

Employer Update

Personal liability of individuals for breaches of the Fair Work Act.

CFOs, day-to-day business managers and human resources staff may be liable as an accessory if their employer, client or a contractor breaches the Fair Work Act.

Summary

It's a tough job being an advisor, balancing the desire to deliver on organisational objectives while identifying potential pitfalls and managing the risks that the Board or CEO may have not considered.

In a concerning development, the Fair Work Ombudsman (FWO) has signalled a new approach to using section 550 of the Fair Work Act to make a range of individuals personally liable for breaches of workplace laws. As such, there has never been a better time to ensure you are giving sound advice in relation to employment law obligations. Ignorance of the law will not be an excuse.



Background

While the FW Act currently provides for Directors to be pursued for fines under the Civil Remedy Provisions, the Fair Work Ombudsman Natalie James has signalled a clear intent to extend responsibility beyond the direct employer to others who may have played a part in a breach of workplace law such as human

resources staff or day to day managers, accountants, bookkeepers, and even administration staff engaged to assist with recruitment and supervision.

The FWO has stated:

"We are pushing the boundaries of the accessory liability provisions contained in the Fair Work Act. So far this financial year nearly every matter we have filed in court -94% in fact - has also roped in an accessory. We are increasingly pursuing a broader range of accessories, including accountants and human resources managers."

Personal liability of individuals for breaches of the Fair Work Act

Section 550 of the Fair Work Act imposes liability on a person who is 'involved' in a contravention of a civil remedy provision.

A person is involved if the person:

1. has aided, abetted, counselled or procured the contravention; or
2. has induced the contravention, whether by threats, promises or otherwise; or
3. has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
4. has conspired with others to effect the contravention.

Human resource staff, day-to-day business managers, accountants or individuals involved in a supply chain are all examples of accessories that have been found to have been involved in conduct which is unlawful.

An involved individual can still be liable even if they were not specifically aware that their conduct constituted a breach of the FW Act.



The maximum penalty for an individual for breach of the general protections provisions is currently \$10,800 (\$54,000 for a company). An individual found to have contravened the Act is also exposed to an order for compensation for the loss that an employee has suffered because of the contravention. However, the non-monetary consequences such as reputational damage, can be just as damaging.

Recent cases have joined individuals such as managers and HR staff as respondents to employee's claims of adverse action against an employer and serve to highlight the importance of ensuring that any contractors engaged by the organisation also comply with their employment law obligations.

The FWO acknowledges the role her office plays in making things more complex when it comes to providing advice on employment law – with more risks and more serious consequences, however she makes no apologies for the regulator making life more difficult.

Those who provide advice in relation to pay and conditions need to be familiar with relevant minimum terms and conditions of employment to ensure compliance and take prompt action if errors are discovered.

Lessons for Employers

Ensure senior management and contractors understand the requirements of workplace legislation.

Ensure that individuals with employment related responsibilities are aware that they may be personally liable for breaches of the Fair Work Act.

Review corporate insurance policies to ensure that managers (in addition to directors) will be covered for breaches of the adverse action provisions of the FW Act.

In relation to contractors, investigate all complaints received from their employees or their sub-contractors and take appropriate action, such as an inspection of the contractors' employment records to ensure compliance with the FW Act.

Seek professional advice if you are in doubt.

- Savvy delivers significant results by aligning business strategy with leadership, culture and organisation design.
- We build capability to support change, equip leaders with skills to act, and track progress over time.
- We help our clients connect their people with their strategies, engage them in a shared vision, and make values feel valuable again.
- For over a decade we have worked with our clients across all sectors and industries to build 'fit for purpose' structures wherein individuals understand expectations and accountability, the people systems and processes drive the right behaviours and capable and credible leadership creates a customer-focused culture.

If you are considering conducting a review of your workplace or project employment practices, contact Savvy Human Resources Associates:

Sydney Ballina Brisbane

info@savvyhr.com.au

Phone +61 (0) 428 874 186

www.savvyhr.com.au



This publication is provided by way of general guidance only and is not to be construed by the reader as legal advice or as a recommendation to take a particular course of action in the conduct of their business or personal affairs. You should not rely upon the material as a basis for action that may expose you to a legal liability, injury, loss or damage and it is recommended that you obtain your own advice relevant to your particular circumstances.