

Workplace Equality^{and} Respect

PRACTICE GUIDANCE

Understanding your rights in the workplace and Victorian anti- discrimination law



Victorian Equal Opportunity
& Human Rights Commission

**Our
WATCH**
End violence against
Women And Their Children

Our Watch 2019

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This guide is a joint publication between Our Watch and the Victorian Equal Opportunity and Human Rights Commission. It has been developed to support workplaces implement the Our Watch Workplace Equality and Respect Standards.

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Acknowledgement of Country: Our Watch acknowledges the traditional owners of the land across Australia on which we work and live. We pay our respects to Aboriginal and Torres Strait Islander people.

The content of the guide assists employees to understand their legal right to protection from discrimination, sexual harassment and victimisation, and to a safe and healthy workplace. It is expected that workplaces provide information about non-discriminatory work conditions to their staff as part of the norms and practices of the organisation.¹

Rights in the workplace: a guide

As an employee, you have rights that are protected under several different laws.² You may also have additional rights in your workplace awards, enterprise bargaining agreement or employment contract.

The Fair Work Act

The *Fair Work Act 2009* (Cth) sets out the National Employment Standards. These are 10 minimum terms and conditions of employment that have to be provided to all employees. They include:

- **Parental leave and related entitlements.** Parental leave can be taken when an employee gives birth; an employee's spouse or de-facto partner gives birth; or an employee adopts a child under 16 years of age. Employees are entitled to 52 weeks unpaid leave (if eligible) and can also request an additional 52 weeks unpaid leave (if eligible).
- **The right to request flexible working arrangements.** This includes parents or individuals who have responsibility for the care of a child who is school aged or younger; are a carer; have a disability; are over 55 years of age; are an employee experiencing family violence or who is supporting a family member who is experiencing family violence.

¹ This document was current as of April 2019.

² This information is intended as a guide only. It is not a substitute for legal advice.

Family and Domestic Violence Leave.

On 12 December 2018 the Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 took effect. The Fair Work Act 2009 now includes an entitlement to unpaid family and domestic violence leave as part of the National Employment Standards (NES).

This entitlement applies to all employees (including part-time and casual employees). It applies from 12 December 2018. The recent changes mean that all employees now have access to this leave entitlement, regardless of whether they're covered by an award or not.

Work, health and safety laws

These laws ensure that employers (so far as reasonably practicable) provide and maintain a healthy and safe working environment for all workers – including employees, contractors and others at the workplace.

Anti-discrimination laws

Both state and federal anti-discrimination laws make it unlawful for an employer to discriminate against an employee based on various attributes/ characteristics and also prohibit sexual harassment. Key laws include:

- at the federal level, the *Sex Discrimination Act 1984*, *Disability Discrimination Act 1992*, *Age Discrimination Act 2004* and the *Racial Discrimination Act 1975*
- in Victoria, the *Equal Opportunity Act 2010*.

If you need further information about your rights in the workplace there are a range of external agencies and services that can provide you with advice and support.

Refer to the section of this guide: *Who to contact for further information and support*.

Your rights under Victorian anti-discrimination law

What is discrimination in the workplace?

Discrimination is treating or proposing to treat someone unfavourably because of a personal characteristic ('protected attribute') protected by the law in an area of public life (this includes employment). The definition of 'employee' in the Equal Opportunity Act is very broad and includes casual employees and contractors.³

In Victoria, it is against the law for an employer (or potential employer) to discriminate against you because of a **protected attribute**, which includes:

- age
- breastfeeding
- employment activity
- gender identity
- disability
- industrial activity
- lawful sexual activity
- marital status
- parental status or status as a carer
- physical features
- political belief or activity
- pregnancy
- race
- religious belief or activity
- sex
- sexual orientation
- expunged homosexual conviction
- personal association (whether as a relative or otherwise) with a person who is identified by reference to any of the above attributes.

³ Note that this does not include an unpaid worker or volunteer except in relation to sexual harassment.

Discrimination in the workplace can be **direct** or **indirect**.

Direct discrimination occurs when an employer treats you, or proposes to treat you, in an unfavourable or adverse manner based on one of the protected attributes listed above, such as because you are pregnant, or because of your carer or parental status. Being treated unfavourably may include termination, demotion, or even harassment or humiliating treatment.

An example of direct discrimination

Janelle, an area manager for an engineering company is responsible for negotiating large corporate contracts. Upon finding out she is pregnant, her employer demotes her to a bookkeeping position with less pay and status. Her employer tells her that he does not believe it is suitable for a pregnant woman to represent the organisation.

Indirect discrimination may occur when an employer imposes or proposes a condition, requirement, or practice that appears to treat everyone equally, but which will actually (or has the potential to) disadvantage a person based on one of the protected attributes (such as parental status). To be discriminatory, the condition or practice must be unreasonable in the circumstances.

An example of indirect discrimination

Paul works in a research role. The organisation has a policy that all staff must be in the office by 9am and leave no earlier than 5pm. This policy applies to all staff, however Paul, who is a parent, finds this policy difficult as he needs to pick up his two children from school at 3:30pm. He proposes to start earlier so that he can leave earlier. This policy may be discriminatory if the employer is unable to explain why it is reasonable in the circumstances for all employees to adhere to the strict hours.

What is sexual harassment in employment?

In Victoria, the *Equal Opportunity Act* defines sexual harassment as unwelcome conduct of a sexual nature which could be expected to make a person feel offended, humiliated or intimidated. The unwelcome sexual behaviour could be physical, spoken or written. There are a range of behaviours that may constitute sexual harassment. Examples include:

- requests for sex and/or repeated requests to go out
- sexually suggestive behaviour or comments, such as leering or jokes
- brushing up against someone, touching, fondling or hugging
- displaying offensive screen savers, photos, calendars or objects
- sexually explicit emails, text messages or social networking sites
- sexual assault (these acts are also criminal and can be reported to the police).

Employers are legally responsible for acts of sexual harassment by their employees or agents that occur in the workplace or in connection with a person's employment, unless they can show they have taken reasonable precautions to prevent such acts.

Sexual harassment may include conduct that occurs at the work premises, at work related events (such as Christmas parties) or between people sharing the same workplace.

What is victimisation?

Under the *Equal Opportunity Act*, it is against the law to punish or threaten to punish someone because they have:

- asserted their rights under this Act
- made a complaint
- helped someone else make a complaint
- refused to do something because it would be discrimination, sexual harassment or victimisation.

An example of victimisation

Sally was dismissed from her employment after she made a complaint of sexual harassment.

What is the positive duty?

In Victoria, employers have a positive duty to take reasonable and proportionate measures to eliminate discrimination and sexual harassment and victimisation as far as possible.

This means that instead of simply responding to complaints, organisations are required to be proactive and take steps to prevent it from occurring. For example, an employer may take steps toward complying with the positive duty by reviewing whether any complaints have been made to the organisation by parents/carers, reviewing organisational policies and practices, and providing amendments to prevent any future complaints and issues.

Return to work process

What happens when parental leave ends?

When you return from a period of parental leave you are entitled to return to the position you held before going on leave. If that position genuinely does not exist, you are entitled to return to any other position for which you are qualified and suited, that is the nearest in status and remuneration to your pre-parental leave position (if a position exists).

For example, Bilyana worked as a permanent employee in a senior role before her pregnancy. Upon her return, she was offered casual employment in a lower paid position and her previous role was occupied by another worker. This is against the law and Bilyana may make a complaint of discrimination.

Requesting part-time & flexible work arrangements

When you return to work from parental leave you don't have an automatic right to convert from full-time to part-time work. However, you can request flexible work arrangements, which includes part-time employment under the Equal Opportunity Act and relevant federal legislation (for example, the Fair Work Act). This applies to both primary and secondary carers.

Other flexible work arrangements may include change of location (such as working from home), changing start or finish times, or roster arrangements that may allow you to fulfil your parental or carer responsibilities.

Under the *Equal Opportunity Act*, an employer must not unreasonably refuse flexible arrangements for an employee with parental or carer responsibilities.

Relevant considerations for determining whether a ‘refusal’ is or is not reasonable includes:

- nature of the employee’s work and parental or carer responsibilities
- nature and cost of the arrangements required to accommodate those responsibilities
- financial circumstance of the employer
- size and nature of workplace
- effect of the flexible workplace on the workplace (including financial impact on business)
- the consequence to both employee and employer for not making the accommodation.

For further information about making requests for flexible working arrangements and sample letters go to: humanrightscommission.vic.gov.au/pregnancy-and-work

Breastfeeding

In Victoria, it is against the law to discriminate against a woman for breastfeeding.

For example, Nayla is a financial analyst who expresses milk during breaks and stores the milk in the fridge. Jason, a co-worker, makes rude remarks about this to Nayla and also complains at the team meeting. Nayla feels humiliated and insulted by Jason’s behaviour. This behaviour is against the law and Nayla may make a complaint of discrimination

Who to contact for further information and support

Within your organisation there may be contact officers, occupational health and safety officers, union representatives or other internal supports that may be able to assist you in relation to your workplace rights.

There are also a range of external agencies and services that can also provide you with advice and support.

If you believe you have been discriminated against, sexually harassed or victimised you can contact the **Victorian Equal Opportunity and Human Rights Commission** on 1300 292 153 or (03) 9032 3583 enquiries@veohrc.vic.gov.au, humanrightscommission.vic.gov.au/complaints.

The Commission is able to provide you with information, as well as a free, fair, confidential and timely dispute resolution service.

Other organisations that may be able to assist: (depending on your circumstance)

- Victoria Legal Aid: 1300 792 387
- JobWatch: 1800 331 617 or 9662 1933
- Worksafe Victoria Advisory Service: 1800 136 089
- Australian Human Rights Commission: 1300 656 419 or (02) 9284 9888
- Fair Work Australia: 1300 734 265
- Fair Work Helpline: 1300 090 946