



Workplace Relations Assist

Helping employers comply with changes to Fair Work Laws

# Implementing new workplace relations obligations

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# Agenda

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- The changes: an overview
- A framework for operationalising the changes
- These slides deep dive into some key changes:
  - Definition of employee
  - Casual employment
  - Labour hire (“same job, same pay”)
  - Requests for flexible working arrangements
  - Right to disconnect
  - Fixed term contracts

# The changes: an overview



## *Secure Jobs, Better Pay Act*

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### **7 December 2022**

Objects of Act  
Equal remuneration orders  
Pay secrecy  
Job advertisements  
Anti-discrimination  
Initiating of bargaining  
Dealing with EA errors  
EA terminations limited  
Sunsetting of zombie agreements  
New modern award and minimum wage objectives

### **6 March 2023**

FWC Expert Panels  
Sexual harassment disputes  
ROC goes to FWC with new enforcement options

### **6 June 2023**

Requests for flexible working arrangements  
Multi-employer bargaining  
EA approvals and BOOT  
Industrial action  
Intractable bargaining  
Unpaid parental leave (requests to extend)

### **7 June 2023**

Pay secrecy penalties

### **1 July 2023**

Small claims jurisdiction  
National Construction Industry Forum

### **6 December 2023**

Fixed term contracts

### **7 December 2023**

Zombie agreements end

## *Protecting Worker Entitlements Act*

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**1 February 2023**

NES paid family and domestic leave (1 Aug)

**30 December 2023**

Recurring variable salary deductions authorization

**1 July 2023**

Unpaid parental leave – (e.g., flexible UPL increased to 100 days)

**4 June 2023**

Family domestic leave pay slip requirements

**1 January 2024**

NES superannuation entitlement

## *Closing Loopholes Act 2023*

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### 15 December 2023

Small business redundancy exemption provisions commence

Regulated labour hire arrangement jurisdiction commences

Employee workplace delegates' rights provisions commence

Protections for those subject to family and domestic violence commence

Amendments to compulsory conciliation conferences in protected action ballot order matters commence

### 1 July 2024

Determinations varying modern awards to include an employee delegates' rights term come into operation

Delegates' rights term must be included in a workplace determination made on or after 1 July 2024

Delegates' rights term must be included in an enterprise agreement approved by vote on or after 1 July 2024

### 1 November 2024

Regulated labour hire arrangement orders can commence operation

### 1 January 2025

Wage theft provisions apply (or, if later, the day after the Minister declares a Voluntary Small Business Wage Compliance Code)

## Closing Loopholes No. 2 Act 2024

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### 27 February 2024

Bargaining for franchisees

Transitioning out of multi-enterprise agreements

Intractable bargaining workplace determinations

Defence to sham contracting narrowed (employment)

Penalties for underpayments and serious contraventions

Compliance notices

De-merger provisions for registered unions

Opt-out notices for new employer/employee meaning

### 1 July 2024

Exemption certificates for entry for suspected underpayments

### 26 August 2024

Right to disconnect (except for small business employers)

Casual employment changes: definition, employee choice pathway, small claims, sham arrangements

New meaning of 'employee' and 'employer'

Regulated workers (employee-like and road transport) – minimum standards, unfair deactivation/termination, consent collective agreements and powers to impose obligations on participants in a road transport industry supply chain

### 26 August 2025

Regulated workers' delegate rights

Unfair contract terms

### 26 February 2025 or proclamation

Model terms in enterprise agreements

### 26 August 2025

Right to disconnect for small business employers

For further information [available to Ai Group members]

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- [Ai Group Guide - Secure Jobs, Better Pay \(SJBPA\) Amendments](#)
- [Ai Group Guide - Protecting Worker Entitlements Amendments](#)
- [Ai Group Guide - Closing Loopholes Amendments](#)
- [Ai Group Guide - Closing Loopholes No 2 Amendments](#)
- Ai Group Industrial Relations Legislation Changes [webpage](#) for additional resources.





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Deep dive into some  
key changes





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## Definition of “employee”



## Who's an employee?

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- New meaning of 'employee' and 'employer' for the Fair Work Act: based on the 'real substance, practical reality and true nature of the relationship between the parties' – consider:
  - the totality of the relationship between the parties;
  - the terms of the contract; and
  - other factors relating to the totality of the relationship (eg, how the contract is performed)

➡ The terms of the contract are no longer definitive!

## Employee or independent contractor?

Factors indicating employment relationship	Factors indicating independent contractor relationship
<ul style="list-style-type: none"><li>• Degree of control exercised (the more control, the more likely an employment relationship exists) – for example, right to dictate place &amp; hours of work</li><li>• Employer provision and maintenance of equipment</li><li>• Hours of work and provision for holidays</li><li>• Deduction of income tax</li><li>• Obligation to work</li><li>• Inability to delegate work to others</li></ul>	<ul style="list-style-type: none"><li>• Work involving a profession or trade</li><li>• Provision of own place of work/equipment</li><li>• Creation of goodwill or saleable assets in the course of performing their work</li><li>• Payment of business expenses from revenue earned through working</li><li>• Payment without deduction for income tax</li></ul>

Not an exhaustive list – and weight given to each factor will vary

## Some case examples

### Hollis v Vabu

#### Employee

- Courier company provided radio equipment & uniforms (which couriers were required to wear)
- Required to commence work at 9am and work to a roster of deliveries provided
- Couriers not able to refuse work
- Couriers paid a standard rate of pay (no ability to bargain for a different rate)

#### Independent contractor

- Signed a “Contract for Services”
- Couriers required to provide their own bikes

Finding: employee

### Stevens v Brodribb

#### Employee

- Allocation of tasks and day-to-day direction of work managed by sawmill’s site manager (employee)

#### Independent contractor

- Provided & maintained own equipment
- Set own hours of work
- Payment by amount of timber transported
- No deduction for income taxes
- Paid expenses out of income received
- No guarantee of work – and free to seek other work if no work available (eg, due to bad weather)

Finding: independent contractor

## What does this mean for our existing contractors?

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- New definition applies to relationships entered into before 26 August 2024 if the relationship continues beyond that date [NB: contractor must be an individual, not Pty Ltd company]:
  - Status pre-26 August: determine based on previous High Court test
  - Status post-26 August: determine based on new statutory test
- Potential for contractors to avoid being deemed employees under the new definition through the 'opt out' mechanism where the contractor's earnings exceed the contractor high-income threshold (\$175k)
- Either principal or contractor can commence the opt out process
- Be aware:
  - If opt out notice is given now, contractor may have been an employee from 26 August to date opt out notice provided
  - If contractor becomes an employee through the new test, any industrial instrument applicable to employees will also apply to that individual (eg, Modern Award, enterprise agreement etc)

NOTE: contractor can only opt out once and can only revoke the nomination once

# Sham contracting

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- Employers engage in sham contracting when they mischaracterise or misrepresent an employment relationship as an independent contracting arrangement
- New stricter defence: employer proves that they 'reasonably believed' that the contract was for services
- Reasonable belief: consider the size and nature of the employer's enterprise and other relevant factors, including:
  - the employer's skill and experience
  - the industry in which the employer operates
  - how long the employer has been operating
  - the presence or absence of dedicated human resource management specialists or expertise
  - whether legal or professional advice sought including any advice from an industrial association and, if so, acted in accordance with that advice
- Very significant penalties for sham contracting – a maximum of \$469,500 for most entities



## What do we need to do?

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Audit your current contractor base – are any of these individuals likely to be deemed employees under the new test?



If you have contractors who may be impacted by the changed definition, are they eligible to opt out?



Audit your processes for classifying workers when they commence – make sure you properly identify whether someone is an employee or contractor



If you have any doubt about a worker's status, seek advice





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# Casual employment



## Who's a casual employee?

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- A person is a casual employee if:
  - there is an absence of a 'firm advance commitment to ongoing and indefinite work'; and
  - the casual employee is entitled to a casual loading or a specific rate of pay for casual employees
- The FWC determines the **absence** of 'firm advance commitment' on the basis of the "real substance, practical reality and true nature of the relationship" by assessing:
  - the terms of the contract (whether written or not)
  - any non-contractual mutual understanding or expectation
  - the conduct of the parties, including after work commences
- NB: be aware of interaction between new definition of casuals and any definitions included in applicable award or enterprise agreements

## Some things that may indicate a firm advance commitment

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- Can the employer elect to offer/not offer work?
- Can the employee elect to accept/reject work?
- Is it likely (considering the nature of the employer's business) that work of this kind will continue to be available?
- Are there full-time employees or part-time employees performing the same kind of work as the employee?
- Is there a regular pattern of work for the employee?
  - NB: this factor alone will not indicate a firm advance commitment

No single factor is determinative – and not all need to be satisfied

## What does this mean for our existing casuals?

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- Employees engaged as casuals immediately before 26 August 2024 remain casuals:
  - This is the case even if their employment arrangements are inconsistent with the new definition
- In respect of these ongoing existing casuals:
  - any period of employment as a casual employee before 26 August 2024 is not counted for the purposes of calculating the periods relevant to the giving of an employee choice notification;
  - the employer obligation to make an offer of casual conversion (or give a notice of no offer of casual conversion) continues to apply for a period of 6 months from commencement, except for casuals who work for small business employers; and
  - requests for casual conversion (if applicable) continue for 12 months for small business employers and 6 months for all other employers.

## Once a casual, always a casual...

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- If the employee is properly classified as a casual at the point of engagement, they will remain a casual until:
  - convert to permanent employment having made a casual conversion request;
  - FWC makes an order following a dispute which converts them to permanent employment;
  - employment status is converted to permanent under the terms of an industrial instrument; or
  - employer makes an offer of permanent employment which the employee accepts.

Applies irrespective of whether the circumstances of their work change such that they no longer meet the casual definition

However – if the employee was incorrectly classified as a casual upon commencement, will have been a permanent employee from the outset and can make a claim for unpaid entitlements (subject to offset against the casual loading paid)

## Employee choice notification

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### Making the request

- Casual employee:
  - employed for at least 6 months (or 12 months, where employer is a small business); and
  - has not exercised a casual conversion right or notified FWC dispute in the past 6 months;
- Gives employer written notification that they believe they are no longer casual;
- Employer must:
  - consult with the employee prior to providing the written response; and
  - provide a written response within 21 days – which must include certain content

### Refusing the request

- Grounds for refusing employee choice notification:
  - the notification was made incorrectly
  - the employee's current employment relationship still meets the statutory definition of a casual employee; or
  - offer of permanent employment will contravene a government-based recruitment/selection process; or
  - employer has "fair and reasonable operational grounds" for not accepting notification

## “Fair & reasonable operational grounds” for refusing a notification

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- “*Fair and reasonable operational grounds*” defined as:
  - substantial changes would be required to the way in which work in the employer’s enterprise is organised;
  - there would be significant impacts on the operations of the employer’s enterprise; or
  - substantial changes to the employee’s terms and conditions would be reasonably necessary to ensure that the employer does not contravene a term of a fair work instrument that would apply to the employee as a full time or part time employee
- For these purposes, “*substantial changes*” include changes that would have a significant effect on the way an employee would need to work

## What if there's a dispute?

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- Disputes process:
  - Parties must first discuss at the workplace level to try and resolve it
  - If unresolved, FWC must seek to resolve other than by arbitration, e.g., mediation, conciliation, making a recommendation or expressing an opinion – then arbitration if dispute unresolved by other means
  - If arbitrating, FWC may make any order it considers appropriate, including that the person should continue to be treated as a casual employee or that an offer to change to part-time or full-time employment must be made
  - If a dispute resolution process applies under a modern award or industrial agreement it must be complied with.
- FWC must not make an order:
  - if the order is not *fair and reasonable*; or
  - which would be inconsistent with the *Fair Work Act* or the terms of a fair work instrument.
- When considering whether to make and the terms of an order, the FWC:
  - have regard to whether substantial changes to the employee's terms and conditions would be reasonably necessary to ensure the employer does not contravene a fair work instrument; and
  - disregard conduct of the employee and employer that occurred after the employee gave the notification.



# Backpay, fixed term contracts & information statements

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## Backpay & misclassification

- If an employee is misclassified as a casual, a court may offset a compliant casual loading paid to the employee against an underpayment.
- Casual loading must comply with Fair Work Act
- Claim be brought in the small claims jurisdiction (where under \$100k is being claimed)

## Casual employment information statement

- For **medium and large business employers:**
  - before, or as soon as reasonably practicable after employment commences;
  - after 6 and 12 months' service respectively; and
  - every 12 months thereafter.
- For **small business employers:**
  - before or as soon as reasonably practicable after employment commences; and
  - after 12 months' service.

## Casuals & fixed term contracts

- Limits on fixed term contracts apply also to casual contracts –
  - Maximum of two years; and
  - Maximum of one renewal or extension; and
  - Limitations around consecutive contracts for the same or substantially similar work



## What do we need to do?

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### Check your template casual contracts:

- |                                     |   |                                     |   |
|-------------------------------------|---|-------------------------------------|---|
| <input checked="" type="checkbox"/> | State that they are for casual employment   | <input checked="" type="checkbox"/> | State it's not possible to determine whether there will be continuing work available  |
| <input checked="" type="checkbox"/> | State that there is no firm advanced commitment to ongoing work   | <input checked="" type="checkbox"/> | Does not commit to a regular pattern of work  |
| <input checked="" type="checkbox"/> | State the casual loading or specific rate of pay for casuals – make sure it is compliant                | <input checked="" type="checkbox"/> | Is otherwise consistent with casual employment (eg, doesn't contain entitlements that should only be made available to permanent employees) |
| <input checked="" type="checkbox"/> | Confirm the employer may elect whether to offer work, and the employee may elect whether to accept work |                                     |   |



## What do we need to do?

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### Ongoing management:



Ensure you manage your casual population consistent with their casual status – for example:

- Ensure rostering arrangements reflect casuals' ability to refuse shifts
- Train recruiters and managers not to promise ongoing work

### General



Update internal policies & processes to reflect new casual conversion process



Train your managers around the steps required in response to a request for employee



Review any enterprise agreements to ensure casual terms are consistent with new law – consider applying for variation



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# Fixed term employment



## What are the new rules about using fixed term contracts?

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- Employment contracts cannot have a fixed term if:
  - **Time:** the term is greater than two years;
  - **Renew/extend:** has a term which permits it to renew or extend more than once; or
  - **Two consecutive contracts:** the contract is a second consecutive contract for the **same or substantially similar work** with **substantial continuity** of the employment relationship and any of these circumstances apply:
    - the initial contract has already been renewed or extended;
    - the duration of both the initial and consecutive fixed term contract is more than 2 years; or
    - the consecutive fixed term contract has an option for renewal or extension.

## What is a consecutive contract?

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### The same or substantially similar work

- Work is likely to be the **same or substantially similar** if:
  - the person is employed in the same role (or capacity);
  - the roles in substance or practice are the same despite being described differently between the two contracts; or
  - the changes to the work are insubstantial or minor.

### Substantial continuity

- Consider:
  - **length of the break** - e.g., a shorter break may be more likely to be continuous
  - **reason for the break** - e.g., if the employee has personal reasons for a break, it may indicate continuity
  - **history of the employment relationship** - e.g., a history of 'rolling contracts' this may indicate continuity
  - **financial and operational context** - e.g., does the funding require a break – if so, this may indicate continuity
  - **whether other employment was entered into between contracts** - e.g., has the employee worked for another employer during the break – this may indicate a lack of continuity

## Are there any exemptions available?

Exception	What type of employee
Specialised skills	Employee has specialised skills the employer does not have, but needs, to complete a distinct and identifiable task
Training arrangement	Employee engaged as part of a training engagement – e.g., as a trainee or apprentice
Essential work	Employer needs additional employees to do essential work during a peak period - e.g., fruit picking or other seasonal work
Emergency or absence	The employer needs additional employees during an emergency or to replace a permanent employee who is absent for personal or other reasons (e.g., parental leave, sabbatical, long service leave or an absence relating to workers compensation)
High-income	Employee earns above the high-income threshold in the first year of the contract - currently \$175,000 (1 July 2024 to 30 June 2025) – calculated different to unfair dismissal threshold in relation to fixed term employee
Reliant on funding	Employer reliant on government funding, or other funding specified in the Regulations, to directly finance the employee's position (in whole or part), employer receives the funding for >2 years, and no reasonable possibility the funding will be renewed
Governance position	Employee is appointed under governance rules of a corporation or other association which specify the length of appointment
Modern award	Employer is permitted to enter into the fixed term contract by a term specified in a modern award that covers the employee
Regulations	The contract is a type of contract, prescribed in the Regulations for which an exception applies

## Breach & anti-avoidance provisions

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### Breach

- Fixed term contract term is invalid, but rest of the contract remains – eg, contract is permanent on those terms
  - ... and, because the employee is now permanent, would have access to relevant applicable safety nets – eg, notice and redundancy entitlements, access to unfair dismissal etc
- FWC may conciliate or mediate a dispute about limitations and, if parties agree, may arbitrate the dispute
- Employee (prospective employee), union or FWO can apply to a Federal Court for penalties for civil penalties (potentially significant fines) and/or determination of whether the fixed term is taken to have no effect

### Anti-avoidance provisions

- Employer prohibited from making changes to employment contracts for a reason including avoiding the fixed term contract restrictions
- For example:
  - terminating an employee's employment or delaying re-engagement to ;
  - artificially changing the work duties of an employee between the two contracts; or
  - instead engaging another person to do the same or substantially similar work.
- The limitations are workplace rights – hence potential for general protections claims





## What do we need to do?

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- Review the use of fixed term contracts across your business – do you use them?
- If you engage fixed term contractors, review whether your use is within the new restrictions – and if not, update your practices
- If you do engage employees on fixed term contracts and you need to continue doing so, consider whether you can rely on an exemption – and if so, update employment contracts to reference this
- If there is no exemption available, factor redundancy costs into business planning when fixed projects conclude – consider applicability of unfair dismissal remedies

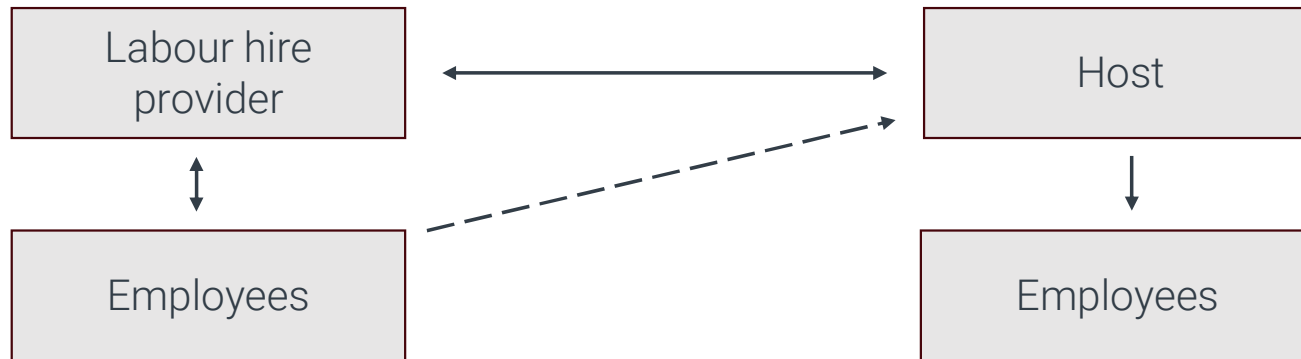


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Labour hire  
("same job, same pay")



## What are the same job, same pay provisions?



- Where an application is made, an order requiring a labour hire provider to pay its employees no less than the host is paying its own employees
- Order made **only** where:
  - An enterprise agreement would apply to labour hire employees, if employed directly by the host to perform work of that kind
  - Work is the supply of labour, not the provision of service
  - Host is not a small business employer
  - Fair & reasonable to make the order [only considered where submissions are made on this point]

## When is it “fair & reasonable” to make the order?

Circumstance	Detail
Nature of pay arrangements applicable to host and labour hire employees	<ul style="list-style-type: none"> <li>Does the host’s EA apply only to a particular class of employees?</li> <li>Has the host’s EA ever applied to an employee at a classification, job level or grade which would apply to the labour hire employees?</li> <li>What rate of pay would apply if the order were made?</li> </ul>
History of the industrial arrangements applying to the host & labour hire provider	n/a
Relationship between host & labour hire provider	<ul style="list-style-type: none"> <li>Are the parties related bodies corporate or engaged in a joint venture?</li> </ul>
Is the work for the benefit of a joint venture/common enterprise of the host and another party?	<ul style="list-style-type: none"> <li>Nature of the host’s interests in the venture/enterprise?</li> <li>Pay arrangements for employees of other persons in the venture/enterprise</li> </ul>
Terms & nature of arrangement under which the work is performed	<ul style="list-style-type: none"> <li>Period for which the arrangement operates or will operate;</li> <li>Location of work being performed under the arrangement;</li> <li><u>Industry in which the regulated host and the employer operate;</u></li> <li>Number of employees of the employer performing work for the regulated host under the arrangement.</li> </ul>
Any other matter considered relevant by FWC	n/a

## When is work the provision of a service?

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- Order cannot be made where work is or will be for **the provision of a service**, rather than the supply of labour
- Factors relevant to whether the work is the supply of labour:
  - labour hire provider's involvement in matters relating to the performance of the work;
  - extent to which labour hire provider directs, supervises or controls the performance of work (eg, managing rosters, assigning tasks, reviewing quality of work);
  - extent to which employees use labour hire provider's systems, plant or structures to perform the work;
  - extent to which either the labour hire provider or another person is subject to industry or professional standards or responsibilities in relation to the employees;
  - extent to which the work is of a specialist or expert nature.

Not all factors need to be satisfied for FWC to find that work is the provision of service – FWC to consider the reality of arrangement

## What happens when an order is made?

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### Labour hire provider's obligations

- Must not pay its employees less than the protected rate of pay (even while on leave)
- **Protected rate of pay:** full rate of pay that would be payable in connection with work if the host's enterprise agreement applied to them
- Includes, for example, incentives, commissions, penalties, allowances
- Obligation applies despite any provisions of the labour hire providers enterprise agreement or contractual arrangements with its employees (which must otherwise still be complied with)
- On termination:
  - termination payments based on labour hire rate of pay, unless just worked for one host in which case apply protected rate of pay
  - PILON: calculated on protected rate of pay

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### Host's obligations

- **Information:** where requested, provide:
  - information to the labour hire provider to enable calculation of protected rate of pay; or
  - protected rate of pay
- **Engaging a new labour hire providers:** apply to FWC to vary the order to apply to a new/additional labour hire provider performing the same work and inform provider of the variation application
- **New enterprise agreement** – notify covered employers and inform of effect.
- **Tenders:** detailed obligations around notifying tenderers during a tender process for work

# Exceptions, disputes & anti-avoidance provisions

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## Exceptions

- Labour hire providers do not have to pay the protected rate of pay to a regulated employee if:
  - it is a short-term arrangement (eg, 3 months – with FWC ability to extend or reduce period)
  - it is a training arrangement (eg, apprentices)

## Disputes

- After seeking to resolve first, parties may go to FWC to seek to resolve disputes about an order – eg, a dispute around how to calculate protected rate of pay
- FWC may deal with the dispute as it considers appropriate, including mediation, conciliation, making a recommendation or expressing an opinion or arbitration (where fair & reasonable) – inc. making an arbitrated protected rate of pay order
- Parties may seek alternative protected rate of pay order - enables protected rate of pay from an alternative agreement to be applied

## Anti-avoidance provisions

- Anti-avoidance provisions apply to prevent conduct or schemes to avoid the operation of the provisions
- Apply if sole or dominant reason for the scheme was prevent RLHA order being made or avoiding a RLHA order which was made – eg:
  - cycling labour hire through short term 'exempt' contracts
  - engaging other employees to do the same work as that performed by a regulated employee
  - dismissing employees and engaging independent contractors

## Same job, same pay in action

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- Significant number of applications have been made for regulated labour hire arrangement orders (with obligation to pay protected rate of pay coming into effect on 1 November 2024)
- To date, no decisions in contested matters because:
  - Hosts & labour hire providers have not opposed the applications, and hence the orders have been made without dispute; or
  - Hosts have offered direct employment to labour hire employees
- Several applications currently on foot where likely will be contested – Ai Group involved in these matters





## What do we need to do?

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Consider how reliant your organisation is on labour hire personnel – what impact would a regulated labour hire arrangement order have on your organisation?  
Remember potential application within group entity structures

Remember, if an order is made:

- Labour hire is no longer a hands-off arrangements – whether you're the labour hire provider or the host, you will have obligations you need to manage
- If you're engaging labour hire, your costs are likely to increase as they seek to pass on their increased salary costs to you



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# Flexible working requests



## Who can make a flexible working request?

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- **Minor change:** expansion of employees who can make a flexible working request under the NES
- New categories:
  - Employees, where the employees or a member of their immediate family or household experiences family or domestic violence
  - Pregnant employees
- Note:
  - Expanded categories only relevant where relying on the NES right to request flexible working arrangements – expansion will not impact on organisations that have their own policies regarding flexible working requests (although policies must meet the NES requirements at a minimum)
  - Application for a flexible working arrangement under the NES must be linked to the categories of employees who can make a request – eg, if making a request because employee is a carer, request must be in support of those caring responsibilities

## What is the process for responding to a flexible working request?

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- **Major change:** new process required to responding to a flexible working request
- Within **21 days** of a written request, employers **must**:
  - discuss request with employee;
  - have regard to the consequences of any refusal for the employee;
  - genuinely try to reach agreement about accommodating the employee's circumstances;
  - inform employee of any alternative working arrangements that could be made to accommodate the employee's circumstances;
  - provide employee with written reasons for any refusal (must be *reasonable business grounds* and must include specific information)
    - NB: this document may be the basis for subsequent FWC dispute so very important to get it right!

## Do we have to agree to a flexible working request?

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- Changes don't impact on employer's ability to reject a flexible working request:
  - Employers remain able to refuse a request where it has reasonable business grounds for doing so
- **Reasonable business grounds** might include (but not limited to):
  - the new working arrangements requested would be too costly for the employer;
  - that there is no capacity to change the working arrangements of other employees to accommodate the new working arrangements requested;
  - that it would be impractical to change the working arrangements of other employees, or recruit new employees, to accommodate the new working arrangements requested;
  - that the new working arrangements requested would be likely to result in a significant loss in efficiency or productivity;
  - that the new working arrangements requested would be likely to have a significant negative impact on customer service.
- When considering reasonable business grounds, an employer should have regard to its specific circumstances, including the nature and size of its enterprise
- Where request is refused, dispute resolution provisions apply which enable the FWC to arbitrate an outcome – eg, deciding whether or not to accept the flexible working request

## Flexible working requests in action

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### Jordan Quirke v BSR

- Reason for application: insomnia and anxiety
- FB of FWC: request invalid because:
  - Insufficient service
  - No link between changes sought and her disability
- Although not determinative, employee also provided insufficient evidence to demonstrate she experienced a disability

### Charles Gregory v Maxxia

- Employer introduced requirement for 40% of time in the office
- Employee submitted flexible working request to continue working from home
- FWC: requiring face-to-face presence at work (to enable productivity and support, including knowledge and experience transfer to less experienced team members) reasonable business grounds for refusal

### Ridings v FedEx

- Request to work from home permanently to care for disabled wife and children
- FWC found in favour of employee
  - Employee not provided sufficient information to support his request and hence enable employer to engage with the request
  - But employer rejected the request for generic reasons (about benefits of in-office presence), rather than considering specific issues related to the employee – did not demonstrate a likely detriment to the business



## What do we need to do?

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Review your flexible working policies and procedures:

- Update to ensure reflect new categories of employees eligible to make a request
- New process required to be followed when responding to a request



Train your managers or other employees who will receive a flexible working request regarding the process for responding to a request



Prepare a template flexible working request response letter that can be used, ensuring it addresses all of the required areas – must be amended to cater to the individual circumstances



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# Right to disconnect





## What is the right to disconnect?

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- A new right for employees to refuse, where the refusal is reasonable, to monitor, read or respond to contact (or attempted contact) from their employer or a 3P (related to work) outside working hours
- Matters that will be considered in determining whether the refusal is reasonable include (but are not limited to):
  - the reason for the contact or attempted contact (eg, is it an urgent matter/emergency);
  - how the contact is made and the level of disruption caused to the employee;
  - the extent to which the employee is compensated (including non-monetary compensation) for the fact that they may need to respond outside working hours;
  - the nature of the employee's role and the employee's level of responsibility; and
  - the employee's personal circumstances (including family or caring responsibilities).

This does not mean employers can't contact their employees outside their work hours – but if they do, their employee may reasonably refuse to respond

## Right to disconnect & Modern Awards

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- Applies from 26 August 2024 or, 26 August 2025 for small business employers on 26 August 2024.
- The model term prohibits an employer from **directly or indirectly** preventing an employee from exercising their right to disconnect under the Act
- Unlike the right to disconnect under the Act, which is framed as an 'employee right', the model term regulates an employer's conduct in relation to the employee's exercise of the right to disconnect – if the employer's conduct stops an employee from exercising their right to disconnect this may contravene the Award
- Some awards contain terms which make it clear that the employer is not prevented from:
  - requiring an employee to monitor/respond to contact for the purpose of the employer notifying the employee that they are required to attend work or give other notice about the standby
  - contacting or attempting to contact an employee outside of their working hours in circumstances including to notify them of matters arising under these award clauses

# Dispute resolution

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- Parties must attempt to resolve disputes in the workplace
- FWC may
  - make an order to stop refusing contact or to stop taking certain actions; and/or
  - otherwise deal with the dispute (except it cannot order a pecuniary payment)
- Either party may appoint a person or industrial association (such as Ai Group) to provide support or representation in respect of the dispute
- FWC will only make an order if satisfied that:
  - employee has unreasonably refused and there is a risk this will continue;
  - employee's refusal is not unreasonable and there is a risk that the employer will:
    - take disciplinary or other action against the employee because of the employer's belief that the refusal is unreasonable; or
    - continue to require the employee to monitor, read or respond to contact or attempted contact despite the employee's refusal to do so

## Be aware!

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- Enterprise agreements may contain right to disconnect terms, which are more favourable than the Modern Award terms (which forms the baseline right)
  - Employers will need to comply with any such more favourable term
- Right to disconnect is a workplace right -
  - If adverse action is taken because the employee exercises the workplace right, risk of a general protections claim
- FWC not prepared guidelines around the operation of the right – waiting to see how this is managed in practice



## What do we need to do?

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Identify roles where people may be required to work or be contactable outside of their working hours– eg, roles with global interface, roles where out of hours assistance may be required



Where out-of-hours work/contact will be required, update:

- Employment contracts to reflect this – and the fact that employees' remuneration reflects this
- Position descriptions to reflect this



Consider what's included in Codes of Conduct & general policies – do you need to reference expectations regarding flexibility (going both ways)?



Provide training for your managers & employees on the right to disconnect and what it means

# A framework for operationalising the changes



What have you done/what are you doing to operationalise the changes within your business?

## Step 1: understand the changes

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- Significant number of changes have been made over the past two years
- Need to understand what the changes are, before looking to operationalise
- Significant resources available to assist employers:
  - See [Ai Group website](#) – industrial relations changes
  - **Summaries:** [employee/independent contractor](#), [casual employment](#), [labour hire](#), [right to disconnect](#), [wage underpayments and wage theft](#) and [fixed term](#)
  - **Videos:** [The right to disconnect](#), [Managing employment versus contracting relationships from 26 August 2024](#), [Managing casual employees from 26 August 2024](#), [Limitations on fixed term contracts](#), and other topics – see [here](#)



## Step 2: do the changes apply to your organisation?

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Category 1:	Impact all employers – need to know, need to act
Category 2:	Impact some employers – need to know if impacted, and act
Category 3:	Good to know – no immediate action required
Category 4:	For information only – no action required

### Category 1 changes

- Right to disconnect
- Prohibition on pay secrecy
- Prohibition on job advertisements that breach the FW Act
- New 'protected attributes'
- Prohibiting sexual harassment in connection with work
- Requests to flexible working arrangements
- Changes to parental leave (extension of unpaid parental leave, parental leave for couples and flexible unpaid parental leave)
- Payslip requirements relating to taking FDV Leave
- Authorisation of multiple and/or ongoing payroll deductions

## Step 2: do the changes apply to your organisation?

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<b>Category 1:</b>	Impact all employers – need to know, need to act
<b>Category 2:</b>	Impact some employers – need to know if impacted, and act
<b>Category 3:</b>	Good to know – no immediate action required
<b>Category 4:</b>	For information only – no action required

### Category 2 changes

- Limitations on fixed term contracts
- Changes to employee definition
- Migrant worker protections
- Labour hire (“same job, same pay”)
- Casuals
- Regulated workers
- Workplace delegates rights
- Rights of entry – WHS and suspected underpayment
- ABCC / ROC
- Zombie Agreements
- Changes to bargaining and enterprise agreements (EA approval process, BOOT, multi-enterprise agreements, bargaining disputes, industrial action, termination of EAs, model terms):
- Coal Mining LSL Scheme – changes for casuals

## Step 2: do the changes apply to your organisation?

Category 1:	Impact all employers – need to know, need to act
Category 2:	Impact some employers – need to know if impacted, and act
Category 3:	Good to know – no immediate action required
Category 4:	For information only – no action required

### Category 3 changes

- Changes to small claims jurisdiction
- Changed operation of NES redundancy provisions in winding up scenarios
- Superannuation now part of NES (changed enforcement landscape)
- Changes to equal remuneration principles and Object of FW Act in respect of pay equity
- Compliance measures:
  - Compliance notices
  - Increases to civil penalties
  - Lower threshold for ‘serious contraventions’
  - New criminal ‘wage theft’ offence from 1 Jan 2025

## Step 2: do the changes apply to your organisation?

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Category 1:	Impact all employers – need to know, need to act
Category 2:	Impact some employers – need to know if impacted, and act
Category 3:	Good to know – no immediate action required
Category 4:	For information only – no action required

### Category 4 changes

- Establishment of two new FWC Expert Panels
- Establishment of National Construction Industry Forum
- Changes to prevent unions withdrawing from amalgamations after 5 years

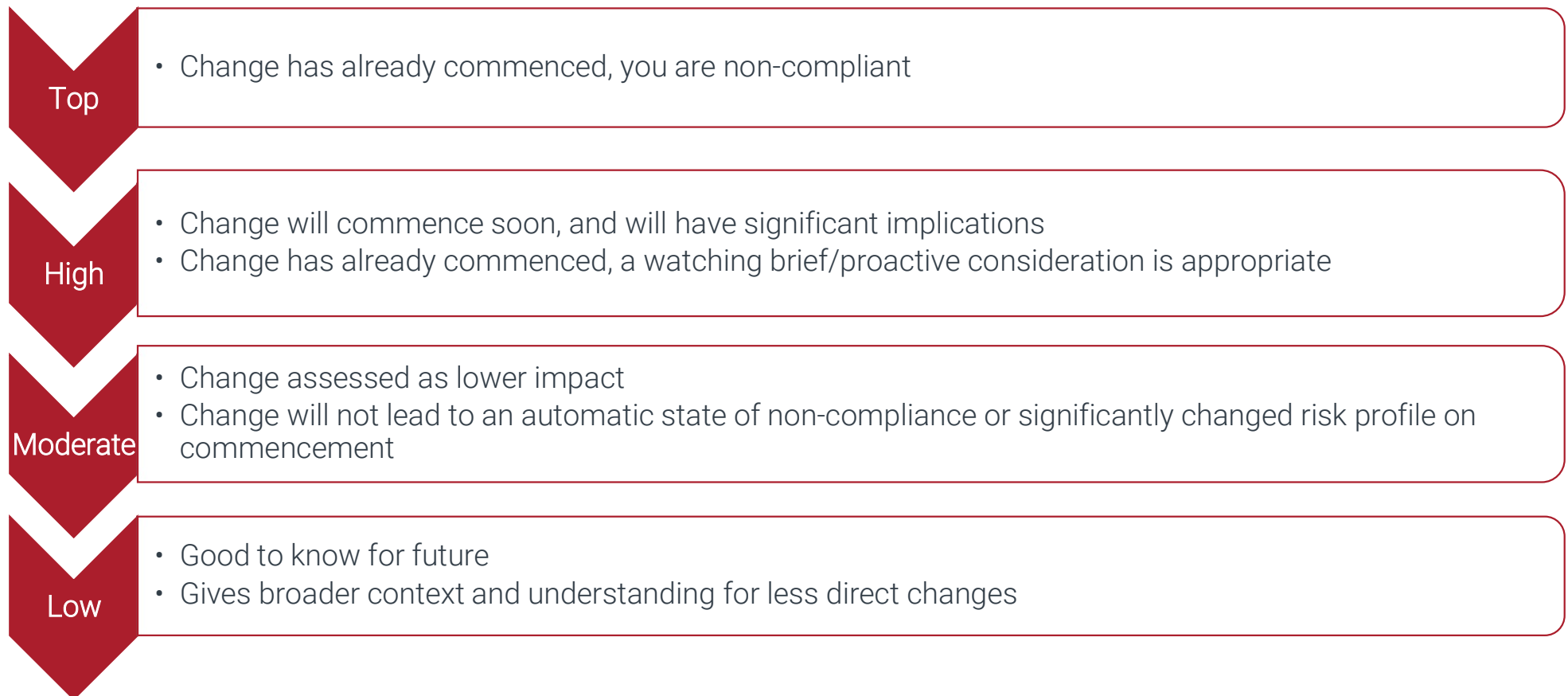
## Step 3: what potentially needs to change?

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Policy/document	<ul style="list-style-type: none"><li>• Policies</li><li>• Procedures</li><li>• Employment contracts</li><li>• Independent contractor agreements</li><li>• Enterprise agreement(s)</li><li>• Standard/template employee communications</li></ul>
Operational/ systems	<ul style="list-style-type: none"><li>• The way you do things</li><li>• The systems you use to do those things</li></ul>
Strategic/risk/ opportunity	<ul style="list-style-type: none"><li>• Changes that go to your (or your competitors') fundamental operating model</li><li>• Impact on quantification and management of risk</li><li>• May necessitate significant change to underlying operating assumptions and embedded practices</li></ul>

## Step 4: prioritise what you need to do

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## Example

Area of change	Workplace delegates' rights	Right to disconnect
Key changes	<ol style="list-style-type: none"> <li>1. Workplace delegates are provided with rights to represent and communicate with members/eligible members, reasonable access to workplace facilities, reasonable paid time to attend training. (and terms in EAs)</li> <li>2. Certain conduct by employers towards delegates prohibited.</li> <li>3. Delegates rights terms included in awards from 1 July 2024</li> </ol>	<ol style="list-style-type: none"> <li>1. A new workplace right that allows an employee to refuse to monitor, read or respond to contact or attempted contact from employer or 3rd party outside working hours</li> <li>2. FWC dispute resolution jurisdiction - availability of 'stop orders'</li> <li>3. Modern awards include a 'right to disconnect' term –</li> </ol>
Commencement date	15 December 2023	26 August 2024 (other than small business) 26 August 2025 (small business)
Who is impacted?	Employers with a workforce union presence Employers of award-covered employees Employers who are negotiating an EA	All employers
Nature of impact/change required	<ul style="list-style-type: none"> <li>• Policy/documents</li> <li>• Operational/systems</li> </ul>	<ul style="list-style-type: none"> <li>• Policy/documents</li> <li>• Operational/systems</li> <li>• Strategic/risk</li> </ul>
Urgency	Urgent –already in operation	<ul style="list-style-type: none"> <li>• Urgent for medium to large businesses - change in operation and may have significant impact</li> <li>• Less urgent for small business</li> </ul>



Workplace Relations Assist

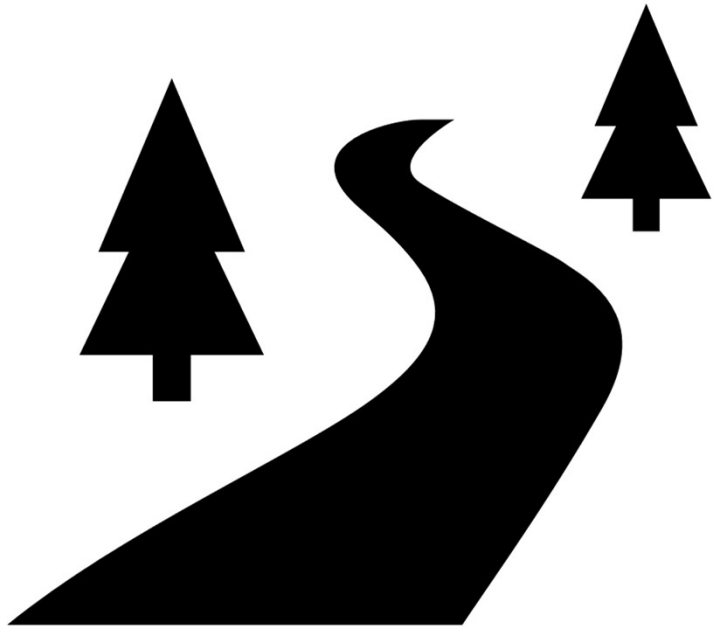
... and one more thing





## All roads lead to the Fair Work Commission

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- Many of the recent changes provide a route for disputes to be referred to the Fair Work Commission
  - ... and in many cases, a right for the Fair Work Commission to arbitrate an outcome
- Changes will result in a significantly increased likelihood that any disputed matters will be resolved by a 3P with outcomes imposed your business
- As a registered organisation, Ai Group has the right to appear in the Fair Work Commission on behalf of its members without seeking permission to appear – you're guaranteed representation

# Thank you

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