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# *New changes to the Fair Work Act*

12 September 2017

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## *In brief*

Last week, the Senate passed significant changes to the *Fair Work Act 2009 (Cth)* (FW Act) to strengthen laws under which franchisors can be liable for the failure by franchisees and subsidiary companies to comply with minimum employee entitlements. These include increasing penalties for serious contraventions, broadening the scope of the Fair Work Ombudsman's (FWO) powers, and creating a franchisor and holding company liability regime for franchisee/subsidiary breach. The new laws also increase penalties for record keeping breaches, and reverse the onus of proof where an employer has failed to keep records in relation to certain contraventions.

These changes are in direct response to the issues arising out of a number of high profile franchisee underpayment cases in recent years. However, holding company liability, new record keeping offences and penalty increases have broader application beyond franchise businesses. The concern to protect vulnerable workers through regulation is also playing out in State labour-hire licencing regimes being considered in Victoria, Queensland and South Australia. In this Alert, we consider some steps your business can take now to prepare for the changes ahead.

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## *In detail*

The Senate has now passed significant changes to the FW Act to increase franchisor liability for franchisee labour law breach under the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (Amendments).

### **Key changes**

The Amendments will put in place the following:

- ***A new category of breach, namely 'serious contravention', attracting higher penalties.*** A 'serious contravention' is defined to encompass a breach of the FW Act that is deliberate and part of a systematic pattern of conduct. Serious contraventions will attract maximum penalties of up to AU\$630,000 per breach for a company, and AU\$126,000 for an individual (NB, by comparison, the current maximum fine for a breach of the FW Act is AU\$63,000).

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- ***New record keeping provisions***, which create offences for knowingly providing or keeping false or misleading employee records or giving a payslip that is known to be false or misleading.
  - ***A reverse onus of proof in the absence of records***. An employer will be presumed to have breached certain provisions of the FW Act if it has not (without reasonable excuse) kept required records unless it can lead evidence to show compliance.
  - ***A new franchisor liability regime***. A franchisor can be liable for a breach of its franchisee if the franchisor knew, or could reasonably have been expected to know of the relevant breach, and where the franchisor otherwise has a significant degree of influence or control over the franchisee's business. A franchisor party will not be liable where it can show that it has taken 'reasonable steps' to ensure compliance. Reasonable steps will include steps to put in place training, audit controls and complaint-handling mechanisms within a franchise network.
  - ***Liability for holding companies***. The Amendments similarly extend liability for subsidiary breaches to their holding companies. A holding company may be liable for its subsidiary's breach where it knew, or could reasonably have been expected to know of the relevant breach, and in the absence of a 'reasonable steps' defence as set out above. A holding company will be taken to have knowledge where an 'officer' knew or ought to have known of a contravention.
  - ***Prohibition of cashback terms***, requiring an employee to pay amounts to an employer or third party at the employer's direction.
  - ***Increased information-gathering powers*** of the FWO.

#### ***When will the changes occur?***

The Amendment will commence after assent (which is likely to occur shortly), although franchisor/holding company liability provisions will have a 6 week-delayed start.

#### ***What should employers be doing in response to changes?***

Whilst the changes significantly affect franchisor businesses, the Amendments will affect a much broader group of employers.

All employers should take steps to review their current record-keeping and payroll practices for compliance, and ensure that human resources personnel and management are aware of the changes.

Franchisor businesses should be considering their existing arrangements in the context of new liability provisions. For further information about franchisor preparation, please see our earlier Alert, [Proposed changes to franchisor liability under the Fair Work Act](#).

Directors of holding companies should also review subsidiary operations, given the possibility for holding company liability for subsidiary breach, and consider similar audit controls to those that should be in place in franchise businesses.

Whilst there were attempts in the Senate to extend franchisor/holding company liability provisions to labour hire companies, these amendments didn't progress. However, State governments in Victoria, Queensland and South Australia are considering new labour-hire licencing regimes that are likely to require similar audit and review responses from labour hire firms to those required for a reasonable steps defence under the Amendments.

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## ***The takeaway***

Given the scheduled changes, employers should be actively considering their current approach to compliance. Our three tips are:

1. *Review your record-keeping and payroll practices for compliance with record-keeping requirements under the FW Act;*
2. *Ensure that officers and key management personnel understand pending changes, particularly within franchisor/holding company operations;*
3. *Review compliance and review protocols at a franchisor or holding company level, and ensure that reasonable steps are in place to monitor compliance.*

## ***Let's talk***

For a deeper discussion of how these issues might affect your business, please contact:

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