



Unlawful workplace discrimination

Australia's new workplace relations system

From 1 July 2009, most Australian workplaces are governed by a new system created by the *Fair Work Act 2009*.

The Fair Work Ombudsman helps employees, employers, contractors and the community to understand and comply with the new system. We provide education, information and advice, help to resolve workplace complaints, conduct investigations, and enforce relevant Commonwealth workplace laws.

The Fair Work Ombudsman can help people who believe they have been subject to unlawful discrimination in relation to their employment. The Fair Work Ombudsman investigates allegations of unlawful workplace discrimination and may initiate litigation against a national system employer for contravening the *Fair Work Act 2009*.

The Fair Work Ombudsman only has powers to investigate and take action about workplace discriminatory practices that happened (or continued) after 1 July 2009.

The Fair Work Ombudsman is committed to ensuring that employees and prospective employees are protected from unlawful workplace discrimination and any other adverse actions by an employer.

What is unlawful workplace discrimination?

Unlawful workplace discrimination occurs when an employer takes adverse action against a person who is an employee or prospective employee because of the following attributes of the person:

- race
- colour
- sex
- sexual preference
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction or social origin

Where an investigation finds that the employer has (or had) discriminatory practices that are linked to adverse actions for employees or prospective employees, the Fair Work Ombudsman may take enforcement action.

Who is covered by these protections?

It is unlawful for an employer, regardless of size, to discriminate against an employee. This includes full time, part time and casual employees, probationary employees, apprentices and trainees, and individuals employed for fixed periods of time or tasks.

It is also unlawful to refuse to hire a prospective employee based on one of the attributes listed above.

What is 'adverse action'?

Adverse action can include action that is unlawful if it is taken for a discriminatory reason. The *Fair Work Act 2009* describes a number of adverse actions.

Adverse action taken by an employer includes doing, threatening or organising any of the following:

- dismissing an employee
- injuring an employee in their employment
- altering an employee's position to their detriment
- discriminating between one employee and other employees
- refusing to employ a prospective employee
- discriminating against a prospective employee on the terms and conditions in the offer of employment.

Example:

Sally is employed at an advertising firm. Recently, Sally applied for a promotion for a vacant Account Manager position. During the interview, Sally mentions to the Manager that she is pregnant, and in the future will be taking her entitlement to parental leave. Although Sally is highly qualified for the job, her manager tells her that she did not receive the promotion because she would be away on parental leave for a period of time. Denying Sally this position because she is pregnant is prohibited under the *Fair Work Act 2009*.

For more information on adverse action and other rights protected from certain unlawful action, please see the *Fair Work Ombudsmans Fact Sheet – General Workplace Protections*.

What is not considered unlawful discrimination?

Treating someone differently is not necessarily unlawful discrimination. Some different treatment such as general performance management may not be an unlawful discrimination issue. In terms of the *Fair Work Act 2009*, an action is only considered adverse action if it occurs due to one or more of the above attributes (race, sex, age, disability, etc). If this is not the basis of the action, it may not be considered an act of unlawful discrimination.

Example:

Paul is a marketing employee who made several errors on his last project. Paul's manager advised him that he would undergo a performance management program to develop his skills. However, whilst on this program, Paul continued to make errors. As such, Paul's employer changed his daily duties while he was undergoing further training. In this example, it is not unlawful to alter a person's employment if the reason is not based on one or more of their personal attributes (i.e. race, sex, age, disability, etc).

The *Fair Work Act 2009* also provides that in some circumstances, an action may not be considered discrimination.

This includes where the action:

- is permissible under State or Territory anti-discrimination laws
- is based on the inherent requirements of the particular position concerned
- is taken against a staff member of an institution run in accordance with religious beliefs, and the action is taken in good faith and to avoid injury to those religious beliefs.

A concern for some employees in the workplace is the issue of bullying or harassment. Bullying or harassment does not necessarily constitute unlawful discrimination under the *Fair Work Act 2009* unless the behaviour can be shown to be adverse action linked to one of the attributes listed above. However, forms of bullying or harassment which do not fall within the jurisdiction of the Fair Work Ombudsman may be considered unlawful under occupational health and safety laws. People experiencing bullying or harassment are encouraged to seek advice and assistance from their local occupational health and safety body.

What do I do if I think I've been discriminated against in my employment?

If you believe that you have been unlawfully discriminated against in your employment and the action occurred or continued to occur after 1 July 2009, you can lodge a complaint with the Fair Work Ombudsman.

Some discriminatory practices may affect a group of employees. Please notify the Fair Work Ombudsman if you believe that the unlawful discrimination is also affecting other employees.

You may also be able to lodge an application with the Fair Work Commission. If you have not been dismissed but allege that there has been a contravention of the unlawful discrimination protection provisions of the *Fair Work Act 2009*, you may make an application to the Fair Work Commission to deal with the dispute.

How do I make a complaint to the Fair Work Ombudsman?

Please telephone the Fair Work Infoline on **13 13 94** for assistance in making an unlawful workplace discrimination complaint. You are also able to lodge an unlawful workplace discrimination complaint online by visiting www.fairwork.gov.au, or the Fair Work Infoline can post a copy of the form to you.

What do I do if I've been sacked due to discriminatory grounds?

If you have been dismissed and you believe that it is because of one of the attributes listed above - (e.g. race, sex, age, disability, etc) you should make an application to the Fair Work Commission in the first instance.

There are timeframes for lodging an application to the Fair Work Commission of 21 days for unfair dismissal, and 21 days for unlawful termination. To find out more about matters involving termination, contact the Fair Work Commission on **1300 799 675**

What are the remedies or penalties for unlawful discrimination?

Under the *Fair Work Act 2009*, there are a number of remedies and penalties for adverse action on discriminatory grounds.

The maximum penalty for contravention of the unlawful discrimination protections is \$51,000 per contravention for a corporation, and \$10,200 per contravention for an individual.

Where the Federal Court or Federal Circuit Court of Australia determines that a person has contravened the unlawful discrimination protections under the *Fair Work Act 2009*, the court may make any order that it considers appropriate, including orders for injunctions, reinstatement and/or compensation.

Other ways of getting help

The Fair Work Ombudsman does not have jurisdiction to deal with all unlawful discrimination complaints. Where a complaint or enquiry is outside of the Fair Work Ombudsman's jurisdiction, you will be referred to the appropriate organisation. For example, if an employee is being bullied or harassed by colleagues, they will need to seek assistance from the relevant State or Territory Occupational Health and Safety Authority.

There are a range of anti-discrimination laws and you may prefer to raise your concerns with the Australian Human Rights Commission or your relevant state or territory anti-discrimination body. Information about these agencies is available on the internet at the National Anti-discrimination Information Gateway at www.antidiscrimination.gov.au or you can call the Australian Human Rights Commission on **1300 369 711**. If you are a member of a trade union or employee association, they may also be able to help you.

Further information

Unlawful workplace discrimination is provided for by section 351 of the *Fair Work Act 2009*.

The Fair Work Ombudsman has a collection of fact sheets, Best Practice Guides and other resources. For further information and assistance, visit www.fairwork.gov.au or contact the Fair Work Infoline on **13 13 94**.

Contact us

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on 13 14 50

Hearing & speech assistance

Call through the National Relay Service (NRS):

- For TTY: 13 36 77. Ask for the Fair Work Infoline 13 13 94
- Speak & Listen: 1300 555 727. Ask for the Fair Work Infoline 13 13 94