SECURE JOBS, BETTER PAY

Preparing your organisation for 6 June

LANDER & ROGERS

Guide

INTRODUCTION

The Australian industrial landscape, and your workplace, are changing apace.

While we have already seen significant reforms, on 6 June another suite of changes brought in by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* will take effect.

Do you know what is changing and which changes will be most significant for you and your business?

Do you have the processes and procedures in place to remain compliant with your obligations to your people?

Are your enterprise agreements expiring after 6 June and you haven't started bargaining?

Many organisations are struggling to get across the volume, scope, and implications of the changes.

This guide will help you work out what you need to do now to get your house in order before we see the expected next round of legislative changes later this year.

Timeline

7 December 2022

- Pay secrecy clauses cease to have effect.

6 June 2023

- New obligations for employers responding to requests for an extension of unpaid parental leave.
- Pay secrecy prohibition applies to any new contracts entered into after this date.
- Employers required to provide notice of terminating zombie agreements to affected employees.
- Change to the multi-enterprise bargaining framework come into effect.
- Major changes to bargaining and making agreements come into force.

1 July 2023

- Small claims cap lifted to $100,000 for employees bringing underpayment claims.

6 December 2023

- Restrictions on fixed-term contracts come into effect.

7 December 2023

- Zombie agreements cease to operate unless an extension has been sought in the Fair Work Commission.

H2 2023

- Second tranche of industrial law reforms to be introduced to Parliament.

SECTION 1

FLEXIBLE WORK

What's changing?

From 6 June 2023, pregnant employees will be eligible to request a flexible work arrangement.

In addition, an employer will only be able to refuse an employee's request for flexible work where:

- the employer and employee have been unable to reach agreement after discussing the request;
- the employer has made genuine efforts to identify an alternative working arrangement they would be willing to make to accommodate the employee's circumstances;
- the employer has considered the consequences of the refusal for the employee;
- the refusal is based on reasonable business grounds (e.g. due to cost, loss of efficiency or productivity, negative impact on customer service, or if changing the working arrangements of other employees or recruiting new employees to accommodate the request would be impractical).

Employers are required to:

- respond to requests within 21 days;
- provide detailed reasons for the particular business grounds relied upon in refusing the request and how they apply;
- inform the employee of any alternative working arrangements;
- inform the employee of the availability of dispute resolution processes through the Fair Work Commission.

If the matter cannot be resolved internally a new dispute resolution process, also in effect from 6 June 2023, will allow an employer or employee to apply to the FWC to conciliate and, if unsuccessful, arbitrate the dispute.

Background

Employees who have completed at least 12 months' continuous service, including casual employees engaged on a regular and systematic basis, are eligible to request a flexible work arrangement (eg. reduced hours, job share, remote or hybrid work, etc.) provided they meet one of the following personal circumstances:

- The employee is a parent of a child of school age or younger.
- The employee is a carer as defined by law.
- The employee has a disability.
- The employee is aged 55 or over.
- The employee is experiencing family violence or is supporting an immediate family member or household member facing family violence.

Key date

6 June 2023

Changes commence to the process for responding to requests for flexible work.

Actions

Before 6 June

- Establish processes for assessing and responding to flexible work requests.
- Provide appropriate training to human resources and/or managerial staff in how to give genuine consideration to requests for flexible work arrangements.
- Consider what limitations exist in relation to offering flexible working arrangements and how these limitations might be evidenced.

After 6 June

- Actively engage in discussions with employees within the 21-day response period to minimise the risk of a protracted dispute.

More information:

https://www.landers.com.au/legal-insights-news/flexible-work-and-reasonable-working-hours

SECTION 2

EXTENSIONS TO UNPAID PARENTAL LEAVE

What's changing?

From 6 June 2023 when an eligible employee requests an extension to a period of unpaid parental leave, their employer is obliged to discuss the request with them. If the employer refuses a request, they are required to:

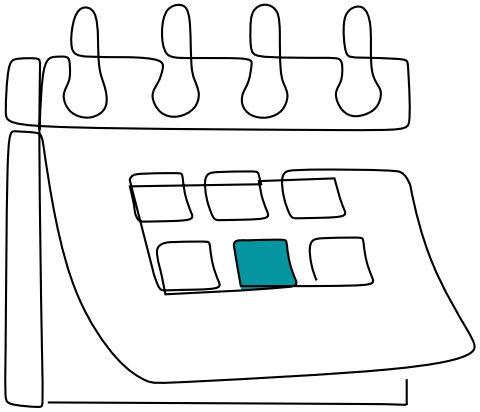
- inform the employee of their reasons in writing;
- consider and notify the employee in writing of any other periods of extension the employer would agree to.

Grounds for refusing a request for an extended period of unpaid parental leave include if the extension would be too costly for the employer; loss of efficiency or productivity; negative impact on customer service, or if changing the working arrangements of other employees or recruiting new employees to accommodate the request would be impractical.

Employees will also have greater access to dispute resolution through the Fair Work Commission if a dispute about an extension to unpaid parental leave cannot be resolved within the workplace.

Background

An employee taking 12 months of unpaid parental leave can request up to 12 months of additional leave (up to 24 months in total) unless their partner has already taken 12 months of leave. To date, there has been limited clarity on how employers should respond to such requests or how the Fair Work Commission should deal with disputes arising from an employer's refusal to grant the request.



Key date

6 June 2023

New obligations for employers responding to requests for an extension of unpaid parental leave.

Actions

Before 6 June

- Consider updating your parental leave policies and procedures.
- Ensure managers and supervisors are aware of the relevant processes and additional details to be provided to employees upon refusing a request for an extension of unpaid leave.

SECTION 3

PAY SECRECY

What's changing?

Any existing obligations upon employees to keep their remuneration confidential, whether in instruments or contracts, no longer have effect. Employees will have the ability to disclose (or ask someone to disclose) their remuneration, or terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes. This means they can bring general protections claims in relation to adverse action for exercising this workplace right. Employees also have a right not to speak about their remuneration, if they do not wish to do so.

The amendments will also prohibit employers from including pay secrecy clauses in new employment contracts entered into from 6 June 2023.

An employer may be liable for a civil penalty where they include a pay secrecy clause in a new employment contract from 6 June.

Background

Pay secrecy clauses, which prevent employees from discussing with others and revealing their salary, bonuses and other financial incentives, have previously been lawful in Australia and a common feature in employment agreements, particularly in industries where discretionary incentive and bonus payments are commonplace.

Key dates

7 December 2022

Pay secrecy clauses cease to have effect.

6 June 2023

Pay secrecy prohibition applies to any new contracts entered into after this date.

Actions

Before 6 June

- Review all new standard form contracts to ensure they do not fall foul of the pay secrecy prohibitions and risk the imposition of a civil penalty.
- Assess whether the removal of pay secrecy clauses may bring to light any perceived inequalities within your organisation, and consider whether additional communications or actions may be required.

SECTION 4

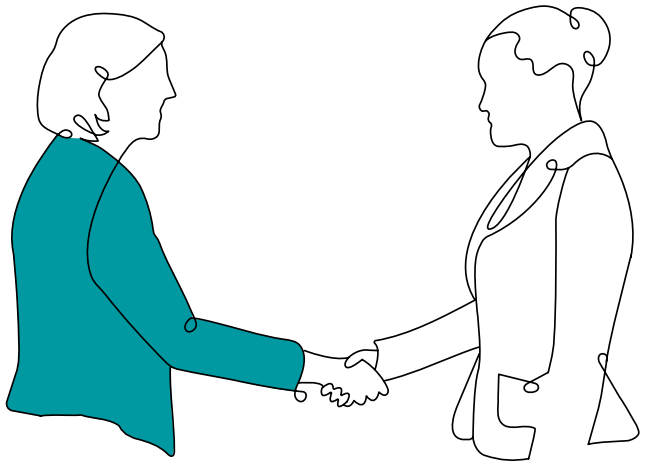
ZOMBIE AGREEMENTS

What's changing?

Under the FW Act changes, zombie agreements will automatically "sunset" and cease operating on 7 December 2023. Unless relevant employers/employees/unions apply to the Fair Work Commission (FWC) for a zombie agreement to be extended (and this application is granted by the FWC), from 7 December affected employees will revert from their zombie agreement to the applicable modern award.

Background

Pre-reform workplace agreements (or "zombie" agreements) are those that have been made before the commencement of the *Fair Work Act 2009* (Cth) (ie. prior to 2010). The most common types of zombie agreements are collective agreements, workplace agreements, and Australian workplace agreements made under the *Workplace Relations Act 1996* (Cth).



Key dates

6 June 2023

Employers required to provide notice of terminating zombie agreements to affected employees.

7 December 2023

Zombie agreements cease to operate unless an extension has been sought in the Fair Work Commission.

Actions

Before 6 June

- Identify any zombie agreements within your organisation and the employees covered by them, as well as the relevant modern awards that would otherwise apply. Assess whether the affected employees will be better off under the relevant modern award or their zombie agreement, as this will inform your employee communications and help to ascertain whether an application to the FWC for an extension of the zombie agreement may be successful.
- Notify affected employees that they are covered by a zombie agreement that will be terminated on 7 December unless an extension is granted by the FWC. Failure to issue this notice will be a breach of the FW Act and incur a maximum penalty of $16,500 for individuals and $82,500 for entities.

After 6 June

- Monitor and prepare for the 7 December deadline, including preparing a contingency plan in the event employees/unions apply to the FWC for an extension of a zombie agreement, or seek to initiate enterprise bargaining (whether single or multi-enterprise bargaining).
- Prepare systems and processes for a smooth transition to a modern award for employees covered by zombie agreements. This includes payroll, rosters, time and attendance, manager training, etc.

More information:

https://www.landers.com.au/legal-insights-news/the-rise-and-demise-of-zombie-agreements

SECTION 5

MULTI-ENTERPRISE BARGAINING

What's changing?

From 6 June, unions can apply to the Fair Work Commission (FWC) for authorisations to bind employers into bargaining for multi-enterprise agreements. Depending on the bargaining stream (ie. whether it's under the "supported" or "single-interest" stream), the FWC will, in deciding whether to grant these authorisations, consider criteria including:

- prevailing pay and conditions in the relevant industry or sector, ie. are employees paid at, or close to, award rates of pay? ("supported" stream)
- whether the employers have clearly identifiable common interests (both streams)
- reasonably comparable operations and business activities between the employers ("single interest" stream)
- will bargaining be manageable? ("supported" stream)

Also, under the "supported" bargaining stream, there will be an ability for the relevant Federal Minister to declare that a particular industry, occupation or sector will fall under this stream (in which case FWC criteria referred to above won't need to be satisfied).

However, there are important potential "carve outs" for employers to not be roped into multi-enterprise bargaining - including, for example, where they already have an in-term enterprise agreement in place for their relevant employees, or, provided certain criteria are met, they are already in bargaining for an enterprise agreement.

Also importantly, under these changes, employers could be "roped into" multi-enterprise agreements by the FWC, after they have already been made by unions and other employers. In this scenario, similar FWC considerations will generally apply as those referred to above (eg. does the new employer at risk of being "roped into" an existing multi-enterprise agreement, have clearly identifiable common interests with the employers who are already on this agreement?).

Background

6 June 2023 will see significant changes to the multi-enterprise bargaining framework, designed to lower barriers to entry to the enterprise bargaining system. This includes the ability for multiple employers with a "common interest" to be "roped into" bargaining for, and coverage under, an agreement.

Under these changes, two multi-enterprise bargaining streams will be established - a "supported" bargaining stream (targeted at low-paid industries such as aged care, childcare, and disability care), and a "single-interest" bargaining stream (which is broader and not necessarily targeted at low-paid industries).

Key dates

6 June 2023

Change to the multi-enterprise bargaining framework come into effect.

Actions

Before and after 6 June

Review your workplace relations / industrial instrument frameworks as a priority, particularly if you may be at risk of being "roped into" multi-employer arrangements (under either the "supported" or "single-interest" bargaining streams).

Employers should assess the following:

- Do you have current in-term enterprise agreements in place, or are you operating under expired agreements?
- Are you about to commence, or are you in the process of, bargaining for new agreements? Do you have agreement to bargain with relevant union/s?
- Does your sector or industry have the new supported bargaining stream as its focus?
- Do you share "common interests" with competitors in your market (eg. geography, regulatory framework, nature of operations, employee terms and conditions)?
- Are the operations and activities of your business reasonably comparable to others in your market? If not, will you be able to satisfy the FWC that this is the case, to avoid multi-enterprise arrangements?
- Are you able to rely on any of the exclusions to the new multi-enterprise arrangements?
- Are your employees (and their representatives) strong supporters of the new multi-enterprise arrangements?
- Is there a relevant Ministerial declaration in place?
- Is it better for you to be "at the table" (ie. part of multi-enterprise bargaining) or "on the menu" (ie. later roped into a multi-enterprise agreement that's already been made)?

SECTION 6

ENTERPRISE BARGAINING AND AGREEMENT MAKING

What's changing?

New powers for the Fair Work Commission to resolve enterprise bargaining disputes

The FWC will be given power to make "intractable bargaining declarations" and then arbitrating where it is satisfied that there are no reasonable prospects of the bargaining parties reaching an agreement (providing prescribed minimum timeframes have been met – generally after at least nine months of bargaining). Parties who are subject to an intractable bargaining declaration will not be able to take protected industrial action from that point.

Application of the "better off overall test" (BOOT) in enterprise agreement approvals

The BOOT will be applied by the FWC as a "global" assessment, rather than a line-by-line comparison, of the proposed agreement and relevant modern award. Also, the FWC will only be required to consider reasonably foreseeable patterns of work or types of employment rather than unlikely theoretical scenarios when comparing entitlements for the purposes of the BOOT.

The FWC can also reconsider the application of the BOOT to an enterprise agreement already made, where there has been a material change in working arrangements, and will be empowered to amend or excise terms that otherwise prevent an agreement from passing the BOOT.

Procedural requirements for enterprise agreement-making

The requirement for a prescribed seven-day "access period" in advance of an agreement vote will be replaced with a broad requirement for the FWC to be satisfied that an enterprise agreement has been genuinely agreed to by the employees covered by the agreement. The FWC will apply its published "Statement of Principles" - which outlines the factors it will consider in determining whether an agreement has been "genuinely agreed" by the relevant employees.

The requirement to provide a Notice of Employee Representational Rights (NERR) to employees, and then waiting 21 days before a vote is held on the agreement, will remain for single-enterprise agreements.

The FWC, in approving enterprise agreements, will also need to be satisfied that the employees who have voted up that agreement have a "sufficient interest" in the terms of that agreement, and are "sufficiently representative" of the coverage of the agreement.

Greater limitations on the termination of enterprise agreements

This includes new limitations on the ability for the FWC to terminate enterprise agreements - including for example the FWC being satisfied that the continued operation of the agreement would be unfair to employees, or that the proposed termination would not adversely affect the bargaining position of the employees (ie. agreement termination cannot be used by the employer as a bargaining tactic), or the continued operation of the agreement would pose a significant threat to the viability of the employer's business.

Background

The Secure Jobs, Better Pay Act entails significant changes to enterprise bargaining and agreement making.

Key dates

6 June 2023

Major changes to bargaining and making agreements come into force.

Actions

From 6 June

Employers should consider the following:

- Are you currently in bargaining for new enterprise agreements / about to commence bargaining, and may be impacted by the new BOOT and procedural bargaining changes?
- Are you considering terminating any existing enterprise agreements, and will this now be less feasible given the new restrictions?
- Have you previously made enterprise agreements with small cohorts of employees, and this model may now be jeopardised with the new "sufficient interest" and "sufficiently representative" requirements?

SECTION 7

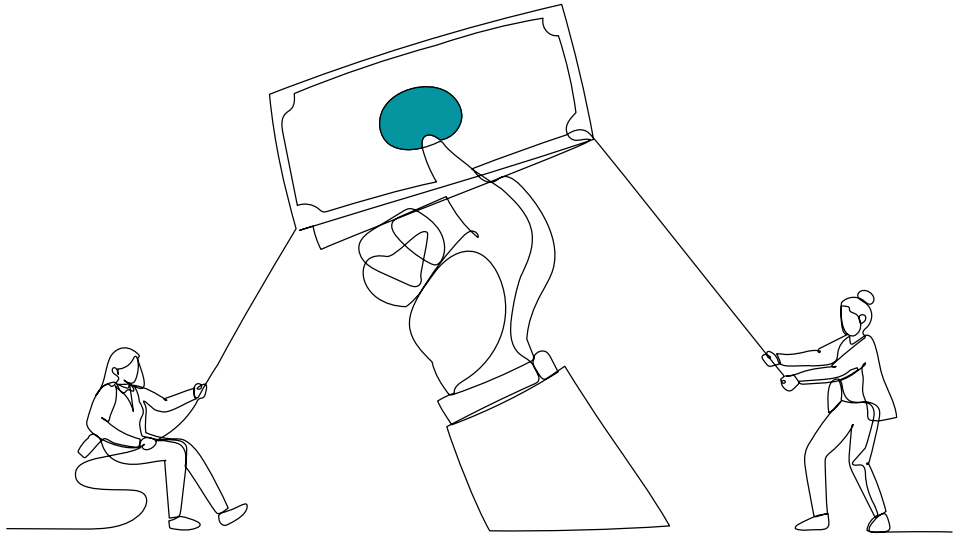
WAGE THEFT

What's changing?

- The compensation cap for small claims proceedings under the Fair Work Act is increasing from $20,000 to $100,000, providing access to dispute resolution to a greater number of workers.
- Amendments to the Fair Work Act have clarified the courts' ability to award filing fees as costs to successful claimants.

Background

Small claims court procedures provide avenues for employees to recover their unpaid work entitlements. Cost and complexity have often deterred employees from pursuing underpayment claims through small claims procedures.



Key dates

1 July 2023

Small claims cap lifted to $100,000 for employees bringing underpayment claims.

Actions

Before 1 July 2023

- Review employee remuneration to identify, address and prevent the underpayment of employees as a matter of priority. This includes all of remuneration including loadings, penalty rates, overtime, leave, allowances and superannuation guarantee.

SECTION 8

FIXED-TERM CONTRACTS

What's changing?

The amendments apply only in relation to new fixed-term employment contracts. However, previous fixed-term contracts will be relevant where the previous and new contracts together constitute consecutive contracts within the meaning of the new provisions.

A fixed-term contract will effectively be prohibited in circumstances where:

- an employer enters a contract of employment with an employee; and
- the contract has a stated termination date; and
- the employee is not a casual employee; and
- any of the following apply:
  - the contract is for greater than two years; or
  - the contract is renewable either for a period greater than two years or can be extended or renewed more than once; or
  - prescribed "consecutive contracts" criteria are satisfied (eg. the work to be performed across these contracts is the same or substantially similar, and there is substantial continuity of the employment relationship between these contracts).

Some exceptions apply. The new restrictions will not apply where a fixed-term contract:

- is for the performance only of a distinct and identifiable task using specialised skills;
- relates to a training agreement (ie. apprenticeship or traineeship)
- relates to an employee earning more than the high-income threshold (currently $162,000 per annum full-time - but this is expected to increase from July);
- is for the undertaking of essential work during a peak demand period;
- is for the undertaking of work during emergency circumstances or during a temporary absence of another employee (eg. a parental leave backfill);
- falls under prescribed government funding exceptions;
- relates to a governance position that has a time limit under the governing rules of a corporation or association of persons; or
- where a modern award permits the term.

Employers will also be required to provide to new employees before, or as soon as practicable after, entering into a fixed-term contract a new Fixed Term Contract Information Statement, to be drafted by the Fair Work Ombudsman.

The Fair Work Commission will have the ability to conciliate or, if both parties agree, arbitrate disputes in relation to fixed-term contracts.

Employers who fail to comply with these new obligations may be required to pay penalties.

Background

The Secure Jobs, Better Pay Act amends the FW Act to include new obligations in respect of fixed-term employment contracts. Generally speaking, the new provisions limit the use of fixed-term contracts to a period of two years (with several exceptions). "Fixed-term employment contract" encompasses true fixed-term contracts (i.e. contracts that contain a term that ends the employment after a certain period and cannot be terminated at an earlier date) as well as maximum-term contracts (i.e. contracts that may be terminated on notice prior to the expiry of the term).

Key dates

6 December 2023

Restrictions on fixed-term contracts come into effect.

Actions

Before 6 December 2023

- Review the manner in which you are utilising fixed-term employees.
- Update standard form contracts to amend fixed-term clauses.
- Identify any relevant exceptions that apply to your organisation, and prepare and implement guidelines and controls for when fixed-term contracts can be offered and when they expire.

After 6 December 2023

- Ensure fixed-term employees are provided a Fixed Term Contract Information Statement upon commencement. Ensure the reasons for engaging an employee on a fixed-term contract are clearly documented, particularly in the case of second fixed-term contracts.

SECTION 9

LOOKING FORWARD

Labour hire regulation and "same job, same pay"

What's changing?

The government proposes to legislate Same Job, Same Pay measures to apply to labour hire arrangements.

In simple terms, what is proposed is that labour hire providers - which is very broadly defined and includes internal corporate labour hire providers - will need to provide terms and conditions to their employees that are the same as directly engaged workers who are employed by the "host" employer.

In addition to the Same Job, Same Pay measures, a proposal has also been released for consultation to establish a national labour hire regulation scheme. The aim of this scheme would be to protect labour hire workers from exploitation and ensure that all labour hire providers must obtain and maintain a licence in accordance with certain conditions.

Similar schemes are already operating in Queensland, Victoria, South Australia and the Australian Capital Territory.

Background

One of the government's commitments in the lead-up to the 2022 Federal Election was to legislate to ensure that labour hire workers would be paid the same as directly engaged workers doing the same work. In other words - people doing the same job as someone else should get the same pay.

This was the Same Job, Same Pay proposal.

Key dates

H2 2023

Second tranche of industrial law reforms to be introduced to Parliament.

Actions

- Evaluate the proposed labour hire reforms and consider the systems and processes you will need to establish to comply with proposed legislation.

SECTION 10

LOOKING FORWARD

Casuals, the gig economy and sham contracting

What's changing?

- The definition of "casual worker" will be amended, such that casual employees are more likely to be considered part-time or full-time employees. The new definition would be an objective test based on the employee's ongoing employment relationship, as opposed to the terms and conditions agreed at the commencement of employment.
- "Sham" contracting laws will be strengthened to prevent employers from misrepresenting a contract of employment as an independent contracting agreement.
- Additional provisions inserted into the FW Act to extend protections and provide minimum standards to a range of different "employee-like" workers, including those in the gig economy, and other "employee-like" forms of work.

Background

The government has indicated that it will introduce policy changes to prevent insecure employment and provide workers with greater security.

Key dates

H2 2023

Second tranche of industrial law reforms to be introduced to Parliament.

Actions

- Start reviewing the working arrangements of any casual employees in your organisation to determine whether any risk of misclassification exists (eg. where casual employees are working regular hours and shifts over an extended period).
- Consider whether any offers of casual conversion should be made or are appropriate for employees.
- Update your independent contractor agreements and review your engagement processes to ensure that appropriate engagement models are chosen for particular roles.
- Review onboarding arrangements for contractors and ensure the day-to-day engagement of these workers is consistent with their contractual terms. Only true "independent contractors" should be engaged as such.

KEY CONTACTS

For more information on how the Secure Jobs, Better Pay reforms apply to your organisation, please contact a representative of Lander & Rogers' Workplace Relations & Safety practice.

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ABOUT US

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