

18 February 2013

Practice Group:

*Labour, Employment
and Workplace Safety*

Proposal for Fair Work Commission to Address Workplace Bullying

By Kathy M. Dalton, Michaela A. Moloney & Sam Jackson

The Australian Federal Workplace Relations Minister, Bill Shorten, recently announced changes that will allow employees to seek assistance in respect of workplace bullying from the Fair Work Commission (FWC).

The proposed new laws seek to cut through the current complex processes available to employees under state health and safety laws and seek early intervention in bullying claims. The new changes will require the FWC to deal with any application urgently.

The Potential Changes

The Commonwealth Government has announced it will hurry through amendments to the *Fair Work Act 2009* (Cth) (FW Act) creating a new cause of action in relation to workplace bullying.

The amendments are proposed to take effect from 1 July 2013.

Definition of Bullying

The changes will adopt the definition of bullying set out in the Draft Code of Practice Preventing and Responding to Workplace Bullying. "Bullying" will be defined as "repeated, unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety". Importantly, the changes will clarify that the definition of bullying does not include reasonable management action, including performance management conducted in an appropriate and reasonable manner.

Process to Resolve Complaints

Mr Shorten announced that the new process will permit workers who believe they have been bullied to make a complaint to the FWC, which will be required to list any application within 14 days of the complaint. The changes will also enable the FWC to make orders in relation to the complaint, and/or to refer the complaint to the relevant state health and safety regulator.

Early reports suggest that any new FWC processes would be similar to those currently in place for unfair dismissal and adverse action complaints. This would include a compulsory conciliation conference, which is intended to quickly resolve the dispute to the parties' mutual satisfaction and avoid the need for arbitration or court action.

Where conciliation is unsuccessful, the amendments to the FW Act will enable FWC to make civil orders in respect of claims. Current penalties under the Fair Work Act are up to AUD33,000 per breach, however, the Minister has advised that he will consult with business before confirming such penalties will apply.

Proposal for Fair Work Commission to Address Workplace Bullying

What does this mean for employers?

Currently, victims of workplace bullying may seek to have their complaints addressed under many different legislative regimes. If an act of bullying is serious enough to pose a risk to health and safety, employers and employees may be liable under the relevant state health and safety legislation. In addition, in Victoria, legislation created as a result of the Brodie Panlock case enables criminal prosecutions in cases of serious workplace bullying. Both of these actions are initiated by state prosecution authorities rather than the individual employee.

The changes foreshadowed by the government suggest that for the first time individual employees (rather than regulators) will be able to bring claims against their employers for workplace bullying. This is a significant change in workplace law and if it proceeds is likely to result in an influx of claims from employees.

As yet, no draft legislation has been tabled regarding these significant changes. This is expected in the autumn session of parliament and we will provide a further update once the legislation is tabled.

This Legal Insight was prepared with the assistance of Seasonal Clerk, John Monroe.

Contacts:

Kathy M. Dalton

Kathy.Dalton@klgates.com

+6.3.9640.4232

Michaela A. Moloney

Michaela.Moloney@klgates.com

+61.3.9640.4430

Sam Jackson

Sam.Jackson@klgates.com

+61.3.9640.4336

Proposal for Fair Work Commission to Address Workplace Bullying

K&L GATES

Anchorage Austin Beijing Berlin Boston Brisbane Brussels Charleston Charlotte Chicago Dallas Doha Dubai Fort Worth Frankfurt
Harrisburg Hong Kong Houston London Los Angeles Melbourne Miami Milan Moscow Newark New York Orange County Palo Alto Paris
Perth Pittsburgh Portland Raleigh Research Triangle Park San Diego San Francisco São Paulo Seattle Seoul Shanghai Singapore Spokane
Sydney Taipei Tokyo Warsaw Washington, D.C.

K&L Gates practices out of 47 fully integrated offices located in the United States, Asia, Australia, Europe, the Middle East and South America and represents leading global corporations, growth and middle-market companies, capital markets participants and entrepreneurs in every major industry group as well as public sector entities, educational institutions, philanthropic organizations and individuals. For more information about K&L Gates or its locations, practices and registrations, visit www.klgates.com.

This publication is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer.

©2013 K&L Gates LLP. All Rights Reserved. Rights Reserved.