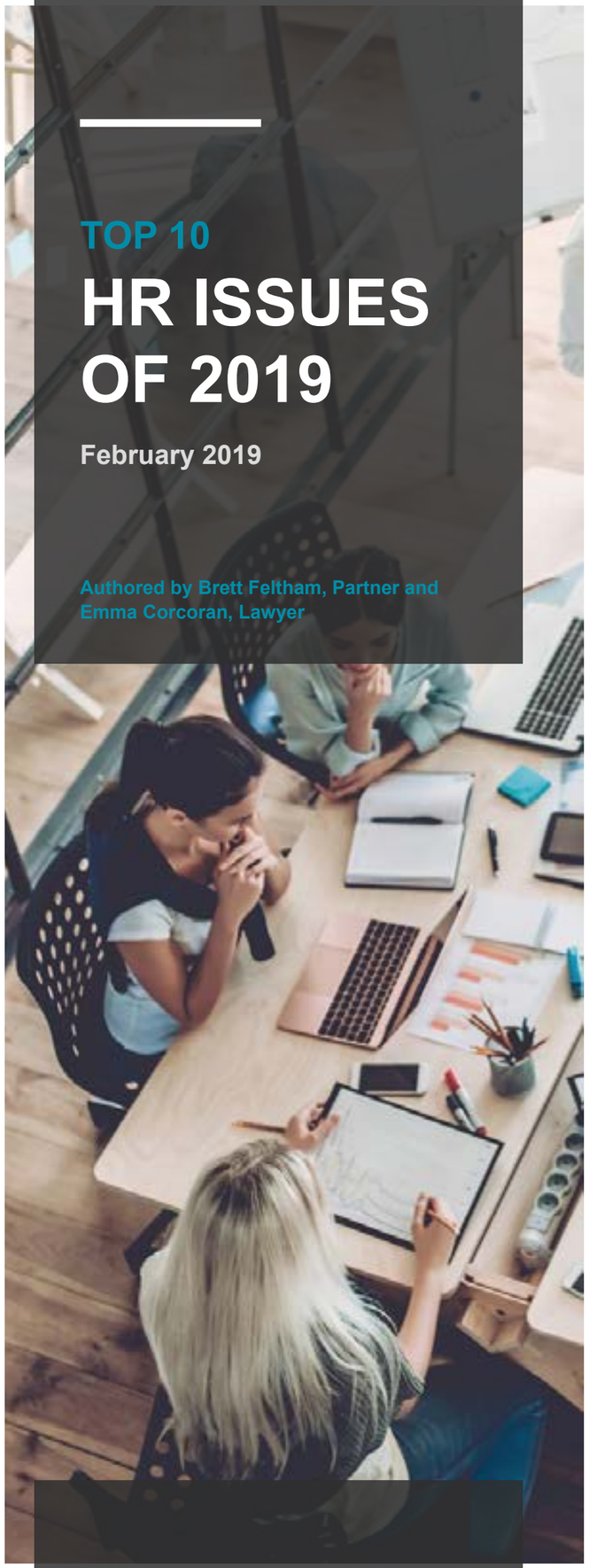

TOP 10

HR ISSUES OF 2019

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1 CASUAL EMPLOYMENT

One of the key cases in the employment space last year was the WorkPac Pty Ltd v Skene decision. In that case, the Full Federal Court found that a casual employee (who received the benefit of casual loading) was not a casual employee for the purposes of the Fair Work Act 2009 (Cth) (FW Act), but a permanent employee and therefore entitled to leave entitlements. The implication of this decision is that an employer may not be immune from claims from a casual employee for entitlements under the FW Act, even if the outcome results in the employee "double-dipping" with respect to those entitlements.

To fix that 'loophole' created by the WorkPac decision, the Federal Government introduced new regulations which allow employers, in certain circumstances, to offset the casual loading paid to an employee against certain entitlements that may otherwise be owed to the employee if they are found in the future to be a permanent employee.

NEXT STEPS

Employers need to carefully consider the proper classification of employees from the outset and constantly monitor their casual workforce (particularly any long term casuals employed on a "regular and systematic basis"). Employers should also review and amend existing casual employment contracts to ensure they are drafted to allow employers to utilise the offset in the new regulations. For a more detailed analysis on the case and our recommendations for how employers can ensure they are in the best position to make use of the regulations see our articles 'No second bite at the cherry for casual employees' and 'Keeping it Casual? Think Again!'.

2 EMPLOYMENT RELATED CLASS ACTIONS

Traditionally class actions have been used to litigate product liability claims or shareholder actions. This is changing, with a number of class actions being commenced in the employment sphere. The increase in these claims is arguably due to various factors, including a number of high profile underpayment and alleged misclassification claims and an increase in availability of litigation funding in Australia.

An important issue for employers is that the mere bringing of a class action against a company can have a major reputational impact. This is because class actions by their very nature – as actions brought on behalf of a group or class of persons – are often widely publicised by the litigation funder or relevant law firm to both increase the number of potential claimants and ultimately to ensure sufficient returns for the funder.

NEXT STEPS

We expect that there will be more class actions commenced in 2019. Watch this space!

3 FEDERAL PRE-ELECTION POLICIES

With a Federal election scheduled for May this year, most punters are betting on a change of government. This means that the ALP's IR policy platform might become law. For their part, unions have been advocating for changes to the current workplace relations landscape, backed by their 'Change the Rules' campaign. The major areas of change that may be introduced by a Federal Labor government include:

- restoring penalty rates that were cut in some industries in 2017
- industry-wide bargaining (which is being pressed for by the ACTU)
- limiting the ability to terminate enterprise agreements which have passed their nominal expiry dates (which is also being pressed for by the ACTU), and
- introducing industrial manslaughter laws.

NEXT STEPS

This is another area for HR and employment professionals to continue to monitor during 2019 as the election campaign gets underway, and expect material changes with any change of Federal government.

4 WHISTLEBLOWING REFORMS

In late 2017 a Federal government committee recommended changes to Australia's limited whistleblower protections in the private sector. A Federal bill strengthening whistle-blower protections passed Parliament on 19 February 2019 and the provisions will most likely commence on 1 July 2019. The Australian Labor Party has stated that if they form a Federal Labor government they will look to further strengthen those laws to establish a protection authority and implement a whistleblower rewards scheme where people would receive a percentage of any penalties levied.

NEXT STEPS

We will shortly publish an update setting out the obligations for organisations under these new laws and the steps that employers should take to ensure compliance. Employers should expect to need to update their existing policies (or introduce new policies) consistent with these laws and train senior managers who may receive whistleblower disclosures moving forward.

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5 EMPLOYEES / CONTRACTORS AND THE GIG ECONOMY

The gig economy and the classification of contractors has continued to be in sights of regulators including the Fair Work Ombudsman. Gig economy workers also continue to take action in their own right – an unfair claim against Uber was rejected on grounds that the driver was not an employee, but a similar claim against Foodora backed by the TWU found that the rider was an employee. Key points of focus (and differentiation) between gig economy providers is the nature of the arrangements and the devil is in the detail.

The NSW opposition announced plans to amend the state industrial relation act to extend minimum pay and employment conditions to gig economy workers if elected in March 2019 and the Victorian government has commenced an inquiry into the on-demand workforce, which includes reviewing the application of workplace laws to gig workers. The ACTU is also pushing for the ALP to bring in changes including providing minimum employment entitlements for gig workers.

NEXT STEPS

We expect that 2019 will see governments catch up with the gig economy – as such, companies who operate in this space or have significant contractor workforces must remain abreast of developments.

6 #METOO AND THE NATIONAL SEXUAL HARASSMENT INQUIRY

2017 saw an avalanche of sexual harassment allegations against high profile people. These allegations inspired others to come forward and to share their own experiences – the #MeToo movement was born. In 2018 there was an increase in the number of sexual harassment allegations being made by employees including historic claims, together with a continuing focus on the response taken by an employer to those allegations.

The Australian Human Rights Commission also commenced a National Inquiry into Sexual Harassment in Australian Workplaces with nationwide consultations which is expected to be finalised in late 2019.

NEXT STEPS

Employers need to be aware of the additional challenges of dealing with historic allegations and do more than simply review company harassment policies and train staff. Employers need to critically assess their workplace culture and make changes to ensure that the culture is based on mutual respect between employees. For more information about the challenges employers face, the National Inquiry and our recommendations for responding to sexual harassment complaints, see our article '#MeToo and sexual harassment in Australian workplaces'.

7 MODERN SLAVERY REPORTING

The Modern Slavery Act 2018 (Cth) passed Federal Parliament in late 2018 and came into force on 1 January 2019. The new legislation requires entities based, or operating, in Australia, which have an annual consolidated revenue of more than $100 million, to report annually on the risks of modern slavery in their operations and supply chains, and actions taken to address those risks. The first reporting period under the legislation will be the organisation's first financial year starting on or after 1 January 2019. While many smaller organisations may not have direct reporting obligations, if they form part of the supply chain for larger organisations then they should expect to have to provide this type of information "up the chain".

NEXT STEPS

Organisations should, if they have not already, begin to prepare to meet their reporting requirements by mapping their supply chains (including those overseas) and identifying potential modern slavery risks in their operations. Organisations should also review the policies and procedures they have in place in relation to modern slavery, including supplier codes of conduct and human rights policies. See our recent update on commencement and our October article for a comprehensive overview of the legislation and the steps that organisations should be taking to prepare to meet their obligations.

8 LABOUR HIRE LICENSING

Victoria followed Queensland and South Australia in passing labour hire legislation in 2018. However, the South Australian Government has introduced a bill to repeal the SA laws before enforcement has begun. If elected at Federal level, the ALP has pledged to introduce a national scheme.

NEXT STEPS

Labour hire companies and employers who engage them should review the new labour hire regulations to ensure compliance and follow legislative developments in 2019. Employers who engage non-licensed labour hire providers may themselves be subject to fines.

9 CASUAL CONVERSATION

Many modern awards now provide that a regular casual employee after six or 12 months regular service (which depends on the award) may request to convert their employment to full-time or part-time status. Employers can refuse those requests on reasonable business grounds and must notify their employees in writing of their casual conversion rights.

NEXT STEPS

Employers should ensure they are across the conversion rights applicable to their employees. See our 'FAQs on new casual conversion clauses' for our responses to common queries.

10 FAMILY AND DOMESTIC VIOLENCE LEAVE

In its final flurry of legislative activity for 2018, the Federal parliament passed an amendment to the FW Act that enshrined the right for employees to take up to five days unpaid leave to deal with family and domestic violence.

NEXT STEPS

Employers should ensure that their policies and procedures reflect the new entitlement and best place employers to assist employees experiencing family and domestic violence. For more information about the leave entitlement, see our updates here and here.

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