

Key changes to Australia's workplace laws

Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022

The [Fair Work Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022](#) was passed into law on 6 December 2022, significantly reforming the legal framework of Australia's workplace relations system. In short, these measures further raise the level and broaden the areas of responsibility that Australian employers are now legally required to assume for their employees.

The key changes to Australia's workplace laws, particularly those affecting employment agreements, enterprise agreements, and workplace policies and procedures, are outlined below.

Failure to comply with the new laws will expose employers and some individual managers to significant monetary penalties and other court orders.

Secret no more – pay confidentiality in employment contracts

Effective 6 December 2022, the Act prohibits pay secrecy clauses in employment agreements to increase transparency in workplaces and reduce the risks of gender pay discrimination, (and presumably other reasons for discrimination). Employees have a workplace right to choose to disclose (or refuse to disclose) their remuneration and terms of employment that may determine remuneration outcomes.

For employers this means that pay secrecy clauses in employment contracts have no effect. There may be adverse implications for workplaces where employees consider their remuneration is inequitable.

What this means in practice is that employers will need to explain the basis for legitimate pay differentials, which could include more transparency about the relative objective performance of employees. Further, from 7 June 2023, if employers put forward employment contracts which contain pay secrecy provisions, they may be liable for penalties of up to \$66,600 per contravention.

Job advertisement crackdown

As of 7 January 2023, employers are prohibited from putting out advertisements for ads which include pay rates which breach the Fair Work Act or any other fair work instrument (i.e. an award or enterprise agreement). These changes have been brought in to protect jobseekers who are entering the workforce for the first time, in particular migrants and linguistically diverse workers.

The effect of this change is to prevent employers from advertising work where pay is less than the minimum wage. The legislation will apply retrospectively to any ads which had been published prior to the commencement date of the rules.

For employers this means that if you currently have any ads which are advertising work for less than the minimum wage, you should take immediate steps to remove these ads, even if they were published prior to 7 January 2023. If a complaint is made about an ad which breaches these provisions, employer may be liable for fines of up to \$16,500 per infringement.



Family and domestic violence leave

From 1 February 2023 (or 1 August 2023 for small businesses), all employees, including casual and part-time, will be entitled to an additional 10 days of paid family and domestic violence leave each year as part of the National Employment Standards.

The definition of family and domestic violence has been expanded to include physical violence, sexually abusive behaviour, verbal abuse, emotional or psychological abuse, stalking, financial abuse, spiritual or cultural abuse, serious neglect, damage to belongings, technological assisted abuse, and abuse or threats to pets.

For employers this means:

- Educating and training managers on the content of the new laws and how to deal with applications for the leave – including what you can and cannot ask the employee;
- Reviewing and updating systems, policies and procedures to ensure compliance;
- Communicating the relevant changes to staff; and
- Implementing record-keeping arrangements to track leave taken.

Practically, for employers this means that the overall cost of employing someone now needs to anticipate that the employer is required to take responsibility for a wide array of private and domestic circumstances of their employees.

Employer liability for discrimination

Effective 6 March 2023, sexual harassment is expressly prohibited under the Act, together with further protections for intersex status, gender identity and breastfeeding. It also prohibits people from being subjected to a hostile work environment based on their sex and introduces a positive duty for employers to prevent sexual harassment in the workplace.

In addition to the existing power of the Fair Work Commission to issue stop sexual harassment orders, the Act grants the Commission increased powers to deal with disputes about sexual harassment by conciliation, mediation or making a recommendation or expressing an opinion. If a dispute cannot be resolved in this way, the Commission may deal with the dispute by arbitration and can make an order for compensation for lost wages or require a person to do something that is reasonable to remedy any loss or damage suffered.

Applications to the Commission can be made by a person or group of persons alleging sexual harassment or by an industrial association on their behalf.

These new provisions exist alongside with the introduction of a *positive duty* for employers to prevent sexual harassment in the workplace as outlined in the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022*. In addition to the positive duty, it also prohibits people from being subjected to a hostile work environment based on their sex. This means that employers will be liable for any sexual harassment which is committed by an employee or agent, unless the employer can prove that they had taken “all reasonable steps” to prevent that harassment taking place.

For employers this means they must take immediate steps to review and update their processes to fulfil this positive duty, not just to respond to issues that may arise in their workplace. The obligation to take “all reasonable steps” means that employers must be proactive in their approach to these issues to maintain the safety and wellbeing of their employees, and avoid liability under the Act. How this positive duty is fulfilled is not entirely clear, and employers will need to tread a careful line



between invasive enquiries into their employees' private lives (including sexual preferences) and reacting to issues that arise in the workplace.

Reasonable steps will vary between employers depending on a number of factors, including, but not limited to:

- The size of the organisation;
- The nature of the work;
- Work conditions; and
- Historical instances of discrimination.

However, it is important that every employer put into place policies and procedures to proactively address discrimination in the workplace, with a particular focus on training and awareness of the issues. As these changes will be effective from June, it is vital that employers take steps **now** so that they do not fall prey to claims for non-compliance.

Flexible Work Requests and Unpaid Parental Leave

Effective 6 June 2023, the Act:

- Expands the scope of flexible work requests to include circumstances where employees are caring for family members over 55 years of age or in family and domestic violence circumstances;
- Increases employer obligations when an employee requests an extension to unpaid parental leave (including for stillborn babies); and
- Requires employers to undertake certain procedural steps before refusing any request for flexible working arrangements or unpaid parental leave made by an eligible person under the Act.

The requirements from June 2023 will be:

- To respond to a request within 21 days;
- Discuss the request with the employee;
- Make a "genuine effort" to accommodate the employee;
- Consider the consequences for the employee if the request is refused; and
- Provide a written response outlining the business grounds on which the request is refused, any other changes the employer will make to assist the employee (or state clearly that no other changes will be made), and giving the employee information on how to refer the matter to the Fair Work Commission if they dispute the decision.

The Fair Work Commission also has increased power to arbitrate disputes about flexible work arrangement applications and unpaid parental leave disputes.

For employers this means that the process they must follow on receiving an employee's request for flexible work arrangements or extended unpaid parental leave has become more prescriptive and they must review their processes around future requests for flexible work arrangements and unpaid family and domestic violence leave.

Practically, this will mean that the overall cost of employing someone now needs to anticipate that the employer is required to take responsibility for certain private and domestic circumstances of their employees.

Fixed term contracts severely limited



Liability limited by a Scheme approved under Professional Standards Legislation



Effective 6 December 2023, the Act seeks to restrict the use of fixed or maximum-term contracts by employers. New restrictions which will be put in place include:

- No contracts to be provided which have a term of 2 or more years (including any extensions which may have been offered);
- No contract can be extended more than once;
- No “new” contracts can be issued to the same employee with an identical or substantially similar role to previous contracts;
- Fixed term contracts which are issued must include a Fixed Term Contract Information Statement; and
- No new contracts can be issued to the same employee where there is substantial continuity of the employment relationship in circumstances where the total term of the contracts exceeds 2 years, or there are provisions for extensions within the new or previous contract.

There are limited exceptions, including if:

- The role requires specialised skills to complete specific tasks;
- The contract is part of a specific training arrangement;
- The employee is engaged to undertake essential work during a peak demand period;
- The employee is engaged to undertake work during emergency circumstances or during a temporary absence of another employee;
- The relevant employee earns over the high-income threshold (\$162,500 per annum at the date of this Solution Brief) for the first year of the contract;
- The contract related to a position that is funded wholly or in part by the government;
- The employee works in a governance role and the rules of a corporation or association specify a length of time that the appointment can be in place; or
- A modern award permits the fixed or maximum term.

If an employer enters a fixed or maximum term contract with an employee that contravenes the restrictions, then the expiry mechanism will be considered invalid although the remainder of the contract will operate unaffected.

For employers this means your ability to engage employees on fixed term or maximum term contract will be severely constrained. If an employer maintains a fixed term contract which breaches the above, it will be regarded as an ongoing contract, and will be subject to the usual termination rules in applicable legislation. This may mean an employee is entitled to notice of termination of their employment, redundancy entitlements, and protection from unfair dismissal. In practical terms, it will most likely mean redundancy pay in addition to notice, if the need for the role is genuinely limited in term.

What next?

Overall, these measures further broaden the areas, and raise the level, of responsibility that Australian employers are now legally required to assume for their employees. Modern workplaces must be proactively patrolled for actual and potential incursions on individual preferences, and also anticipate, support, and accommodate prescribed private and domestic scenarios.

From a social and maybe even ‘moral’ perspective, it is hard to argue with the intent of any of these measures. However, how well ‘employers’ (of any size) are really equipped to assume this additional responsibility from a practical day-to-day perspective remains an open question.



What we can do for you

In the changing legislative landscape, we are here to help you navigate the complexities of employment law and your obligations. If you are an employer in need of advice, we can provide guidance including:

- Reviewing your existing contracts and policies to provide advice on compliance and areas of improvement;
- Assisting you to implement new contracts and policies to ensure that your terms and conditions are up to date and can protect you from unforeseen legal claims;
- Providing recommendations on implementation of policies and trainings required to maintain your obligations as an employer; and
- Advising you on the latest changes to legislation and case law, and what that means for your workplace.

If you would like to speak to an experienced employment lawyer about these significant changes to our Australian workplace laws, call us on **02 9199 8597** or email us at wehelp@jfmlaw.com.au. Further information can also be found on our website at www.jfmlaw.com.au



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