

Prohibiting Pay Secrecy

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Introduction

Pay secrecy clauses are commonly inserted into employment contracts by employers to prohibit workers from disclosing what they get paid and taking action about wage inequity. This lack of transparency means that women have no way of knowing whether they are being paid equally to men, whether their pay is keeping up with market rates, and whether there is a gender pay gap in their workplace. Pay secrecy clauses can significantly contribute to the gender pay gap.

The Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022 (SJBPA Act) inserts new provisions into *The Fair Work Act 2009 (Cth) (FW Act)* which give workers the right to discuss pay and related conditions despite any contractual pay secrecy clauses and protect employees from adverse action if they exercise their right to disclose (or not disclose) their remuneration.

Prohibiting Pay Secrecy Clauses

Under the new provisions, employees will have the right to:¹

- Disclose (or not disclose) information to any other person about their own remuneration, including in relation to past employment;
- Also disclose (or not disclose) information to any other person about any terms and conditions of employment that are reasonably necessary to determine remuneration outcomes, such as the number of hours they work;
- Ask other employees about any of the above, whether they are employed by the same employer or a different employer,

The above rights are workplace rights², which means that the General Protections provisions of the FW Act apply to them. Employers cannot take adverse action (including dismissal) against employees or prospective employees for exercising these workplace rights. These changes mean that employees are free to choose whether or not to discuss and reveal their pay to others and are protected from adverse action if they exercise the right to disclose (or not disclose) their remuneration or ask other employees about theirs. The new statutory provisions override a term of a contract or a fair work instrument (such as an award or enterprise agreement) that requires pay secrecy (these terms being rendered of no effect to the extent they are inconsistent with the new provisions).³

¹ FW Act s 333B

² FW Act s 333B (3)

³ FW Act s 333C

The new provisions also prohibit employers from entering into a contract of employment or enterprise agreement that requires pay secrecy. Employers who require pay secrecy in a contract or agreement are subject to a civil penalty.⁴ After a six-month transitional period, employers who continue to include pay secrecy terms in new written agreements and contracts of employment will have breached the prohibition and could be liable to penalties.

When these changes take effect

The FW Act has already been amended to make the changes that are described above, however they do not take immediate effect for all employees. There are some important transitional provisions which govern when this occurs, which is an important consideration before members act in reliance of them. The rights to disclose remuneration etc. and to ask about it apply:⁵

- From 7 December 2022:
 - For any existing employee whose contract of employment does not contain a term preventing them from disclosing their remuneration;
 - For any new employee who enters into a contract of employment on or after that date;
- From the date an existing contract of employment is varied, for any employee who was employed before 7 December 2022 and whose employment contract is varied after that date.

This means that existing employees will have the right to talk about their pay if their contract doesn't prevent it but will have to wait until that contract is varied (or a new contract entered into) if it does.

The transitional arrangements also affect past employees, who are able to exercise the right after 7 December 2022 in relation to their previous employment after 7 December 2022 (including employment prior to that date) but are still bound by any contractual pay secrecy terms entered into prior to that date.⁶

Any term in an award or enterprise agreement requiring pay secrecy is of no effect from 7 December 2022.⁷

New employment contracts and other written agreements

Pay secrecy clauses included in new employment contracts from 7 December 2022 will have no effect, and from 7 June 2023 will attract penalties. This will provide a six-month grace period for employers to ensure their standard employment contracts comply with the prohibition.

Existing employment contracts

Pay secrecy clauses in current employment contracts (i.e., those entered into before 7 December 2022) will continue to operate, until those contracts are varied, in which case the clause will no longer have effect. Current contracts of employment which do not have pay secrecy clauses in them will not be impacted.

⁴ FW Act s 333D

⁵ FW Act Sch 1 Pt 13 Div 5 cl 59

⁶ See FW Act Sch 1 Pt 13 Div 5 cl 59; Note: it is unlikely in these circumstances that the contract would be varied, meaning that the limitation would be likely to endure.

⁷ FW Act Sch 1 Pt 13 Div 5 cl 59(3)

New or existing fair work instruments (awards and agreements)

Pay secrecy terms in fair work instruments such as awards or enterprise agreements have no effect and cannot be enforced after 7 December 2022. This applies regardless of whether the instrument was made before, on, or after this date.

Considerations when using the new provisions

The provisions regarding pay secrecy only apply to employees, and do not apply to other types of workers such as independent contractors. This means other kinds of workers will not have the same workplace rights to ask others about their remuneration, and to disclose their remuneration, and employees who ask non-employees about remuneration will not be protected. For example, an employee who asks about the remuneration of another person in the workplace, not realising that they are not an employee (but are an independent contractor for example), would not have any protection from adverse action including termination of their employment.

Further, the prohibition on pay secrecy terms in contracts and written agreements only apply to employees and pay secrecy terms in agreements with other kinds of workers will still be allowed.

Making the most of new laws

The laws relating to pay secrecy have changed. The true application of the new legislative provisions will not be fully determined until it has been tested by the Fair Work Commission and the courts. This means that it's really important that the union movement selects and runs cases which support our preferred interpretation of the legislation and defend against cases which do not. Making sure that we run the best "test cases" to make sure the laws are operating for working people will require careful coordination and information sharing across the union movement.

One of the key questions of interpretation that will guide how the new laws operate will be whether a contract of employment has been validly varied, such that the new pay secrecy prohibitions apply to the employee. ⁱ

ⁱ *The information in this document does not constitute legal advice and should not be taken to include all requirements or obligations relevant to the entitlement.*