



Discrimination and the obligations of the employer

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Discrimination by employers

All of the main Federal anti-discrimination Acts specifically prohibit discrimination by a person or a company in their role as an employer. Employers must not discriminate against a person on any of the relevant grounds in the following circumstances:

- the arrangements made to determine who should be offered employment;
- determining who should be offered employment;
- the terms or conditions on which employment is offered;
- the terms or conditions of employment;
- by denying or limiting the employee's access to promotions, transfer, training or other employment benefits;
- by dismissing the employee; and
- by subjecting the employee to any other detriment.

The *Fair Work Australia Act 2009* also prohibits employers from taking 'adverse action' against an employee, or prospective employee, because of their sex, sexual orientation, age, disability, race or other protected characteristic, for example, being a member of a union.

Adverse action taken by an employer includes doing, threatening or organising to:

- dismiss an employee;
- injure the employee in their employment;

- alter the position of the employee to their detriment; or
- discriminate between the employee and other employees of the employer.

Adverse action taken by a prospective employer includes:

- refusing to employ the prospective employee; or
- discriminating against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.

What are the obligations on employers to prevent discrimination and harassment?

Employers have legal obligations to prevent discrimination and harassment from occurring in the workplace or in connection with a person's employment. This requires the employer to take all reasonable steps to prevent discrimination and harassment both in the usual work environment and at work events, such as sponsored seminars, conferences, work functions, Christmas parties and business or field trips.

"Employers can be held legally responsible for discrimination or harassment committed by their employees or independent contractors unless ..."

Employers can be held legally responsible for discrimination or harassment committed by their employees or independent contractors unless they have taken all reasonable steps to prevent it. This is called 'vicarious liability'.

They also have an obligation to carefully manage how discrimination and harassment are dealt with when it occurs. Employers should attempt to resolve a case of discrimination or harassment internally so it does not escalate and the employee does not make an external complaint to an anti-discrimination authority such as the Equal Opportunity Commission.

Every employer must adopt a proactive risk management approach to discrimination. They must actively implement precautionary measures or reasonable steps.

What is the reasonable steps defence?

An employer will not be held vicariously liable for the discrimination or harassment committed by their employees if they have taken all reasonable steps to prevent it.

What constitutes reasonable steps will depend on the circumstances, but as a minimum they are expected to:

- have an appropriate discrimination and harassment policy; and
- properly manage cases of discrimination and harassment to avoid escalation or external complaints.

Examples of reasonable steps are:

- obtaining high level support from a chief executive officer and senior management for implementation of comprehensive strategy to address discrimination and harassment;
- developing written policies that prohibit discrimination and harassment;
- regular distribution and promotion of any relevant policies at all levels;
- providing a policy on discrimination and harassment to new employees as part of the standard induction process;
- periodically reviewing any relevant policies to ensure they are operating effectively and contain up-to-date information;
- training all management employees on their role; and
- developing a policy prohibiting inappropriate use of computer technology, such as email, screen savers and the internet.

What are the consequences of discrimination and harassment for employers?

It is in the best interests of the employer to prevent discrimination and harassment in the workplace. Discrimination and harassment can affect the reputation, productivity, culture and atmosphere of a workplace creating an increase in absenteeism and ineffective employees.

"...having to pay damages to an employee to compensate for discrimination or harassment may have devastating financial consequences for the employer..."

Also, having to pay damages to an employee to compensate for discrimination or harassment may have devastating financial consequences for the employer, especially if they are a small business.

Furthermore, victims of discrimination often also suffer psychologically which can invariably lead to workers compensation claims (either Return to Work claims or Comcare claims). These claims are not only traumatic for the injured workers and their family but can have a real cost to the business who then needs to find replacement staff, pay an increased workers compensation levy, deal with complex litigation and disputation in the Tribunal, etc.

It is much safer and more efficient for employers to focus on preventing workplace discrimination rather than dealing with the legal consequences when it is too late.

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