



Employment Practices – best-practice tips for principals

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Real estate agency principals will be aware that there are certain legislative obligations placed upon them insofar as ensuring that appropriate measures and processes are adopted when appointing and managing agency staff.

Unfortunately, for many principals, knowing just how to best manage those matters can seem overwhelming when balanced with the myriad of other matters which must be juggled in the course of overseeing the day-to-day operations of their business.

The Fair Work Ombudsman (**FWO**) is the regulatory authority tasked with ensuring compliance with Australian workplace laws. The FWO has the power to investigate any suspected breaches of workplace laws and, where appropriate, initiate prosecution proceedings. The penalties which may be imposed in respect of breaches (even where inadvertent) can be significant at up to \$54,000 for a corporate entity and \$10,800 for an individual per breach.

To assist principals in understanding their core obligations, we provide below, a brief overview of relevant factors which they ought to have in contemplation when engaging new staff, altering the terms under which a staff member is engaged, or when managing the workplace performance and conduct of employees.

Appointment of workers

It is not uncommon for real estate agencies to engage staff under differing arrangements depending on the nature of the role and level of experience of the individual concerned (that is, some individuals may be retained under contracts of service in an employer/employee relationship, whereas others may be engaged via contracts for service in a hirer/contractor relationship).

However, as strict obligations apply for the retainer of staff under either arrangement, it is important that principals give consideration to the true nature and purpose of the appointment before determining which arrangement is appropriate.

Principals must comply with their obligations under the *Independent Contractors Act 2006* (Cth) (**ICA**) and the *Fair Work Act 2009* (Cth) (**FWA**) when appointing workers.

The distinction between an employee and an independent contractor is premised on multiple factors and the courts will have regard to the totality of the individual arrangement to determine the true nature of the relationship. Criteria which are often considered include the degree of control which the principal exercises over the individual, whether there is exclusivity of service, the hours of work, the manner in which the individual is remunerated, and who is responsible for the provision of equipment etc.

Where an employer engages an individual under an independent contractor agreement for the purpose of avoiding responsibility for employee entitlements, it will be deemed to be a sham contracting arrangement. Given the significant penalties which apply for sham contracting, and having regard to the fact that the distinction between a contractor and employee can often be difficult to discern, principals are urged to take independent legal advice prior to appointing individuals under an independent contractor agreement.



Contractual terms

It is equally important that both the employer and employee (or hirer and contractor) have certainty as to the terms of the retainer referable to the work being carried out.

Often, where a term of a contract is ambiguous, the contract will be read down in favour of the worker, with potentially significant consequences for the employer/hirer. Moreover, without sufficient clarity, disputes may arise which have the potential to not only become costly but which may expose the parties to the risk of an irreparable breakdown in the commercial relationship.

Many agencies utilise precedent employment contracts which are available via industry subscriptions. These documents have usually been prepared by qualified lawyers and provide appropriate clauses for an employee who is to be engaged under standard terms. However, if it is the principal's or the individual's intention to include flexible or modified terms, then it is important that independent legal advice is obtained to ensure that the intended terms are lawful, and that they are properly drafted within the contract such as to be binding upon the parties.

An improperly drafted contract may see the whole, or part, of the contract rendered void, or worse still, deemed to be in contravention of the FWA, exposing the agency and its principals to significant penalties.

Implementation of workplace policies and procedures

It is also important for agencies to have in place a set of documented policies and procedures to ensure that all staff members are informed of, and engage in, appropriate behaviours within the workplace.

Such policies should include:

- Professional code of conduct;
- Grievance handling procedures;
- Social media use policies;
- Policies pertaining to workplace bullying, harassment, sexual-harassment and discrimination;
- Occupational health and safety policies;
- Clearly documented performance management procedures, leave policies and flexibility arrangements etc.

All new staff members should be inducted into the agency's policies and procedures upon first commencing work, and refresher training should be conducted annually (or earlier, if it becomes necessary to revise the policies in the meantime). Principals should ensure that they acquire the staff member's signed acknowledgement of their understanding of the policies. It is also prudent to ensure that a complete copy of the company's documented policies is readily accessible to all staff members during work hours.

It is imperative that the agency's policies and procedures comply with the *Real Estate Industry Award 2010*, the National Employment Standards and the FWA. If in doubt, always seek independent legal advice.

Conclusion

The key objective for managing a successful business is to provide a harmonious working environment which encourages increased productivity and strong staff retention.

The first steps in achieving these objectives are:

- having in place lawful and binding retainers which clearly set out the nature and scope of staff member's roles, and the terms under which they are to perform and be rewarded for their work;
- adopting appropriate workplace policies and procedures to ensure that staff members are properly informed of their obligations concerning their workplace conduct, and which otherwise promote a harmonious and respectful working environment; and
- ensuring that staff members are treated fairly and respectfully when addressing issues of underperformance or misconduct.

Members of the REIQ Professional Indemnity Insurance Scheme (brokered by Aon Risk Solutions and underwritten by QBE Insurance) who encounter any concerns regarding the appointment or management of staff members are urged to call the Carter Newell REIQ Scheme toll free phone line for advice and assistance (1800 624 264).