

Industrial Relations Reform Insights

JOB SECURITY MEASURES

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Overview

The Federal Government has now passed its Pay Equity and Secure Jobs Bill.

This is ABLA's third publication on the Bill, which focuses exclusively on those reforms that broadly relate to the Government's 'Job Security' agenda. Specifically, these job security reforms comprise of:

- insertion of new objects into the Fair Work Act pertaining to job security;
- limitations on fixed term contracting;
- advertising of positions at rates that could not satisfy any underlying industrial instrument safety net; and
- expansion of the small claims process for hearing underpayment claims up to a value of \$100,000.

Through our unique position in advising a range of industry bodies on legislative reform and policy matters (including a large number of employers in the Community and Care sector), we are pleased to share our insights and update you on the specific details of the changes and the impact these are likely to have on businesses.

Insertion of new objects into the Fair Work Act

The Bill will insert a new object into the Fair Work Act to ensure job security and will also amend the modern awards objective (which applies to the variation of modern awards) that ensures the *"need to improve access to secure work"*.

These two changes are more than symbolic.

Once introduced, they will mean that:

- when provisions of the Fair Work Act need to be construed, they will be construed in a manner influenced by and likely consistent with the Act's objects - which will promote an application of the Act which favours more secure work; and
- when the Fair Work Commission exercises its functions (including new powers to arbitrate bargaining disputes), it will need to exercise any decision making power consistent with the desire to ensure greater job security. This will have particular application to any bargaining disputes that pertain to restrictions on contracting out of services or the use of labour hire.

Minister Tony Burke has already indicated that the insertion of these new objects into the Act and modern awards objective will likely trigger a new round of modern award reviews to ensure that awards meet the newly amended Fair Work Act objects and modern awards objective.

Limitations on fixed term contracts

The Bill limits the ability for parties to enter contracts (however drafted) which have a term that provides for the contract to terminate at the end of an identifiable period - whether or not the contract also includes other termination provisions if:

- they extend for a period for more than two years; or
- the contracts provide they may be renewed so the employee is employed for more than two years; or
- they follow on from a previous fixed term contract and:
 - > the previous contract is in relation the same or substantially similar work; and
 - > there is “substantial continuity of the employment relationship” between the end of the first contract and the current contract coming into effect;

and either:

- > the period of the two contracts together extend for a period of more than two years; or
- > the previous contract contained an option for renewal or extension and that option was exercised; or
- > the current contract contains an option for renewal or extension.

To summarise the fairly complicated regime above, fixed term contracts that (individually or combined) extend for more than two years are prohibited as are all successive contracts that either have an option for extension or that follow on from previous contracts that have been extended.

Where a contract is entered into which breaches these provisions, the Act will have the effect that the termination date set in the contract will no longer have effect.

There are exceptions to these prohibitions. These include:

- employees engaged to perform only a distinct and identifiable task involving specialised skills;
- employees engaged by way of a training arrangement;
- employees engaged to undertake essential work during a peak demand period;
- employees engaged to undertake work during emergency circumstances;
- employees who earn more than the high income threshold for the year that employee enters into the contract;
- employees engaged in a governance role which is prescribed a time limit under the governing rules of a corporation or association of persons;
- the contract is wholly or partly funded by government funding (or a type of funding allowed by the regulations) **and** the funding is for a period of more than two years **and** there are *no reasonable prospects* that the funding will be renewed after that period;
- a modern award covering the employee permits the employee to be employed for more than two years under a fixed term contract, a renewable contract and/or a consecutive contract.

There is a transition period applicable in the Fair Work Act. The provisions will only apply to contracts that are entered into after the provisions commence unless a successive contract is entered into.

The provisions will not commence until December 2023.

Finally, employers will be required to provide a Fixed Term Contract Information Statement to new employees who enter contracts with an identifiable end date.

Advertising for jobs with rates below those contained in the applicable industrial instrument

The Bill proposes to create a new civil remedy provision offence where an employer advertises for an employment position at a rate that would be in contravention of the Fair Work Act or a Fair Work instrument, which includes either a modern award or an enterprise agreement.

The intention of the offence is to reinforce that the consideration of employers' workplace and employment obligations must underpin the advertising of roles.

There is a defence to this offence if an employer has a "reasonable excuse". This has not been defined by the Bill or the Explanatory Memorandum.

The Explanatory Memorandum does helpfully provide that what is a reasonable excuse will depend on the circumstances of the individual case, taking into account the purpose of the provision.

The defence includes the consideration of any excuses which would be accepted by a reasonable person as sufficient to justify non-compliance. The Explanatory Memorandum states that the reasonable excuse defence is not confined to practical or physical difficulties in complying, making the defence broad enough to anticipate a range of reasonable excuses.

The provision specifically requires employers' advertisements of piecework to include details of any periodic rate of pay to which the pieceworker would be entitled to or whether a piecework rate applies.

This does not require affected employers to specify the actual rate of pay in their advertisement of the role as including a statement to the effect that a periodic rate of pay is payable in relation to the employment is sufficient to comply with the obligation.

In the advertisement of roles that are not related to piecework, the prohibition will only apply if the employer opts to specify a rate of pay in their advertising.

Expansion of small claims jurisdiction

The Bill will expand the ability to bring underpayment claims under the small claims jurisdiction of the Federal Circuit Court (and State/Territory Courts) by increasing the cap on small claims from claims up to \$20,000 in value to claims up to \$100,000 in value.

This will see some new impacts for relatively substantial underpayment claims of between \$20,000 to \$100,000:

- the more informal processes available under the small claims jurisdictions of the Federal Circuit Court or State/Territory Courts will now apply; and
- amongst other things, these small claims jurisdictions will often only allow parties to be represented by a lawyer with the permission of the Court. This means claims of some substance may need to be resolved without legal assistance.

The Bill does not propose to confer any jurisdiction on the Fair Work Commission to determine these types of claims. This was a matter initially canvassed in consultations with the previous Coalition Government and as part of the ACTU campaign in the lead up to the previous Federal Election.

It is possible the Commission's jurisdiction to hear and determine such claims might be expanded upon in future.

Next steps

For employers engaging employees on fixed term contracts that extend beyond two years, you will need to reset how you use these contracts and reassess the alternate options available where there is a lack of certainty in relation to the permanency of a position.

For all other employers, it remains the case that you need to be vigilant to ensure that they are correctly classifying employees and setting salaries and hourly rates of pay that adequately compensate employees for their hours of work under the applicable modern award.

As always, ABLA's team of experts are available to help with these matters. Feel free to reach out if you have any queries.



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