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Save us from $8bn leave ruling hit, employers ask Government

13 September 2018 4:02pm

Employer groups have stepped up pressure on the Morrison Government to prevent casual workers "double dipping" by claiming annual leave on top of 25% pay loading in the wake of a crucial decision by the Full Federal Court last month.

The Australian Industry Group today warned that with at least 1.6 million casuals working on a regular, ongoing basis, back pay claims for annual leave could reach $8 billion.

Ai Group chief executive Innes Willox said some class actions were already planned against employers and a rapid legislative response was needed from the Federal Parliament (see Related Article).

"The significant potential costs involved could drive many businesses, small and large, into insolvency, leaving tax-payers to pick up the tab under the Fair Entitlements [Guarantee] legislation and trigger[ing] major job losses," he said.

Last month, the Full Federal Court upheld a ruling that a FIFO mine driver's regular predictable working arrangements meant he was an employee entitled to benefits under s86 of the Fair Work Act, even though he was engaged as a labour hire casual (see Related Article).

The government flagged that it would intervene if the labour hire company, WorkPac, appealed the decision to the High Court.

However, the deadline to apply for special leave to appeal the decision passes today, and while WorkPac refused to comment, the Ai Group said it understood the company did not intend to file an application.

Important part of award system for two decades: AiG

The Ai Group estimates of the flow-on costs of the Federal Court decision employed statistics from the ABS and the Household Income and Labour Dynamics in Australia (HILDA) survey which showed between 61% to 85% of Australia's 2.6 million casual workers were engaged in "regular" work with an employer, depending on what legal definitions were applied.

Willox argued it would be unfair to allow employees who have received a special loading as a casual to now be able to "double-dip" by also claiming annual leave and redundancy entitlements.

"The very widespread and longstanding practice across virtually all industries is that an employee engaged as a casual and paid as a casual is a casual.

"It is very common for casuals to work on a regular and systematic basis for extended periods.

"The Federal Court's decision is inconsistent with the whole notion of casual conversion clauses, which have been an important part of the award system for 20 years."

The Ai Group argues that Part 4-1 of the Fair Work Act should be amended to prevent an employer being ordered to pay compensation or a pecuniary penalty as it would result in "double dipping" by an employee who was engaged as a casual employee and paid as a casual employee at the time when the employment commenced.

It says the FW Act should also needs to be amended to define a "casual employee" as, in effect, an employee engaged as a casual and paid as a casual, regardless of the pattern of work.

The Ai Group cited amendments passed in 2001 to the Workplace Relations Act 1996 to address the "adverse impacts" of the Federal Court's 2001 decision in Hamzy v Tricon International Restaurants trading as KFC.

Flawed business model: ACTU

The Australian Mines and Metals Association is also pressing the government for a legislative fix to the WorkPac precedent.

However, unions today seized on the Ai Group calculations as evidence that a majority of Australia's two million-plus casuals were employed in regular and on-going work.

The ACTU said the precedent set by the WorkPac decision could impact millions of Australian workers who had been "incorrectly" defined and treated as casuals.

"It is clear that employers trying to avoid paying entitlements to their staff can no longer do this by simply classifying them as casuals," said ACTU president Michele O'Neil.

"This goes right to the core of challenging the flawed business model that promotes insecure work with few rights for working people.

"For too long employers have tried to cut corners by hiring people on casual contracts so that they can deny them their proper leave entitlements."

CFMEU national president Tony Maher, meanwhile, accused the Ai Group of "hysteria" over the impact of the Workpac decision which underlined the extent to which Australian workers have been ripped off by the ‘permanent casual’ trend.

"The AIG’s own analysis shows that a majority of Australians employed as casuals work on a regular, on-going basis," he said.

"If the Skene decision has a cost impact, that shows the extent to which workers’ lost pay and entitlements have been subsidising company profits."

"The court has been very clear that employers can’t just label workers as casual because they want to and it’s cheaper."

Maher said the employer claim that casual workers are "double-dipping" if they claimed leave entitlements did not stack up because many casual workers are paid less than permanent employees.

"In coal mining where Paul Skene was employed, casual labour hire workers are typically paid an hourly rate of 30% less than permanents and they have no paid holidays, sick leave or job security."

"This isn't double dipping, it's a double whammy for casual workers. Employers should stop complaining and accept the jig is up."

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