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INTERACTION

RESPECT AT WORK

The Fair Work Commission sexual harassment jurisdiction

Interaction Opinion

The new Part 3-5A of the Fair Work Act deals explicitly with sexual harassment. The key changes are the prohibition of sexual harassment and the new dispute resolution framework. The changes result in the Fair Work Commission (FWC) having a wider discretion to make orders against individuals as well as employers.

The changes impose onerous obligations on employers, who must take all reasonable steps to prevent employees and agents from engaging in the unlawful acts. This means that employers will have to be proactive in implementing processes, procedures and other measures that are targeted at preventing sexual harassment in the workplace.

Here is a comprehensive overview of these changes within the Fair Work Act.

Prohibition of sexual harassment

The Fair Work Act prohibits sexual harassment in connection with work, reflecting the definitions in the model WHS laws. This applies to workers, prospective workers and a person conducting a business or undertaking.

Principals can be held vicariously liable for acts of their employees or agents unless they can prove that they took all reasonable steps to prevent the unlawful acts. Individuals and body corporates may have accessorial liability if they are 'involved', including for compensation and penalty orders.

Sexual harassment claims

Workers may apply to the FWC seeking stop sexual harassment orders for future sexual harassment and to apply for compensation for past sexual harassment.

Stop sexual harassment order

On application, if the FWC is satisfied that a person has been sexually harassed and that there is a risk they will continue to be sexually harassed, it can make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the aggrieved person from being sexually harassed again.

In considering the terms of a stop sexual harassment order, the FWC must take into account:

- The outcomes of any final or interim investigations into the alleged conduct being undertaken by a third party
- Whether there are other procedures available to the aggrieved person and if so the outcome of those procedures
- Any matters the FWC considers relevant.

The FWC has a wide discretion as to the types of orders it can make (although it cannot order the payment of money). Orders can be made against the individuals involved as well as the employer and the types of orders made will mirror those under the anti-bullying jurisdiction.

Dealing with sexual harassment disputes in other ways

The sexual harassment prohibition is also supported by a new dispute resolution framework, modelled on the compliance framework in the Fair Work Act that applies to general protections dismissal disputes. The FWC may deal with disputes about sexual harassment which relate to past harm caused by sexual harassment. This framework is similar to that which applies to the general protections dismissal dispute provisions. A time limit of 24 months after the last alleged contravention applies.

If an application for compensation is made to the FWC to deal with a dispute that does not consist solely of an application for a stop sexual harassment order, the FWC may deal with the dispute other than by arbitration. This may include mediation or conciliation, or by making a recommendation or expressing an opinion.

If the dispute remained unresolved and the FWC is satisfied that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful, the parties could proceed to consent arbitration in the FWC or, in the absence of consent, applicants may make an application to a Court. An application to a Court will generally need to be made within 60 days of a certificate being issued by the FWC.

Jurisdiction

A Court can order a party that has contravened the sexual harassment prohibition to pay a pecuniary penalty as well as making other orders (e.g., compensation). The imposition of a pecuniary penalty is significant, as under existing anti-discrimination legislation the primary remedy available is damages.

Employers may now be exposed to pecuniary penalties separate to substantiated injuries or damage. The maximum penalty a Court can order for each contravention will be 60 penalty units (\$16,500 for individuals and \$82,500 for corporations from 1 January 2023). This is consistent with the maximum penalty that currently applies under the Fair Work Act in relation to analogous conduct, for example, discriminatory adverse action.

Anti-double dipping provisions are inserted to prevent a person from obtaining multiple remedies in relation to the same conduct. This prevents the concurrent operation of state and territory anti-discrimination laws and, except in some limited circumstances, work health and safety laws (to the extent they deal with sexual harassment).

Anti-discrimination and special measures

There are three further protected attributes being introduced under the Fair Work Act in the anti-discrimination provisions: breastfeeding, gender identity and intersex status. These changes align the Fair Work Act with other Commonwealth anti-discrimination legislation.

'Special measures to achieve equality' will be confirmed as being matters pertaining to the employment relationship and are not discriminatory terms and therefore able to be included in an enterprise agreement.

Stay informed and seek assistance

By staying informed and fostering a supportive environment, you and your HR team can successfully navigate these changes and ensure a thriving work culture and a resilient organisation. And remember, you don't have to face these changes alone. Interaction Consulting is here to assist you in navigating these changes through effective strategy consultation, cultural improvement, and policy support. We're just a call away, ready to help you create a workplace that's compliant, supportive, and ready for the future.

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