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STRATEGEYES:

Workplace Perspectives

People+Culture Strategies
Labour & Employment Law

A LOOK INSIDE:

Welcome

from the Founder and Managing Principal

Recently our firm sponsored the National HR Summit held at Sydney's Luna park and attended by over 300 HR professionals from around the country. I was fortunate enough to be able to present on two occasions to the general audience and also to the HR Directors Forum.

The subject of my general address was on "Managing Mental Health Issues in the Disciplinary Process" and in the Directors' Forum was on "Exiting Cultural Misfits from your Leadership Team". Notwithstanding the differences in the topics I opened both presentations, as I have done with all of my thought leadership presentations in recent years by referencing the "People Management Quadrants" - the centrepiece for our firm's philosophy to holistic people management across law and strategy.

I will be expanding on this unique methodology at our firm's key breakfast briefing being held at the Shangri-La Hotel in Sydney on Thursday 11 May 2017. This is an invitation-only event so I would encourage you to express your interest by sending an email to events@peopleculture.com.au.

On the broader subject of sponsorships, we continue to be delighted that in 2016 alone our firm has reinvested significant amounts (both financially and in kind) to Cricket NSW, the Royal Botanic Gardens, SCECGS Redlands, the Manly Marlins Rugby Football Club, the Western Sydney Rams (a team in the National Rugby Championship), the Classical Languages Teachers Association on top of the considerable pro bono work that our firm does.

In 2017 we will shortly be announcing details of a very special sponsorship of Packemin Theatre Company, the nation's foremost musical theatre production company for young people as well as the donation of a number of prizes to the University of Sydney.

The diversity of sponsorship across education, thought leadership promotion, arts and entertainment and sports reflects the "renaissance man" philosophy embedded into me in my early years and I hope we can continue our approach for many years to come.

Joydeep Hor
FOUNDER AND MANAGING PRINCIPAL

Transgender: a new frontier in workplace diversity

Michael Starkey, ASSOCIATE

When it comes to the new frontier of workplace diversity, few issues stand out as prominently as the rights of transgender individuals, and the associated practical and cultural challenges for employers in ensuring that those individuals are supported in, and given every opportunity to contribute to, their workplace without risk of harassment, discrimination or victimisation. The need for employers to face up to those challenges was recently highlighted by *The Report of the 2015 U.S. Transgender Survey*, the largest survey of transgender people ever conducted, involving almost 28,000 individuals, and released in December 2016. It reported that, *"in the year prior to completing the survey, 30 per cent of respondents who had a job reported being fired, denied a promotion, or experiencing some other form of mistreatment in the workplace due to their gender identity or expression, such as being verbally harassed or physically or sexually assaulted at work"*. This article will explore the ways in which transgender rights at work are evolving (albeit unevenly across the globe), the challenges for employers when it comes to transgender issues, and how employers can capitalise on those challenges in order to create workplace cultures in which diversity and its benefits are embraced.

Evolving legal rights

It is in the realm of anti-discrimination law that the rights of transgender individuals at work are most rapidly evolving. However, the nature and extent of legal protections for transgender individuals in employment varies significantly across the globe.

A global snapshot

Australia

At the federal level in Australia, discrimination by employers specifically on the basis of an individual's gender identity has been unlawful since 2013. All Australian States and Territories, with the exception of the Northern Territory, also explicitly make unlawful discrimination on the basis of gender identity, and in some of these jurisdictions these protections have been in place for some time.

Under federal legislation, employers have a responsibility to take all reasonable steps to prevent such discrimination (which may include harassment or victimisation) in the workplace and may be found vicariously liable for discrimination engaged in by their employees, unless they have taken all such steps. In effect, to avoid liability, Australian employers should have policies on transgender discrimination and harassment, thoroughly implement and train their employees in respect of these policies, and react swiftly to investigate any alleged discrimination or harassment.

On the topical issue of the use of toilets and other facilities, Australian anti-discrimination laws require employers to support transgender employees to use the toilets of the gender with which they identify, and employers run the risk of a discrimination claim by denying transgender employees access to appropriate toilets and facilities.

Individuals who believe they have been discriminated against on the basis of their gender identity may complain to the Australian Human Rights Commission (or an equivalent State or Territory agency) in respect of that discrimination, and have the potential to be awarded compensatory damages in the event that such a complaint is ultimately successful in court. The treatment that an individual receives at work may also be the subject of proceedings under national labour laws if that treatment amounts to an unfair dismissal or a form of adverse action.

The United States

In the United States, there is no federal law which explicitly prohibits discrimination on the basis of gender identity. However, federal courts have held that discrimination on the basis of a person being transgender can constitute unlawful discrimination on the basis of sex. A number of States also have laws that prevent discrimination on the basis of gender identity.

However, in certain other States, transgender rights continue to be limited. Perhaps the most high profile situation in 2016 was with respect to North Carolina, where a law was passed to (among other things) prevent transgender people who have not taken surgical and legal steps to change their gender from using public restrooms of the gender with which they identify. While the law does not extend to private companies (which are able to continue to develop their own policies in respect of transgender rights in the workplace), the North Carolina situation highlights a greater degree of uncertainty surrounding transgender rights in the United States than in places such as Australia (particularly given the often robust relationship between State and Federal legislatures in the United States).

China

In China, there is no specific law or regulation that protects employees against discrimination on the basis of their gender identity.

In 2016, transgender rights in employment were placed under the spotlight in China after a transgender male brought a case before an arbitration panel against his employer on the basis that his employment was terminated on the basis of his gender identity. The complainant produced evidence of a sound recording in which he was told by his manager that wearing male clothing in the workplace would damage his employer's image, and alleged that he was dismissed on this basis.

The arbitration panel rejected this evidence, holding that the conversation did not represent the employer's intent because the manager did not work for the company's personnel department, and accepting that the employer's reason for dismissal was that the employee did not have the required skills for the job.

Transgender discrimination: what does it look like?

Whether unlawful or not, discrimination against transgender individuals may take many forms, including, but not limited to:

(a) refusing employment, promotion or training opportunities to a transgender employee because of their gender identity;

(b) refusing to work with, ignoring, bullying, harassing or ostracising transgender employees;

(c) refusing to share toilets and other facilities with transgender employees;

(d) invasive, inappropriate questioning about a person's physical characteristics or their sex life; and

(e) refusing to use the transgender employee's preferred name or refer to them by the gender with which they identify.

The challenge for employers in eliminating these forms of discrimination is addressing the underlying factors that perpetuate such practices, such as ignorance, lack of understanding, and prejudice.

Challenges for employers

The law is not the limit

In addressing transgender issues, employers should aspire to adopt best practice strategies rather than be guided by the minimum standards set by the law in their jurisdiction. Employers should adopt the mindset that, as well as being a benefit in itself, workplace diversity produces other tangible benefits for businesses in terms of boosting morale, inclusion, motivation, and creativity, and consequently has a positive impact on productivity and innovation.

Understanding the term "transgender"

One challenge confronting employers is the number of ways in which being transgender can be described. One of the broadest and most inclusive definitions being used is that a transgender person is a person whose gender identity is different to the physical sex they were assigned at birth. While legal definitions of what is encompassed by the term "transgender" may vary from jurisdiction to jurisdiction, in terms of best practice, employers should consider viewing transgender issues at work through a broad lens in order to avoid marginalising those who may identify as transgender despite not qualifying in terms of a legally defined threshold.

Challenging unconscious bias

While it is clear that employers need to take appropriate steps to counsel employees who overtly exhibit prejudice against transgender individuals, employers also need to be aware of and respond to unconscious bias that may exist within their organisations and affect their workplace practices in order to ensure that discrimination against transgender employees does not occur.

Recruiters and people managers should be trained on the nature of unconscious bias (that is, that they may make decisions based on judgments they are unaware of and that are influenced by their background and personal experience) and encouraged to question the reasons for which decisions are made with respect to certain employees or prospective employees. All employment related decision-making should be based not on a personal attribute such as gender identity, but on the basis of an individual's merits. In addition, how "merit" is constructed needs to be examined to ensure that this is not affected by preconceived ideas about what capabilities an individual might bring to the job or whether they will be a good "cultural fit" for a workplace.

Gender identifiers and other terminology

As transgender protections are still evolving globally, there are a number of questions that are yet to be answered about how far the protections afforded by the law extend. For example, in Australia, while it is clear that the tangible detriments outlined above constitute unlawful discrimination, it is less clear what employers are required to do with respect to a variety of administrative matters relating to the employment of transgender employees.

For example, it is not entirely clear whether a person who identifies as transgender, but may not have any official documentation from a

relevant government agency to confirm this, can insist that their employment records be changed to reflect the gender they identify with rather than the physical sex they were assigned at birth.

In terms of creating a culture which embraces transgender individuals, it is important that employers refer to transgender employees (both in the workplace and in official records, wherever possible) using their preferred name and preferred gender pronouns, and that they require (through policies) that their employees do the same. It is also important that the transgender individual is consulted about which name and pronoun they wish to be used and, for individuals who are transitioning, if and when they would like any change to commence.

Developing meaningful policies

While informing employees through policies that discrimination against transgender individuals is unacceptable workplace behaviour (and unlawful, if that is the case) is important, transgender policies should be as much about fostering inclusivity and support for transgender individuals in the workplace as they are about setting appropriate guidelines for behaviour.

For example, best practice policies often include provisions which make employees aware that their employer will work with them to develop a transition plan if this is desired, and include information about what a transition plan might involve (for example, in respect of communications with other employees about the transitioning employee's gender identity and decision to transition).

Dealing with potential hostility

Employers also need to be prepared to work with the fact that other employees may express some hostility or animosity towards a transgender individual at work. While acknowledging that some employees might find the situation confronting, ultimately employers need to convey a clear message that inclusion and non-discrimination is the required standard of behaviour of all employees.

Implementing best practice

It is clear that there are a number of challenges facing employers as they work to support transgender individuals at work. By giving consideration to the issues below, employers can best position themselves to embrace these challenges through building workplace cultures that foster respect for diversity in all its forms.

- Does the business have the right framework in place in terms of policies and procedures, including regarding the disclosure by employees of personal information of a highly sensitive nature?
- Do any administrative changes need to be made in order to reflect a transgender employee's preferred gender? For example, to existing employment records or recruitment forms (including by giving employees the option to not specify their gender), and in respect of how the employee is to be referred in terms of name and pronouns.
- Does any training need to be undertaken (for example, on unconscious bias) to ensure that there is strong leadership in terms of transgender issues?
- Does the business need to make any changes to ensure that the overall culture of the workplace conveys the support that exists for transgender individuals, including those who may not have yet communicated that they are transgender?

Ultimately, employers need to be aware that the legal landscape globally is evolving, and that some jurisdictions require a proactive response on the part of employers to transgender rights at work. While other jurisdictions may lag behind, there are clear benefits from an inclusive approach to diversity which extends to transgender issues. Positive messaging about and effective implementation of an organisation's diversity and inclusion strategies can not only boost productivity by creating workplaces in which people of all backgrounds are given the support they need to contribute fully, but can also enhance an organisation's brand in the marketplace. If the history of movements for diversity tells us anything, it is that employers should get on board now, or risk falling behind the pack. ■

WHS incidents in the workplace:

reducing the fallout

Ben Urry, ASSOCIATE DIRECTOR

Even where an organisation has implemented "best practice" procedures and training with respect to work health and safety ("**WHS**"), things can and do go wrong. Where a WHS incident occurs, the important thing for an organisation is how it responds to the incident. Responding in an appropriate and timely fashion can make a significant difference to the level of liability and exposure for an organisation as well as for individual workers, managers and officers who may be involved in the incident.

A common complaint raised by organisations with respect to WHS is that it is "too hard", "too complex" or "too expensive" to comply. While a proactive and preventive approach (including policies, procedures and training) is the best way to reduce the overall risks to WHS, in the event that an incident occurs, an organisation needs a strategy to frame how it will react. A thorough understanding of the parameters of the obligation to notify a health and safety regulator ("**Regulator**"), when it may be necessary to seek legal advice, and the rights and obligations of duty holders and the Regulator, can make a considerable impact on the outcome.

Uncertainty over incident management: statistically speaking

In a report published by SafeWork Australia in August 2016 titled *"Perceived Levels of Management Safety Empowerment and Justice Among Australian Employers"*,[1] small to large businesses were surveyed as to how well they believed they managed WHS. These statistics reveal that, especially among small businesses (which make up over 90% of all Australian businesses), incident management and reporting

still has a long way to go. By way of example:

- 45% of small businesses (having less than 19 employees) do not collect accurate information from incident investigations;
- approximately 32% of small businesses look for someone to blame rather than the underlying causes when investigating an incident;
- businesses with young workers tended to be more safety conscious than other businesses; and
- 10% of businesses in the manufacturing, transport, postal and warehousing industries indicated that fear of negative consequences discourages workers reporting incidents.

It is crucial for businesses of all sizes to understand the basics of incident management.

What is notifiable?

So what if someone is injured or falls ill? Should you be informing the Regulator each time someone gets a paper cut or only where there is a fatality? How soon should you tell the Regulator? Given that the Regulator is often the authority that can bring WHS prosecutions against organisations and individuals, care should be taken in meeting your notification obligations.

In jurisdictions which have adopted the model WHS laws (being all States and Territories other than Victoria and Western Australia), it is a requirement that the Regulator be notified immediately if it constitutes a "notifiable incident". But what does this mean exactly?

A "notifiable" incident is defined to include a death, serious illness/injury or dangerous incident.[1]

A serious illness/injury includes:

- immediate treatment as an in-patient in hospital;
- immediate treatment for:
  - amputation;
  - serious head/eye injury, burn or lacerations;
  - separation of skin from underlying tissue (e.g. scalping or degloving);
  - spinal injury;
  - loss of a bodily function;
- medical treatment within 48 hours of exposure to a substance; and
- anything prescribed by the Regulations (for example, in NSW this includes such things as infections associated with blood-borne illnesses and occupational zoonoses such as Q-fever or Hendra Virus).[2]

A dangerous incident includes:

- an uncontrolled:
  - escape, spillage or leakage of a substance;
  - implosion, explosion or fire;
  - escape of gas, steam or a pressurised substance;
- electric shock;
- fall or release from height of any plant, substance or thing;
- collapse, overturning, failure or malfunction of, or damage to, any plant that is required to be authorised for use under the Regulations;
- collapse or partial collapse of a structure;
- collapse or failure of an excavation or of any shoring supports;
- inrush of water, mud or gas in workings, in an underground excavation or tunnel; and
- interruption of the main system of ventilation in an underground excavation or tunnel.

[1] See for example section 35 *Work Health and Safety Act 2011* (NSW).

[2] For assistance see SafeWork Australia's "Incident Notification Information Sheet" at http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/690/Incident-Notification-Fact-Sheet-2015.pdf

While the above definitions appear comprehensive, it can be difficult at times for organisations to determine whether a particular incident falls into one of those categories. For example, if a worker suffers a serious strain or sprain to their foot after colliding with a forklift and is treated at hospital on the same day in an emergency department, does this require notification? The standard reaction of most organisations would be "yes as hospital treatment was involved", but it is possible to be treated in hospital as an outpatient and not an inpatient. Outpatient treatment for such an injury is not subject to the requirement to notify. Where in doubt external legal advice should be sought as soon as possible to ensure appropriate compliance with the notification requirement.

When an incident occurs, regardless of whether it is notifiable or not, an organisation should conduct an investigation (formal or informal) to determine how to rectify the situation, if at all possible, to avoid further risks to health and safety.

Internal investigations and privilege

Incident investigation is not simply a matter of nominating a person within the organisation to conduct the investigation. Rushing off and investigating a matter without taking time to plan and develop a strategy can increase exposure to liability, especially in circumstances where the incident may be one which could lead to an investigation or prosecution by a Regulator.

One of the biggest issues we see with organisations in this position is failure to consider whether privilege applies.

Legal professional privilege (now referred to as client legal privilege) provides protection for confidential communications between a lawyer and their client where these might otherwise be required to be produced in court or similar proceedings. The key to such privilege is that the dominant purpose of the communication must be for obtaining legal advice or preparing and/or conducting litigation. Speaking to your external legal advisors as soon as possible after an incident occurs and before speaking to the Regulator can assist in determining whether a formal approach covered by privilege is warranted. Importantly, care should be taken when relying on in-house counsel, as the fact that these individuals "wear two hats", being a commercial and legal one, may result in the privilege being waived.[3]

A common mistake many organisations make is partially or even fully completing their investigation before speaking to their external legal advisors. An investigation report can contain findings about what the organisation has done wrong and may attribute responsibility for certain failings within the organisation, giving the Regulator a useful outline of possible breaches for its investigation and/or prosecution. As a matter of best practice we recommend taking the time to make contact with your external legal advisors before investigating or notifying the Regulator.

Regulator response: know your rights, but also know theirs

So either through notification or through other means (for example, reporting by a workers' compensation insurer), the Regulator becomes aware of issues within your organisation. Now what?

The two main functions of the Regulator are to monitor and enforce compliance with WHS legislation and to provide advice and information on WHS to duty holders and the community generally.

[3] See for example *Victorian WorkCover Authority v Asahi Beverages Australia Pty Ltd (Ruling) [2014] VCC 1260*

The powers of WHS Inspectors are broad and far-reaching. These powers include, without limitation, the ability to:

- *inspect, examine and make inquiries at the workplace; and*
- *bring their own equipment, take measurements, conduct tests and make sketches or recordings (e.g. film, audio, photographs).*

More specifically, upon entering a workplace Inspectors can require a person to:

- *provide details on the whereabouts of a document;*
- *produce the document if they have access or control of it; and*
- *answer questions put by the Inspector.*

Importantly, at least in "harmonised" jurisdictions there are provisions dealing with self-incrimination. Typically, in ordinary criminal matters an individual is not compelled to answer any questions or provide information which may tend to incriminate him or her. Such protection does not apply in WHS matters (other than in South Australia) as individuals are compelled to answer, subject to privilege. At no stage, absent a Court order, should privileged materials be shown or otherwise provided to an Inspector.

The trade-off for the loss of this right is, although a person must provide non-privileged incriminating evidence if asked, such evidence cannot be used against that person in criminal or civil proceedings (unless the evidence provided is misleading or fraudulent). "The catch?" The protection only applies where the information is provided to an Inspector when he or she is exercising their powers under legislation, and not where the information is provided voluntarily.

While cooperating with the Regulator as much as possible is the correct basis for approaching incident management, this cooperation should occur in a context where the Regulator complies with its obligations at law, including allowing legal representation and providing a statutory caution before requiring answers to be provided. This caution should refer to the provisions regarding self-incrimination and the protection afforded by client legal privilege. If the caution is not provided, or individuals are uncertain about whether it is necessary, there is no restriction on seeking a short break to obtain legal advice before embarking on answering questions or providing documents. ■

Key Takeaways

1. Notify a notifiable incident. If in doubt, seek legal assistance from your external legal advisors.
2. Speak to external legal advisors as soon as an incident occurs to determine the best approach to an investigation and privilege.
3. Understand that the Regulator is never really "off the record" when conducting an investigation and avoid giving opinions or speculation – stick to the facts.
4. Remember to obtain the caution and respond only to the specific question(s) asked.
5. Check the applicable local laws – States and Territories do have subtle variations.

[4] See for example Part 9 *Work Health and Safety Act 2011* (NSW).

Show me the money:

cashing out leave entitlements

Sam Cahill, ASSOCIATE

Employers and employees may occasionally find it mutually convenient to "cash out" a portion of an employee's paid leave entitlements. While this can serve as a useful tool for managing an employer's leave liabilities, the cashing out of leave entitlements is subject to strict rules, which can vary considerably depending on the type of leave involved and the source of these rules. In this article, we examine the most common rules relating to the cashing out of annual leave, personal/carer's leave and long service leave, and the opportunities they may present to employers.

Annual leave

Cashing out of annual leave is governed by the National Employment Standards ("**NES**") in the *Fair Work Act 2009* (Cth). The NES provides different rules depending on whether or not the employee is covered by an industrial instrument (a Modern Award or Enterprise Agreement).

Employees covered by a Modern Award

The NES provides that, where an employee is covered by a Modern Award, the employer and employee may only agree to cash out annual leave if this is expressly permitted by the terms of the relevant Award.[5]

During the Four Yearly Review of Modern Awards, the Fair Work Commission developed a new "model" annual leave award clause, which has since been inserted into most but not all Modern Awards.[6] This means that an employer will need to check the applicable Award to determine whether cashing out is permitted and, if so, the conditions that will apply.

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5 *Fair Work Act 2009* (Cth), s 92.

6 For example, see clause 29.9 of the *Clerks - Private Sector Award 2010*.

The model clause provides that an employer and employee may agree to cash out up to two weeks of annual leave in any 12-month period, provided that the employee will have at least four weeks of annual leave remaining after the cashing out takes effect.

Among other things, the model clause also provides that:

- each occasion of "cashing out" must be subject to a separate written agreement between the employee and employer;
- the agreement must include details of the amount of leave being cashed out, the amount of money being paid to the employee and the date on which payment will be made;
- the agreement must be signed by the employer and employee and, if the employee is under 18 years of age, by the employee's parent or guardian; and
- the employer must keep a copy of the agreement as an employee record.

Employees covered by an Enterprise Agreement

The NES provides that, where an employee is covered by an Enterprise Agreement, the employer and employee may only agree to cash out annual leave if this is expressly permitted by the terms of the Agreement.[7] Unlike Modern Awards, there is no standard annual leave clause for Enterprise Agreements. This means that an employer will need to check the applicable Enterprise Agreement to determine whether cashing out is permitted and, if so, the conditions that will apply.

For example, the *Inghams Enterprises (Lisarow) Enterprise Agreement 2014* includes a provision for cashing out annual leave. It provides that

"*An employee may request in writing to forgo one week of annual leave and to receive payment of that amount (including the leave loading) in lieu of taking the leave. Payment is conditional on the Company agreeing to the request. The employee must have at least four weeks of accrued leave remaining after the pay-out and can only request payment twice per year. Where an employee elects to receive a payment in lieu of taking annual leave, their annual leave entitlement shall be reduced by the quantum of the annual leave payment*".

Employees who are not covered by a Modern Award or Enterprise Agreement

The NES provides that, where an employee is not covered by a Modern Award or an Enterprise Agreement, the employee and employer may agree to cash out annual leave, provided that the employee will have at least four weeks of annual leave remaining after the cashing out takes effect.[8]

The NES also provides that:

- each agreement to cash out must be a separate agreement in writing; and
- the employer must pay the employee at least the full amount that would have been payable to the employee had the employee taken the leave.

[7] *Fair Work Act 2009* (Cth), s 92.

[8] *Fair Work Act 2009* (Cth), s 94.

We note that cashing out of annual leave is prohibited for employees whose employment is governed by the *Annual Holidays Act 1944* (NSW) (this will usually be public sector employees).

Personal/Carer's leave

The NES provides that, where an employee is not covered by a Modern Award or an Enterprise Agreement, he or she is not permitted to cash out personal/carer's leave.

Employees who are covered by a Modern Award or Enterprise Agreement may cash out personal/carer's leave if this is expressly permitted by the relevant Award or Agreement.[9] However, given that the NES does not require personal/carer's leave to be paid out on termination, it is very rare for Awards or Agreements to permit cashing out of this entitlement, and perhaps even rarer for an employer to be willing to do so.

Long service leave

Cashing out of long service leave is governed by the rules of the relevant State or Territory long service leave scheme.

Cashing out of long service leave is permitted in South Australia, Western Australia and Tasmania.[10] In these jurisdictions, an employee and employer may agree to cash out an entitlement to long service leave *after* the entitlement has been accrued. The agreement to cash out must be in writing (and, in South Australia, signed by the employer and employee).

In Queensland, an employee may only cash out long service leave with the permission of the Queensland Industrial Relations Commission ("**QIRC**").[11] The QIRC may grant a request to cash out long service leave only if it is satisfied that the payment should be made on compassionate grounds or on the ground of financial hardship.

Cashing out of long service leave is unlawful in New South Wales, Victoria, the Northern Territory and the Australian Capital Territory.

Key Takeaways

1. Cashing out annual leave can be an effective way of managing excessive leave liability.
2. Employers should consider engaging in discussions to cash out annual leave for employees who:
   - have at least six weeks of annual leave accrued; and
   - are not covered by an Award or Agreement, or are covered by an Award or Agreement that expressly permits cashing out of annual leave.
3. Employers with an Enterprise Agreement are subject to the cashing out provisions contained in the Enterprise Agreement. If the Agreement does not expressly permit cashing out of annual leave, given the changes that have been made to Modern Awards, consideration should be given to inserting such a clause when the Enterprise Agreement is re-negotiated.
4. There is limited capacity for the cashing out of personal/carer's leave and long service leave.
5. Given the penalties that can be enforced for breaches of the cashing out provisions, we recommend that employers take a cautious approach to employee requests to cash out leave entitlements. If necessary, an employer should seek specific legal advice on whether it can lawfully enter into a cashing out agreement with a particular employee, and if so, what conditions will apply. ■

9 *Fair Work Act 2009* (Cth), s 100.

10 *Long Service Leave Act 1987* (SA), s 5(1a); *Long Service Leave Act 1958* (WA), s 5; *Long Service Leave Act 1976* (Tas), s 10.

11 *Industrial Relations Act 1999* (Qld), s 53.

Sign on the pixelated line...

e-Mployment contracts in the digital age

David Weiler, ASSOCIATE

The way individuals, corporations and governments are signing documents is rapidly changing. In the current commercial context, communications are almost entirely undertaken in an electronic form. The challenge for businesses is to ensure that documents are executed in a way that is legally binding, despite the fact that there may not be a hard copy of the document created or returned to them.

A natural extension of these commercial practices is for employers to allow employees to sign their employment contracts using electronic signatures. The question from a compliance point of view is whether this impacts on the binding nature of the employment contracts and the enforcement of obligations contained in these contracts, such as restraints and extended notice periods.

When considering the appropriateness of e-signatures, it is useful to remind ourselves that even the President of the United States can satisfy the Constitutional requirement that he or she must "sign" a bill of Congress to turn the document into law by directing a subordinate to affix the President's signature using an auto-pen, when he or she unable to be in the same location as the document.[12]

Types of e-signatures

e-signatures fall into two principal categories:[13]

Electronic Signatures – this is simply an electronic symbol or process used to signify the execution, or acceptance of the terms, of an agreement. This type of e-signature might be a scanned signature or other form of electronic sign-off, or an email confirming acceptance of a document.

[12] Mark Knoller, *Obama uses autopen, again, to sign bill into law,* CBS News <http://www.cbsnews.com/news/obama-uses-autopen-again-to-sign-bill-into-law/>

[13] https://acrobat.adobe.com/content/dam/doc-cloud/en/pdfs/document-cloud-global-guide-electronic-signature-law-ue.pdf

Digital Signatures – this term describes a method that uses an encrypted digital certificate to authenticate the identity of the signatory. In contrast to an electronic signature, a digital signature is linked to certain identifying information and provides for greater certainty and security around the circumstances of the e-signature.

The legislative regime

In Australia, the legislative framework makes it clear what requirements are relevant when considering the use of e-signatures. Commonwealth and State/Territory governments have in place legislation designed to provide certainty around electronic transactions in the form of uniform laws, referred to as the *Electronic Transactions Act 1999* ("**Act**").

The uniform laws provide that where a law (either at the Federal or State/Territory level) requires a handwritten signature, this requirement can be satisfied electronically, (unless the regulations specifically exclude the Act from operating in respect of certain circumstances). For the purpose of the Act, an electronic signature will have the same weight as a handwritten signature, and therefore a digital signature is not necessary. However, there may be circumstances where a business will choose to use a digital signature instead of an electronic signature for greater certainty surrounding the authenticity of a particular transaction.

The requirements for a valid e-signature under these laws are threefold, with each one serving its own purpose. The important take away from these requirements is the idea of capturing a person's intention to be bound by a particular transaction or to undertake certain obligations.

Identification and intent

The overarching and leading determination of the validity of an e-signature under the Act is that it must use a method for identifying the person as well as indicating that person's intention with in respect to the information communicated.

For example, a person's email signature that sets out their contact information can be helpful as *part* of the method of identifying the person, but it is not helpful in indicating that person's intention in relation to a particular transaction (such as accepting an employment contract). Instead, there would need to be an acknowledgement from the sender that they are accepting the terms of the agreement, for example, in the body of the email. Another way of confirming a person's intention is requiring that person to take steps to tick a box electronically in order to accept the terms or indicate their agreement.

Reliability

The method used to communicate the signature must be appropriately reliable for the purpose for which the electronic communication was generated or communicated. This is viewed in light of all the relevant circumstances, including any indication by the parties themselves as to what is acceptable. For example, if an employment contract provides that an e-signature can be used, this would indicate the parties have deemed it to be reliable in the circumstances.

Consent

The final requirement under the Act is that the party receiving it (unless they are a government entity or official) must have consented to the method used to convey the e-signature. If a party requires a signature in a specific way (e.g. a signed original) then the provisions in the Act would be insufficient to establish the validity of the purported e-signature. This final point is crucial with respect to the broader use of e-signatures in relation to employment contracts.

Contractual relations

Given that e-signatures are permitted by law, the question then is whether there are any relevant constraints on using them in the context of employment contracts.

The employment relationship is one that lends itself to using e-signatures for a number of reasons, including:

- the preference to store documents electronically rather than using hard copies for contracts and policies;
- for the purpose of training and policy implementation, e-signatures give employers the ability to time-stamp and record when an employee has read and accepted a policy document; and
- drawing employees' attention to specific and important obligations in the employment relationship, such as a behaviour policy.

Some businesses are now shifting away from hard-copy "wet signatures", however in doing so there are some aspects to which employers should pay particular attention.

For example, where a term of a contract (such as a non-solicit/non-compete restraint) is particularly onerous, it may be helpful for an employer seeking to enforce such a clause that it had drawn the employee's attention to the particular provision , possibly with a specific acknowledgment of the term.

If the terms of an employment contract are contained separately from where an employee accepts the terms electronically, this may also increase the likelihood of the terms of the agreement being challenged. Having an integrated process where the terms of the contract and any relevant polices are accessed prior to any electronic acceptance of the terms will minimise this risk. ■

Key Takeaways

1. Have a robust system which is capable of identifying the signatory.
2. Always draw the terms and conditions of employment to the attention of employees prior to signing.
3. Ensure that the storage of employment contracts is capable of providing for both e-signatures as well as wet signatures in the event e-signatures cannot be used by the employee.

Great Expectations:

emerging leaders and diversity

Stacy Richardson & Gabriela Leighton

"Helping Millennials understand their personal leadership qualities, and how they can be used to create diverse and inclusive workplaces, is one of the essential strategic strands of talent management today", argues Stacy Richardson & Gabriela Leighton.

Emerging leaders face a vast number of exciting opportunities and challenges as they begin their leadership journey: from learning to transition away from being an individual contributor and discovering what great leadership looks like; to trying to identify the talent and support they need around them to succeed. Although organisations are certainly aware and, in varying degrees, supportive of these steps, they often overlook the opportunities that emerging leaders present for Diversity and Inclusion (D&I). They may be missing a trick because now, more than ever, organisations are prioritising diversity – according to PwC, 23% of CEOs have made it a top priority in 2016. They are running unconscious bias training, re-assessing flexibility, establishing employee working groups and setting up D&I councils to ensure diversity is no longer a 'nice to have'.

In fact, D&I may be one area where today's emerging leaders won't need much awareness training and education. As likely Millennials (Gen-Y'ers, born 1980-1995), they've been raised in more culturally and ethnically diverse times than ever before, where equality in organisations has become an expectation. Indeed, the main thing that differentiates this generation from previous ones is the huge diversity within it. As Deloitte found in its 2014 *'Millennial Survey'*, they are more socially and environmentally aware than their predecessors – more values-driven, purposeful in how they live and work, and driven by what they think is right, both for themselves and others. What's more, they're expected to make up 75% of the workforce by 2025.

Nonetheless, negative stereotypes about Millennials exist that contradict their potential for great leadership. We've all heard them (or said them!): Millennials are needy, individualistic, lazy and uncommitted. They have poor work ethics, little respect for authority and an overinflated sense of entitlement and expectation from their workplace. Yet data from YSC's Career Navigations Diagnostic shows this is more than likely not the case, and certainly not applicable to an entire generation.

Here are five key qualities that bust some of the stereotypes and illustrate how Millennial emerging leaders can become key early contributors to your organisation's D&I journey.

1. *Millennials are less concerned with autonomy than we think*

Debunking the self-obsessed myth. YSC data has shown that the greatest difference between generations is in how much less value Millennials place on autonomy compared with older generations, who, by contrast, placed autonomy high on their list of success factors. This aligns with more recent studies showing that Millennials are more likely to focus on teamwork and on creating a culture of connectivity when thinking of inclusion (Deloitte, 2015). In contrast with the more 'command-control' approach of previous generations, Millennials tend to establish collaborative practices proactively and tap into a team's existing diversity of thought.

2. *Millennials ARE loyal*

According to our data, Millennials are more likely than any other generation to postpone a career move out of loyalty to their current manager and organisation, or a group of people within it. The 'Millennial Leadership' study found that the top two most desired leadership styles were 'inspiring others with purpose and excitement' and 'leading democratically'. They want to work in – and, as leaders, create – cultures that engender followership. And they believe the

most effective way to achieve this is by creating truly inclusive working environments where individuals are encouraged to be themselves.

3. Millennials really want to develop people

More than previous generations, Millennials define success by the personal and professional growth they experience. What motivates them to move jobs is perceived stagnation in a role devoid of new challenges. They therefore tend to lead in a way that help others to grow and realise their professional ambition. How? By creating a 'psychologically safe' workplace where people can openly show vulnerability, share development areas and are keen to hear other perspectives. According to a '2015 Catalyst Survey', the most inclusive leaders are known to create psychologically safe work environments where there is a shared belief that the team is safe for interpersonal risk-taking. The impact on team members, as Prof Amy Edmondson of Harvard Business School noted in 2002, is that individuals learn and improve by openly and critically reflecting on current or past performance.

4. Millennials don't think they're the expert

Related to earlier points on collaboration and professional growth, Millennials are desperate to learn. Contrary to stereotypes, YSC's data says they are more likely than other generations (controlling for tenure) to postpone a role move due to concern over their level of experience or expertise. They are not as confident as others might like to think and, as leaders, are open to and keen for feedback and opportunities to learn from others. The upshot is that they aspire to create non-hierarchical, inclusive organisational structures that encourage learning and a culture of speaking up with new ideas or challenges to the status quo. These psychologically safe environments cultivate the right conditions for great results and innovation.

5. Like most of us, Millennials want to lead in a supportive, purposeful environment

YSC data shows that Millennials who feel 'extremely supported' by their organisations also value organisational prestige and an opportunity to lead others, much more than those who feel less supported – and more than older generations who also feel extremely supported. Millennials are realistic and honest about their ability to help others succeed; they will not seek or readily accept leadership opportunities where they know that strong support for their own and others' learning and development is unavailable or inconsistent. When visible and considerable support is in place, Millennials surge with purpose and a desire to lead. In the absence of it, they will move on.

Summing it all up

The challenge for organisations is to ensure that Millennials develop into leaders who can leverage these qualities, which have the potential to change the nature of our workplaces. The answer is to start now! Helping Millennials understand their personal leadership qualities, and how they can be used to create diverse and inclusive workplaces, is one of the essential strategic strands of talent management today. As emerging leaders, the earlier they can begin to re-shape the way D&I is lived (as opposed to 'used') in organisations, the better.

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> ***The top two most desired leadership styles were 'inspiring others with purpose and excitement' and 'leading democratically'.***

Founded in 1990, YSC is a leadership consulting firm, comprised primarily of consultants with backgrounds in psychology and the behavioural sciences, working with organisations to unlock the power of their people. YSC has over 100 consultants operating from 20 international YSC offices. ■

PCS Education and Thought Leadership:

underway with great success.

February saw the start of the PCS Education and Thought Leadership calendar, with Joydeep Hor, Managing Principal hosting the dynamic Advanced Strategic People Management program. Below are some comments provided by participants reflecting their experience in the program.

"A stimulating program that consistently met the high expectations of professionalism we are accustomed to when working with PCS. Useful pre-work and dynamic course delivery made all of the sessions extremely enjoyable, but also 'sticky' and pragmatic.

As always, it's a great privilege to have the opportunity to invest in development and learn from peers. A terrific learning environment with practical tools readily applied at work!"

Mars Petcare

"Thought provoking & challenging 2 days of learning & sharing of concepts & ideas. New approaches to frequently faced issues are very welcome."

BaptistCare

"Insightful, provoking, challenging! A great two days of excellent questions and awesome conversations!...Love Joydeep's style, charisma and inspiration. He truly knows how to leave a great impression through amazing story telling and candid sharing of experiences. Thank you!"

Avon Products Pty Ltd

"Great Course. A lot of useful things to take in & use in the workplace. Simple ideas that cut through the complexities of HR to help us manage people better and more efficiently."

Ascham School

Inside PCS

The PCS team was excited to welcome back our paralegal, Emily Setter, who returned from Shanghai in February 2017. Emily spent seven weeks working at River Delta Law Firm, the largest and longest-standing specialist labour and employment law firm in China.

Emily was engaged in a number of interesting projects, including presenting two seminars as part of the firm's Comparative Labour Law Series. Emily was also fortunate enough to be involved in a number of contract and policy reviews, and had the opportunity to sit in on a mediation and an arbitration at the Shanghai People's Court, which is a rare experience for foreigners.

When asked about the highlights of her professional experience, Emily wrote:

> *I was incredibly fortunate to spend my summer working with the talented and driven team at River Delta. I was exposed to the broad range of issues that can arise in the Chinese employment law context, and I have come away with an appreciation of just how complex and varied the law is, particularly between regions. The difficulties are often exacerbated by the inconsistencies in the enforcement of the law, which certainly made the work very challenging!*

I have no doubt that my soft skills have developed significantly as a result of working in an international context, and I am very grateful to the team at River Delta Law Firm for the opportunity to work with them and for sharing their expertise with me. ■

PCS Ambassador: Alicia Quirk

Alicia, an Olympic Gold Medallist at the RIO 2016 Olympics, is the firm's inaugural Ambassador. The addition of Alicia as PCS Ambassador reflects the dual commitments and passions of the firm for fostering an environment of high performance for female talent and rugby.

Alicia was born and raised in Wagga Wagga, NSW and grew up with her older sister and younger brother. She played many sports as a child until she decided to focus on Touch Football and she represented the Australian Women's Open Touch Football team at the World Cup in 2011. Following this tournament she received an invitation to play Rugby 7's. Alicia debuted for the Australian Women's 7's team in 2012 in London. Moving to Sydney in 2014 Alicia became one of the first professionally contracted Australian Women's 7's players.

Alicia played every minute of every game during Australia's successful Olympic Games campaign in Rio in August 2016. Following this extraordinary achievement, Alicia was inducted into the Wagga Wagga Sporting Hall of Fame and awarded an Order of Australia Medal.

Outside of rugby, Alicia recently completed her Bachelor of Physiotherapy degree through Charles Sturt University Albury. She studies Portuguese in her spare time.

Events

AUSTRALIAN OPEN TENNIS AND RUGBY SEVENS

PCS once again hosted the finals weekend of the Australian Open tennis that saw two historic finals being played (including Roger Federer's win) and entertained a group at the Rugby Sevens weekend at Allianz Stadium in the PCS suite (including a visit from PCS Ambassador Alicia Quirk).

HYPOTHETICAL

Now in it's fifth year, the PCS Hypothetical was a great success. The thought-provoking discussion addressed issues of mental health, domestic violence, transgender and medical documentation at work. Clients were entertained afterwards with cocktails and canapes to celebrate the end of the year.

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