

CLOSING LOOPHOLES SUMMARY

KEY CHANGES TO THE FAIR WORK ACT 2009

This document summarises the key changes to the Fair Work Act 2009 ('Fair Work Act') arising from the recently introduced Fair Work Legislation Amendment ('Closing Loopholes') [No.1](#) and [No.2](#) legislation.

Only those changes most likely to impact our industry have been summarised. This document does not address all the changes introduced by the Closing Loopholes legislation.

Any information in this summary is general in nature and not a substitute for professional advice. For further information, please call our Employment and Industrial Relations team on (03) 9411 4555.

Effective from: Now	
<p>New regulated labour hire arrangements ('same job, same pay')</p> <p>Further information</p>	<p>This change concerns the provision of labour hire workers to a host company where that host company has an enterprise agreement providing for more beneficial pay arrangements.</p> <p>In these circumstances, a regulated labour hire arrangement order ('RLHAO') can be sought from the Fair Work Commission (FWC).</p> <p>The effect of a RLHAO will be to require the labour hire company to pay a 'protected rate of pay'. This will be equivalent to the full rate of pay that would be payable if the labour hire worker was to be covered under the host company's enterprise agreement. The protected rate of pay includes base rates of pay, allowances, penalties and loadings.</p> <p>While applications can be made now, a RLHAO won't take effect until after 1 November 2024.</p>
<p>New rights for workplace delegates</p> <p>Further information</p>	<p>Union delegates have been afforded new rights.</p> <p>These new rights expressly allow a delegate to:</p> <ul style="list-style-type: none">• represent the industrial interests of union members and those eligible to be union members;• reasonable communication with union members and others eligible to be union members; and• for the purpose of representing the interest of union members and those eligible to be union members;<ul style="list-style-type: none">○ reasonable access to the workplace and workplace facilities; and○ other than for small businesses, reasonable access to paid time, during normal working hours, for the purposes of related training. <p>All modern awards and enterprise agreements will also need to contain a delegate's rights term from 1 July 2024.</p>

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<p>Changes to right of entry requirements for union officials assisting a HSR</p> <p>Further information</p>	<p>Union officials are no longer required to hold a federal entry permit where they are requested by a HSR to assist them perform their role on site.</p> <p>Please note, if an entry is for a suspected contravention of the OHS Act or Regulations (i.e. independent of a HSR's request), the union official is still required to provide a notice of suspected contravention and show their federal and ARREO permits on request.</p>
<p>Changes to sham contracting definition</p> <p>Further information</p>	<p>The threshold for sham contracting has been lowered.</p> <p>Sham contracting is where a company misrepresents an engagement as an independent contractor relationship where it is, or would be, an employment relationship.</p> <p>Where a sham contract is established, a company must now prove they 'reasonably believed' that the relationship was a contractor relationship to have a defence. This change has lowered the bar for businesses to be penalised for sham contracting.</p>

Effective from: 1 July 2024

<p>Changes to right of entry requirements for investigating suspected underpayments</p> <p>Further information</p>	<p>This change concerns a union official's ability to enter a workplace to investigate suspected breaches to the Fair Work Act or a Fair Work Instrument (i.e. wage underpayments).</p> <p>A union official entering to investigate a breach will now be able to apply to the FWC to waive the 24 hour notice requirement.</p> <p>The FWC must grant this exemption where it reasonably believes:</p> <ul style="list-style-type: none">• the suspected contravention involves the underpayment of wages affecting a member of the union; and• the provision of the usual 24 hours' notice would hinder an effective investigation into the alleged underpayment.
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Effective from: 26 August 2024

<p>New definition of 'employment' impacting independent contractor arrangements</p> <p>Further information</p>	<p>This change targets the independent contractor vs employee debate.</p> <p>The new definition reduces the importance of written contractual arrangements when characterising a relationship between a worker and a business. It instead requires consideration of the real substance, practical reality and true nature of the relationship between the worker and the business.</p> <p>Whilst it is still recommended to have written contractual arrangements, this change moves the focus away from purely considering a written</p>
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	<p>independent contractor agreement when determining if a worker is an employee or an independent contractor.</p> <p>An important exception to the changes is that independent contractors and businesses can now 'opt out' of new employment definition. To opt out, the independent contractor's earnings must exceed the contractor high income threshold, set at \$175,000 for the year starting 1 July 2024.</p>
<p>Changes to the definition of 'casual employee'</p> <p>Further information</p>	<p>The new definition reduces the importance of written contractual arrangements when considering whether an employee is a casual employee.</p> <p>An employee is now a casual employee only if:</p> <ul style="list-style-type: none"> • There is an absence of a firm advance commitment to continuing and indefinite work; and • The employee receives a casual loading/rate of pay.
<p>Changes to the casual conversion process</p> <p>Further information</p>	<p>The existing casual conversion process has been simplified to put the onus on employees to request a transition to permanent employment.</p> <p>This means that employers no longer have an obligation to offer permanent employment to casuals working a regular pattern of hours on an ongoing basis.</p> <p>Employers have an ability to reject an employee's request for conversion on certain grounds.</p>
<p>New right to disconnect</p> <p>Further information</p>	<p>This new right addresses an employee's right to not be contacted outside of working hours.</p> <p>Employees may refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable.</p> <p>This right extends to refusing contact from third parties related to work.</p> <p>In determining whether the refusal is unreasonable, consideration will be had to factors such as the:</p> <ul style="list-style-type: none"> • extent to which the employee is compensated; • reason for contact; • role and level of responsibility held by the employee; and • personal circumstances of the employee. <p>This right will be a workplace right, meaning that an employee cannot be adversely treated for exercising it.</p>
<p>New unfair contract terms jurisdiction with the Fair Work Commission</p> <p>Further information</p>	<p>This change grants the Fair Work Commission with powers to adjudicate disputes relating to unfair contract terms in service contracts with independent contractors.</p>

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	<p>To be eligible to lodge a dispute, an independent contractor must earn below the contractor high income threshold (yet to be determined).</p> <p>Only contract terms that would have otherwise been considered 'workplace relations matters' can be the subject of an unfair contract term dispute.</p> <p>Limited remedies are available for a dispute of this nature. Compensation cannot be ordered. Orders can only be granted to set aside, vary or amend all or part of the service contract.</p>
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Effective from: 1 January 2025

<p>New criminal offence for intentional underpayments</p> <p>Further information</p>	<p>New federal wage theft laws will be introduced into the Fair Work Act, replacing the current Victorian wage theft laws which the State Government has announced it will repeal.</p> <p>It will be a criminal offence to intentionally not pay an amount owing to an employee under the Fair Work Act, a modern award or an enterprise agreement.</p> <p>The new offence will carry a maximum of 10 years' imprisonment and/or a maximum fine of the greater of:</p> <ul style="list-style-type: none">• 3 times the amount of the underpayment; or• For an individual: 5,000 penalty units - \$1,565,000.00• For a body corporate: 25,000 penalty units - \$7,825,000 <p>The new laws give small businesses an avenue to protection against this new offence through a Voluntary Small Business Wage Compliance Code. Whilst not yet developed, small businesses that comply with this Code will be protected against criminal penalties.</p> <p>A pathway for self-reporting possible instances of wage theft to the Fair Work Ombudsman has also been created which may lead to a cooperation agreement. Where a cooperation agreement is reached with the Fair Work Ombudsman, a company will be protected against criminal penalties.</p>
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