Article Information

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Webinar Q&As: Employment Relations National Seminar Series | Changes to the Fair Work Act: What is in store for Employers?

Piper Alderman provides the Answers in response to the Questions received during our Employment Relations National Seminar Series | Changes to the Fair Work Act: What is in store for Employers? Webinar on 16 November 2022.

To view the recording of the on demand webinar, please register here.

Pay secrecy

Q1: Does the prohibition of pay secrecy clauses apply to everyone (i.e. not just those covered by Awards)? And employers cannot require in employment contracts that employees keep their salaries confidential?

A1: Yes the proposed changes will apply to any employee covered by the *Fair Work Act 2009* (Cth), not just Award-covered employees. An employer cannot enforce a pay secrecy clause in their contracts of employment if these proposals are ultimately made into law.

Q2: If somebody asks a Manager/HR to reveal what others in a similar role is receiving so that they can compare their offer, is there any obligation to do so?

A2: Under the proposed provisions, while there will be a right to ask, there will also be a right to not tell. Ultimately, employees would not be *required* to disclose their remuneration, and likewise would not be required to disclose someone else's remuneration.

Q3: What about disclosure of bonus or annual salary review increases? Are we still able to advise staff in these letters that this should not be discussed with other employees?

A3: The Bill has been drafted to also include "*any terms and conditions of the employee's employment that are reasonably necessary to determine remuneration outcomes*". Accordingly, details of a pay rise would likely be covered. Bonus payments may also be covered given how broad the provision has been drafted, but we may need to wait to see how the provisions are tested in practice.

Q4: Does the pay equity questions protection extend to permitting workers to discuss a third person's pay? (E.g. If B asks A what their pay is and A tells them, can B tell C what A is paid?)

A4: There is no clear answer to this. It may depend on the way in which "person A" conveyed the information to "person B" (in particular, whether it was conveyed in a manner of confidence or whether it was being discussed quite openly, suggesting they are happy for other people to know). This may prove to be a difficult area for employers to manage, because once person A has put the information "out there," it may be hard to show that that information was intended to remain confidential.

Sexual harassment

Q5: Will a complainant be encouraged to go via the Australian Human Rights Commission first or will this avenue now be closed?

A5: That avenue will remain; it will be the individual's choice as to which forum they would like the matter to be dealt

with. We expect the Fair Work Commission (**FWC**) might receive more complaints of this nature, at least at first once these changes come in, even if only because of increased publicity of the option.

Q6: Will the complainant be required to raise the allegation with the employer first in order to follow their workplace policies and procedures to investigate the allegation, or can they go straight to lodging a complaint with the FWC?

A6: Under the Bill there is no prohibition on going directly to the FWC, however, as we have seen in the anti-bullying jurisdiction of the FWC, complainants may be encouraged to pursue an internal process before commencing their claim in the FWC. Such encouragement may be given by way of particular questions being included in the FWC's forms for the anti-sexual harassment jurisdiction.

Q7: Does the subject of the allegations need to attend arbitration and if a workplace investigation found 'no case to answer' can the employer represent the subject of allegations?

A7: Where the alleged wrongdoer is an organisation's employee, it is quite likely that they will already be a party to the proceedings (this often happens with the anti-bullying claims as well). In such a situation, the employer will need to decide if its interests sufficiently align with the employee to be able to use joint representation. That does sometimes happen, but it will depend on the circumstances and specific legal advice should be sought.

Q8: We work in community services where the clients that we support may have sexually explicit behaviours that are known. How would we decrease our vicarious liability when these behaviours are known when we take the client on and potentially expose workers to this known behaviour?

A8: The risk of that behaviour occurring should form part of your usual work health and safety risk management. There may be steps that are able to be taken to reduce the risk, such as sending two staff out, not providing services if particular negative behaviour is repeated etc. Having a policy (and training on those policies/processes) will also help to evidence the steps that the organisation has taken to manage the risk.

Fixed term contracts

Q9: Under the Bill, are references to "Fixed Term Contracts" the same as maximum term contracts? I've always understood there was a difference.

A9: Yes, for this purpose, a maximum term contract (being a contract with an end date, but also the ability to terminate the employment prior to that end date upon provision of notice or payment in lieu) is considered a fixed term contract.

Q10: To clarify, after 2 years of fixed term, the employee is automatically permanent?

A10: Yes, if a contract is in breach of the new requirements (e.g. longer than 2 years, or a renewed contract that takes the total period of employment over 2 years), it converts to an ongoing permanent arrangement. This will be the case even if your organisation's arrangements with other providers (such as in a labour hire scenario) means that the need for a particular employee's services could end at any time.

Q11: Would the fixed term contract exceptions include people on 4 year visas where you fix the term for 4 years or the duration of the relevant work visa?

A11: This issue is quite closely tied up with the Migration Act and skills recognition issues. It is something that the Government may not have had time to consider yet. This is something that may be dealt with in a Regulation in due course. We are likely to see some lobbying about increasing the number of exemptions.

Flexible work

Q12: In regard to Flexible Work requests, how do you practically manage the flow on effect once it becomes an arbitrated decision? This means that the rest of the business could then use the same argument to get the same outcomes for them, which could have a significant impact on business productivity and outputs.

A12: Such an outcome (e.g. if everyone is working from home all the time and no one is in the office) might, depending on the individual circumstances, end up being a "reasonable business ground" for why such a request cannot be accommodated for other employees. Flexibility requests (and an organisation's response) are necessarily required to be tailored to the individual, so arbitration for one employee should not necessarily create a precedent for others. But it could create an expectation amongst employees that such a request could or should be granted. The evidence shows that most requests are in fact granted. Ensuring any agreements (or rejections) are appropriately documented will be very

important.

Disclaimer: The contents of this Q&A are intended only to provide a summary and a general overview on issues of interest. The responses are not intended to be comprehensive, they do not constitute legal advice and do not take into consideration your specific circumstances. You are encouraged to seek legal advice from a member of Piper Alderman's Employment Relations team before relying on any of the content.

Note: As at 24 November 2022, the Bill is before the Senate. Further or other changes may be proposed before any legislation is enacted. Organisations should check for the most up to date proposals before making any changes to their current arrangements in response to the Bill.