

Workplace Relations in 2023: 'It's a whole new ball game!'

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Topics being covered today

- Pay secrecy
- Family and Domestic Violence Leave
- Sexual harassment
- Flexible work arrangements
- Enterprise bargaining approval process
- Multi-enterprise bargaining
- Fixed term contracts
- Key takeaways

This is what we saw in 2022

- Return to work from lockdown
- Dealing with fatigue and mental health issues
- Recruitment and retention problems
- Inflation and higher wages (compared to only a 5.2% increase to the minimum wage)
- Increased role of bystanders and upstanders
- Intolerance for inappropriate behaviour
- Underpayment claims

Changes to the Fair Work Act



Prohibiting pay secrecy – changes commenced on 7 December 2022

- It is now unlawful to prevent employees from disclosing:
 - Information about their pay to other employees
 - Other details about their employment terms and conditions that are reasonably necessary to determine remuneration outcomes
- An employee's ability to disclose will be considered a 'workplace right'
 - Accordingly, it would be unlawful for employers to take adverse action against employees for discussing their pay or employment terms with other employees
- Employers would also be prevented from enforcing pay secrecy clauses in employment contracts and fair work instruments
- What does this mean for Employers?

Family and Domestic Violence Leave

- Changes have commenced on 1 February 2023/to commence on 1 August 2023
- Now updated and leave has been increased to 10 days per 12-month period
- Available to full-time, part-time and casuals – not pro-rated
- No minimum employment period to access
- “Family and domestic violence” definition has been extended to include conduct by a member of the household or a former intimate partner
- Employers can ask for proof
- Privacy and confidentiality are paramount

Prohibiting sexual harassment – changes commenced 7 December 2022

- The changes to the Act implement recommendations from the Respect@Work Report
- The Act will prohibit sexual harassment in connection with work, by a person towards:
 - a worker in a business or meeting
 - a person seeking to become a worker, in a business or undertaking
 - a person conducting a business or undertaking
- A broad definition of ‘worker’ is applied
 - The prohibition extends to individuals carrying out work in any capacity for a person conducting a business or undertaking
- Employers can be vicariously liable and civil remedy provisions may apply for an unlawful breach of the prohibition on sexual harassment
- A positive obligation on employers

Responding to sexual harassment

- A person who was sexually harassed at work may apply to the FWC to:
 - Make a stop sexual harassment order
 - Deal with the dispute by alternate methods (eg. by mediation, conciliation)
 - FWC may make a stop sexual harassment order if FWC is satisfied that a person has been sexually harassed and there is a risk the sexual harassment will continue
 - If resolution is unsuccessful, complainant by consent to arbitration before the FWC, or commence proceedings in a Federal Court

Flexible working requests – changes to commence 6 June 2023

Who is eligible?

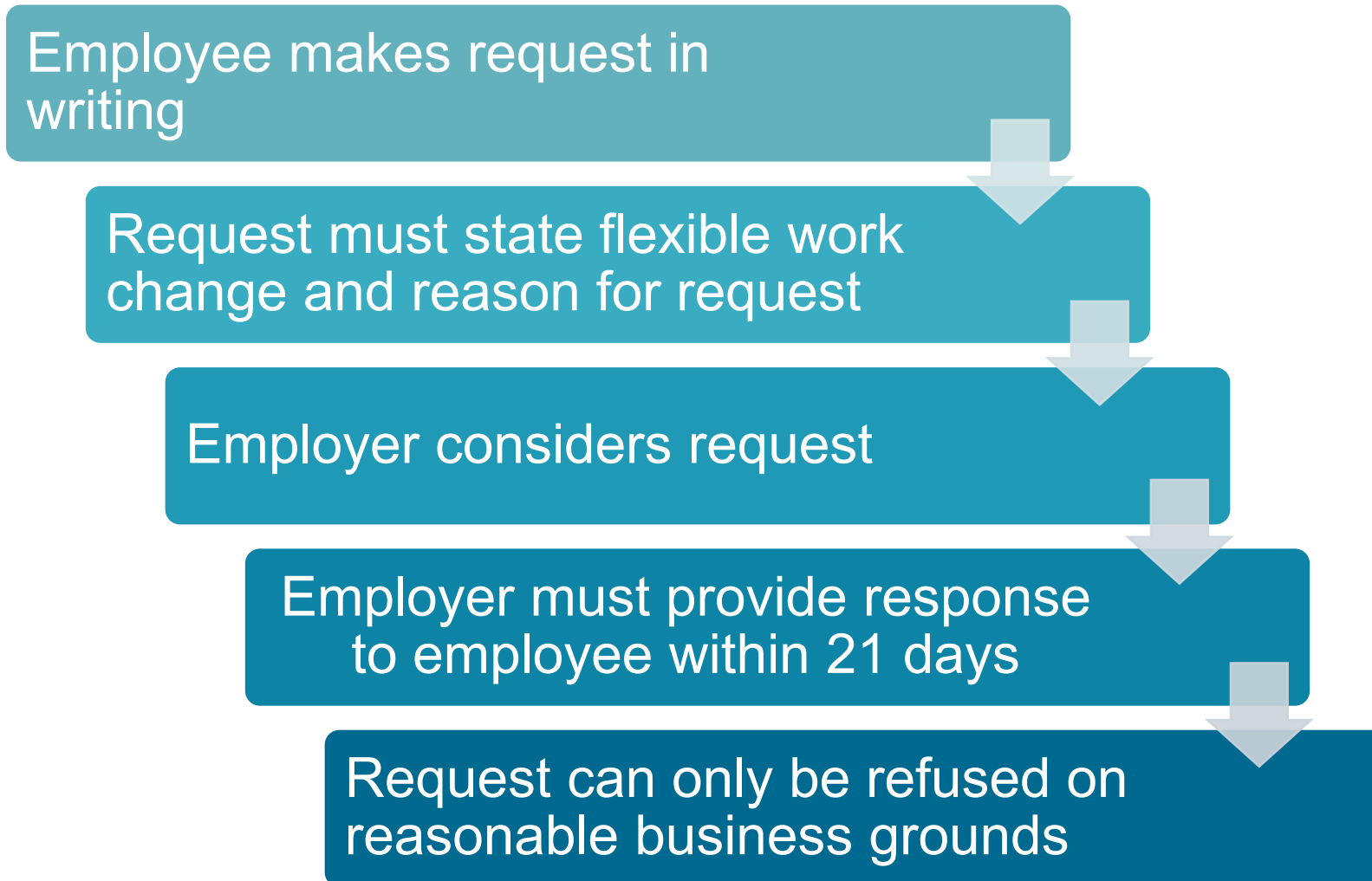
- Relevant circumstances apply to the employee
- **Non-casual employee:** has completed 12 months' continuous service
- **Casual employee:**
 - a regular casual employee who has been employed on that basis for a sequence of periods of employment of at least 12 months immediately before making the request; and
 - has a reasonable expectation of continuing employment by the employer on a regular and systematic basis

Types of adjustments

- Change to hours
- Change to pattern of work
- Change to location of work

Flexible working requests

Timeline of a request:



Flexible working requests

Fair Work Act 2009 (Cth) section 65

Reasonable business grounds can include:

- too costly
- working arrangements of other employees
- impractical to change the working arrangements of other employees, or recruit new employees;
- likely to result in a significant loss in efficiency or productivity
- likely to have a significant negative impact on customer service
- Is WFH the game changer here?

Multi-employer enterprise bargaining – Changes to commence 6 June 2023 (or earlier)

Proposed new supported bargaining agreements (SBAs)

- Intended for industries where single-enterprise bargaining is difficult (eg. home care, disability services, early childhood education)
- FWC to authorise a bargaining application and must do so if:
 - It is appropriate to do so having regard to:
 - Prevalent low rates of pay in industry/sector
 - Whether employers have clearly identifiable common interests
 - Whether number of bargaining reps for the agreement would be consistent with bargaining
 - Any other matters the FWC considers appropriate
 - At least some of employees covered are represented by an employee organisation
- Restrictions apply to FWC's ability to make an authorisation
 - Employees still covered by a single-enterprise agreement that has not passed its nominal expiry
 - Employees in the building and construction industry

Multi-employer enterprise bargaining

Proposed changes to single-interest employer agreements (SIAs)

- Ministerial declaration requirement for certain employers to be removed
- FWC empowered to make an SIA with/without employer consent if:
 - Employers agree to bargain or majority of employees want to bargain
 - Employers have clearly identifiable common interests (eg. geographic location, common regulator regime, nature of enterprises which the SIA will relate)
 - At least some of the employees covered are represented by an employee organisation
 - Employers will have an opportunity to express their views to the FWC – but FWC not bound by them
 - Decision cannot be contrary to public interest
- Limitations apply. FWC cannot make an SIA unless satisfied the employer is **not**:
 - A small business, currently awaiting a decision for another SIA authorisation, specified in a SIEA or SBA being considered, currently covered by an EA that is passed its nominal expiry date

Simplifying the enterprise bargaining approval process

- The changes seek to simplify the agreement making process and requirements for the FWC to be satisfied that an agreement has been '*genuinely agreed to*'
- Strict pre-approval steps may be removed or simplified, including:
 - The process to initiate bargaining
 - The seven day 'access period'
 - NERR requirements and the 21 day rule for holding the vote
 - The Better Off Overall Test (BOOT) – given the proposed “genuinely agreed to” test
- It is proposed that the FWC will publish a statement of principles
 - Which provides guidance on how to ensure employees have genuinely agreed
 - Hasn't been issued yet – expected 6 June 2023

Fixed term contracts – changes to commence 6 December 2023 (or earlier)

- It is proposed that employers be prohibited from engaging an employee:
 - **On a fixed term contract** – for more than two years; for two fixed terms that cumulatively exceed two years; or on a basis that allows for renewal so the employee will be employed for more than two years
 - **On consecutive contracts of employment** – where the employee is performing same or similar work under the consecutive contracts
- Intended to prevent employees from breaking continuing of employment
- Exceptions are:
 - The FW Act would render any unlawful fixed term as having no effect
 - But would not otherwise affect the validity of any other terms of the contract

What to expect in 2023

- More underpayment claims
- Changes to OH&S/WHS Regulations concerning psychological health
- New legislation, main issues:
 - Positive measures to address workplace issues (ie. sexual harassment and mental health)
 - Multi-employer bargaining
 - Fixed Term arrangements being phased out
 - Challenging flexible work arrangements (particularly WFH)

Where to from here for employers?

- Employers need to:
 - Review their employment contracts and any enterprise agreements (if applicable)
 - Be aware of the impact on the enterprise bargaining process
 - Consider the impact of the changes on their current business model
 - Consider a review of workplace policies and procedures
 - Ensure staff (and directors) receive training on the changes

Thanks!

