



**Baker  
McKenzie.**


**Australian Employment Law Updates  
March 2023**







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## 1. Discrimination, harassment and psychosocial risks

Law Change	Recommendation
<p> <b>Duty to manage psychosocial risks</b></p> <p>NSW has amended the Model Work Health and Safety Regulations by passing the <i>Work Health and Safety Amendment Regulation 2022</i>. The new Regulations impose a positive duty on persons conducting a business or undertaking (PCBUs) to manage psychosocial risks in the workplace, and to implement control measures to eliminate these risks or minimise them as far as reasonably possible.</p> <p>A psychosocial hazard is a hazard that arises from systems of work, the design, layout and environment of a workplace, interactions and behaviours (which could include a toxic workplace culture, or sexual harassment); or the guidance of supervision provided to employees, to the extent that these factors may cause psychological harm.</p> <p>Common hazards identified by SafeWork include high job demands, poor organisation change management, poor organisation justice, remote or isolated work, and of course, bullying, harassment, and poor workplace interactions.</p> <p>Common psychosocial risks may include employees who are overworked, jobs which involve unreasonable demands, employees chronically working long hours, or employees working remotely without much communication or support from management.</p> <p><b>Effective date: 1 October 2022</b></p> <p><i>Work Health and Safety Amendment Regulation 2022 (NSW)</i></p>	<p>Safe Work Australia has produced an <a href="#">infographic</a> to assist employers with the process of undergoing risk assessment and reviewing their control measures in relation to psychosocial hazards. Employers should:</p> <ul style="list-style-type: none"><li>• Identify psychosocial hazards and risks by monitoring the workplace, consulting with workers, conducting inspections and using survey tools, questionnaires or conducting regular cultural reviews and exit interviews to gather information from staff.</li><li>• Assess the impact of workers' exposure to the identified hazards and risks.</li><li>• Take prompt steps to control the risk by eliminating it or, if this is not practicable, minimising the risk as much as possible through planning and prevention.</li><li>• Review the efficacy of control measures to ensure that they remain effective.</li></ul> <p>Some examples of measures to control risks include:</p> <ul style="list-style-type: none"><li>• Measuring the duties required of the position.</li><li>• Ensuring that employees take proper breaks.</li><li>• Ensuring that complaints systems are operating properly, and that investigations are investigated in a trauma informed way.</li><li>• Ensuring that managers engage in role model behaviour.</li></ul> <p>Employers will also need to review their internal policies to ensure that they contemplate the new obligation, and to consider how these policies will play into minimising psychosocial risks.</p>


Law Change	Recommendation
<p> <b>Prohibiting sexual harassment in the Fair Work Act</b></p> <p>Prohibition on sexual harassment which occurs in connection with work including by third parties. This amendment aims to protect workers, prospective workers, and persons conducting or undertaking a business by prohibiting sexual harassment. As a result these amendments increase protections against workplace sexual harassment whilst giving workers a new way to deal with sexual harassment complaints.</p> <p><b>Effective date: 6 March 2023.</b></p> <p><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p>Employers will need to review and update their existing mechanisms for dealing with sexual harassment in the workplace so as to ensure the following (at least):</p> <ul style="list-style-type: none"> <li>• their policies and training include mechanisms for dealing with poor behaviour from third parties e.g. customers, client and contractors;</li> <li>• it is clearly communicated to staff that they are not expected to accept poor behaviour from third parties (despite any immediate economic consequences), and are encouraged to escalate any incidents; and</li> <li>• managers are trained to support staff and intervene on any such bad behaviour.</li> </ul> <p>Employers should also consult with significant contractors and labour hire organisations to ensure the following:</p> <ul style="list-style-type: none"> <li>• their workers are subject to compliant policies and receive training in relation to sexual harassment; and</li> <li>• there are mechanisms in place to ensure that complaints about workers are investigated properly and disciplinary processes are engaged.</li> </ul>
<p> <b>New grounds of unlawful discrimination</b></p> <p>Breastfeeding, gender identity and intersex status have been added to the anti-discrimination provisions in the Fair Work Act as new grounds of unlawful discrimination.</p> <p><b>Effective date: 7 March 2023.</b></p> <p><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p>Employers should ensure that employees are given breaks to breastfeed or express milk, and that they have access to private spaces in which they can do so comfortably, including while on assignments with clients (if it has not done so already).</p> <p>We also recommend that employers conduct a review of its employment contracts and workplace policies to ensure that anti-discrimination provisions explicitly contemplate breastfeeding, gender identity and intersex status as grounds of unlawful discrimination.</p>


Law Change	Recommendation
<p> <b>Prohibition on subjecting others to hostile workplace environments on the grounds of sex</b></p> <p>The Respect at Work Act has amended the <i>Sex Discrimination Act 1984</i> (Cth) to make it unlawful for a person to subject another person to a workplace environment that is hostile on the basis of sex. Conduct such as displaying obscene or pornographic materials, general sexual banter or innuendo and offensive jokes could contribute to a “hostile” workplace, and will therefore be captured by the prohibition.</p> <p>Sexual harassment may be caught under these laws even if the specific conduct is not directed at a particular person.</p> <p>It is important to note that the concept of “hostile workplace environment” has been introduced to address sexualised workplaces and other workplace cultural issues that arise but are not acted on in the absence of a specific “complaint” by a workplace participant.</p> <p><b>Effective date: 13 December 2022.</b></p> <p><i>Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022</i></p>	<p>Employers should carefully review their current workplace environment and sex-based risk factors. Reasonable and proportionate measures to eliminate hostile workplace environments could include a range of actions including:</p> <ul style="list-style-type: none"> <li>• Regular cultural reviews / 360 degree feedback;</li> <li>• Encouraging leaders to exhibit role model behaviours not only through training, but also through remuneration outcomes;</li> <li>• Increasing support levels to employees who have experienced stressful behaviour;</li> <li>• Mandating intervention by management on poor behaviour; and</li> <li>• Training HR professions and internal investigators to take a “trauma informed” approach to complaint handling and investigation.</li> </ul>
<p> <b>New positive duty to eliminate sex discrimination, sexual harassment and victimisation</b></p> <p>The Respect at Work Act, which received royal assent in December 2022, has amended the <i>Sex Discrimination Act 1984</i> (Cth) to impose a positive duty on employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible. The positive duty complements the existing requirement under work health and safety law for employers to provide, so far as is reasonably practicable, a safe working environment for their workers.</p>	<p>Employees at all levels should receive induction and compulsory training on these matters during onboarding. Induction and training should be conducted in person, and face-to-face if possible. Training and induction should include the following topics:</p> <ul style="list-style-type: none"> <li>• The nature and definition of sex discrimination, victimisation and workplace sexual harassment;</li> <li>• The prevalence of these issues and their impacts;</li> <li>• An outline of the obligations held by individual employees toward one another under legislation and under the employer’s sexual harassment and discrimination policy, and by the employer as a duty holder toward its employees; and</li> </ul>





Law Change	Recommendation
<p>The Australian Human Rights Commission has also been given new functions to assess and enforce compliance with the positive duty which will commence later this year (including the capacity to issue compliance notices to employers who do not meet their obligations).</p> <p><b>Effective date:</b></p> <ul style="list-style-type: none"> <li>• <b>Positive duty: 13 December 2022.</b></li> <li>• <b>AHRC's compliance powers: 12 December 2023.</b></li> </ul> <p><i>Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022</i></p>	<ul style="list-style-type: none"> <li>• Any key points of contact or complaints mechanisms available to those reporting these matters.</li> </ul> <p>The Respect@Work website also contains resources and tools developed by the AHRC to support workplaces to address sexual harassment. In addition to educative reports and other guidance materials, the AHRC has developed short online courses which employers may wish to utilise free of charge.</p> <p>Employers should also review and update their contracts and policies to ensure that they contain robust provisions addressing an employee's right to raise a complaint or report on sex discrimination.</p>

## 2. Workplace flexibility and parental leave

Law Change	Recommendation
 <p><b>Right to request flexible work arrangements</b></p> <p>Eligible employees are entitled to request flexible working arrangements. For example, this can include a request for changes in hours of work. An employer can only refuse such a request on "reasonable business grounds".</p> <p><b>Effective Date: 6 June 2023</b></p> <p><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p>When a request for flexible working arrangements is made the employer must discuss this request with the employee. If the request is denied, the employer will need to provide reasons in writing. The Fair Work Commission will now have the power to resolve a dispute with respect to flexible working arrangements including through conciliation, mediation or mandatory arbitration. Note there are expanded categories of employees that can make a request for a flexible working arrangement under the new laws.</p> <p>Employers should review their existing practices around receiving such requests and ensure that requests are promptly addressed and considered and discussions held with employees. It will be critical for employers to ensure that requests on workplace flexibility are reviewed against pre-determined reasonable business grounds consistent with the Fair Work Act. These decisions should also be vetted by a human resource manager to ensure that the assessments are consistent and supported by evidence.</p> <p>Managers / supervisors should be trained on the new rights. In particular, they should be required to escalate any such requests immediately to</p>


Law Change	Recommendation
	human resources professionals so that the requests are properly assessed within the available time-frame.
 <p data-bbox="293 360 584 387"><b>Unpaid Parental Leave</b></p> <p data-bbox="203 456 1055 544">An employee taking 12 months unpaid parental leave can request an extension of a further 12 months leave (up to 24 months in total), unless their partner has already taken 12 months of leave.</p> <p data-bbox="203 595 551 619"><b>Effective Date: 6 June 2023</b></p> <p data-bbox="203 671 949 695"><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p data-bbox="1128 360 2018 448">When an eligible employee makes a request for an extension of unpaid parental leave, their employer has an obligation to discuss this request with them. If the employer refuses then they need to provide written reasons.</p> <p data-bbox="1128 472 1834 496">Managers / supervisors should be trained on the new rights.</p>

Law Change	Recommendation
<p> <b>Government Paid Parental Leave (GPPL) pay</b></p> <p>The <i>Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022</i>, passed by the Senate on 6 March 2023, will amend the <i>Paid Parental Leave Act 2010 (Cth)</i> to extend GPPL pay following the birth of a child or (for adoption) the placement of a child, from the existing entitlement of 18 weeks to 20 weeks, by combining the existing GPPL pay and Government Dad and Partner Pay, which can be accessed by either parent.</p> <p>The Bill gives more families access to the payment by introducing a new family income test and provides a greater flexibility to parents to access the entitlement in multiple blocks.</p> <p><b>Effective date: 1 July 2023</b></p> <p><i>Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Bill 2022</i></p>	<p>Employers should update their Parental Leave policies which include references to Government PPL pay and/or Dad and Partner Pay.</p>
<p> <b>Family and Domestic Violence Leave</b></p> <p>Replacing the entitlement in the National Employment Standards (NES) of 5 days unpaid family and domestic violence leave with an entitlement to 10 days paid leave for full-time, part-time and casual employees.</p> <p>The amendment also extends the definition of family and domestic violence to include conduct of a current or former intimate partner of an employee, or a member of an employee's household.</p> <p><b>Effective Date: 1 February 2023 (for large businesses); 1 August 2023 for small businesses</b></p>	<p>Employers should update policies or procedures which include references to family and domestic violence leave.</p>




Law Change	Recommendation
<i>Fair Work Amendment (Paid Family and Domestic Violence Leave) Act 2022</i>	



### 3. Pay secrecy


Law Change	Recommendation
<p data-bbox="212 491 459 555">  <b>Pay Secrecy</b> </p> <p data-bbox="201 587 1064 678">Employees have a new workplace right to ask any other employee about remuneration and any terms and conditions of employment relevant to remuneration.</p> <p data-bbox="201 699 392 726"><b>Effective date:</b></p> <ul data-bbox="246 746 1086 973" style="list-style-type: none"> <li>• <b>New rights to ask any other employee about remuneration – December 7 2022.</b></li> <li>• <b>Employers have a 6-month grace period to update their employment contracts. From 7 June 2023, employers who retain pay secrecy clauses in their contracts may be liable for 60 penalty units, or 600 penalty units for a serious contravention.</b></li> </ul> <p data-bbox="201 1024 952 1050"><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p data-bbox="1131 494 2016 646">Employers should update existing employment contract templates do not contain clauses prohibiting employees from discussing their remuneration, or any terms or conditions of employment relevant to remuneration. Employers should also refrain from taking any disciplinary action against an employee that makes a lawful disclosure.</p> <p data-bbox="1131 667 2016 818">Employers should also ensure that their decisions on remuneration can be justified by reference to an employee's experience, capabilities, and performance, and also prevailing market forces. These reasons should be recorded. Employers must ensure that they are capable of justifying their decisions, and should expect more challenges.</p>

## 4. Fixed term contracts/temporary agreements

Law Change	Recommendation
<p data-bbox="210 347 564 411"> <b>Fixed Term Contract</b></p> <p data-bbox="210 443 1102 561">Prohibition on engaging an employee on a fixed term contract beyond 2 years or certain consecutive contracts, except in certain circumstances. This would include all temporary agreements with employees, regardless of whether or not either party has a right to terminate during the term.</p> <p data-bbox="210 609 1057 762"><b>Effective Date: 6 December 2023 (or a date earlier to be a fixed by proclamation). The prohibition will capture all agreements entered into after this date (including renewals). However, the period of previous temporary agreement will still be taken into account when assessing the 2 year limitation.</b></p> <p data-bbox="210 810 954 836"><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p data-bbox="1128 347 2020 497">Employers should review their existing arrangements for fixed term / temporary contracts and ensure that any such arrangements cease or fall within an exemption to the new laws. This will limit the use of fixed term contracts for the same role beyond two years or two consecutive contracts - whichever is shorter.</p> <p data-bbox="1128 517 2020 730">It is important that organisations map out their temporary arrangements and establish a plan for business continuation, following the expiry of the two year period. For key temporary workers, employers should assess the pros and cons of engaging them on permanent agreements which may be terminated by giving notice or making a payment in lieu of notice. The key downside is that these employees will more likely be able to access unfair dismissal rights and earn redundancy benefits.</p> <p data-bbox="1128 750 2020 932">Please note that provided that a temporary employee is engaged beyond the minimum employment period (6 months for employers with 15 or more employees), the temporary employee is entitled to access unfair dismissal laws and redundancy benefits, if their employment is terminated during the term of their employment by an employer exercising a right to give notice or make a payment in lieu of notice.</p>

## 5. Collective Industrial Relations changes

Law Change	Recommendation
<p> <b>Prohibiting job advertisements that would breach the Fair Work Act / minimum and award wage</b></p> <p>This amendment prohibits the advertisement of a job with a pay rate that would breach the applicable national minimum wage / minimum award wage for the relevant role. There is also an introduction of a new civil remedy provision in the <i>Fair Work Act 2009</i> which will allow inspectors to issue compliance notices requiring employers to take specific action in relation to non-compliance.</p> <p><b>Effective date: 7 December 2022.</b></p> <p><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p>Employers must ensure that they understand their obligations with respect to minimum wages, including award wages <i>before</i> advertising for roles. This does mean that, well in advance of advertising roles, employers should focus on preparing detailed (but flexible) job descriptions which clearly outline the general nature of the role, role requirements and critical competencies. Assessments of award coverage should be based on these job descriptions.</p>
<p> <b>Termination of enterprise agreements after expiry date</b></p> <p>The test for terminating an enterprise agreement after its nominal expiry date has been changed to limit the circumstances where such applications can be made by the Fair Work Commission.</p> <p><b>Effective date: 7 December 2022.</b></p> <p><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p>Employers should factor this change into their overall industrial strategy and tailor their workplace planning accordingly.</p>

Law Change	Recommendation
<p> <b>Sunsetting of 'zombie' agreements</b></p> <p>"Zombie" agreements, being agreement-related instruments made prior to the commencement of the <i>Fair Work Act 2009</i> and during the 'bridging period' (1 July to 31 December 2009), will automatically 'sunset' or terminate on <b>7 December 2023</b>.</p> <p><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p>Employers should ensure that they notify affected employees by no later than 6 June 2023 that they are covered by a zombie agreement and that the agreement will terminate unless an application to extend is made to the Fair Work Commission on or before 7 December 2023 (the sunset date).</p> <p>Consider current industrial relations strategy and how payroll, finance and related systems would operate in the event that a zombie agreement terminates.</p>
<p> <b>Multi-employer bargaining</b></p> <p>Employees at different companies within an industry will be able to join together to collectively bargain for pay and working conditions. Whilst this change has existed for some time under the <i>Fair Work Act</i>, it was largely restricted to a process where only the employer could initiate the bargaining. Under this change unions will also be able to initiate the bargaining process.</p> <p><b>Effective Date: 6 June 2023 (or a date earlier to be a fixed by proclamation).</b></p> <p><i>Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022</i></p>	<p>Employers should consider whether these changes could impact their workforce and adapt their industrial strategies accordingly.</p>

## Law Change

## Recommendation



### Enterprise Agreement Changes

Changes to the Better Off Overall Test and approval process for an enterprise agreement. These amendments provide employers with greater certainty about how the BOOT is applied whilst ensuring that employees are not worse off. The BOOT will become a global assessment (rather than a line-by-line comparison between the proposed agreement and the relevant modern award). The Commission will have greater involvement in considering views of parties and must undertake its own independent assessment in applying the BOOT. The Commission will also have power to amend an agreement where the agreement does not meet the BOOT. Note a new reconsideration mechanism applies to agreements.

Changes to enterprise agreement pre-approval processes including compliance with new obligations under the Fair Work Commission's Statement of Principles (yet to be finalised).

**Effective Date: 6 June 2023 (or a date earlier to be fixed by proclamation)**

*Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*

Employers should monitor the Fair Work Commissions' Statement of Principles (once finalised) to understand their new obligations on and from 6 June 2023 (the anticipated date when these changes are made law) when making an enterprise agreement.

Employers should ensure that they are prepared for any reconsideration applications made during the life of an enterprise agreement on and from 6 June 2023.

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