

AUSTRALIA: PAY SECRECY CLAUSES NO LONGER ALLOWED

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (Cth)* amends the *Fair Work Act 2009 (Cth) (Act)* by introducing, among other things, measures to secure equal pay objectives for employees, including to address the gender pay gap by prohibiting pay secrecy in Australia. The amendments prohibiting pay secrecy became law on 7 December 2022.

This article summarises what employers need to know about the new prohibitions on pay secrecy and recommends some steps employers can take to avoid contravening the prohibitions.

New workplace rights

The amendments relating to pay secrecy have created two new workplace rights. Specifically, employees now have a workplace right to:

- (a) disclose (or not disclose) to others their remuneration or terms and conditions of their employment that are reasonably necessary to determine remuneration outcomes (for example, potentially their hours of work) (together, **remuneration information**); and
- (b) ask other employees (whether or not they are employed by the same employer) about their remuneration information.

Employers are prohibited from taking adverse action against employees, including prospective employees, that exercise these workplace rights.

Clauses about pay secrecy abolished or invalid

Employment agreements have commonly contained clauses which require employees to keep their remuneration confidential, so it is likely that a number of existing employees may be party to employment agreements containing such clauses. Because of the amendments to the Act, those clauses (and clauses in fair work instruments, such as a modern award or enterprise agreement, that require secrecy of remuneration information) are now invalid and of no effect. This means that existing employees may now disclose and share information about their remuneration information even if their employment agreement (or applicable fair work instrument) includes a clause to the contrary.

The amendments also prohibit employers from including secrecy clauses relating to remuneration information in new employment contracts or other written agreements with employees. This prohibition, as well as the two new workplace rights mentioned above, are civil remedy provisions. Should an employer contravene these civil remedy provisions, it may be exposed to penalties, as may others who are accessories to the employer's contravention.

What does this mean for employers?

The combined effect of the various amendments is that employees (and prospective employees) may now discuss and disclose their remuneration information with others, and employers cannot contractually (or otherwise) prevent them from doing so or take adverse action against them if they do.

Given the potential adverse consequences arising from non-compliance with these new provisions, it is vital that employers act now. To that end, we have put together the following helpful checklist to assist with compliance:

Employer Checklist

Action items

Contract Terms

- Review and update your template employment agreements to remove any clauses which:
 - **directly** require remuneration information to be kept secret; and
 - **indirectly** require remuneration information to be kept secret. For example, if the definition of 'Confidential Information' includes the terms of the employment agreement, then that will have the indirect effect of requiring remuneration information to be kept confidential and so should be amended.
- Ensure that offers of employment made to existing or prospective employees are only made on the basis of these updated template employment agreements.
- Audit your employment agreements with existing employees to check whether they include clauses requiring them to keep confidential remuneration information, and, for any that do, consider appropriate steps to address the invalidity of these clauses.

Incentive Schemes

- Review any incentive schemes/plans and offer letters made under them to ensure that they do not require secrecy of remuneration information, and, if they do, take appropriate steps to effect amendments (including by complying with any corporate law requirements as necessary).
- Where offer letters previously provided to employees under incentive schemes/plans require pay secrecy, consider what steps should be taken to make the employees aware that they are no longer required to comply with the pay secrecy obligations.

Policy Terms

- Review any company policies or procedures that require secrecy of remuneration information and edit to remove any such requirements. Promulgate any amendments.

Training/education

- Educate about the amendments relating to pay secrecy. If employees are made aware that pay secrecy is prohibited, it is less likely that they (and more particularly, managers) will engage in any adverse action in contravention of the new workplace rights (such as disciplining an employee for disclosing details about their pay).

Organisation impacts and strategy

- Consider impacts of transparency around remuneration information on organisational reputation, the morale of employees and relationships between employees, particularly with respect to pay negotiations and/or promotions, and develop a strategy to manage.
- Consider the impact of the amendments on the organisation's management of gender pay equality and identify any gaps that may need to be addressed.

If after considering this checklist, if you would like some assistance with any matters relating to implementation, please reach out to one of our capable team members who will be happy to assist you.



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