

WHAT YOU NEED TO KNOW ABOUT THE FAIR WORK AMENDMENT (PROTECTING VULNERABLE WORKERS) BILL 2017

July 2017

What you need to know?

The Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Bill) which seeks to amend the Fair Work Act 2009 (Act) was introduced into the House of Representatives in March and is currently being debated. The Bill may be amended. However, in its current form, the Bill will result in significant changes for franchisors and holding companies.

The Bill seeks to hold franchisors and holding companies responsible for certain breaches of the Act by their franchisees or subsidiaries where they knew or ought reasonably to have known of the breaches and failed to take reasonable steps to prevent them.

Why was the Bill introduced?

One of the key incidents which led to the identification of issues and the introduction of the Bill was the 7-Eleven scandal. The 7-Eleven case revealed serious and systemic underpayment of workers, and the practice of franchisees paying their employees at a lawful rate and then forcing them to repay their wages in cash.

It became apparent that migrant workers were particularly vulnerable to exploitation. The Bill is intended to protect this group and other vulnerable workers.

Further, the successful action of the Fair Work Ombudsman against Yogurberry in late 2016, where Yogurberry World Square, their parent company YBF Australia Pty Ltd, and their payroll company CL Group Pty Ltd, were collectively fined \$146,000 for exploitation of workers, indicates that the Bill forms part of a recent push to strengthen and enforce the regulatory framework in light of the 7-Eleven case. In addition to the penalties imposed, the Fair Work Ombudsman secured a Court Order requiring the Yogurberry Group of companies to commission a professional external audit of all Yogurberry stores in Australia and to rectify any underpayments discovered.

What are the consequences of the Bills introduction?

The Bill significantly increases penalties for serious breaches of the Act involving deliberate and systematic underpayment of workers (as opposed to one-off mistakes). Penalties are also being increased for those who falsify pay records. These penalties will not apply to inadvertent breaches or honest mistakes. In addition, the Bill introduces increased investigatory powers for the Fair Work Ombudsman when investigating reported breaches which includes penalties for providing false or misleading information.

The Bill seeks to address systematic patterns of conduct rather than inadvertent conduct or honest mistakes.

Breaches are likely to be considered as a systematic pattern of conduct if there are:

- concurrent breaches of the Act;

- breaches over a prolonged period;
- many employees being affected within a workplace; and
- inaccurate employee records, and no payslips issued, making it difficult to prove alleged underpayments.

Franchisor's/Holding Company's Liability

If a franchisee breaches the Act, the franchisor will also be held liable if the franchisor knew or could reasonably be expected to have known about the breach or similar breach.

Also, if the franchisor has significant influence or control over the franchisee and franchisee's business is substantially associated with the intellectual property of the franchisee.

Importantly, a franchisor will not breach the Act if they have taken reasonable steps to prevent the breach by the franchisee.

It will not be sufficient for a franchisor to claim that they did not know about the breach. Franchisors may be held liable if they ought to have taken steps to inform themselves of potential issues, create processes to prevent problems and educate their franchisees.

The same rules will apply to holding companies and their subsidiaries.

When will the changes come into effect?

Parliament is currently debating the Bill. At this stage, we do not know when or if this Bill will come into law. We will keep members updated as to the progress of the Bill and any amendments to the Act.

What should Franchisors and Holding Companies do?

The Bill has significant consequences for franchisors and holding companies as it broadens their liability for breaches by their franchisees and subsidiaries.

It is imperative that franchisors and holding companies take steps to audit their franchisees and subsidiaries and implement appropriate policies and procedures for compliance. Franchisors and holding companies should also be taking reasonable steps to educate their franchisees and subsidiaries about their workplace obligations.

Franchisors and holding companies should:

- Conduct an audit of current employment systems and processes;
- Develop comprehensive workplace policies and procedures;
- Utilise good quality, legally compliant employment documents to record details about the employment relationship including employment contracts and other employment agreements;
- Educate employees, particularly migrant workers, about their rights;
- Establish payroll processes to ensure all employees are paid in full and any deductions are compliant;
- Ensure all employment records, timesheets and payroll systems are up-to-date and accurate; and

- If dealing with Fair Work Inspectors, ensure that company records or information collected is accurate and assist the investigation in any way possible.

Industry Legal Group's Employer Assist team can assist franchisors/holding companies and their franchisees/subsidiaries to comply with their workplace obligations and avoid unnecessary claims.

As members, franchisors and holding companies should remind their franchisee and subsidiary stores that they can access free workplace relations advice from Employer Assist by Industry Legal Group as well as access to a broad range of services at discounted member rates.

Need assistance?

If you require any advice on the matters set out in this article, please contact Employer Assist by Industry Legal Group on 1300 694 842 or hvia@employerassist.com.au.

This article is intended for information purposes only and should not be regarded as legal advice. Please contact Employer Assist by Industry Legal Group for specific legal advice.

We look forward to hearing from you.

Emma Dalley and the ***HVIA Employer Assist*** team