

MANAGING A RESTRUCTURE

These Guidance Notes apply to national system employers who are governed by the *Fair Work Act 2009* (Cth) (“**Act**”). These notes are general in nature, and are designed to bring to your attention matters that you may not have considered before and/or are outside of the scope of advice you requested from us. As such they provide a general overview of the relevant issues that may be applicable to your situation but do not constitute specific advice.

The purpose of the Guidance Notes is to provide you with an overview of the key steps and industrial relations risks that need to be managed for a potential restructure. These guidance notes are provided as general information that you can then research and apply to your situation, or alternatively, use to determine if you need to seek specific advice on the matter.

The Guidance Notes also refer you to templates or tools that you may find useful in management of your particular business situation.

THINGS TO CONSIDER

Employers should note that to complete a restructure which is compliant with industrial relations legislation will require realistic timeframes to be set, because of the consultation requirements and the potential for selections between employees for available positions.

The key steps in compliance and the key industrial relations risk areas for such a potential restructure are set out in these guidance notes.

If an employer proceeds with a consideration of restructure, a detailed project implementation plan should be developed with all risk mitigation strategies identified and the necessary supporting documentation prepared.

The obligation to consult

Before commencing a restructure, the employer must notify and consult with any potentially affected employees (and their unions, if any) in accordance with any applicable modern award or enterprise agreement. This will ordinarily require setting out in writing all relevant information about the changes, including the nature of the changes proposed, the expected effects of the changes on employees and any other matters likely to affect employees. This will include details about potential adverse effects of the restructure on the affected employee(s).

Employers should also identify how it will mitigate the adverse effects of the redundancies on a specific and individual basis. Such measures could include (for example) voluntary separations, additional payments, outplacement services, the ability to work some or all of a notice period and other measures. Where possible, the timeframes for the restructure should provide time for the direct input from affected or potentially affected employees, as a crucial part of consultation is for the employee to be given a meaningful opportunity to consider the information and provide their feedback or thoughts.

The employer must give genuine and prompt consideration to any matters raised by the employee(s) before making any final decisions in relation to that employee's employment that arise from the restructure.

Employers should always take advice about the content of any communication – especially where they discuss options for changed roles or redeployment – as these may have an impact on an employee's entitlement to redundancy pay.

Selection Processes

Selection into remaining or modified roles must be on lawful and objective criteria to protect the employer from an unfair dismissal risk, and also to ensure that the employer is able to demonstrate that the selection of any employees to be made redundant was for lawful reasons and not for prohibited reasons that may give rise to a claim of adverse action under the General Protections section of the Act or under anti-discrimination legislation.

A relevant industrial instrument might specify or provide rules around a mandatory selection processes. If so, these must be strictly followed.

Redeployment

If the employer identifies a redundant position(s) it is obliged to look for suitable opportunities for redeployment for the employees affected. This will require the broad consideration of positions, including those available at associated entities of the employer (see section 389(2)(b) of the Act.)

Positions at a lower level must not be discounted. If the employee has the skills, knowledge and experience required for an available position, it must be offered to the employee for their consideration for the employer to have met its redeployment obligations. In some circumstances, the employer will also need to consider roles that may require retraining and determine whether or not it is a reasonable option in the circumstances.

The employer will also need to consider any of its currently outsourced work to determine whether it would be reasonable to redeploy the employee in an in-sourced role undertaking that work (or part of that work). As with all other considerations about redeployment, whether this would be reasonable depends on the specific circumstances.

Whether voluntary separations are a reasonable mechanism to open up redeployments will depend on the circumstances.

In some specific circumstances, even if the employee is redeployed to a different role, they may still be able to make an unfair dismissal or general protections claim or be entitled to redundancy. Employers should seek specific advice and assess this risk before deciding to restructure, because ordinarily (under most awards and enterprise agreements) as soon as a definite decision is made consultation requirements commence and all relevant information must be disclosed.

Notice of Termination

Where an employee is made redundant because of a restructure, written notice of termination must be provided, complying as a minimum with the relevant award, enterprise agreement or contract of employment of any displaced employees, and with the minimum periods in the National Employment Standards (“NES”) of the Act. Notice does not commence until it is given specifically in writing, though in many (but not all) cases, payment can be made instead of notice. Documents will need to be reviewed to ascertain the employer’s obligations. If more than 15 employees are to be made redundant, relevant unions and Centrelink must be notified.

Redundancy Pay

Redundant employees must be paid redundancy pay (in addition to the notice period described above). As a minimum this must be the higher of their award, contract of employment, enterprise agreement, or the NES provisions. Some exemptions may apply depending on the specific circumstances and the size of organisation.

Unfair Dismissal Claims

Unfair dismissal claims are a key risk involved in any potential restructure. These may arise from a claim that any dismissals were not “genuine redundancies” because the consultation was inadequate, or the employer still requires the role to be done (i.e. the restructure is a sham), or that the employer did not comply with its obligations to reasonably redeploy. If successful, such claims can result in reinstatement or compensation.

General Protections Claims

Employees can claim that any part of the employer’s decision making in a restructure was for a prohibited reason – this is known as a ‘general protections’ claim. These claims can be a significant risk for the employer because if an employee makes a general protections claim, the employer must prove that the reason for dismissal or transfer did not include a prohibited reason. Employers must be able to prove that the decision to restructure was made for lawful reasons.

The court has scope to make any order that it considers appropriate, including reinstatement, penalties, and/or compensation. In this jurisdiction, there is no cap on the financial compensation that the court can order.

These claims can arise where an employee believes, for example, that the restructure/redundancy is not genuine and is being used by an employer to disguise some other reason for termination. An example of this may be if poor performance or misconduct has been an issue and the employer then commences a restructure, or if the employee feels that they have been selected for a redundancy because of a prohibited reason (such as having made a workplace complaint).

Trainees and Apprentices

Apprentices and trainees have special arrangements under their training contracts. The precise rules vary in each state, but employers should not consider the redundancy or transfer of a trainee or apprentice without taking specific advice about it.

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Workers Compensation

There may be restrictions on the right to terminate the employment of an employee receiving worker's compensation under a relevant state or territory law. If your worker has applied for or has an approved claim under the relevant worker's compensation legislation, we recommend you seek advice before making that worker redundant.

Disputation

Unions and/or individuals might seek to apply disputes settlement procedures in a modern award or enterprise agreement to challenge an employer's compliance in relation to a proposed restructure. These challenges often occur around whether the employer has complied with its consultation obligations. These dispute processes ordinarily add time to the restructure because until it is settled (if necessary by an order of the Fair Work Commission) it can act to put a hold on the restructure. If the employer is found not to have followed the required consultation process in their modern award or enterprise agreement, this could affect or delay the employer's ability to finalise the restructure.

Penalties for Non-compliance with Statutory Obligations

If an employer breaches specific award or enterprise agreement obligations, or does not comply with mandatory provisions of the Act, it might be exposed to prosecution and penalties for such breaches.

BEST PRACTICE PROCEDURES, TOOLS, SERVICES AND TEMPLATES THAT MAY ASSIST EMPLOYERS IN THE DISCHARGE OF THEIR INDUSTRIAL OBLIGATIONS

We offer a variety of tools, procedures or templates that may assist your management of this process or processes in the future. This will depend on your business situation. Your EMA consultant can provide further information about these.

- Restructure/Redundancy Project Plan
- Presentation for management outlining the key industrial relations steps and employer obligations
- Presentation outlines for communication with various stakeholders
- Template Letters to employees and their representatives

Require further information/assistance?

If you require further information or advice, please contact your Consultant.

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