

29 JULY 2013

WORKPLACE BULLYING - AMENDMENTS TO THE FAIR WORK ACT 2009 (CTH) UPDATE

THE NEW WORKPLACE BULLYING LAWS AND PERFORMANCE MANAGEMENT

On 1 January 2014, new workplace bullying laws will form part of the *Fair Work Act 2009 (Cth)*. These laws will entitle workers to apply to the Fair Work Commission, Australia's industrial tribunal, alleging that they have been bullied in the workplace. It has been predicted by the General Manager of the Fair Work Commission that there may be up to 3500 applications per year to the Fair Work Commission under these provisions.¹

THE CURRENT STATE OF PLAY

At present, there is no Australian legislation that specifically prohibits workplace bullying. Therefore, depending on the type of workplace bullying which is alleged, workers have had to rely on other general laws such as occupational health and safety laws, workers' compensation laws, anti-discrimination laws and the general protection

provisions of the Fair Work Act 2009 (Cth), as well as common law claims.

The new laws follow the House of Representatives Standing Committee on Education and Employment Report of October 2012 "Workplace Bullying, We just want it to stop," (**Report**). The Report recognises that work provides Australians with a sense of dignity and workplace bullying is a hidden problem, which affects an employee's worth of self and value. The Report estimated that workplace bullying costs the Australian economy between \$6 billion and \$36 billion every year and that a workplace bullying cases costs employers an average of \$17,000 to \$24,000 per claim.

For the first time, there will be an all-encompassing law that makes bullying conduct unlawful with a right to redress workplace bullying through the Fair Work Commission.

¹ Evidence given by the General Manager of the Fair Work Commission to the Senate Estimates - Education, Employment and Workplace Relations Legislation Committee; Estimates, 3 June 2013 (page 83)

AMENDMENTS TO THE *FAIR WORK ACT 2009 (CTH)*

The new laws will introduce a new part to the *Fair Work Act 2009 (Cth)* headed "Workers Bullied at Work" and will not be limited to employees.

Rather, it will cover "workers" as defined in the *Work Health and Safety Act 2011 (Cth)*.² This includes contractors, subcontractors, outworkers, apprentices, trainees and students gaining work experience as well as volunteers.

Under the new laws, a worker is bullied at work if an individual or a group of individuals repeatedly behave unreasonably towards a worker, or a group of workers which the worker is a member and that behaviour creates a risk to health and safety.

It is important to note the following:

- there must be repeated behaviour;
- the behaviour must be unreasonable; and
- that behaviour must create a risk to health and safety.

However, it is not a requirement, that the risk to health and safety is to the workers being bullied.

Exception - Reasonable workplace management

If the conduct complained of is "reasonable management action carried out in a reasonable manner," that conduct does not contravene the workplace bullying provisions. However, there is no definition of what is "reasonable management action carried out in a reasonable manner." We expect that reasonable performance and conduct management will fall within this exception.

However, we also expect workers will allege that performance and conduct management amounts to bullying conduct and allege that the management was neither reasonable nor was it carried out in a reasonable manner.

Although this exception is welcome, the provision does not operate as a jurisdictional objection but as a defence. Consequently, it will be incumbent upon an employer to provide evidence to the Fair Work Commission that the performance management is "reasonable management action" and that that it has been "carried out in a reasonable manner." This could lead to a significant cost for employers as

they will be required to participate in a hearing in order to establish that the performance management is "reasonable management action carried out in a reasonable manner." It is also worth keeping in mind that the Fair Work Commission is essentially a no costs jurisdiction.

Powers of the Fair Work Commission

The Fair Work Commission must start to deal with an application within 14 days after the application is made. No explanation is given whether that involves considering the application or listing the matter for hearing or conference, although we expect matters will proceed to conference first.

If bullying has occurred, the Fair Work Commission cannot order payment of a pecuniary amount but it can make interim or interlocutory type orders to restrain the conduct of the employer. If such orders are made, the employer may, depending on the scope of the order, be prevented from continuing with the performance management, on an interim basis, until the matter is either resolved by the parties in conference or determined by the Fair Work Commission with a final order.

Non-compliance with Fair Work Commission Orders

If the Fair Work Commission makes an order which effectively restrains the continuation of the performance management process, and the employer does not comply with that order, the worker could apply to the Federal Court or Federal Circuit Court to enforce the order. If the Federal Court or Federal Circuit Court determines that the employer has contravened the Fair Work Commission's order it can impose a civil penalty on the employer. The maximum penalty that maybe imposed on a corporation is \$51,000 and \$10,200 on an individual. Individuals involved in the contravention such as managers and directors could also be penalised (section 550, *Fair Work Act 2009 (Cth)*).

THE COALITION POLICY

Even if there is a change of government at the next Federal Election this year, the proposed workplace bullying laws will be maintained in the *Fair Work Act 2009 (Cth)* with amendment. The Coalition policy, however, will require a worker to seek the assistance of an independent State or Territory

² Replicated in all states other than Victoria and Western Australia.

based work health safety regulator before the worker can make the application to the Fair Work Commission.

CONCLUSION

With the introduction of the workplace bullying laws, it will be essential that all employers have an effective workplace bullying policy in operation. That policy should be in line with the language of the new provisions and should include:

- a definition of workplace bullying including a statement that workplace bullying is unlawful;
- a complaints process; and
- consequences for the worker that has engaged in workplace bullying.

It will be important that employers also ensure that their performance management processes are fair and reasonable. This will mean that employers must have appropriate documentation that backs up their performance concerns.

We are happy to assist you with developing the policy and provide the necessary training to both staff and human resources personnel responsible for dealing with bullying complaints.

MORE INFORMATION

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