

ANTI-DISCRIMINATION & SPECIAL MEASURE CHANGES TO THE FAIR WORK ACT

What is it, and what is new?

Breastfeeding, gender identity and intersex status will now be included as protected attributes in the Fair Work Act (FWA), meaning workers cannot be discriminated against because they have those attributes.

Previously, the FWA limited the ability of workers and unions to achieve substantive equality in the workplace through bargaining due to the definitions of 'matters pertaining to the employment relationship' and 'discriminatory terms.' Now, the FW Act confirms that 'special measures to achieve equality' are matters pertaining to the employment relationship, and are not discriminatory terms. This means that special measures are terms that can be included in enterprise agreements.

What are the key rights and requirements?

Anti-discrimination

- » Workers with breastfeeding, gender identity, and intersex status attributes will be able to bring general protections and unlawful termination complaints to the Fair Work Commission (FWC). This means unions can seek penalties for a breach.
- » Modern awards and enterprise agreements will not be able to discriminate based on these attributes
- » The FWC will need to consider the need to prevent and eliminate discrimination based on these attributes while performing its functions and exercising its powers.
- » Protections and remedies are available to all workers in Australia, not just those in the national system.

Special Measures

- » In order for a term to be a special measure to achieve equality, it must be necessary and intended to achieve substantial equality.
- » A term will cease to be a special measure after substantive equality for the employees has been achieved.

Strategic considerations

Coordinate:

- » How can we centralise and resource education and training to promote these new rights?
- » How can unions best coordinate the development and sharing of different kinds of special measures that can be included in logs of claims?
- » How can unions which are using the new multi-employer bargaining and supported bargaining streams best coordinate on what special measures would be beneficial to the workers covered?

Growth:

- » How can unions best use these changes to seek strengthened industrial rights and protections in industrial instruments, and grow membership by organising around these issues? For example, access to paid breastfeeding breaks and adequate facilities, paid gender transition/affirmation leave, strengthened protections against discrimination.

- » Bargaining for special measures terms in enterprise agreements will provide significant opportunities for growth. How can unions best use these provisions to organise diverse groups of workers and increase participation across workforces of workers with particular protected attributes?
- » How can unions best use special measures terms to address intersectionality and provide equality for workers with a combination of protected attributes – for example women with a disability, First Nations women, women of colour, LGBTIQA+ women?

Precedent:

- » How do we ensure initial cases are providing the strong interpretation, and critical public education, in relation to these new rights? The interpretation of the test 'a reasonable person would consider that the term is necessary in order to achieve substantive equality' will be key.
- » The interpretation of the provision that a term ceases to be a special measure after substantive equality for the employees has been achieved will be key.

**EQUIP
PLAN
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