

# Employment Law Changes – What Every Business and HR Team Needs to Know



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## Areas of Focus

Pay Secrecy Clauses in Employment Contracts & Workplace Policies

Sexual Harassment at Work

Expansion of General Protections Regime

The Use of Fixed-Term Contracts

Flexible Working Arrangements

Future Reforms

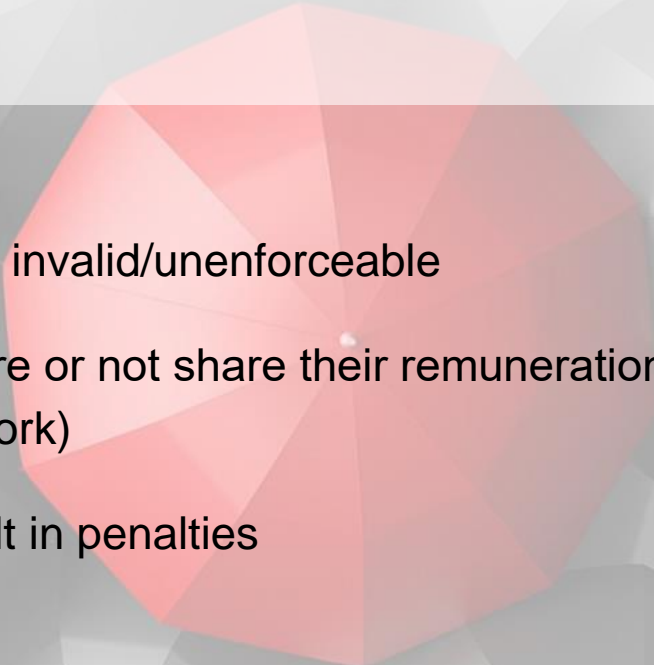
The background of the slide is a blurred image. On the left, a person in a dark suit is partially visible, looking towards the right. On the right side, there is a stack of books. The top book has a dark green cover, and the book below it has a maroon cover with gold-colored spine details. The text 'PAY SECRECY' is centered in a white rounded rectangle.

# PAY SECRECY

## What is Pay Secrecy?

- Employment contracts, workplace policies or confidentiality deeds sometimes require employees to keep their remuneration information confidential
- Breaching this requirement often resulted in disciplinary action up to and including termination of employment (see *Australian Meat Industry Employees Union v Primo Foods Pty Ltd* [2022])

## Changes to Pay Secrecy

- Pay secrecy clauses are now unlawful and invalid/unenforceable
  - Employees have a 'workplace right' to share or not share their remuneration information (including hours and days of work)
  - Inclusion of pay secrecy clauses may result in penalties
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## Required Action

Although the reforms take effect from different dates (the earliest being 7 December 2022), employers should proactively:

- review existing contracts and remove clauses requiring or relating to pay secrecy
- issue either updated contracts or contract variations to existing employees, which reflect the changes
- consider publishing general remuneration information to employees in an effort to prevent misinformation and ensure participation in workplace dialogue

The background of the slide is a blurred image. On the left, a person in a dark suit is out of focus. On the right, a stack of books is visible, with the top book having a dark cover and the one below it having a maroon cover with gold lettering. The text 'SEXUAL HARASSMENT AT WORK' is centered in a white rounded rectangle.

# SEXUAL HARASSMENT AT WORK



## What is Sexual Harassment?

A person **sexually harasses** another person if:

- (a) the person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or
- (b) engages in other unwelcome conduct of a sexual nature (orally or in writing) in relation to the person harassed;

in circumstances in which a **reasonable person**, having regard to all of the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.



# What is Sexual Harassment?

- The following factors are relevant:
  - (a) the age, sex, sexual orientation or marital status of the person harassed
  - (b) the relationship between the person harassed and the person who made the advance or request or engaged in the conduct complained of
  - (c) any disability of the person harassed or any other relevant circumstance

## The 'Positive' Duty

From 6 March 2023, employers will have a positive duty to take all reasonable and proportionate measures to prevent sexual harassment in the workplace. This duty:

- operates concurrently with WHS and other obligations
- increases the burden to employers
- requires a proactive approach to be taken in preventing sexual harassment in the workplace

# How Are Sexual Harassment Complaints Managed?

The AHRC initially manages complaints at the federal level, including by facilitating a conciliation. If this is unsuccessful, an employee or their representative (such as a union) may initiate federal court proceedings which may result in:

- a declaration that unlawful discrimination has occurred and a direction for an employer not to repeat / continue the unlawful discrimination
- an order requiring an employer to perform any reasonable act to redress loss / damage suffered by a complainant
- an order requiring an employer to re-employ a complainant and/or pay compensation

## Risks from Sexual Harassment in the Workplace

Sexual harassment poses financial / legal risks for employers as well as:

- breakdowns in workplace morale
- increased use of employee leave / absenteeism / workers' compensation
- serious health risks - anxiety, depression, threats of self-harm, suicide
- risk of employee grievances – increased time and resources investigating these
- reduced productivity
- reputational damage which affects the ability to attract and retain talent, and maintain contractual relationships

## Required Action

Employers should ensure all employees (including managers) regularly receive training which enables them to recognise, report and eliminate sexual harassment in the workplace.

Additionally, employers should:

- monitor sexual harassment complaints and take timely / appropriate remedial action
- administer tests to measure employees' understanding of sexual harassment training
- continuously review / update sexual harassment training and policies to reflect appropriate workplace feedback and complaints data
- ensure employment agreements include appropriate clauses regarding compliance with policies and address sanctions for sexual harassment



**EXPANSION OF THE GENERAL  
PROTECTIONS REGIME**

# General Protections

The General Protections regime prohibits an employer from taking adverse action (including dismissal or demotion) against an employee because of their exercise of a workplace right or for a discriminatory reason. Important features include:

- reverse onus of proof
- no requirement for the prohibited reason to be the sole reason
- compensation not limited to 26 weeks' remuneration / half of the high-income threshold (as in unfair dismissal claims)
- no requirement for dismissal to occur before a claim is made
- possible liability for penalties



# Expansion of General Protections Regime

The recent reforms expand the General Protections regime by:

- including gender identity, breastfeeding and intersex status as protected attributes
- clarifying that an employee's choice to disclose or not disclose their remuneration information is a 'workplace right'

This means an employee may bring a General Protections claim for action taken because of the above attributes or exercise of the 'pay secrecy' workplace right

## Required Action

Employers should:

- ensure no adverse action (i.e. termination, demotion, disciplinary action etc) is taken directly or indirectly because of the protected attributes and/or an employee's disclosure of (or failure to disclose) their remuneration information
- update relevant policies (i.e. bullying and harassment, grievance and disciplinary policies) to reflect these changes
- provide training to managers and other employees with supervisory responsibilities

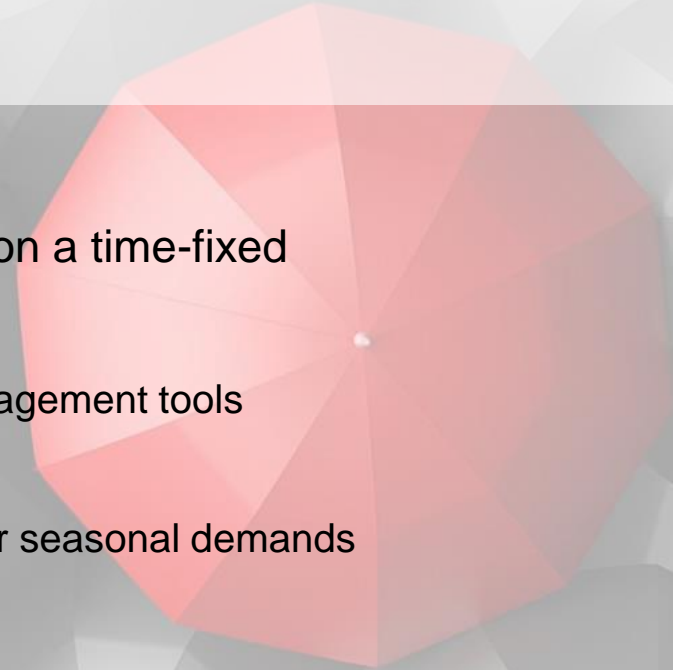
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# CHANGES TO FIXED-TERM CONTRACTS

## Fixed-Term Contracts

Fixed-term contracts allow for employment on a time-fixed basis. They often:

- are attractive workforce planning and management tools
- promote certainty for employers
- enable employers to meet project-based or seasonal demands without ongoing financial obligations



# Fixed-Term Contract Reforms

From 7 December 2023, it will be unlawful to engage an employee under a fixed-term contract:

- for a period longer than two years
- which could be extended or renewed for a period exceeding two years
- which could be renewed or extended more than once (regardless of renewal timing or total period of employment)
- without providing that employee with a copy of the Fixed Term Contract Information Statement

## Fixed-Term Contract Reforms

Exceptions apply, including where:

- the renewed or extended contract relates to work / duties which are substantially different to the previous contract
- the employee's income exceeds the high-income threshold (currently \$162,000) in the first year of the contract
- the employee is engaged as a trainee or to cover other absent employees (i.e. during parental, long service or workers' compensation leave)
- a modern award covering an employee permits the ongoing use of fixed-term contracts

# Implications of Fixed-Term Contract Reforms

The fixed-term contract reforms mean:

- contract clauses contravening the new requirements will be unlawful, invalid and unenforceable
- relying upon the conclusion of the fixed-term (where invalid) to end the employment may be considered to be a 'dismissal at the employer's initiative' (and therefore give rise to protection from unfair dismissal)
- penalties may be imposed for contraventions



## Required Action

Although the fixed-term contract reforms only take effect from 7 December 2023, employers should proactively:

- review existing contracts and remove provisions relating to the extension / renewal of the fixed-term contract that are contrary to the new reforms
- audit all current fixed-term employment contracts and identify all current employees who will no longer be eligible for an extension / renewal of their fixed-term contract (and consider lawful arrangements in lieu)
- consider adjusting recruitment and workforce planning initiatives (i.e. offer fixed-term contracts within the parameters of the reforms or consider alternative forms of employment)



**FLEXIBLE WORKING ARRANGEMENTS**

# Flexible Working Arrangements

Flexible Working Arrangements (**FWA**) allow employees with:

- at least 12 months' continuous service with their employer
- specific circumstances (i.e. caring responsibilities, family / domestic violence, advanced age or disability)

to request changes to their working arrangements, including to their working hours or location of work

# Flexible Working Arrangements Reforms

The recent reforms:

- reduce an employer's capacity to refuse an FWA request
- allow employees to make an FWA request if they or their immediate family experiences family and domestic violence
- require employers to consult with employees before refusing an FWA request and provide reasons
- complement the introduction of 10 days' paid family and domestic violence leave available from 1 February 2023 (or 1 August 2023 for employers with fewer than 15 employees)
- expose employers to liability for a breach of the NES if they fail to follow the consultation and other requirements above or refuse an FWA request for reasons other than 'reasonable business grounds'
- expand the jurisdiction of the Fair Work Commission to deal with FWA disputes

## Required Action

Although the FWA reforms do not take effect until 6 June 2023, employers should:

- consult and work constructively with employees who submit an FWA request
- be prepared to consider alternative arrangements which may be accommodated in the workplace (if the FWA request is too costly / impractical)
- ensure any refusal of an FWA is based on 'reasonable business grounds', communicated in writing within 21 days and made after consultation and alternative arrangements have been considered



# FUTURE REFORMS

## Looking Ahead

The Federal Government's reform agenda for this year includes:

- the introduction of employee-like rights for 'gig economy workers' which could include leave entitlements, workers' compensation and/or minimum wages
- preventing employers paying labour hire employees differently from direct employees where they perform the same job
- the criminalisation of 'wage theft'
- amending the definition of a casual employee in the *Fair Work Act 2009*



## How We Can Help

We can assist you by:

- reviewing and updating your existing employment agreements and company policies or preparing new ones for you
- delivering a practical training session to your executive or management team about what they need to know or do in response to the reforms
- drafting checklists for you to use in order to achieve practical compliance with the new laws
- advising and assisting you with any workplace incident, near miss, grievance or claim that arises
- discussing the reforms in greater detail with you in the context of your particular workplace
- providing further information about the potential penalties and claims that a business or manager may face

# QUESTIONS?



# THANKS!

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