

Making employees redundant is never a pleasant situation. However, failing to comply with relevant laws can expose a business to additional legal complications and costs at a time the business can least afford it. Below we set out some important considerations for employers.

Unfair dismissals

For private sector employers, the *Fair Work Act 2009* establishes the framework for unfair dismissals. While a “genuine redundancy” is not an unfair dismissal, in order to be considered “genuine”, [three](#) conditions must be met. This is relevant to employees who are [protected](#) from unfair dismissal, which includes any award or enterprise agreement covered employee and any employee whose annual rate of earnings is less than \$133,000 (2014/15 financial year).

A genuine operational reason

The first requirement is that there is a genuine operational reason for the decision such as shortage of work, restructure or introduction of new technology. A genuine operational reason will not be established if the reason for the decision is not operational (e.g. dressing up a performance termination as a redundancy).

Consultation

An employer must also comply with any applicable consultation provision under a modern award or enterprise agreement (this does not apply to award / agreement free employees). Consultation requires that an employer genuinely consult with affected employees about the change, and measures to mitigate or avert the proposed change.

It is important that the specific provision that applies is checked carefully before any decision is taken, as most provisions include detailed timing and preliminary requirements including the provision of a detailed written notice. While there is some flexibility in relation to enterprise agreements, most award provisions contain a similar clause, such as this [provision](#) from the *Clerks– Private Sector Award 2010*.

Redeployment

The final consideration is whether or not it was “reasonable” to redeploy a person into a position within the business or within any associated entity. This creates extra complications for medium to large businesses, and especially for businesses that are part of a larger corporate group. If there are available positions, or an employer is part of a larger group, it is recommended that employers seek advice about this obligation.

Adverse action

In addition to unfair dismissals, an employee can consider challenging a redundancy (even a “genuine redundancy”) on the basis that some aspect of the decision making process constituted ‘[adverse action](#)’. Under the Act it is unlawful to select an employee for a redundancy (that is, discriminate against them) because that person has a workplace right. The definition of ‘[workplace right](#)’ is extremely broad covers traditionally prohibited discrimination (age, gender, disability), victimisation (union membership/non-membership), as well as broader reasons such

as having made a complaint or inquiry about workplace rights (eg. safety etc.).

Because adverse action matters contain a [reverse onus](#) of proof, and there is an impossibly broad set of matters that may be alleged to form the basis of an adverse action application, where selection may be at issue it is important employers put in place and document proper selection criteria that demonstrably do not include any prohibited reason.

Workers compensation

For South Australian employers, the *Workers Rehabilitation & Compensation Act 1986* may create additional other considerations. If a candidate for retrenchment has a current compensation claim, employers must ensure that they meet any applicable obligations to provide duties under section [58B](#), including obtaining any necessary authority for WorkCover, and notice of termination obligations under section [58C](#). Employers covered by other compensation schemes should seek specific advice in relation to their obligations.

Notice of Termination, severance and other payments

On retrenchment, employees (other than casual employees) are generally entitled to receive notice of termination, severance pay and leave entitlements. Below sets out some basic information. However, an employee may also be entitled to higher payments if their contract of employment or an enterprise agreement provides for it.

Notice of termination

An employee is entitled to notice of termination, which may be worked or paid in lieu. Most employees are entitled to notice in accordance with [s117](#) of the Act. However, there are some [exceptions](#), such as casual and daily hire employees. Notice under s117 must be given in writing.

Severance

Most employees are entitled to severance payments in accordance with the [s119](#) of the Act. However, small businesses are generally exempt unless an award or agreement provides for additional payments. There are other [exceptions](#) and peculiarities for specific employees. Transitional provisions also apply for longer serving employees.

Outstanding leave

Employees are entitled to payment for outstanding annual leave and annual leave loading, if applicable. Employees with lengthy service (seven years in South Australia) may also be entitled to payment of pro rata long service leave. Sick leave is not paid out on retrenchment unless a contract or enterprise agreement provides for it.

The information contained in this publication is general in nature and does not constitute legal advice. There are a variety of circumstances under which this general information may vary (including, but not limited to, legislative provisions, awards or agreements and express or implied terms of employment contracts). Employers should seek legal advice in relation to any particular circumstances.
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