

MEDIA RELEASE

New disability legislation to contribute to already increasing discrimination claims relating to stress

Employers face added obligations to assist employees return to work from medical stress leave

12 August 2009 – Stress-related claims by employees have increased over the last decade and may become a greater potential liability for employers as a result of new disability legislation which confirms that the burden of proof is on employers to show they have taken all necessary and reasonable steps to adjust their workplaces to enable employees suffering from any form of disability to safely work, according to Harmers Workplace Lawyers.

Lesley Maclou, Partner at Harmers Workplace Lawyers, said the Disability Discrimination Act, which was first introduced into Federal parliament last year and passed last month, holds implications for employers of employees dealing with stress related illnesses and disorders.

Ms Maclou said, “Over the past few years there has been a significant increase in the number of stress-related claims in the workplace in Australia and abroad. Typically, the issue of stress baffles those within an organisation who have responsibility for managing absences due to illness and it is also difficult to identify because the effects of stress can be exemplified in both physical or mental conditions.

“In addition, while there is no specific ‘stress’ legislation, an employer has obligations under health and safety legislation, at common law and under the disability discrimination legislation. In particular, the new disability legislation, which imposes greater obligations on employers when dealing with employees with a disability, could lead to an increased focus on how employers manage stress-related illnesses and the return to work of employees suffering from such illnesses.

“The Disability Discrimination Act has made it clear where the burden of proof lies, and that is with the employer. Employers are now required to prove that they have made all reasonable adjustments to make amends and arrangements for a stress affected employee to return to work.

“If the employer is unable to prove that reasonable adjustments have been made that could have enabled an employee with a stress-related illness to safely return to work (or indeed to prevent such an employee being treated less favourably than another employee without such an illness), the employer could face a claim of unlawful disability discrimination,” she said.

According to government statistics in Australia the total cost of workers compensation claims for stress-related conditions is estimated at over \$200 million every year. Ms Maclou noted that in order to implement practical measures to assist an employee with a stress related illness to successfully return to the workplace as well as minimise an employer’s legal risks, it is important for the employer to identify the cause of the original stress or the reason for its exacerbation at work.

An employer must then consider if the contributors to the employee's stress are within their control. An employer should also have various strategies and processes in place to accommodate and manage these situations - many employers offer their employees access to confidential help via independent third parties, for example in the form of counselling. Undoubtedly, given all the potential legal risks and to ensure the safety of all of their employees, an employer must consider undertaking risk assessments, ongoing monitoring and be committed to genuinely addressing reasonable adjustments in these circumstances.

"For example, if a fellow worker is causing an employee significant stress and harm, the employer should consider re-arranging the team in which the employee works so there is limited or no interaction with that colleague as well as ensuring the employee that is allegedly causing the issues also has access to training and assistance. Other examples include reducing an employee's hours of work and reducing their workload, counselling and buddying as well as engaging a workplace rehabilitation coordinator," she said.

Ms Maclou said that employers faced with claims of discrimination from employees who suffer from a stress-related illness will only be able to defend their inaction if they can prove that the required adjustments to their workplaces would place a significant burden or an 'unjustifiable hardship' on that business and its ability to operate.

"The message for employers is clear. Any time an employee takes stress leave, employers should be prepared to take all necessary steps in order to help that employee rehabilitate themselves into the workplace. A failure to do so will likely see the employer exposed not only to a claim under the new Discrimination Act, but also potentially in breach of its common law and occupational health and safety obligations. The cost to the business can be significant," she said.

Ms Maclou also reminded employers that the definition of disability is extremely broad. "Stress-related illnesses can be a direct result of a particular incident in the workplace or caused by an ongoing workplace environment. However, it also may extend to pre-existing conditions that are exacerbated by a workplace incident or ongoing 'unsafe' workplace environment. The global economic downturn and the subsequent fears over job security and the way in which some employers are managing (or not managing) these issues are also contributing to rising stress levels in the workplace," she said.

"Workplace stress is an issue that must be addressed seriously by employers and managers. The best prevention is to ensure good workplace practices are always upheld, putting in place policies and employee education and training to ensure bullying and harassment (which are often significant contributors to workplace stress) are eradicated," concluded Ms Maclou.

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Note to editors:

About Harmers Workplace Lawyers

Harmers Workplace Lawyers was established in 1996 as a boutique employment law firm. Since then it has become one of Australia's leading employment and industrial law firms, with offices in Sydney, Melbourne and Brisbane. The firm has been awarded Australasian Legal Business's 'employment specialist firm of the year' for the past three years running.

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