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The Secure Jobs, Better Pay Bill is here: How will the Bill impact the management of staff?

On 27 October 2022, the Albanese Government's Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022 (Bill) was tabled in Federal Parliament. In this article, Piper Alderman's Employment Relations team unpacks the proposals relating to flexible work and the contractual relationships between employer and employees, as part of its series of insights into the Bill.

Flexible Work Requests

Section 65 of the *Fair Work Act 2009* (Cth) (**FW Act**) allows an employee to request a flexible working arrangement if they are parents of school-aged or younger children or carers, have a disability, are over 55 years of age, or are a victim of family violence or supporting such a victim.

The Bill proposes to expand the last two categories to align with the broader notion of family and domestic violence now reflected in the leave provisions in section 106N, which can include abusive and threatening behaviour, not just violence.

More generally, the Bill would place further obligations on employers when they consider an employee's request and make it easier for employees to challenge refusals.

Employers would need to discuss the request with the employee, genuinely try to reach agreement to accommodate the employee's circumstances, and have regard to the consequences of the refusal for the employee.

Employers would be obligated not only to provide written reasons for any refusal, but to identify the reasonable business grounds justifying that refusal. Employers would also have to state what other changes (if any) to the employee's working arrangements they would be willing to make, and inform the employee of their right to dispute the refusal. A failure to do any of these things could result in penalties being imposed.

Under the current Act, refusals can only be challenged if the employer consents, or has previously consented (for example as part of an enterprise agreement) to arbitration. That limitation would be removed by the Bill.

Where an employer refused a request for flexible working arrangements, or did not respond within 21 days, the employee and employer would first have to attempt to settle the dispute at the workplace level. If no resolution was reached, either party could apply to the Fair Work Commission (**FWC**) to resolve the dispute. The FWC could deal with such disputes in any manner that it considered appropriate, such as mediation, conciliation, making a recommendation, expressing an opinion, or arbitration.

Where the FWC considered that arbitration was appropriate, it could order the employer to provide a written response or additional details, or make any other order to achieve compliance with the obligations set out above.

The FWC could also determine whether reasonable business grounds existed to refuse a request and, if not, order that the request be granted or that alternative arrangements be put in place to accommodate the employee's request. In resolving such disputes the FWC would be directed to consider fairness as between the parties, and they must not make orders unless strictly necessary.

Prohibiting Pay Secrecy

Arguably one of the most controversial and substantial elements of the new Bill involves amending the FW Act to prohibit pay secrecy, both retrospectively and in the future. There are four main components:

- employees would be allowed to ask other employees (of either the same or different employers) about their remuneration and other relevant conditions, including the number of hours worked;
- employees would be free either to disclose, or not disclose, their remuneration and any other employment conditions that determine that remuneration. Nothing within the amendments is intended to compel any employee to disclose such information. Both this and the right to ask other employees about their pay would be treated as workplace rights, for the purpose of the adverse action provisions in Part 3-1 of the FW Act;
- any provision in an employment contract, award or enterprise agreement that prohibited employees from asking about or disclosing their remuneration and other relevant conditions would be treated as unenforceable; and
- employers would be prohibited from including any pay secrecy clauses in new contracts or other written agreements.

The intention of these changes is to allow employees to use the information provided by other employees to assess whether their own remuneration is fair and comparable within the workplace, or the wider industry, as well as to consider past remuneration with previous employers.

Pay secrecy clauses in employment contracts agreed to before the amendments took effect would remain enforceable, but only up to the point at which any variation to that contract was agreed. Employers would also have a six-month grace period before being exposed to penalties for including such clauses in their new contracts.

If these provisions are ultimately enacted, it will be more important than ever for employers to ensure that employees are being paid above any mandatory minimum rates, and that any variation of pay rates amongst employees can be justified (based on experience, qualifications, etc.).

Limiting the use of fixed term contracts

The Bill proposes to include the promotion of job security as one of the stated "objects" (purposes) of the FW Act. It has little to say otherwise about that topic, other than in relation to fixed term contracts, on which there are significant but complex new rules.

Subject to the exceptions noted below, the proposed amendments would substantially limit an employer's ability to offer fixed term employment for periods of more than two years. Fixed term contracts with a right to renew if the total period extended beyond two years, or if there was a right to renew the period more than once, would also be prohibited.

Consecutive fixed term contracts would likewise be prohibited where each contract was for a fixed term, the job or position was substantially the same in each, there was "*substantial continuity*" between the contracts, and the total period was either more than two years, or the previous contract contained an option to renew. According to the Explanatory Memorandum, the reference to substantial continuity is intended to cover a situation where there is a break between contracts, but the employment is expected to continue: for example, a break between teaching semesters, or a short period of unpaid leave.

Entering into any of the prohibited types of contract after the amendments took effect, or seeking to avoid the new limitations, would constitute a breach of a civil remedy provision. A prohibited contract would still be enforceable, except that any term that provided that the contract would terminate at the end of the fixed term would have no effect. Essentially, the contract would be treated as indefinite in nature and presumably terminable by reasonable notice even in the absence of expressly agreed notice periods.

Having said this, there are a large number of exceptions to the proposed limitations, which would allow fixed term contracts beyond two years where:

- the employee is contracted to "*perform only a distinct and identifiable task involving specialised skills*";
- there is a training arrangement;
- the contract is to accommodate essential work during an emergency or a period of peak demand, or to cover a temporary absence of another employee;
- the contract provides payment in excess of the high income threshold (currently $162,000), or a pro rata amount for part-time or partial year employees;
- the work is funded by a government funding scheme of a kind prescribed by regulations and the funding is payable for more than two years, but there is no reasonable prospect that the funding will be renewed beyond that period;
- the work relates to a governance position that is time-limited by the governing rules of a corporation;

- a modern award provides that fixed term contracts of the relevant type are permissible (such as the awards covering schools and higher education); or
- any other class of contract prescribed by regulation.

It is also made clear that the new prohibition is not intended to apply to casuals. The Explanatory Memorandum explains that this is "*to avoid unintended consequences, for example in circumstances where casuals enter into contracts on a shift-by-shift basis*".

Employees would be able to raise disputes about the new fixed term employment provisions with the FWC, providing that they had attempted to resolve the dispute at the workplace level first. The FWC would be obliged to deal with the dispute, but it could only do so by arbitration with the consent of all parties.

The FWC would also be empowered to vary an existing enterprise agreement to resolve any inconsistency, uncertainty or difficulty created by the new fixed term contract provisions.

Finally, the Fair Work Ombudsman (**FWO**) would be charged with drafting a Fixed Term Contract Information Statement, which employers would need to provide to each fixed term employee at the time of making such a contract, regardless of whether the contract fell within any of the exceptions listed above.

In terms of timing, the new restrictions will not apply to contracts entered into before the amendments take effect, unless a further fixed term contract is subsequently created that takes the total period of employment over two years.

If these proposals are adopted, many organisations will need to reconsider the practice of engaging certain types of staff on rolling fixed term contracts. In some sectors, such as education, awards will still often permit such contracts, at least for some types of staff. Managers and professionals earning over the high income threshold will also be unaffected. But for smaller businesses and non-profit organisations in particular, greater use may need to be made of indefinite contracts with provision for termination on notice.

In parts 3 and 4 of our series of insights, Piper Alderman will consider how the Bill will impact gender-based issues and bargaining.

Piper Alderman will continue to monitor the Bill and its progress, and will be running a client webinar on 16 November 2022 to discuss the proposed changes and their possible impacts.Click here to register now.