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The necessity of having effective Workplace Policies – Potential risk for employers

By ,

All employers should have a series of workplace policies to assist with managing employee obligations and to reduce exposure to potential liabilities.

It is insufficient for employers to attempt to control the requirements of their employees just by way of their employment contract or, if applicable, by the relevant modern Award or other registered workplace agreement.

There is an increasing diversity of recent cases involving disputes with employees which have considered the effectiveness and deficiencies of the employer's workplace policies. Such cases include an increasing number of unfair dismissal and adverse action claims. Unfortunately, in many of these disputes, the employer could have avoided liability for significant damages by checking that it had the correct policies in place and regularly addressing whether such policies provided adequate protection.

This article is designed to assist employers with understanding the necessity and various benefits of having policies and the additional measures which can be taken to reduce potential risks flowing from such policies.

Why Have Workplace Policies

The benefits for implementing effective workplace policies, and regularly ensuring that they are up to date, are significant and numerous.

Such advantages include the following:

1. Providing clear and concise information to employees about their expected standard of behaviour and performance at the workplace (as well as special events and social functions) and the consequences which may apply;
2. Providing an employer with a basis for defending potential liabilities such as being able to show that an employer has an established and objective process of taking reasonable management action in dealing with particular workplace incidents (especially regarding issues with workplace health and safety, sexual harassment, workplace bullying and anti-discrimination);
3. Attracting and retaining key employees due to the additional advantages and benefits provided by particular policies (for example, additional entitlements of parental leave, the availability of valuable resources such as a motor vehicle);
4. Educating new employees on essential information for the various requirements of working for a new employer;
5. Providing the employer with the flexibility of being able to change employee obligations and introduce new requirements on an ongoing basis compared with contractual employment terms which are much more difficult to vary;
6. Providing further details of the procedures and rules involved in implementing a contractual term (for example, providing the employee with the practical requirements of using and returning company resources and the operation of grievance resolution procedures); and
7. Providing employees with a clear, consistent and objective framework which will be used for dealing with

particular situations and which will show that the employer's actions have been exercised fairly, systematically and equally.

Essential Workplace Policies

The extent and types of workplace policies which should be implemented will depend upon the nature of the particular business, its operational requirements and key industry considerations.

However, there are certain fundamental policies which should be considered for all workplaces including the following:

	Type of Policy	**Objectives of the Policy**
1.	Anti-Discrimination and Equal Opportunity Policy	1. To explain the necessity of the equality of opportunity for all employees at the workplace. 2. To clearly describe events of unlawful discrimination which will not be tolerated. 3. To set out the procedures which will be utilised as a result of any complaints of discrimination or other vilification at the workplace. 4. To provide details of the reporting and complaint procedures (and any other employer resources) which are available to employees if they believe they have been subject to (or a witness to) any forms of discrimination or vilification. 5. To define the possible consequences to an employee engaging in unsatisfactory conduct.
2.	Code of Conduct	1. To provide a detailed description of the required standard of conduct of employees in performing their duties and interacting with others at the workplace. 2. To describe special workplace requirements such as appearance, hygiene, dress, behaviour, the taking of breaks, smoking and times of attendance at the workplace. 3. To set out the consequences if an employee breaches these obligations.
3.	Drug and Alcohol Policy	1. To provide a clear description of the requirement for employees to participate in a healthy and safe work environment. 2. To detail the potential adverse effects of employees being affected by alcohol or drugs at the workplace. 3. To detail the requirements of an employee's obligations regarding the use of, and being impaired by, alcohol and drugs at the workplace and during work functions. 4. To provide, in appropriates workplaces, the requirement for the employee to undergo regular testing for the existence of alcohol and drugs (including the possibility of random testing being conducted) and the employee's consent to these tests. 5. To clearly specify the consequences of a breach of these requirements and if the employee is dishonest in providing any details.

4.	Email and Internet Usage Policy	1. To provide clear directions to employees of their obligations when using internet and email resources supplied by the employer and the range of activities which are forbidden. 2. To inform employees that their use of email and internet resources will be monitored (and appropriate action taken depending upon any inappropriate use).
5.	Grievance Resolution Policy	1. To provide employees with a clear explanation of the objective procedures, support and resources which are available if an employee has a grievance regarding their employment. 2. To show employees that they will be fairly treated following a grievance complaint.
6.	Parental Leave Policy	1. To provide a clear explanation of the employee's entitlements to take parental leave, including the ability to access relevant legislative rights. 2. To set out in further detail the procedural requirements of taking such leave. 3. To specify the details of any additional entitlement to participate in an employer's paid parental leave policy (if one exists).
7.	Performance Review Policy	To provide information to employees about: 1. the timing of performance reviews; 2. the purpose of regularly conducting these; 3. the requirements for the employee's active participation; and 4. the nature of the consequences of such a review (including increased salary package) being at the absolute discretion of the employer.
8.	Privacy Policy	1. To clearly describe to employees their requirements when handling relevant records of personal information. 2. To assist employers with complying with the Privacy Principals and reducing the risk of any liability as a result of an employee's conduct.
9.	Return to Work Policy	1. To provide a detailed framework of an employee's requirements following an injury, illness or other event which has affected the ability of the employee to attend the workplace and perform their duties. 2. To ensure that employees consent to any requirement to undergo further assessment and actively participate with the employer's requirements in returning to work as soon as possible.

10.	Sexual Harassment Policy	1. To explain the necessity of an employee's participation in a workplace free from sexual harassment. 2. To provide a clear and detailed description of behaviour and conduct which must not occur and which will not be tolerated. 3. To detail the procedures, resources and employer representatives which are available to an employee who believes they have been subject to such harassment. 4. To provide details of the reporting and complaint procedures which are available to employees if they believe they have been subject to any forms of harassment. 5. To provide a description of the possible consequences to the ongoing employment of an employee following an investigation into any complaint.
11.	Social Media Policy	1. To provide a detailed description of the requirements of employees using social networking platforms (including Facebook, Twitter and LinkedIn) either during work hours (if permitted during such time) or when publishing any content regarding the business at any time. 2. To describe the precise forms of social networking platforms which are covered. 3. To specify the information which employees are prohibited from posting on social network websites (especially information which is confidential, discriminatory, denigrating, personal or harassing) and to detail other social media behaviour which is not acceptable. 4. To include details of the employer's right to monitor the use of social media by its employees and the reasons for this. 5. To provide details of the consequences which will apply if an employee is in breach of the policy requirements.
12.	Workplace Harassment (Bullying) Policy	1. To explain the necessity of employees participating in a safe workplace, free from harassment. 2. To clearly define conduct which may constitute bullying. 3. To provide employees with details of the procedures and other resources which are available if they believe they have subject to such harassment. 4. To provide a description of the possible consequences to the ongoing employment of an employee following an investigation into any complaint.

13.	Workplace Health and Safety Policy	1. Ultimately, the content of this policy will depend upon the particular operational requirements of the business and the special safety procedures which need to apply. 2. These policies are an essential component of an employer's compliance with its legislative health and safety obligations. 3. As a minimum, all such policies should: 1. explain the reasons for needing a safe workplace and for employees being aware of the potential risk of injury to others; 2. set out the necessary safety procedures which employees must follow; and 3. specify the employer's procedures in dealing with health and safety incidents.

Depending upon the nature of the business and the requirements of its employers, the nature and requirements of additional key workplace policies can be diverse. Such policies can include the following: medical assessment policy; heavy equipment and vehicle operation policy; quality assurance policy; health management policy; environmental policy; and disciplinary policy.

Essential Elements of a Workplace Policy

In order to be effective, workplace policies should include the following:

1. a detailed description of the purpose of the policy;
2. the categories of the employees which will be covered by the policy;
3. the scope of the workplace activities applicable to the policy;
4. the other relevant workplace policies, procedures or obligations that relate to the policy;
5. a detailed treatment of the employee conduct which will be not acceptable using examples;
6. an express provision that the policy is not legally binding on the employer;
7. a clear description of the important terms in the policy and the procedures which will be utilised during the application and enforcement of the policy;
8. a reference to the relevant laws and how certain conduct may contravene such laws, including the possibility of the employer being vicariously liable for an employee's actions in certain circumstances;
9. the methods which the employer will use to investigate the conduct of the employees under the policy and the procedures which will be implemented to investigate any complaints or inappropriate behaviour;
10. the relevant disciplinary action and other consequences which will apply if there is a breach of the policy including the possible effects on the ongoing employment of the employee (such as termination in appropriate cases);
11. the relevant employer representatives who should be contacted if there are concerns regarding the obligations covered by the policy;
12. any other grievance resolution procedures which may be utilised by the employer's representatives to deal with potential breaches of the policy;
13. the program of inducting new employees to the requirements of the policies and the ongoing education of employees of such requirements including any variations which may be introduced;
14. language which is simple, clear and precise and which avoids using industry statements or meaningless aspirational phrases (for example, employees must "keep it real");
15. a clear description of any necessary qualifying conditions, if the policy sets out any additional employee benefits;
16. a system of regularly reminding employees of the obligations of policies, including special policies at the relevant time (for example, before social events); and
17. a reference to any additional procedures which may be implemented by the employer in order to monitor the compliance with policy requirements.

Specific Examples and Recent Problems

The following cases show the consequences of employers failing to have satisfactory policies in place.

In *Linfox Australia Pty Ltd v Glen Stutsel [2012] FWAFB 7097*, the employer was liable for the unfair dismissal of its employee who posted derogatory, offensive and discriminatory Facebook comments as the employer failed to have a social media policy in place which set out the consequences of the employee making such statements.

In *Richardson v Oracle Corporation Australia Pty Ltd and Tucker [2014] FCAFC 82*, the employer was liable for substantial damages to an employee that had been sexually harassed as the court found that the employer had not taken all reasonable steps to prevent the conduct. Such steps included deficiencies with its relevant policy including the policy not making it clear that: sexual harassment is against the law; legal action can be taken against anyone who engages in such conduct; and that an employer can be vicariously liable for such conduct of its employees.

In *Vaughan v Anglo Coal (Drayton Management) Pty Ltd [2013] FWC 10101*, an employee tested positive for a certain drug in breach of the employer's drug and alcohol policy. Although the policy did not specify that the employee could be immediately dismissed for the first failure to comply with the policy, the decision by the employer to terminate the employee's employment was upheld on the basis of the employee's dishonesty prior to the testing and during the subsequent investigation.

In *Judith Wilkinson-Reed v Launtoy Pty Ltd trading as Launceston Toyota [2014] FWC 644* an employee was found to have been unfairly dismissed for making certain Facebook postings about the employer which indicated that the employee had a low opinion of the employer. The Facebook postings were found to be private in nature (compared to general Facebook "wall" postings) and were not sufficiently denigrating of the employer to a degree which provided the employer with the right of termination.

In *Sharp v BCS Infrastructure Support Pty Limited [2015] FWCFB 1033*, it was held that employer policies which provide for disciplinary action including dismissal as a result of positive drug testing may, in certain safety-critical workplaces (in this case the employee was a worker at the Sydney Airport), be lawful and reasonable depending upon the details and effect of the policy.

The case of *Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FCAFC 177* held that the employer's Workplace Harassment and Discrimination Policy formed part of the employment contract as a result of the language used in the Policy and the surrounding circumstances of the education and enforcement of the Policy. Consequently, the employer was found to have breached its obligations to an employee to properly investigate a complaint.

How to Minimise Liability for Employers

It is crucial that the following requirements are satisfied in order to minimise any potential liability arising from the operation of policies:

1. Each policy (and the relevant employment contract) should include a specific provision that the policy does not form part of the terms of the employment contract and that the employer is not bound by the policy. In recent cases, the courts have determined that the description of the procedures of an employer in certain policies has amounted to a term of the employment contract and that the employer has been liable for failing to comply with such an obligation.
2. The policy should not specifically include required obligations of the employer. Instead, a policy should be sufficiently flexible to enable the employer to manage employment issues in accordance with the circumstances which may arise.
3. Employers must ensure that its policies are objectively followed by all levels of management in order to avoid any claim that an employee has been unfairly treated.
4. Employers must also ensure that all employees are regularly educated regarding the requirements of the policies and promptly informed of any changes to the policies.

Now more than ever the consequences for an employer of having insufficient or deficient policies can be severe. As

a result, it is essential that the nature and content of workplace policies are regularly reviewed. We can assist employers with the drafting of legally effective policies, implementing new policies in the workplace and in performing the ongoing review of workplace documents in order to reduce potential liabilities.

Should you wish to discuss any matters arising out of this article, please contact the author:

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