

Welcome to our Human Resources Group Bulletin

Welcome to the Initial Bulletin from the Kemp Strang Human Resources Legal Group

The purpose of the bulletin is to provide our clients and prospective clients with up to date summary information concerning recent developments in the legal aspects of human resources including employment and industrial law, superannuation, discrimination, privacy and incentive arrangements.

The Kemp Strang Human Resources Legal Group

The group is comprised of six lawyers being Stephen Godding and Lisa Berton who are the partners in the group who are assisted by Dominic Calabria, Maxwell Wood, Ilona Clarke and Joseph Moses. For curriculum vitae, please see link to our website.

The group provides advice to corporate, government and individual clients in the following areas:

- Employment law including unfair dismissal, unfair contract and wrongful dismissal issues;
- Discrimination and equal opportunity disputes;
- Option share and incentive plans;
- Advice on corporate, industry and individual superannuation funds;
- Advice on industrial matters concerning award compliance, workplace agreement and enterprise agreements.

The group has experience in the above practice areas and is able to work on a flexible and timely basis providing quality advice for reasonable fees.

Please respond to the following email addresses if you have any questions or enquiries in relation to the matters which appear in the bulletins from time to time:

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Our website is at
www.kempstrang.com.au



HUMAN
RESOURCE:
GROUP
BULLETIN

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In this issue

Discrimination
legislation

What you really
need to know about
carer's discrimination

Industrial
Relations Act
Changes

We look at the
changes and how
they will effect you



What's New?

There have been a number of recent amendments to NSW Employment Legislation which are of particular relevance to employers and employees alike.

Carers Discrimination

The *Anti-Discrimination Amendment (Carers Responsibilities) Act, 2000* (NSW) amends the *Anti-Discrimination Act, 1977* (NSW) ("the ADA") with effect from 1 March 2001 to provide that employers are required to offer flexible working conditions to employees who are "carers" to enable such employees to fulfil their "carer responsibilities". Discrimination on the basis of a person's responsibilities as a carer has been prohibited by the amending legislation.

The new Part 4B of the ADA provides that discrimination in employment on the grounds of a person's status as a carer is prohibited. This prohibition extends to:

- arrangements for the purposes of determining who should be offered employment;
- determining who should be offered employment;
- the terms on which an employer offers employment;
- the terms and conditions of employment an employer affords an employee;
- denying or limiting access to opportunities for promotion, transfer, training or other benefits; and,
- dismissal.

The amendment brings the ADA into line with similar provisions under federal and other state jurisdictions (with the exception of South Australia).

Definition of Carer's Responsibilities

The definition of what constitutes a carer's responsibility is broad, and includes responsibilities, both present and future, to care for or support.

The definition of "immediate family" towards whom a person may have responsibilities as a carer is also broader than the applicable definitions in other jurisdictions.

"Immediate family" and other persons to whom a carer may have responsibilities includes:

- a spouse or former spouse (including de facto partners and same sex partners);
- a spouse of a former spouse or a former spouse of a spouse;
- a grandchild (including step-grandchild, grandchild through adoption, fostering or any other legal arrangement);
- a grandchild of a spouse or former spouse (including step-grandchild, grandchild through adoption, fostering or any other legal arrangement);

- a parent (including step-parent, partner through adoption, fostering or any other legal arrangement);
- a parent of a spouse or former spouse (including step-parent, partner through adoption, fostering or any other legal arrangement);
- a grandparent (including step-grandparent, grandparent through adoption, fostering or any other legal arrangement);
- a grandparent of a spouse or former spouse (including step-grandparent, grandparent through adoption, fostering or any other legal arrangement);
- a brother or sister (including step-brother or step-sister, brother or sister through adoption, fostering or any other legal arrangement); and
- a brother or sister of a spouse or former spouse (including step-brother or step-sister, brother or sister through adoption, fostering or any other legal arrangement).

(including step-child, adopted child, foster child or any child for whom they have a legal responsibility).

Unlawful Discrimination

It is unlawful for an employer to discriminate against a person on the basis of that person's responsibilities as a carer. An employer must not discriminate in determining who should be offered employment or the terms upon which employment is offered. Neither may an employer dismiss an employee or subject them to any other detriment, such as limiting promotion opportunities, because of the person's carer's responsibilities.

"discrimination in employment on the grounds of a person's status as a carer is prohibited."

Both direct and indirect discrimination on the basis of a person's carer's responsibilities are unlawful. Direct discrimination is overt and occurs when someone is treated unfairly or unequally because they belong to a particular category of people. For example, it is direct discrimination to refuse to employ a person because he/she has carer's responsibilities.

In addition, the following are also included as persons to whom an employee may have responsibilities as a carer where that person is in need of care or support from the employee:

- an adult of whom an employee is a legal guardian; and
- a child of the employee or of the employee's current or former spouse

Indirect discrimination usually is the result of apparently neutral requirements, policies, or practices which have a disproportionate and unreasonable impact on a particular group. For example, it would be indirect discrimination for an employer to unreasonably require a carer to comply with a requirement or condition to which a substantially higher proportion of people who do not have carer's responsibilities are able to comply.



"Inherent Requirements" and "Unjustifiable Hardship" Defences

However, Section 49V(4) of the ADA provides that it is not unlawful for an employer to discriminate against a person in an employment context on the basis of carer's responsibilities if because of the employee's responsibilities as a carer:

- the employee would be unable to carry out the inherent requirements of the particular employment; or
- would, in order to carry out those requirements, require arrangements that are not required by persons without those responsibilities as a carer and the making of which would impose an unjustifiable hardship on the employer.

An inherent requirement of a job is one which is essential to the performance of a particular position. Where an employee may be in a position to perform the job however, with some difficulty or less efficiency than a person without carer's responsibilities, an employer will not be able to rely on the inherent requirement defence in the absence of extenuating circumstances.

Section 49U of the ADA provides that in determining what constitutes "unjustifiable hardship" all relevant circumstances of the particular case are to be taken into account, including:

- the nature of the benefit or detriment likely to accrue to or be suffered by any persons concerned; and

- the effect of the relevant responsibilities as a carer of a person concerned; and
- the financial circumstances of and the estimated amount of expenditure required to be made by the person claiming unjustifiable hardship.

The NSW Anti-Discrimination Board has published a set of guidelines for employers to ensure that they are conforming with the new carer's discrimination provisions.

The guidelines include the following 5 steps:

1. Remove any direct discrimination based on carer's responsibilities.
2. Remove any indirect discrimination based on carer's responsibilities.
3. Provide flexible work arrangements wherever possible.
4. Ensure there is no harassment against anyone with carer's responsibilities.
5. Check industrial awards and agreements to ensure they do not discriminate against carers.

"You may need to review the terms and conditions of employment contracts..."

Please advise us if you would like us to provide you with a copy of the full text of the Anti-Discrimination Board's guidelines on carer's responsibilities.

You may also need to review the terms and conditions of employment contracts and implement new workplace policies and practices which make provision for carer's responsibilities.



Various Amendments to the Industrial Relations Act

The *Industrial Relations Amendment Bill 2000 (NSW)* provided for a number of amendments to the *Industrial Relations Act, 1996 (NSW)* with effect from 9 October 2000 including:

- casual employees who have worked on a regular and systematic basis for an employer for more than two years are entitled to the same parental leave entitlements as full-time employees namely, twelve (12) months unpaid parental leave;
- certain employees covered by federal industrial awards who are unable to bring unfair dismissal claims in the federal Australian Industrial Relations Commission due to constitutional constraints, now have the capacity to bring unfair dismissal claims before the Industrial Relations Commission of New South Wales;
- employers no longer require the approval of the Industrial Registrar before keeping employee records at a place other than where they carry on business;
- the termination of employment of an injured worker due to an injury is prohibited during either the period that the worker is entitled to accident pay under a relevant federal or state industrial instrument (eg an industrial award) or for six (6) months after the injury is sustained whichever period is longer; and
- the notice period required to be given by an authorised industrial officer who wishes to enter an employer's premises to investigate industrial law or industrial instrument breaches, is reduced from 48 to 24 hours. However, there will be a further period of 24 hours for an employer to produce any records not kept on the premises.



This bulletin is intended to keep readers abreast of current developments in the field of human resources and employment law. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers.