Important reminders when engaging Christmas casuals.

It's hard to believe that October has already passed, and the busy Christmas period is just around the corner! As the demand for services increases, most retailers and hospitality businesses will be taking on extra staff to cover the Christmas period.

With the recent changes concerning casual employees, however, you should ensure that if & when you hire Christmas casuals, they truly are casual!

Is there a contract in place?

Firstly, ensure all casual employees are engaged on an appropriate casual employment contract. An employment contract is essential to clearly define the terms of employment and the nature of the engagement. As a retailer, it's also sensible to be clear with the employee that they are a Christmas casual, and communicate to them that they will be engaged for a specified time over the Christmas period.

When recruiting for Christmas casuals, make sure you tell the employee, in detail, what the business expects of them during the Christmas period. This includes being clear on any policies regarding availability for rostering purposes.

Minimum Engagement Periods.

Secondly, you need to consider the minimum engagement periods specified in the relevant modern award that covers your employees. For example, the *General Retail Industry Award 2010* (**GRIA**) has a 3-hour minimum daily engagement for casual employees.

Members employing staff under other modern awards should check those awards for the minimum engagement periods for casual employees as they differ in some cases:

Overtime and penalty rates

This is the first year where the casual overtime provisions in the relevant awards will apply for the whole Christmas period. The introduction of casual overtime, which came into effect on 1 January 2018, means that casual employees must receive overtime penalties for any work outside of the Award's ordinary hours of work.

In addition to this, employers must also be aware of the weekend, public holiday and late penalty rates that apply to casual employees. Members are also reminded of the recent decision of the *Fair Work Commission*, which boosted casual penalty rates for weekday evening shifts and Saturdays.

With the recent Fair Work Commission changes, ensure you've considered how you will deploy your staff over the Christmas period to assist with keeping costs down.

It's also important to be wary of minimum breaks between work periods. The GIRA requires that all employees be granted a 12-hour rest period (or 10 hours by agreement with an employee) between completing work on one day and commencing work the next day. When an employee doesn't receive this break, they need to be paid double time.

Higher Duties

Most retailers engage Christmas casuals under Level 1 duties. You should, however, consider any higher duties that Christmas casuals may need to perform from time to time.

For example, where you require a casual sales assistant to perform higher duties, which may include opening and closing the store, supervising when managers are not present, or sorting out the tills and the banking, then higher duties under the Award will be triggered.

For more information regarding Christmas casuals, please don't hesitate to call the VANA Employment Relations Advice Line on 02 9083 0091.

Termination during the minimum employment period.

All new employees face a 6-month minimum employment period (or 12 months in the case of a small business with fewer than 15 employees) when initially engaged by an employer. During the minimum employment period, the business determines whether the employee is a good fit for the position and is competent in the role. While most employers understand that during the minimum employment period an employee doesn't have access to unfair dismissal, there's often a misconception that no risk arises when terminating an employee within the minimum employment period.

While employees can't file an unfair dismissal claim during the minimum employment period, they are eligible to make a general protections claim irrespective of their length of service.

What is General Protections?

Under Australia's *Fair Work Act 2009* (**Act**) a person must not take adverse action against another person *because* that person has a workplace right, exercises a workplace right, or proposes to exercise a workplace right. A workplace right is defined broadly in section 341 of the Act. This includes, but isn't limited to, the ability to make a complaint or inquiry in relation to employment and having a benefit under a workplace law or instrument.

In other words, even though an employee is on probation, you can't dismiss them simply for making a complaint about, or asking about, their pay and conditions, or for taking leave or benefits to which they're legally entitled.

For example, a general protection risk may arise where an employee has exercised a right to take carers leave during their probationary period and is subsequently terminated, or where an employee has made an inquiry in relation to their pay and conditions and is soon-after demoted.

To qualify as a general protections breach, the adverse action by the employer must have been taken 'because of' a proscribed reason. If the action was taken for some other reason, such as the employee's underperformance, there will be no breach of the general protections provisions.

The important point to remember with general protections provisions, however, is that there is something called a 'rebuttable presumption'. What this means is, the law presumes that the employer took the action for the alleged reason unless the employer can prove they took the action for some other reason.

In addition to protecting workplace rights, the general protections provisions of the Act protect people from discrimination and unfair treatment, such as coercing and undue influence.

If a general protection claim is lodged and the employer is deemed to have taken adverse action against an employee, they face severe penalties. Unlike an unfair dismissal claim, where damages are capped at 6-months pay or $72,700, whichever comes first, a general protection is uncapped, and penalties can extend into the hundreds of thousands of dollars.

What can I do to protect myself?

There are several steps that employers can take to protect against possible general protection claims. Employers should manage an employee within their minimum employment period as if they were any other employee and ensure notes on their performance and conduct are kept on file. This means using formal training, performance management or disciplinary processes if there are concerns with the employee's performance or conduct.

By following a proper process, an employer can clearly point to a reason for termination which greatly reduces the risk of a successful general protection claim being lodged.

For more information on how to safely terminate an employee in their minimum employment period, call the VANA Employment Relations Advice Line on 02 9083 0091.

A stark reminder to employers

An IGA supermarket operator in Melbourne has been forced to pay a total of $320,263 in penalties after a Court found they had deliberately underpaid six workers. The operator had previously been put on notice to comply by the Fair Work Ombudsman, but continued to pay incorrect wages.

The penalties were imposed after the Court established that the companies who operated the supermarkets admitted to underpaying six employees a total of $11,373 between November 2013 and November 2015. The underpayments occurred despite the majority owner previously being provided with information on his obligations to pay minimum Award rates by the Fair Work Ombudsman.

The underpayments were discovered when employees at both locations raised concerns. FWO inspectors identified that the employees, aged between 19 and 23, were paid flat rates of pay ranging between $15 and $20 per hour. This resulted in underpayments of the minimum hourly rates, casual loading, overtime and penalty rates the employees were entitled to receive under the *General Retail Industry Award*.

Not only were employees underpaid, the operator of the supermarket was found to have breached workplace laws during the investigation by attempting to fabricate pay records for the employees and providing false employment records to FWO inspectors.

Other breaches identified included failure to pay annual leave entitlements, a uniform allowance, and the relevant penalty rate where employees didn't receive the minimum break between shifts. The operator also failed to comply with employment and pay record obligations and did not agree in writing to a regular pattern of work with part-time employees, which is a requirement under the Award.

The underpayments and breaches of workplace obligations were determined to be deliberate and calculated, therefore justifying the heavy penalties imposed.

This case is a stark reminder that employers must ensure they are complying with all obligations they have to their employees. It's important to keep up-to-date with any wage increases or penalty rate decisions, along with ensuring rostering and leave entitlements are compliant.

If you're unsure what your obligations are under the Award, or want to ensure your current practices are compliant, contact the the VANA Employment Relations Advice Line on 02 9083 0091 and speak to one of our friendly consultants today! You're better off identifying any issues early to save yourselves and your business from the risk of heavy penalties if discovered too late!