

The consultation paper from the Australian Department of Employment and Workplace Relations (Department) on the proposed Same Job, Same Pay measure sheds some guidance on the Labor government's commitment to its proposal that labour hire workers are to be paid at least the same as directly engaged employees doing the same work. The government intends to legislate the Same Job, Same Pay measure in the spring 2023 sitting of Parliament, suggesting major changes are just around the corner.

## Obligation

In effect, the measure aims to amend the Fair Work Act 2009 (Cth) (FW Act) to include:

- A direct entitlement for labour hire workers to receive at least the same pay as directly engaged employees
- A positive obligation on labour hire providers and host employers to take reasonable steps to ensure the direct entitlement is paid to the labour hire worker

Enshrining the obligation in the FW Act will mean that it will be enforceable in its own right and affected parties will be unable to contract out of it. This mutual obligation is proposed to include consultation and information sharing requirements between the host employer and the labour hire provider.

Interestingly, there is no mention of what happens where the labour hire worker receives an hourly rate of pay that is higher than a directly engaged employee.

## Scope

The precise coverage of the measures will be a critical factor for consideration. It is proposed that the measures will apply to labour hire arrangements only. However, these arrangements may be defined to encompass more than just traditional labour hire. It may also encompass other labour hire arrangements, such as where the labour supply arrangement involves several tiers of contractual relationships, for example contractor management services, and recruitment and placement services.

Many business groups and employer associations are currently lobbying for direct carve outs, and Workplace Relations Minister Tony Burke has confirmed that a "multifactor test" put forward by the Australian Resources and Energy Employer Association is being considered to distinguish between firms providing specialist services and those simply providing supplemental labour.

The proposed multifactor test includes factors such as whether:

- An employer is providing only contingent labour or performing independent scopes of work
- A contractor's employees are using the host's tools, equipment, machinery and/or plant
- The host and its employees are directly supervising the contractor's employees, or are there supervisory structures provided by the contracting company
- The contractor and its employees have autonomy over their work separate to that of the host, e.g. setting rosters, hours of work and making other day-to-day workforce management decisions

## Identifying "Same Job"

The Department is considering the merits of identifying the "Same Job" with reference to the following criteria relating to whether a labour hire worker is performing:

- Duties that align to a classification or job, or duties set out in or covered by an enterprise agreement that applies to the host employer and directly hired employees
- The same duties as an employee covered by the modern award
- The same duties as a specific directly employed employee working for the host

There has been nationwide backlash from business groups that have launched national campaigns against the measures, with fears that the laws will mean employees with little knowledge or experience would be paid the same as workers with decades of knowledge and experience. While more clarification regarding the measures is required, most enterprise agreements and awards contain classification levels and pay points that consider factors such as position, experience, qualifications and skills, and it is unlikely that more skilled employees who are properly classified will be at a disadvantage.

## Calculating “Same Pay”

The Department is considering calculating the Same Pay based on the “full rate of pay” of each worker as determined by the definition in section 18 of the FW Act, which includes incentives, bonuses, loadings, allowances, overtime, penalties or other separately identifiable amounts.

The proposed approach will mean that any enlivened conditions set out in the host’s enterprise agreement captured under “full rate of pay” will be payable to the labour hire worker, which will be an administratively onerous task to calculate.

## Enforcement

It is likely that Same Job, Same Pay disputes will go to the Fair Work Commission, either under its existing powers or extended powers. The Department is considering making the Same Job, Same Pay provisions civil remedy provisions, and compliance may be enforced by the Fair Work Ombudsman.

Additionally, the Department is proposing targeted anti-avoidance measures to protect against corporate avoidance behaviours (potentially either through a newly added anti-avoidance provision to the FW Act or by enhancing the existing general protections provisions).

## Action

At this point in time, there is a medium level of risk, as a bill is yet to be released and it is likely that a transition period will be enacted to give businesses time to adjust to the changes. However, the Labor government has expressed a firm commitment to legislating the change. While the Same Job, Same Pay slogan has been rebranded to “closing the labour hire loophole”, the substance of the reforms has not changed.

Organisations that utilise labour hire arrangements should analyse these current arrangements to evaluate potential labour cost increases and consider the practical and administrative implications of the obligation to “take reasonable steps to ensure the direct entitlement is paid”. Relevant organisations should review and consider the [Department’s consultation paper](#), and monitor for further changes.

If you would like more information on how Same Job, Same Pay measures may affect your business, please contact our Labour & Employment team for assistance.

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