. • If extra time is needed to process a termination payment, consider utilising notice periods or gardening leave to accommodate the delay. • Where agreed exits are being negotiated, be mindful that statutory entitlements must be paid on the last day of employment.

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In one of these recent decisions[3], the employer was 12 days late in making payment for accrued and unused annual leave and payment in lieu of notice. While these breaches were due to the employer's carelessness and ignorance of the law in relation to the payments, the court imposed a $6,200 penalty against the employer for each of these breaches.	
Payroll compliance and regulatory enforcement Wage theft laws commenced on 1 January 2025, meaning that employers who intentionally underpay an employee's wages or entitlements can now be criminally charged, and significant penalties may be imposed. Against this backdrop, we are increasingly noticing a focus on underpayments. In particular: • Employees are becoming more informed about their rights, and they are actively taking steps to enforce those rights including legal action and seeking assistance from the Fair Work Ombudsman (the **FWO**). • The FWO has recently published its Payroll Remediation Program Guide (the **Guide**). • The Court has been ordering employers to pay significant penalties for underpayments, even when they take prompt corrective action to address the issue. In relation to the Guide, it is important to be aware that it sets out the FWO's 'best-practice' expectations of employers in relation to payroll remediation. Interestingly, it includes: • An emphasis on an 'employee-centred' approach to payroll remediation, through an expectation that back-payments to employees include the payment of interest, and to look beyond the 6-year statutory review period for underpayment claims.	In light of the increased focus on underpayments, employers should: • Review whether they have effective and defensible payroll remediation practices, with consideration of the FWO's expectations under the Guide. It is not designed to serve as a compliance checklist, and employers must assess their payroll remediation practices based on the organisation's size and the circumstances of the relevant underpayment matter. • Act promptly, including obtaining legal advice as necessary, to resolve any known issues resulting in non-compliance, and consider whether to self-disclose identified issues to the FWO. • Be mindful that any level of transparency and compliance with the Guide does not guarantee protection from enforcement action by the FWO. Employers should seek legal advice as necessary.

[3] *Jewell v Magnium Australia Pty Ltd (No 2)* [2025] FedCFamC2G 676.

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• Guidance in relation to the FWO's general position that salaries can only contractually set-off against minimum entitlements on a pay-period specific basis, and not across multiple pay periods. We note that the approach to contractual set-off arrangements is currently the subject of large and complex proceedings in the Court against Coles and Woolworths. This decision will provide critical guidance on this legal issue. • An expectation that employers take a proactive rather than reactive approach to payroll compliance. For example, it guides employers to consider measures to prevent similar contraventions in the future, by seeking to create a culture of compliance within an organisation.	
Restricting non-compete clauses Prior to the federal election, the government announced its plan to ban non-compete clauses for employees below the high-income threshold. This reform will now likely be legislated, and it is expected to take effect from 2027 and apply prospectively. This means that non-compete clauses in employment contracts that are in place when the new laws commence will survive until they are amended or replaced by a new contract.	The practical impact of this reform may be limited, given that in some cases, non-compete clauses may be unenforceable for employees below the high-income threshold under the current law. However, where the potential enforceability of non-compete clauses remains a concern to employers, it is now important to proactively explore alternative safeguards to protect legitimate business interests of an employer and its confidential information, such as: • Incentivisation of employee retention, through structured benefits or bonus arrangements. • Review employment contracts to bolster confidentiality and intellectual property clauses, and ensure that the scope of notice periods and gardening leave provisions are fit for purpose.
Use of generative artificial intelligence (AI) in the workplace Whilst society is still generally grappling with the potential impacts of AI, in the employment law landscape, there has been a particular focus on how the use of AI tools may create risks: • Generally, in relation to work health and safety (**WHS**). • Involving discriminatory practices in employment-related decisions.	Employers should expect that AI technology will evolve faster than any forthcoming reforms in relation to the use of AI in the workplace. Accordingly, employers should proactively develop their own strategies to manage AI-related risks at the workplace level, including: • Creation of an 'AI in the workplace' policy, which sets out the employer's expectations in relation to the use of AI tools to perform work.

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• Involving loss of confidentiality of an employer's confidential information and intellectual property (e.g. misuse of ChatGPT).	• Undertaking an assessment of WHS risks, such as psychosocial risks, associated with the implementation of AI tools. This could include, for example, how to manage uncertainty in the workforce caused by the implementation of an AI tool that may lead to redundancies of certain roles. • Conducting training for managers and HR departments when using AI tools for employment-related decisions that may present risks of discrimination or other adverse outcomes to employees.

Spotlight on flexible working arrangements (FWAs) and hybrid work
 	
We have seen a continuing demand for hybrid work arrangements and FWAs.
 	
Some recent decisions in the Fair Work Commission have highlighted the importance for employers to provide detailed reasons to employees when refusing a request for an FWA, including consideration of how the employer has had regard to the potential consequences of the refusal on the employee.
 	
In considering requests for hybrid work arrangements, a decision in the South Australian state jurisdiction has also highlighted the importance of not overlooking the importance of an employer's WHS obligations, as employers have a duty of care to ensure the health and safety of their employees, including when they work from home[4].
	In terms of FWAs:
	
	• Employers are reminded that they need to provide defensible, detailed and clearly communicated written reasons to the employee, when refusing a FWA request. For example, if a FWA request for a hybrid work arrangement is refused on the basis of decreased productivity or performance, detail should be provided as to the potential impact of the proposed arrangement. This could, for example, include the following detail:
	  • if tasks have not been performed to the required standard while working remotely;
	  • if certain targets have not been met; and
	  • if there has been decreased responsiveness to contact.
	• Generic or 'template' HR responses to FWA requests should be avoided and specific consideration of the employee's personal circumstances should be provided. For example, employers will likely have difficulty relying on grounds that approving a FWA request for a specific employee will set an example or precedent amongst the general cohort of employees.
	
	In terms of WHS obligations, it remains important for employers take steps to ensure the health and safety of its employees with hybrid work arrangements and

[4] *Lauren Vercoe v Local Government Association Workers Compensation Scheme* [2024] SAET 91.

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	minimise liability arising from work from home arrangements. Here are some strategies to consider: • Review employment contracts and workplace policies to ensure they clearly outline expectations for employees working from home or remotely, including defined performance standards to help maintain productivity. • Review workplace policies, including any flexible working policy, to ensure that all employees, regardless of whether they are working in the office, remotely, or in a hybrid model, are treated fairly and do not lead to claims of discrmination. • Regularly conduct risk assessments to evaluate the safety of home work environments and proactively address mental health risks such as stress, isolation, and work overload.
Payday superannuation While not yet law, the Federal government has announced that from 1 July 2026, employers will be required to pay superannuation guarantee payments at the same time as paying employee salary and wages.	In preparation of this change, employers should stay abreast of any updates to the enactment of this law, and consider commencing a review of their payroll management to ensure that real-time superannuation payments can be supported.
Anticipated psychosocial hazards regulations in Victoria New psychosocial hazards regulations are expected to be made in Victoria in October 2025, and come into effect by 1 December 2025. If the regulations are passed as currently proposed, employers will be required to, for example: • identify and control psychosocial hazards; • have a written plan in place to prevent psychosocial hazards such as bullying and sexual harassment; and • comply with reporting obligations in relation to psychosocial hazards such as bullying and sexual harassment.	Employers subject to the OHS Regulations in Victoria can begin preparing for the proposed amendments now by reviewing WHS policies and procedures, to ensure that they appropriately address risks to psychosocial hazards and how to respond to or manage such risks if they arise.

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Workplace investigations The demand for workplace investigations and culture reviews is increasing, driven by growing pressure to adopt robust investigative practices and keep pace with evolving legislative and regulatory requirements, such as the positive duty to take reasonable and proportionate steps to prevent sexual harassment in the workplace, psychosocial hazard management, and updates to whistleblower protections. Based on recent cases in the Fair Work Commission, some challenges faced by employers in their carrying out of workplace investigations have included the following: • **Classifying bullying as serious misconduct**: An employer failed to justify treating substantiated bullying as serious misconduct. The Fair Work Commission clarified that these are legally distinct concepts, and bullying does not automatically constitute serious misconduct. • **Delays leading to procedural fairness claims**: In one case, a union challenged the employer's actions, arguing that an unreasonable delay in commencing the investigation breached procedural fairness. While timeliness is important, a delay does not automatically amount to a breach. Investigators must carefully assess on a case-by-case basis the impact of any delay on the individuals involved and consider whether it has compromised fairness.	Given the potential implications that may arise from the outcome of a workplace investigation, such as disciplinary action, reputational impact, or legal exposure, it is essential for employers to ensure their internal investigation teams are properly trained and equipped to handle workplace misconduct complaints. Upskilling internal investigators by providing training in areas such as evidence gathering, interviewing techniques, procedural fairness and legal compliance helps safeguard the integrity of the process. At the same time, employers should carefully assess when it may be appropriate to engage an external investigator, particularly in complex, high-risk, or sensitive cases.

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