

Excessive leave accruals. Where do employers stand?

The Employment Relations Team have had an increasing number of calls regarding employers rights and obligations in relation to employees who have excessive amounts of annual leave accrued.

Where an employee with an excessive leave balance is covered by a modern award, the terms of the award will dictate the employer's right to give an employee notice to take leave to reduce the balance.

Under the *General Retail Industry Award* (Retail Award) the issue of excessive leave accrual is covered under clause 32. Under clause 32 excessive leave is defined as having more than 8 weeks of paid annual leave accrued, or 10 weeks for a shiftworker.

As a first step, employers must genuinely try to reach an agreement with the employee and on how to reduce or eliminate the excessive leave accrual. However, where an agreement is unable to be reached the employer may direct the employee, in writing, to take one or more periods of annual leave.

When directing an employee to take annual leave it is important to consider the following conditions which must be adhered to under the Retail Award:

- the duration of directed annual leave cannot result in the employee having less than 6 weeks annual leave left;
- the direction must not require the employee to take a period of annual leave of less than 1 week;
- the leave cannot begin less than 8 weeks or more than 12 months after the direction has been given;
- the direction must not be inconsistent with any leave arrangement already agreed to by the employee and employer.

If you would like more information about excessive leave accrual or annual leave generally, members can phone the VANA workplace relations team on (03) 9083 0091.

Vicarious Liability

Do you know everything your employees get up to? Maybe it's time to find out because, as an employer, you can be held accountable for the actions of your employees through the legal concept of vicarious liability.

So what is vicarious liability?

Vicarious liability is a concept that means one individual can be held responsible for the acts of another. In the workplace this means that an employer can be held liable for things individual employees do, provided it is during the course of their employment.

This requirement that the actions are done during the course of their employment means that they must have either been permitted by the employer or linked so closely to the performance of their duties that it is considered to be within the scope of their role.

Acts may be considered to be done in the course of the employment even where the behaviour engaged in is not expressly authorised by the employer. In the recent case of *Cincovic v Blenner's Transport Pty Ltd* [2017] QSC 320 an employer was found liable where an employee, who was riding a pallet jack like a scooter, sustained head injuries when a co-worker kicked the pallet jack from behind causing the employee to fall. This was found to be within the course of their employment as the employer knew the employees used the company equipment in this way and failed to take reasonable steps to stop employees behaving in this manner.

The cost of this mistake? \$874,998.70!

Whilst this seems like a significant amount, it pales in comparison to the potential damages you could face where an employee engages in discrimination, bullying or harassment in the workplace.

So how do I protect myself?

Most commonly vicarious liability is found where discrimination, bullying or harassment has occurred in the workplace. There is no requirement that the act is performed in the workplace only that it requires a connection with the employment of an individual. This means work-related social events and social media accounts under the business name can lead to a very costly vicarious liability claim.

To protect you and your business you need to ensure you take all reasonable steps to prevent this type of behaviour in the workplace. What constitutes reasonable steps depends on the individual circumstances of the situation as well as the workplace more generally. Some precautions that will amount to reasonable steps include:

- implement a bullying and harassment policy including a grievance process providing a framework for dealing with issues if and when they arise;
- spend time properly inducting and training employees;
- encouraging employees to report any undesirable behaviour; and
- provide training for managers to recognise and deal with bullying, discrimination or harassment in the workplace.

If you are looking for more information of the risks associated with vicarious liability and what steps you need to take to protect your business contact the VANA workplace relations team on (03) 9083 0091.

Fair Work Ombudsman secures \$134,000 in penalties for exploitation of vulnerable workers.

Following the findings of underpayments in excess of \$1 million by petrol giant 7 Eleven, the protection of vulnerable workers has quickly become the top priority for the Fair Work Ombudsman (FWO). In order to combat the issue the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (the Act) was introduced to improve the protections available to vulnerable workers.

On 12 June 2018 the full extent of the Act was highlighted as the FWO successfully secured \$134,000 in penalties against Photoplus Australia Pty Ltd and Choi Brothers Pty Ltd. The owner of the companies was also fined an additional \$10,886 for his involvement in failing to adequately keep records and fulfil his pay slip obligations.

The Judge in this case ruled the record keeping and payslip contraventions were “plainly deliberate” as he imposed the large penalty to “send a clear message” contraventions against vulnerable workers will result in “serious sanctions.”

The FWO’s active pursuit of companies and directors systematically contravening the Act and the harsh penalties associated with such breaches, highlights the need for employers to be aware of their employment obligations.

If you are unsure of your obligations under the National Employment Standards or the General Retail Industry Award, members can phone the VANA workplace relations team on (03) 9083 0091.