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Exam Answer Guide for Workplace Law

- CA = Corporations Act 2001 (Cth); FWA = Fair Work Act 2009 (Cth); EOA = Equal Opportunities Act 2010 (Vic); OH&S = Occupational Health and Safety (Vic); WIRC Act = Workers Injury rehabilitation and Compensation Act 2013 (Vic)

When determining the relationship (employment contract)

- **Step 1: Does it fulfil all contractual elements?**
 - Offer and acceptance: offer of job, acceptance is starting work/signing
 - certainty of terms: not a be all end all element - *Byrne v Australian Airlines*
 - intention to create employment relationship: as opposed to favour- *Dietrich v Dare*
 - consideration: remuneration is key
 - legality: not child, illegal activity ect.
- **Step 2: Does it outline/state relationship?**
 - **through agency = 'labour hire'** – *Building Workers Industrial Union of Australia v odco*
 - Use FWA definition of employee/employer if relationship not clearly stated – s 13, 14
 - Control test: high control = likely employee/employer – *Stevens v Brodribb Sawmilling*
 - Indica test: look at listed factors to determine employee or IC – *hollis v vabu*
 - Volunteer: not employee – *Teen Ranch v Brown*
 - Work experience: not employee – *Pacesetter Homes v ABLFU*
 - Significant contribution of student worker: potential employee – *Rowe v Capital Territory*
- **Note: likely will just state they are an employee so all actions below can apply**

Full Notes Summary Overview

Background (topics 1-4)

Determining employment relationship

- **Note: there is two types of workers – employees and independent contractors**
- In order to establish any workplace claims, must establish what the relationship is between the parties via examining the contract (if there is one)
 - Can only claim certain things if you are an employee: unfair dismissal, benefits under NES, modern awards
- When considering if the individual is covered by the FWA, they must come under:
 - S 13: Defines national system employee
 - S 14: defines national system employer
- Use the multifactorial test – *stevens v brodribb sawmilling ;hollis v vabu*
 - **Note: will likely be evident in the exam if they are an employee or contractor so don't need to go through all the test elements.**

Terms of contracts

- Often employment contracts will not detail all rights and obligations as they allow for statute, policies, implied terms ect. to fill the gaps – *byrne v Australian airlines*
- FWA does not have terms that cover all employment relationships, therefore the facts and the contract are key to determining the terms which include:
 - **Express terms from contract**
 - **Statutory provisions**
 - NES, Legislation (OH&S, FWA, WIRC Act ect)
 - **Any awards or enterprise agreements ('industrial instruments')**
 - Will generally only find EA's at workplaces with a union present as they are not compulsory agreements for workplaces to have
 - **Any workplace policies**
 - HR procedures, code of conducts, operative procedures ect.
 - **Any 'implied' terms**
 - Fact = examination of the terms against the 'business efficacy test'
 - custom/usage = so well-known that everyone would reasonably presume they apply
 - law = implied duties of employment (Created by common law + statute)
 - **incorporated terms**
 - expressly incorporated
 - by implication due to mutual creation of the obligation

| Statutory entitlements | Industrial instrument entitlements | Contractual Entitlements |
|--|---|--------------------------------|
| S 44 FWA = NES <i>Civil remedy provision</i> | S 45 (award) & 50 (EA) FWA <i>Civil Remedy Provision</i> | Express terms Implied terms |
| S 539 FWA <i>Standing and Forum</i> <i>'what court and where'</i> | S 539 FWA <i>Standing and Forum</i> | Common law |
| S 545 FWA <i>Compensation Orders</i> | S 545 FWA <i>Compensation Orders</i> | Remedies |
| S 546 FWA <i>Pecuniary Penalties</i> <i>Max.63,000 corp</i> <i>12,000- individual</i> | S 546 FWA <i>Pecuniary Penalties</i> | |