



## Adverse action claims – managers warned to consider who they befriend online

The *Fair Work Act 2009* (Cth) (**Act**) expands employee protection against breach of ‘workplace rights’ and discrimination. The ‘adverse action’ provisions under the Act will compel employers to be more cautious when making decisions that affect employees, which may include interactions on social networking sites such as Facebook and Twitter.

### Overview of adverse action provisions

Section 340 of the Act provides that employees and employers can bring an ‘adverse action’ claim where a ‘workplace right’ has been breached or is threatened to be breached.

#### What is a workplace right?

Section 341 of the Act provides that a person has a ‘workplace right’ and is afforded protection against ‘adverse action’, if he or she is:

- entitled to the benefit of, or has a role or responsibility under a workplace law, instrument or order of an industrial body;
- able to initiate or participate in a process or proceedings under a workplace law or instrument;
- able to make a complaint or inquiry to a person or body having capacity under a workplace law to seek compliance with that law or workplace instrument; or
- an employee who is able to make a complaint in relation to his or her employment.

Some workplace rights include the right to freedom of association, and the right to be free from unlawful discrimination, undue influence and pressure.

#### What is an adverse action?

Section 342 of the Act sets out a number of circumstances which amounts to a person taking ‘adverse action’ against another. Some examples include actions against:

- an **employee** by an employer, such as dismissal, injury during employment, altering an employee’s position to the employee’s prejudice, discriminating between employees;
- a **prospective employee** by an employer, such as refusal to employ or discriminating in the terms and conditions of employment offered to the prospective employee; and
- an **employer** by an employee, such as ceasing to work or industrial action.

The Act also sets out the circumstances where adverse action is taken by principals and independent contractors and by industrial associations and their officers.

Adverse action includes threatening to take any action or organising such action.

#### Adverse action and discrimination

One of the most significant aspects of the ‘adverse action’ provisions are those which prohibit discrimination in employment.

Section 351 of the Act provides that employers are prohibited from taking adverse action against an employee or prospective employee, because of the 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.

## Implications for employers using Social Networking Sites

Employers need to think carefully before they allow employees to become 'friends' on Social Networking Sites as it may be argued that managers are being discriminatory if they accept some friend requests and not others. Disgruntled employees may bring an 'adverse action' claim with Fair Work Australia and have the matter resolved through a compulsory conference.

If the matter cannot be resolved, the employee can make an application to the Federal Court or the Federal Magistrates Court for a civil penalty to be imposed against the employer. The maximum civil penalty for a breach of prohibition against adverse action is \$6,600 for an individual and \$33,000 for a company. Both courts may also make such orders as they see fit which may include compensation and/or re-instatement.

In applications alleging adverse action, the employer will bear the onus of proof to show that the action was not taken for a prohibited reason.

Employers should develop Social Media Policies to clarify what is acceptable and unacceptable in regards to the use of Social Networking Sites for employees both during and after business hours to prevent adverse action claims by employees.

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