



MANAGING THE WORKPLACE

Policy, Procedure and Ending a
Workplace Contract

Useful for: Business, Not for Profit
Article looks at: Australian Workplace laws

Last updated on 1 November 2024

In brief

- The issues surrounding employment (and engaging independent contractors), are many and varied.
- From the interview or procurement, all through the relationship and even after it ends, hiring organisations should put in place effective legal agreements, scrupulously manage the legal (and practical) relationships, and consider the desirability of up front restraint and non-competition clauses carefully to reduce the risks when people leave the business.
- Non-solicitation clauses prevent an employee or contractor engaging or soliciting your employees/contractors/suppliers or clients when they leave your organisation.
- As the gig economy ramps up, there is ever increasing awareness of the effects of discrimination, hostility and bullying in the workplace. Organisations should put in place detailed workplace policies to deal with the behaviour of both employees/contractors and the employer to avoid disputes and give all employees and some contractors a clear pathway to make and resolve complaints.
- It will be discriminatory and therefore illegal to take “adverse action” against someone because of the person’s race, colour, sex (including intersex status), sexual preference, age, physical or mental disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin so frame interview questions carefully and limit them to enquiries that go directly to the ability of the person to do the job.
- Know your rights when the relationship is at an end. Restraints of Trade are contractual promises that an employee will not work/carry on business in competition with their employer for a period of time after expiry or termination of the employment contract.
- As a starting point, Restraints of Trade are unenforceable, but may be enforceable if the employer can show that the restraint is reasonable in the circumstances and goes no further than to protect the employer’s legitimate interests – this is due to the overriding public interest in ensuring people are not unduly restrained from

making a living.

- Adverse action includes refusing to hire or dismissing a person, offering employment on different grounds than the employer is prepared to offer others and treating a person differently to other persons within the organisation.

Keeping the Workplace Running Smoothly – Policies and Procedures

The employment contract covers the legal terms of your relationship, but what about after the person sits down at their desk? As your business expands you'll likely need to have policy and procedure in place to ensure employees have a clear understanding of their rights and what is expected of them in a range of areas, including:

Behaviour of Employee

An employee code of conduct might include provisions about:

- Standards expected in relation to behaviours and treatment by employees and officers and relevant contractors, in relation to others in the workplace, including harassment (including sexual harassment) and bullying, health and safety obligations, discrimination, honesty and acknowledging the contributions of colleagues.
- Standards expected by the employer, including rules about use and misuse of phone, computer (including password protection), vehicles or other equipment or property of the employer, observing health and safety rules, misappropriation of company property or money, drug and alcohol use, email and internet use, avoiding conflicts of interest, compliance with particular legislation affecting the employer's business and confidentiality of the employer's commercial information (including use/misuse of the employer's intellectual property).
- Behaviour toward clients/customers including how complaints are managed and resolved.
- Carrying out private activities on company time and/or use of company equipment for private use.
- Potential ramifications for breach of the code of conduct, (noting that any rights to dismiss should be clearly set out in the employment contract).
- Use of social media platforms, both within the workplace and outside of hours and rules around material that may disparage or damage the employer.

Depending on the nature and size of the business, some or all of these might warrant their own policies and/or procedures.

Behaviour of Employer

- Workplace surveillance policy (if cameras are installed or company computers or phones are accessible by IT management while they are allocated to an employee).
- Whistleblower policy.
- Handling of the personal information of employees (if something more in depth or separate from the privacy policy that applies generally is needed).
- Flexible working arrangements or leave policies that go beyond the employee's legislative rights (including work-from-home rights).
- Right to disconnect after hours (now legislated).
- Employee complaints and grievance policy.

Customer/Client handling or other outward facing policies

Depending on the nature of the business and the industry, the following may be necessary or desirable:

- drug and alcohol testing of persons entering a work site (may apply to contractors as well as staff).
- Customer/client complaints handling policy including a mechanism that ends with the CEO or Board as appropriate, and also provides information on any available third party dispute resolution services relevant to the particular industry, for example an industry association, ombudsman or regulator that provides investigation, conciliation/mediation or other services to customers in the industry.

The concepts of bullying and harassment are wide, and depending on the context, may include:

- Aggressive behaviour toward another person
- Intimidation
- Abusive or offensive language
- Humiliating or mocking behaviour, including public criticism of a person's work
- Initiation ceremonies or hazing
- Teasing or practical joking
- Increasing or decreasing the workload of a person unreasonably
- Directing a person to perform work that is below or above their skill level
- Providing inadequate supervision or information to perform the work required, or at the opposite end of the spectrum, unreasonably micromanaging.

Reasonable performance or other management action is not bullying. The problem is that what is "reasonable" will vary depending on the circumstances of each case, and even reasonable management actions may still be bullying if they are imposed in an unreasonable way.

Continuing developments in laws impacting the workplace and in the broader sense, work health and safety, anti-discrimination (sex, racial and disability) and human rights mean that

employers now need to focus on actively preventing discrimination and harassment in the workplace, rather than merely responding to incidents as they occur.

Under recent changes to the Fair Work legislation, employers must now take reasonable and proportionate measures to proactively avoid discrimination and sexual harassment on the ground of sex, and also to avoid subjecting a person to a workplace environment that is hostile on the grounds of sex. That is, the objectionable behaviour does not need to be directed at a person, it only needs to be offensive, intimidating or humiliating to a person because of their sex or a characteristic that appertains to or is imputed to a person of that sex.

Whether the company is large or small, officers should pay close attention to the culture of the organisation and ensure that relevant policy, procedure and directions are put in place in respect of current and emerging issues affecting the business, including bullying and sexual harassment in the workplace, monitoring of workers on camera while in the workplace, use of company technology, training and professional development, just to name a few employee related examples).

The Interview – start as you mean to go on

The laws against discriminatory behaviour don't begin only after a person is hired or engaged. The Fair Work Act specifically forbids "adverse action" against prospective employees as well as actual employees and independent contractors (which are not confined to individuals) "because of a person's 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".

This means that care needs to be taken when formulating questions to be asked at interview.

Adverse action at interview stage is essentially a refusal to employ a person, or discrimination in the terms and conditions on which the offer of employment is made (but does not include action that is necessary because of the characteristics of the particular position).

Questions asked at interview (or when engaging an independent contractor) should be strictly limited to the suitability of the applicant for the particular position or work, having regard to its capacity, skills and experience. If there are specific characteristics of the position that may affect the ability of certain persons to do the job, for example, overnight work, shift work, heavy lifting, insecurity of workplace or inherent physical or psychological dangers in workplace, then those should be made clear, and the person can be asked if there is anything that they think would impact their ability to fulfil the job requirements.

The websites of the **Fair Work Commission**, the **Fair Work Ombudsman** and the **Human Rights Commission** have a wealth of information and advice available for employers to assist in compliance and managing all aspects of the workplace relations landscape.

When the Relationship Ends – Reducing or Eliminating damage to your business

The starting position at general law is that provisions restraining ex-employees or contractors after a relationship ends are not enforceable, because it is contrary to public policy to stop or restrict people earning a living. Restraints can take the form of:

- Restrictions on the employee working, or trading, for a certain period of time, in certain geographical locations and/or in a certain industry or trade; or
- Restrictions on the ex-employee/contractor soliciting other employees or clients of your business; and/or
- Exclusive dealing clauses in independent contracts (that is, a provision in the contract that gives a party sole or exclusive rights to purchase or sell to the other party for a fixed period)¹.

Restraining Employees from working in competing businesses

A restraint of trade clause prevents an employee from working for other businesses that are in competition with yours.

If you impose a post-employment restraint in the contract or seek to enforce a non-solicitation or exclusive dealing clause, it will be up to you to demonstrate that the restraint is reasonable, if you need to take action to enforce it. A restraint may be reasonable where it goes no further than to protect the legitimate interests of the employer, having regard to the interests of the employer, the employee, and the public interest.

The Court will consider a number of factors, including where your business is located, the geographical scope of your customer or client base, the nature of the activities that you are seeking to restrain and how long the restraint lasts. Courts will look at such factors as:

- Whether the employer has agreed as part of the termination or expiry provisions in the contract, or will, adequately compensate the employee for the restraint (ie will the employee go on being paid or otherwise compensated for the period of time during which they cannot work).
- Whether the duration is reasonable having regard to the nature of the position – how long should it reasonably take for your business to replace the employee and for

¹ The enforceability of exclusive dealing clauses is not dealt with in detail in this article but is included as a reminder that exclusive dealing clauses can be unenforceable, so care needs to be taken if your contract contains one. It is especially important to consider the potential ramifications of the competition provisions in the Australian Consumer Law.

them to establish solid relationships with your clients?

- Is the scope reasonable having regard to the location that your business operates in and the nature of your business. If your business and its customers are located solely in one State, it will likely be unreasonable to impose a restraint covering other States. If you operate in a certain or niche market, a restraint covering other markets or a separate niche of the market, will likely be unenforceable.

To provide discretion at the time of termination, and avoid a restraint being held to be unenforceable, the restraint clause can be drafted to provide options for levels of restraint of each of duration and geographical area. Options can be struck out until the “reasonableness” sweet spot is reached. These are known as “cascading” or “waterfall” clauses.

Non-Solicitation Clauses

A non-solicitation clause restrains the outgoing employee from engaging with (whether by way of offering employment or contracting with), your customers or clients, suppliers, employees or contractors, or otherwise interfering with any of your business relationships that the outgoing employee had relationships of influence with while employed or engaged by you.

All the same considerations apply, but non-solicitation clauses can be much easier to enforce, because the person restrained is likely someone who is a former part owner/officer of your company, or employed at a high level – that is, people who have developed strong relationships with your staff, suppliers or customers/clients. Breach of these clauses is likely to cause real commercial loss to your business, as opposed to just leaving you annoyed that in losing a valuable or “hard to replace” employee your competitive position in the market is reduced.

Non-solicitation clauses are not the only protective mechanism available to employers. Contracts of employment or engagement with C-Suite executives and other management positions should contain obligations requiring ongoing confidentiality and perhaps also restrictions on future use of the intellectual property of your business after the relationship ends.

Important Note: This article is general in nature and is not intended to be a substitute for specific legal advice in relation to the laws and issues impacting your particular workplace, or your specific industry sector. You should have a lawyer draft your employment contracts (although a template may suffice for administrative hires that are straightforward). A lawyer should always draft (or advise on) your contracts for the delivery of services to or by your business with independent contractors.