



DYHRBERG DRAYTON  
EMPLOYMENT LAW

# Employment Update

## What's new?

### Parental leave

Recently there has been discussion about annual leave accruing while staff are on parental leave. When your staff are on parental leave they continue to accrue annual leave. Once the employee returns to work he/she will have annual leave owing, however if it is taken before the employee has been back at work for 12 months it will not be paid at full value. Rather, holiday pay will be calculated on the employee's average weekly earnings for the 12 months immediately before the annual leave is taken. As such, it will be based on earnings over the last 12 months which will include a period of the unpaid leave.

Make sure your staff are aware of how annual leave works. You can include this information in their parental pack, or have a discussion with them before they go on parental leave so they are not taken by surprise when they return to work.

### Copyright (Infringing File Sharing) Amendment Act 2011

The Copyright Amendment Act 2011 came into effect on 1 September 2011. This amendment to the Copyright Act 1994 aims to stop file sharing of copyright material via peer to peer websites. Peer to peer websites are when individuals share their files for others to upload.

How does the Act work?

If the Copyright holder becomes aware of illegal sharing of their material they will contact the internet service provider (ISP), who will issue an infringement notice to the internet account holder. After 3 such notices the Copyright holder can apply to the Copyright Tribunal to fine the account holder up to \$15,000.

What impact does this have on my business?

The holder of the internet account is liable for any downloading or uploading of copyright material. Businesses should review their current internet policies to ensure the law change is covered and staff should be informed that disciplinary action will be taken if they are found to be downloading copyright material from peer to peer sites. Check what types of access your staff currently have and what sites your firewalls currently bar.

We are able to assist you with your policy updates.

### Review of Privacy Act

On 2 August 2011 the Law Commission published its completed review of the Privacy Act, Stage 4. The Commission made in total 136 recommendations for amendments to the current Privacy Act 1993.

Some of the key recommendations are to:

- Increase the powers of the Privacy Commissioner including enabling the Commissioner to issue compliance notices.
- Change the complaints process to make it more streamlined.
- Enable better regulation around governments sharing information.
- Require agencies to notify people if their personal information, being held by the agency, has been lost or seriously compromised.
- Modify or remove some exceptions to the privacy principles including allowing personal information to be disclosed where an individual's health or safety is seriously at risk. It is proposed that the current exception allowing disclosure where there is a serious risk to the life or health of the individual concerned or another individual will be amended so there is no requirement that the risk be "imminent" just that there be a serious threat to the life or health of the individual concerned or another.

### Employment Issues around Christmas

With the holiday season coming up it is important to think about your staffing requirements over the Christmas period. Below is a quick guide to holiday entitlements and employing casual staff over the holiday period.

#### Statutory Holidays

- Over the Christmas/New Year break there are 4 statutory holidays: Christmas Day, Boxing Day, New Year's Day and 2 January.
- Staff are only entitled to be paid for a statutory holiday(s) if the day the statutory holiday falls would otherwise be a working day for them.
- If your staff are required to work any of these days their minimum entitlement is to be paid time and a half and to be given an alternative day off.



#### Fixed term and casual staff

- When employing staff over the Christmas period, consider whether you need casual or fixed term staff.
- Fixed term staff are employed for a set period of time and/or for a specific reason i.e. to cover the Christmas period. They must sign a fixed term agreement that states when the agreement starts and finishes and the reason for the agreement being fixed term. A fixed term agreement should be used where:
  - There are regular hours to be covered.
  - There is a set time period that needs to be covered i.e. over Christmas and New Year.
- Casual staff are engaged to be called in on an “as needed” basis. This means that they have no regular hours and have a casual agreement to come in only when there is an unexpected absence or extra demand. There is no guarantee whatsoever of ongoing employment.
- We are able to provide further advice if required by you.

#### Christmas close down

Employers should check to see whether they have a clause providing for a closedown period in their employment agreements. Section 32 of the Holidays Act 2003 sets out the requirements for annual holidays to be taken during the close down period which are:

- An employee who is entitled to annual holidays at the start of a closedown period must, if required to do so by his or her employer, take annual holidays during the closedown period whether or not the employee agrees to take the holidays.
- An employee who is not yet entitled to annual holidays at the start of a closedown period must, if required to do so by his or her employer, discontinue the employee’s work during a closedown period.
- The employer must give the employee no less than 14 days’ notice of the requirement to take the annual holidays or to discontinue the work (as the case may be).

#### Signed copies of agreements

As of 1 July 2011, employers are required to keep signed copies of employment agreements or the current signed terms and conditions of employees. As well as being a legal requirement, written agreements are essential for running your business well. Employment agreements are required for all employees, regardless of when they started work. A labour inspector who discovers that an employer is not complying with this will give notice. If the situation is not fixed, the labour inspector can seek penalties of up to \$10,000 for individuals and \$20,000 for bodies corporate.

#### Recent Health and Safety case

In a recent case, *Bull v Utumapu*, the plaintiff made a successful application for judicial review of the procedure the Department of Labour (DoL) used to investigate the death of a farm worker on Mangaohane Station. Following the accident causing death DoL launched an investigation under the Health and Safety in Employment Act 1992 (**HASE**). A labour inspector was appointed to conduct the investigation.

During the investigation the inspector gave notice that she wished to interview the plaintiffs who were both Directors of the Station. They objected to the procedures adopted by DoL such as the requirement that they submit to interviews. The Directors also requested written summaries of the questions they would be asked in the interview and, under the Official Information Act, any documentation relating to the enquiry. DoL failed to provide the information and the Directors sought judicial review of DoL’s statutory powers under HASE.

The High Court held that since the interviews requested were in the context of an investigation of possible criminal offences which could be brought against the Directors, they were allowed to exercise their right to silence and refuse to take part in the interviews. The plaintiffs also had the right to have notice of the purpose of the interview and any allegations they could face to prevent them from self-incrimination.