



Workplace Sexual Harassment

Introduction:

On the 6th of March 2023, the Fair Work Act 2009 (the Act) was amended to prohibit sexual harassment in connection with work, including in the workplace. (Part 3-5A of the Act) They expand the previous protections around sexual harassment in the workplace including the Positive Duty.

Despite these changes the MTA employee relations team are still receiving calls from members seeking advice about complaints they have received from employees who have been sexually harassed how to deal with a complaint from an employee, and their obligations are under the new (and old legislation)

What is Sexual Harassment?

Australian law defines Sexual Harassment as:

A person makes an unwelcome sexual advance, or an unwelcome request for sexual favours, to the person harassed; or engages in other unwelcome conduct of a sexual nature in relation to the person harassed; in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.

Examples of Sexual Harassment.

The list for what is considered workplace sexual harassment is extensive and includes:

- Inappropriate physical contact.
- Intrusive questions about a person's private life or physical appearance.
- Sharing or threatening to share intimate images or film without consent.
- Unwelcome touching, hugging, cornering or kissing.
- Repeated or inappropriate invitations to go out on dates.
- Sexually suggestive comments or jokes that offend or intimidate.
- Requests or pressure for sex or other sexual acts.
- Sexually explicit pictures, posters, or gifts.
- Actual or attempted rape or sexual assault.
- Being followed, watched or someone loitering.
- Sexually explicit comments made in person or in writing, or indecent messages (SMS, social media), phone calls or emails—including the use of emojis with sexual connotations.
- Sexual gestures, indecent exposure, or inappropriate display of the body.
- Unwelcome conduct of a sexual nature that occurs online or via some form of technology—including on virtual meetings.
- Inappropriate staring or leering.
- Repeated or inappropriate advances on email or other online social technologies.

The Positive Duty.

The most relevant amendment to the Workplace Harassment legislation is the Positive Duty. For you as a business owner this means adopting an active approach to prevent workplace sexual harassment not just to deal with it when or after it has occurred. Consider it the same as having an effective home security system before you are robbed as opposed to installing it afterwards.

Implementing the Positive Duty.

The introduction of a “Positive Duty” is the key step to the prevention of workplace sexual harassment – and may also affect your employee’s behaviour outside work. Importantly you will need to reinforce with your employees the change is legislation based and they also need to understand you are taking the prevention of sexual harassment seriously and expect them to adopt the same attitude.

Implementation can include:

1. A staff meeting so they are included in the changes and implementation.
2. Leading by example.
3. Encourage staff to chat with a colleague if they have concerns about the persons behaviour.
4. Actively discourage negative comments from staff but do so productively.
5. Encourage the same staff to let you know about any incident.
6. Adopt Policies on sexual harassment – (There are templates on the ERIS Platform which may assist).
7. Educational videos that you and your staff can watch together.
8. Posters and information about the workplace and staff rooms
9. Contact the Employment Relations Team at the MTA as soon as you are concerned sexual harassment may have occurred.

Powers of the Fair Work Commission:

The Fair Work Commission has the power to hear an *“Application for the Fair Work Commission to deal with a sexual harassment dispute”*

There are two applications forms for the Fair Work Commission to deal with workplace sexual harassment. The first F72A for harassment that occurred prior to 6 March 2023 and the second F75 for harassment that occurs after 6 March 2023.

Sexual harassment disputes are heard by a Fair Work member only. In the initial stages they are listed for mediation, conciliation or for the Fair Work member to make a recommendation or expressing an opinion.

Should this not prove successful the matter will proceed to Arbitration where the Commission member has full authority to order the outcome including financial remuneration and compensation.

In conclusion:

Workplace sexual harassment is unfortunately not uncommon in the workplace. One of the reasons it keeps occurring is that people who see it may not know what to do. Further the person being harassed can be too embarrassed or ashamed to report the harassment.

The onus is now you as the employer to address the culture in your workplace by setting a positive standard that does not tolerate workplace sexual harassment nor the people who engage in it.

If you have any questions about workplace sexual harassment or any other issues the MTA Employment Relations team can be contacted at (02) 9016 9098 or eradvice@mtansw.com.au