

SERIES 3: JOB SECURITY MEASURES

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

The [*Fair Work Amendment Legislation Amendment \(Secure Jobs, Better Pay\) Act 2022*](#) (**Secure Jobs Better Pay Act**) introduces gender equity and job security as new objects of the *Fair Work Act 2009* (Cth) (**FW Act**). Accompanying the insertion of these new objects are measures to implement them, such as increasing the small claims threshold, increasing employees' ability to access flexible work arrangements, placing limits on the use of fixed terms contracts, and prohibiting pay secrecy clauses.

Summary of Changes to the Fair Work Act

1. Flexible Work Arrangement Requests – from 6 June 2023

The Secure Jobs, Better Pay Act amends the rules in respect of flexible work arrangements and empowers the Fair Work Commission (**FWC**) to resolve disputes regarding such requests.

Under the FW Act the following employees, have the right to request a flexible working arrangement if they are:

- parents, or have the responsibility or care for a child who is of school age or younger,
- carers,
- disabled,
- 55 or older,
- experiencing family violence, or
- providing support or care to someone experiencing family violence.

A flexible work arrangement can be a change in hours and/or days of work, change in patterns of work or a change in location of work including working from home. Employers can only refuse a request on reasonable business grounds.

Currently, if an employer responds with a refusal to grant the request an employee cannot contest the refusal.

Changes from June 2023

From June 2023, when an employee submits a written request for a flexible work arrangement, employers will now be required to make 'genuine efforts' to identify alternative arrangements where a flexible work arrangement request cannot be accommodated, as well as to discuss and give reasons to an employee if it is denied.

The list of employees eligible to request a flexible working arrangement will be expanded to include employees who are pregnant.

Refusal of a request for a flexible work arrangement is only available where:

- an agreement cannot be reached with an employee;
- the employer has considered the consequences of the refusal on the employee; and
- the refusal is based reasonable business grounds.

When a request for a flexible work arrangement is made and an employer refuses to grant the request, written reasons for the refusal will need to be provided within 21 days, which include:

- the reasons for the refusal including the reasonable business grounds relied on;
- consideration of alternative options that the employer will accommodate or that no alternative exists; and
- an explanation that the employee has the right to challenge this refusal in the FWC.

Employees will now be able to challenge a refusal for request for flexible work arrangement in the FWC. The FWC may:

- make an order that the refusal was not on reasonable business grounds;
- require an employer to grant the flexible work request or make other changes to accommodate the request; or
- require the employer to give a written response providing further details as to why the request was not granted.

What does this mean for LPA Members?

If an employee makes a written request for a flexible work arrangement, LPA Members must ensure that they follow the correct process under the FW Act as set out above, and:

- meet with the employees to discuss their request;
- inform the employee of any changes to working arrangements that they are willing to consider or make;
- if an employee challenges an employer's refusal, the employee must engage with the FWC to resolve the dispute.

LPA Members should consider implementing flexible working policies. They should also consider how they will approach future discussions with employees who request flexible working arrangements and any limitations that may exist in respect of granted or refusing such requests.

2. Prohibition on pay secrecy clauses – immediate effect

Employment contracts commonly require employees to keep their remuneration confidential. The Secure Job, Better Act intends to promote pay transparency by prohibiting pay secrecy.

Employers are now prohibited from including clauses in contracts and enterprise agreements that prohibit employees from discussing their pay.

The prohibition applies to new employment contracts or employment contracts which do not contain pay secrecy terms. Existing contracts with pay secrecy clauses will not be affected, until the contract is varied (this would include a wage increase).

Employees now have the right to discuss their rates of pay and hours of work. This right is protected by the general protections' provisions of the FW Act.

This right to discuss pay means:

- If an employee is asked about their rate of pay, they have the right not to disclose it or discuss their hours of work; and
- All employees will have a right to disclose their rate of pay and discuss rates of pay and pay-related terms with other employees.

What does this mean for LPA Members?

LPA members should ensure that all future contracts of employment and enterprise agreements do not require an employee to keep their rate of pay confidential. From June 2023, employers may be fined \$63,000 for entering a contract with a pay secrecy clause.

All employees must be permitted to openly discuss their pay with their colleagues if they choose to do so.

Where employees are treated adversely for exercising their right to discuss pay, or not disclose details about their pay, they will be able to bring a general protections claim in the FWC.

3. 'Job Security' to be new FW Act object– immediate effect

Job Security has been inserted as an object into the FW Act. The effect of this is intended to be more than symbolic. When exercising its functions (including arbitrating disputes) the FWC will need to exercise any decision-making power with a desire of ensuring greater job security.

4. 'Gender equity' to be new FW Act object – immediate effect

The promotion of gender equity will now be an object of the FW Act. This object will also apply to eliminating gender-based undervaluation in the modern awards. Similar to job security, this insertion of a new FW Act object of gender equity is intended to have more than symbolic effect.

There will be mechanisms that the FWC can use to achieve this objective as follows:

- The FWC will be required to make an equal remuneration order if it is satisfied there is not equal remuneration for work of equal or comparable value;
- The FWC's power to make these orders will be of its own initiative, and there would not have to be similar work to compare it to (i.e., no 'male comparator'); and
- The FWC will also need to take into account gender equity when setting the minimum wage.

These changes are likely to bring about increased claims and will most likely impact sectors like the aged care and healthcare sector. However, like many other parts of the reforms, there could be a range of new applications brought.

5. Small Claims Procedure – increased threshold – immediate effect

The Small Claims procedure allows employees to commence legal proceedings against an employer to recover underpayments, and in respect of some causal conversion disputes in the Federal Circuit Court.

Recent inquiries such as the Migrant Workers' Taskforce and the Senate Unlawful Underpayments Inquiry highlighted concerns that the current threshold of \$20,000 for small claims and filing fees create barriers and disincentives for employees.

Key changes to the small claims procedure are:

- Employees will be able to bring claims for underpayment up to \$100,00.00. This is an increase from the current \$20,000. The claim will not include accrued interest; and
- If employees are successful in their claim, they will also be able to claim court filing fees from their employer.

The benefit of the increased threshold of \$100,000.00 for employers is that there will probably be less likelihood of winding up in a traditional court process, and this could involve reduced legal costs. Claims brought in small claims proceedings do not have the same strict rules of evidence and potentially drawn-out process.

6. Fixed term contracts – effective 6 December 2023

The Secure Jobs, Better Pay Act limits the use of fixed-term contracts for the same role (or substantially similar work) to two consecutive contracts or a maximum duration of two years.

The prohibitions and regulation apply to both fixed-term and outer-limit contracts (i.e., a contract with an expiry date but with a general right to terminate prior to that date).

The following exceptions that **may** apply include:

- Employees who are engaged to:
 - perform distinct and identifiable tasks involving specialized skills;
 - On a training arrangement; and
 - Undertake essential work during peak demand periods.
- Employees who earn more than the high-income threshold (currently \$162,000 per year or pro rata);
- The contract is wholly or partly funded by government and the funding is for a period of more than 2 years and there are no reasonable prospects that the funding will be renewed;
- A modern award permits the employees to be employed for more than 2 years under a fixed term contract, or renewable contract or a consecutive contract; and
- An exception is included in the Regulations.

The Fair Work Commission will have a role in resolving disputes about the operation of the fixed-term contract provisions, although it will not be permitted to arbitrate the dispute. Employees will instead be able to seek orders from a court regarding their employment status using the existing small claims procedure.

The provisions will come into effect in twelve months and civil remedy provisions apply, meaning that employers engaging employees on extended or rolling fixed term contracts will be exposed to monetary penalties.

After 7 December 2023, employers will be required to issue employees with a Fixed Term Contract Information Statement.

7. Prohibition of advertising for jobs with rates below the Award – immediate effect

When employers advertise for a position at a rate that is below the Award or would be in contravention of the FW Act or an enterprise agreement, they will be committing a statutory offence, if they do so without reasonable excuse.

Contravening these provisions will attract monetary penalties.

The legislation does not define ‘reasonable excuse’ but what constitutes a ‘reasonable excuse’ will depend on the circumstances of the individual case, taking into account the purpose of the provision.