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Labor's Industrial Relations Reforms and Your Business

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

Came into force on 6 December 2022 with various commencement dates for the following:

- New legislative objects – Gender equality and job security
- Prohibiting pay secrecy clauses
- Prohibition of sexual harassment in the workplace

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

- Enforceable right to request flexible work arrangements and unpaid parental leave
- Limiting the use of fixed term contracts
- Multi-employer bargaining

1. New objectives in Fair Work legislation and Modern Awards

- The need to improve access to secure work across the economy;
- The need to achieve gender equality in the workplace by ensuring equal remuneration for work of equal or comparable value, eliminating gender-based undervaluation of work and providing workplace conditions that facilitate women's full economic participation.

Fair Work Commission (FWC) is required to take these matters into account when performing its functions including when varying Modern Awards and reviewing and setting minimum wages.

2. Prohibiting pay secrecy clauses

From 7 December 2022

- For new contracts – have no effect and cannot be enforced
- For existing contracts – grandfathered until varied or enter into new agreement

From 7 June 2023

- Civil penalty provision applies for new contracts entered into with pay secrecy clauses but not for existing contracts until varied or renewed



New Workplace right for employees to disclose or not disclose remuneration and ask any other employee (whether with same employer or not) about their remuneration and any other terms and conditions reasonably necessary to determine remuneration outcomes e.g.s. pay increases, bonus etc.

Whilst employees have the right to ask, that does not require an employer to disclose remuneration of other employees which the employer will be expected to treat as confidential.

3. Prohibition on sexual harassment

Commences 6 March 2023

New FWC sexual harassment stop orders already in place and introduced by the Morrison Government

From 6 March 2023 there will also be imposed:

- Pecuniary penalty provisions for sexual harassment;
- Vicarious liability for employers.

FWC will not have power to award compensation but applicants will have two years to bring claims

4. Enforceable right to request flexible work arrangements and extend unpaid parental leave for a further 12 months

Commences 6 June 2023

The right to request Flexible Work Arrangements (FWA) has been extended to include employees who are pregnant as well as situations where an employee, or a member of their immediate family or household, experience family and domestic violence.

Employer must still respond in writing within 21 days but must have first discussed and consulted with employee prior to refusal and genuinely tried to reach agreement.

Employee has a new right of appeal to FWC which must attempt to resolve the dispute primarily by conciliation unless there are exceptional circumstances in which case arbitration will apply.

*See Commissioner Johns' approach in
Fyfe v Ambulance Vic [2023] FWC 49*

Held that there were no reasonable business grounds for employer to reject a different night roster arrangement of a paramedic caring for her three young children and employer had not sought to reach agreement as will now be required



Request to extend unpaid parental leave for a further 12 months can be refused on reasonable business grounds and the following additional guidance is now provided:

- The extension of the period of unpaid parental leave request would be too costly;
- There is no capacity to change the working arrangements of other employees to accommodate the extension of unpaid parental leave requested;



- It would be impracticable to change the working arrangements of other employees, or recruit new employees to accommodate the extension requested;
- The extension of the period of unpaid parental leave requested would likely result in a significant loss and efficiency or productivity;
- The extension requested would be likely to add a significant impact on customer services.

Specific circumstances of the business including its size and nature are relevant to whether the employer has “reasonable business grounds” to refuse a request.

5. Limiting the use of fixed term contracts

Commences 6 December 2023

Does not apply to existing contracts but an existing contract is counted as a consecutive contract.

Limits the use of fixed term contracts (or maximum term contracts which are more common) for the same role beyond two years or two consecutive contracts, whichever is the shorter, including renewals.

This means that from 6 December 2023 a fixed term contract is otherwise lawful and becomes a contract at large on an ongoing basis without an expiry date thereby potential exposure to reasonable notice claims at common law.



Will need to provide a new Fixed Term Contract Information Statement in the prescribed statutory form to employees entering into a fixed term contract.

There are exceptions where fixed term contracts beyond two years are allowed when genuinely necessary and appropriate such as:

- Performing a discrete task for a fixed period;
- Apprentices and trainees;
- Undertaking essential work during a peak demand period (such as a harvest);
- Temporarily replacing another employee on long leave (such as WorkCover); or
- Earning above the high income threshold, currently \$162,000 p.a.

Tips for employers

1. Need to review existing fixed term contract arrangements to prepare for the provisions coming into force on 6 December 2023;
2. Include a notice of termination provision within the contract.

6. Multi-Employer Bargaining

Commences 6 June 2023

Utilises, renames and expands the existing enterprise bargaining streams to create a new emphasis on multi-employer bargaining away from single-enterprise bargaining through:

- Single Interest Employer Authorisations (**SIEA**);
- Supported Bargaining which replaces the low paid bargaining stream; and
- Cooperative Workplaces Bargaining Stream which replaces the current multi-enterprise agreement stream on a voluntary basis.

7. Single-enterprise Agreements

New initiation process for existing enterprise agreements with an expired nominal expiry date.

A bargaining representative (i.e. union) can invoke bargaining for a new agreement by giving an employer a written request to commence bargaining for a new agreement if:

- The proposed agreement will replace an earlier single-enterprise agreement that has passed its nominal expiry date;
- No more than five years has expired since the nominal expiry date; and
- The proposed agreement will cover the same, or substantially the same group of employees as the earlier agreement; and
- A SIEA did not previously operate in relation to the making of the earlier agreement.

Tips for employers

1. No need for union to obtain Majority Support Determination of 51% of workforce to compel employer to bargain.
2. Where requirements above are met, employers are required to bargain for a new enterprise agreement and subject to good faith bargaining obligations and protected industrial action.
3. This is more attractive than it may appear as a single-enterprise agreement in force will protect an enterprise from being “roped” into multi-employer bargaining

8. Single Interest Employer Authorisation

Union or other employer can apply to the FWC to require the employer to bargain with other employers on a multi-employer or single interest basis.

FWC must grant the order if:

- The employers have “clearly identifiable common interests” which may include the nature of their enterprises and terms and conditions of employment in those enterprises, their geographical location, and where they are subject to a common regulatory regime;
- The operations and business activities of the common interest employers are “*reasonably comparable*”;



- It is not contrary to the public interest for the common interest employers to bargain together; taking into account the broader economic ramifications of including a new employer in a single interest employer authorisation or agreement;
- Employers and unions have had an opportunity to express their views to the FWC on whether the bargaining in the stream should be authorised; and
- At least some of the employees are represented by a union.

Exclusions to Common Interest Employer Bargaining or Agreements

- Small business with fewer than 20 employees except by consent;
- Employer with under 50 employees can make case that it is not a common interest employer and/or that its operations and activities are not “reasonably comparable” with those of the other employers to be covered by the agreement;
- Employers and employees undertaking defined types of building and construction work;
- Employer does not consent and there is no majority support among the employees of each employer to bargain for the proposed agreement;



- Good faith bargaining is already occurring in relation to a single-enterprise agreement;
- There is a history of effective bargaining between the parties;
- Less than 9 months have elapsed since the normal expiry of the previous single-enterprise agreement;
- The employees and employers are already covered by a current single-enterprise agreement or employer has agreed in writing to bargain for a replacement single-enterprise agreement.

9. Changes to role of FWC in Bargaining Disputes

Commences 6 June 2023

FWC will be empowered to resolve bargaining disputes that have gone on for a minimum period of nine months or at least nine months has elapsed since the nominal expiry date of the previous enterprise agreement.

FWC can make an intractable disputes declaration and arbitrate unresolved matters after the expiration of a post declaration negotiation period for a specified time.

10.Changes to Enterprise Agreement Making Process

Commences 6 June 2023

Removal of some of the more prescriptive pre approval requirements for enterprise agreements to be replaced by a single broad requirement that the FWC be satisfied that the agreement has been genuinely agreed – watch this space!

For proposed multi-employer single interest enterprise agreements the employer must obtain written agreement from each bargaining representative for the agreement prior to putting to the vote.

11.Changes to Enterprise Agreement Approval Process

Commences 6 June 2023

Clarify that the Better Off Overall Test (**BOOT**) is a global assessment to ensure each employee is better off overall, and is not a line by line comparison between the proposed agreement and the relevant modern award.

Require the FWC to consider only existing patterns or kinds of work, or types of employment that are reasonably foreseeable, rather than hypothetical possibilities as currently happens.



However, the agreement can be reassessed against the BOOT after it has been approved if relevant circumstances were not properly considered upon approval and for the agreement to be amended including with retrospective effect.

FWC can also will make amend agreement (including with retrospective effect) where it is necessary to comply with BOOT.

12.Zombie Agreements entered into pre-2009 but still in use

Must now expire on 6 December 2023 and employers must give six months notice to all affected employees.

If no new agreement is entered into by that date, then award conditions will apply to employees.

Furthermore, the termination of other enterprise agreements which have expired on their normal expiry date are now subject to much more stringent requirements with contested applications to be determined by a Full Bench of the FWC and expressly requiring consideration of whether the application is related to bargaining of a new agreement.

A blurred, low-angle photograph of a busy city street with many people walking. The image is overlaid with a dark blue semi-transparent filter. A bright blue triangle is positioned at the top center of the page.

Q&A

**Online viewers:
Where possible we will
answer questions submitted
via the chat panel in Teams.**



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Qualifications:

- ▶ BA and LLB (Hons), Law, Economics, Politics, University of Melbourne
- ▶ LLM, London School of Economics
- ▶ Accredited Mediator (LEADR) (Association for Dispute Resolution)

Area of Practice:

- ▶ Workplace Relations

Specialisations:

- ▶ Employment & Enterprise Agreements
- ▶ Entitlements & Award Interpretation
- ▶ Termination & Dismissal Disputes
- ▶ Disciplinary Process & Termination
- ▶ General Workplace Compliance
- ▶ Restructuring & Redundancy
- ▶ Transfer of Business
- ▶ Independent Contractors
- ▶ Strategic HR Risk Management
- ▶ Restraints of Trade
- ▶ Bullying Complaints
- ▶ Investigations

Experience:

Tim advises on all aspects of employment law including enterprise bargaining, equal opportunity, entitlements and awards interpretation, termination and dismissal disputes, disciplinary process and termination and restructuring and redundancy.

He acts for employers across a broad range of industries including retail and manufacturing, professional services, higher education and research, in addition to executives on their individual employment issues. He also works with insolvency administrators on employment aspects of restructuring.

He is also an accredited mediator and regularly advises employers in relation to mediations and conciliations, bringing a strategic approach to the resolution of workplace issues and problems.

Tim represents clients in the Fair Work Commission, as well as all Victorian and Federal Courts.