

EMPLOYMENT UPDATE

JULY 11

WHY CONTRACTS AND POLICIES ARE ESSENTIAL

In this Employment Update, we discuss why having employment contracts and workplace policies are not just good practice, but an essential requirement for all employers.

► IN THIS ISSUE

Why have Contracts	1
Why have Policies	2
Communicating is key	2
Enforcing the Policy	3
Incorporation of Policies	3



The importance of having well-written employment contracts and workplace policies cannot be underestimated as they can set a very clear framework in which the relationship between the parties will be regulated.

They also provide significant assistance when resolving workplace disputes.

Why have employment contracts?

Failure to enter into a written contract of employment with employees can lead to a variety of problems, all of which generally do not end well for employers. They are particularly important to deal with issues arising when the employment relationship is at an end.

Some of the key benefits to be gained from ensuring every employee has a written contract of employment include:

- protection of an employer's confidential information and intellectual property;
- inclusion of restraint of trade clauses to protect an employer from unreasonable competition or from employees competing with and/or taking clients, customers or other employees when their employment ends;

- regulating the taking of leave entitlements and the evidence and notice requirements that the employer requires in relation to annual leave and personal/carer's leave;
- requiring a minimum notice period for the employee to give should they wish to resign;
- including key performance indicators in order to assess the employee's performance; and
- aiding the recovery of overpayments, leave in advance or other liabilities which the employee may owe on termination of employment.

Some of the more common problems we see as a result of not having contracts of employment include:

1. **Regulating hours of work:** As result of a combination of the *Fair Work Act 2009* (Cth) (**Act**), the National Employment Standards and provisions contained in Modern Awards, it has never been more important for an employer to clearly define the working hours of an employee, including any obligation to

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work reasonable additional hours or on public holidays. In addition, Modern Awards also contain specific provisions regarding documenting part-time employees' ordinary hours of work at the commencement of the relationship.

2. Over-Award payments and set-off:

It is common for employers to believe that by simply paying an employee above-Award, then issues regarding overtime and penalties that are required under an applicable Award do not have any effect. Unfortunately, without having an appropriate set-off clause in a contract of employment, an employer will be exposed to claims for penalties, overtimes and loadings no matter how much over-Award the employee has been paid. If an employer is paying an Award-based employee any amount over the Award rate, it is essential that the employee have a contract of employment to ensure that the employer is receiving full value for the over-Award payment.

3. Termination and reasonable notice:

If an employee does not have a written contract of employment, they may be entitled to reasonable notice of

termination should their employer wish to terminate their employment. This may be something greater than the minimum set out in the Act and, for senior employees, may even be as much as 6-12 months. Including a clause in an employment contract which expressly provides for the notice to be given on termination of employment by either party will completely resolve this situation.

As such, a small investment in ensuring that all employees have a well-drafted employment contract will alleviate the possibility of a litany of claims that might arise during the employment relationship.

Why have policies?

Workplace policies benefit both employers and employees when implemented and administered effectively. Having policies allows employers to establish guidelines for the management of the workplace. It is also an essential management tool to communicate to employees what the employer views as acceptable and unacceptable conduct.

One of the more significant benefits of having workplace policies is that it helps employers discharge legislative obligations concerning workplace health and safety, anti-discrimination and unfair dismissals. It is a regulative tool which provides employee awareness on conduct which is not only required by company standards, but by standards imposed by law.

Some of the more common workplace policies include discrimination, bullying and harassment (including sexual harassment); drug and alcohol use;

email and internet use; workplace health and safety; grievance procedure and dispute resolution.

Communicating the policy is key

The most well-drafted policy will have no effect if it is not adequately communicated to employees. It is essential to take the time to explain the policy in full to make sure employees understand how to comply with the policy and the consequences involved if the policy is breached.

An appropriate way to do this may be to hold annual training sessions for employees as well as regular inductions for new staff to explain the policies and procedures. It is always a good idea that employees sign off on their attendance at these sessions. Training sessions can also be conducted in conjunction with providing a copy of the employer's workplace handbook which contains the company policies to each employee (where applicable).

Being able to demonstrate an employee's awareness and understanding of a policy will become important should an employer seek to rely upon the policy to take disciplinary action against an employee.

The case of *Kolodjashnij v Lion Nathan t/a J Boag and Son Brewing Pty Ltd* (U2009/3099) is an example of the benefit of an effectively communicated policy. In this case, the employer had a responsible drinking policy which extended outside of ordinary working hours preventing employees from drink driving. Commissioner Deegan explained in his judgment that:

"Not every breach of a policy will

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Contractor Agreements
Contractor Issues
Statutory Leave Issues
Workplace Training
Workplace Investigations
Transmission of Business

provide a valid reason for termination of employment. However in circumstances where the policy is both lawful and reasonable and an employer has stressed the importance of the particular policy to the business and made it clear to employees that any breach is likely to result in termination of employment, then an employee who knowingly breaches that policy will have difficulty making out an argument that there is no valid reason for the termination."

Consequently, the Commissioner upheld the dismissal of the employee given that not only had the alcohol policy been made clear to the employee, but he was also afforded procedural fairness in the termination of his employment.

As such, it is also important that employees are aware of the action that may be taken by the employer in the event that the employee breaches a workplace policy. Most importantly, if the disciplinary process involves the possibility of summary dismissal, an employer should be clear about what circumstances will give rise to this. The *Lion Nathan Case* is a good example of a summary dismissal being upheld because the employer had stressed the consequences of breaching its zero tolerance approach to alcohol consumption.

Enforcing the policy

When it comes to enforcement, it is not only important that employers follow the process provided by the policy, but that they also apply it consistently.

In the case of *AWU Tasmania Branch v Pasmenco Hobart Smelter* (24 February 2003), the Tasmanian

Industrial Commission ordered a final warning be withdrawn after hearing submissions that the employer had applied the relevant policy inconsistently, often failing to enforce the policy on several previous occasions with other workers.

In addition, if enforcing a policy involves dismissing an employee, the decision to do so should only be made being mindful of the requirements under the Act to ensure a fair process is followed. Commissioner Cloghan in *Jones v Zamel's Jewellers* pointed to the importance of employers abiding by their own company policies and ensuring procedural fairness when he said:

"While moving quickly in disciplinary matters is to be encouraged, it should not be at the expense of good procedural fairness...It seems clear that management did not abide by its own company policy with regard to ensuring its dealings with the [employee] were fair and reasonable."

Should policies be incorporated into employment contracts?

Policies are sometimes expressly included as terms of the contract of employment, or are otherwise argued to be implied as a term of the contract. The effect of incorporating policies into a contract of employment has a number of important ramifications. Significantly, it will mean that the obligations in the policy apply equally to the employer such that an employer's failure to abide by any terms in a policy will give rise to a breach of contract claim.

In addition, variation of policies

during the employment relationship becomes difficult due to the fact that an employer is essentially seeking to vary the employment contract by amending any terms of its policies, thus significantly reducing the flexibility that policies usually provide.

For these reasons, we generally consider that the inclusion of policies as a term of employment contracts should be avoided. In this regard, terms included in the employment contract need to be carefully considered given case law regarding implication of policy terms as a result of broad statements made in the employment contract.

Importantly, however, so long as the policies are effectively drafted, communicated and enforced consistently, employers are still entitled to rely upon them.

Key Points: Putting in place well-drafted employment contracts and policies are an essential element in minimising an employer's exposure and liability to a variety of claims. Without having an employment contract, employers are not in a position to properly protect their interests. Having policies in place will assist employers in responding to claims including workplace harassment, sexual harassment and discrimination. Without both, the employer can expect to find it difficult to resolve workplace disputes.

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