



# Employers Liable For Employee Discrimination: Tips to Minimise Risk

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- A recent decision of the Northern Territory Anti Discrimination Commission serves as a timely reminder to ensure company policies are in place, and that staff are adequately aware of, and trained in, those policies
- A failure to ensure staff are trained in policies can lead to an employer being vicariously liable for an employee's discriminatory conduct.

## ANTI DISCRIMINATION COMMISSION DECISION

A recent decision of the Northern Territory Anti Discrimination Commission has found an employer vicariously liable for the racial discrimination committed by two of its employees, on the basis that the employer had failed to ensure that its policies were effectively communicated to employees, and employees had not been provided with anti discrimination training.

While the decision is based on the *Anti Discrimination Act* in force in the Northern Territory, each state's anti discrimination, and the relevant pieces of Commonwealth legislation contain similar terms dealing with the vicarious liability of employers.

## WHEN AN EMPLOYER WILL BE VICARIOUSLY LIABLE FOR THE DISCRIMINATORY CONDUCT OF EMPLOYEES

Generally, an employer will be liable, and potentially required to pay damages, for the discriminatory conduct of an employee, if an employer has failed to take all reasonable steps to prevent the discrimination.

What will be considered "all reasonable steps" will depend on a number of factors, including:

- whether there is an anti discrimination policy in place;
- whether employees are trained in the policy and any remedial action undertaken by the employer for breaches the policy;
- the employer's financial circumstances; and
- the number of employees or workers.

This means that the larger an employer organisation, the more onerous its obligations will be.

Here, we set out some helpful tips for employers to minimise the risk of discrimination and/or harassment in their workplace and, in turn, minimise their potential risk of vicarious liability for that conduct.

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### STEP ONE: PUT A POLICY IN PLACE

Having a policy in place is the first step in minimising discriminatory behaviour in the workplace.

An anti discrimination policy should cover the following:

- . what discrimination and discriminatory conduct is;
- . that discrimination is unlawful, including references to the relevant legislation;
- . the need for compliance with the policy and any ramifications for non compliance; and
- . that the employer can be vicariously liable for any discriminatory conduct.

Some employers will include the above statements in contracts of employment or letters of offer. While this isn't an issue, the benefit of including these items in a policy compared to an employment contract is that a policy can easily be amended (for example due to legislative changes or other developments in the law), whereas a contract requires both parties to agree to, and sign, any amendment.

Some employers will rely on more general terms such as "employees must act in a professional and respectful manner" to discharge their duty. However, this will not be sufficient – the policy must be clear and direct about what behaviour will not be tolerated and what the consequences will be.

### STEP TWO: DISTRIBUTE THE POLICY

Having a policy is the only the first step and, on its own, is not enough to discharge an employer's duty.

Employers must ensure that their policies are communicated effectively to employees and managers and also must ensure that managers are responsible for taking action when the policy is breached.

For example, employers should ensure that the policy is brought to the attention of all employees at the commencement of their employment and is published in a place that is accessible by all employees.

### STEP THREE: TRAIN EMPLOYEES IN THE POLICY

It will also be necessary for employers to train employees in the policy. This can be as simple as having an employee read through the policy and sign off on a

training sheet to confirm that they understand the expectations of them, and the ramifications for failing to behave in accordance with the policy.

To what extent this step is necessary will depend on the size and financial means of the employer. If an employer has a large number of employees and significant financial means, then training obligations will be more onerous. For example, it may be reasonable to have an external training provider conduct training sessions.

### STEP FOUR: ACTION ANY BREACHES

Employers must also action any potential breaches of the policy. A failure to action potential breaches is likely to result in employers being vicariously liable. Even if all other steps are taken, if employers don't action breaches of the policy, then that indicates that the employer accepts anti discriminatory conduct in its workplace.

### STEP FIVE: REVIEW AND UPDATE POLICY AND TRAINING AS REGULARLY AS NECESSARY

All policies should be reviewed at least annually and more regularly if there are any substantive changes to the law.

Training should also be provided regularly to ensure new staff are aware of, and trained in the policy. Regularly training also acts as a "refresher" course for existing employees.

### CONCLUSION

Employers can be required to pay significant sums of money in damages if they are held to be vicariously liable for discriminatory conduct by its employees. More importantly, by not taking steps to prevent discrimination in the workplace, employers may be providing an unsafe and unproductive place of work.

All of the above steps are as important as the other. Employers can often fall at the last hurdle if they have taken all but one step, which is often a failure to train employees.

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