

Workers in International Call Centres – what are your legal obligations?

Over the past decade, access to relatively inexpensive labour in countries other than Australia, coupled with significant developments in technology has resulted in an expedient rise in international call centres. But with this new way of doing business comes new legal considerations. What are your responsibilities for staff employed in countries other than Australia? Are they the same as for Australian based staffed?

Do I need to pay the same wage to workers in an international call centre as I do to workers in Australia?

The answer is no, unless...

Australian minimum wage provisions arise under the Fair Work Act 2009 ('FWA'). The FWA will apply if the employer is a 'national system employer' as defined in the FWA and the employees are 'national system employees' as defined in the FWA. However, there must also be 'an appropriate connection with Australia' or an express provision in the FWA extending its coverage to areas outside of Australia. For example, s33 of the FWA extends the coverage to some ships and oil rigs and other off-shore platforms. Courts have found that unless an employment contract is 'in and of Australia', then the provisions of the FWA won't regulate that contract. In deciding whether a contract is 'in and of Australia' the factors a court will consider include where the employing entity is based and registered, where the employees live, where the contracts were made, where taxes and other payments are made, and similar factors.

There is also a provision that extends some rights and obligations to cover 'Australian employers' which includes corporations formed within Australia and their 'Australian-based employees'. The term 'Australian-based employees' is much broader than we might expect. It includes employees whose primary place of work is Australia. However, it also includes employees who work anywhere outside of Australia if they were 'engaged' within Australia or its external territories. This means if the call centre employees live overseas, were recruited overseas, if social security payments and income tax are paid overseas, and the work is carried out overseas, they are almost certainly not covered by the FWA.

However, if employees were recruited in Australia and are employed by an Australian registered corporation, certain parts of the FWA will apply to them. If they were recruited outside Australia but are paid through Australian bank accounts, have income tax deducted and paid to the ATO, and begin and end their duties in Australia, then they could still be covered by the FWA even if they perform most of the work outside of Australia. Although this means questions of whether and to what extent the FWA applies to a particular employee will be determined by their specific circumstances, call centre workers recruited overseas are likely to be excluded from the FWA in contrast to, for example, airline flight crews recruited and based in Australia, who are likely to be covered.

What about WHS laws?

Workplace Health and Safety ('WH&S') laws operate similarly. State and Territory laws will not operate outside of their own jurisdictions unless they expressly provide otherwise. However, as offences under WH&S laws are also criminal offences, and as various jurisdictions provide for extraterritorial accountability where there is a sufficient nexus with the state, there is the potential for action to be taken for serious breaches of WH&S laws even where incidents occur overseas. The Federal Work Health and Safety Act 2011 states that s 15.1 of the Criminal Code (Cth) applies to offences under the Act. That section of the Criminal Code provides that the jurisdiction applies to offences that occur wholly outside Australia if the person committing the offence is incorporated in Australia.

However, an Australian employer can have health and safety obligations to their employees who work outside of Australia. An Australian employer - or 'Person Conducting a Business or Undertaking' ('PCBU') – where there is a high level of involvement of that Australian business in overseas operations could potentially create some obligations under Australian law. In practice, however, Australian businesses who do not send Australian employees to work overseas and who do not take an active role in running the overseas business are more likely to only have the obligations imposed by local laws.

Persons Conducting a Business or Undertaking ('PCBU's) and others such as persons with management or control of a