SQUIRE SANDERS

WORKPLACE VIEW

February 2014

SPIT TESTING FOR STRESS

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In 2013 Safe Work Australia released its first report on the impact of work-related mental stress on Australian businesses.

The report "Incidence of Accepted Workers' Compensation Claims for Mental Stress" compiled from data obtained from workers' compensation claims during the period 2008-10 made some interesting findings including:

- loss of productivity arising from mental stress absences from work cost Australian employers more than AU$10 billion per annum;
- the highest rate of mental stress is reported by employees who are responsible for the health and safety of others as part of their work, by professional employees and by employees working in dangerous situations (police, paramedics and military personnel for example);
- mental stress claims are the most costly form of workers compensation claim;
- most mental stress claims are made by women;
- work pressures are cited as the most common cause of mental stress in older employees; and
- employees suffering from mental stress are often absent from work for lengthy periods, making work allocation and long term planning difficult for employers.

Sick leave due to mental stress is not unique to Australia. It is also a widespread problem in the UK where some UK employers have introduced mobile saliva testing technology to test employees for mental stress, with the results being available approximately ten minutes after the test. Closer to home, testing for mental stress has been adopted by two universities in Sydney and may soon become more prevalent in Australian workplaces.

Considerations for Employers

Employers considering the introduction of saliva testing for mental stress should tread carefully in these relatively unchartered waters. In particular, employers should consider the following:

- Under occupational, safety and health (OSH) laws, employers have an obligation to provide and maintain, so far as is reasonably practicable, a working environment in which the employee is not exposed to hazards or, if there are hazards, to protect them from such hazards. Employers will need to consider their OSH obligations once they become aware that an employee is suffering from mental stress. For example, they will need to determine whether or not a positive mental stress test should render an employee automatically unfit for work, especially where the employee is not otherwise exhibiting signs of mental stress. The employer may also be under an obligation to make reasonable adjustments to the employee's role.
- It may be unwise for employers to rely solely on the results of saliva testing or one saliva test alone, given that mental stress levels vary throughout the day and may not accurately reflect the employee's overall mental state.
- Employers will need to exercise caution in any subsequent action they take given that the employee may be suffering from a "disability" or "impairment" under anti-discrimination legislation.
- Employers wishing to test for mental stress would be wise to identify "mental stress test parameters" and consider including them in a specific policy related to mental stress testing. Such considerations may include: when testing is likely to occur (for example, "blanket" testing of all employees or just the testing of employees "appearing" stressed), how a saliva test is interpreted, what will happen to employees who test positive and any subsequent follow up testing or support which may be required.
- A positive mental stress test result may form the basis for a claim by the employee – especially where the employee has complained of workplace stress in the past.
- Public sector employers will need to give careful consideration to the storage and disclosure of test results in order to comply with the National Privacy Principles under the *Privacy Act 1988* (Cth).

WORKPLACE VIEW

Did You Know? …

Various sources report that by the end of last year there were in Australia 12.8 million active monthly Australian Facebook users and 3.4 million LinkedIn users. The use of social media continues to rise and has prompted many employers to actively consider the risks involved, particularly in relation to providing references or endorsements.

Networks such as LinkedIn allow those who are connected to "endorse" each other skills and qualifications and to provide comments or recommendations which then appear on the individual's profile. There has been ongoing discussion as to whether this may constitute a breach of company reference policies prohibiting employees from providing a company reference.

Although there are no reported cases as yet, claims for misleading and deceptive conduct under Australian Consumer Law may be available for future employers who suffer as a result of relying on a misleading representation. In order to address such potential risks, employers may want to consider extending any "no reference" policy they may have to social media platforms, or ensuring that employees make clear that they are not representing a view of the company when writing personal endorsements for their former colleagues or connections.

Employer Reminder

We hope you all have your privacy policies in place and ready for March 2014. Changes to the Australian *Privacy Act 1988* (Cth) come into effect on 12 March 2014 and include, amongst other things, the introduction of the new Australian Privacy Principles (**APPs**) and the requirement that all employers have a clear and up to date privacy policy that complies with the APPs and which is easily accessible to employees.

Client Quiz

The first correct entry emailed to isla.rollason@squiresanders.com will win a West Australian Good Food Guide (delivery within Australia only).

What is the statutory entitlement under the *Fair Work Act 2009* (Cth) in relation to the period of concurrent unpaid leave that can be taken by both employees in an employee couple in a parental leave situation?

(a) two weeks

(b) four weeks

(c) six weeks

(d) eight weeks

Events Update

CPD Program

Legalwise Seminars

4 March – 31 March 2014 – Parmelia Hilton, Perth

Kylie Groves, partner, will present on "Social Media and the Workplace: Managing Misuse" as part of a session on "Social Media: Misuse, Brand Hijackers and Defamation" at 2 p.m. on 26 March 2014.

For details visit www.legalwiseseminars.com.au

New IR Law for HR Managers Conference

IES Conferences Australia

31 March – 1 April 2014 – Amora Jamison Hotel, Sydney

Dominique Hartfield, senior associate, will present on "How to Respond to Complaints of Workplace Bullying, Discrimination and Sexual Harassment – A Guide for HR" at 3:45 p.m. on 1 April 2014.

To register, call 02 9425 7600 or email admin.manager@iesconferences.com

Squire Sanders Perth 2014 Annual Client CPD Day

7 March 2014 – Squire Sanders, Level 21, 300 Murray St, Perth

7:30 a.m.	Breakfast/Registration
8 a.m.	First session commences
5:30 p.m.	Sundowner/networking drinks on the terrace

To register, contact Isla Rollason on 08 9429 7624 or email isla.rollason@squiresanders.com

Legislation Update

In our October 2013 edition of Workplace View we reported on the status of the new bullying regime, at which point in time the extent to which the incoming coalition government would alter the proposed regime remained to seen. With the regime having taken legislative force on 1 January 2014, the coalition is yet to make any significant amendments. Therefore at this stage the key features (which are set out below) remain the same.

Since the regime came into force on 1 January 2014, the Commission has received more than 40 claims from employees. The outcome of these claims, and how the Commission will interpret the new regime, remains to be seen.

Legislative Instrument	Status	Key Features
Fair Work Amendment Act 2013	Schedule 3 – "Anti Bullying Measure" came into force on 1 January 2014	• A worker may apply to the Fair Work Commission (**FWC**) for an order to stop workplace bullying from occurring. • Bullying will be deemed to have occurred when a person or a group of people **repeatedly** behave unreasonably towards a worker or group of workers and the behaviour **creates a risk to health and safety**. • FWC can only deal with applications from employees in "constitutionally covered businesses". • The FWC has given the following examples of behaviour which can amount to bullying: - aggressive or intimidating conduct; - belittling or humiliating comments; - spreading malicious rumours; - teasing, practical jokes or "initiation ceremonies"; - exclusion from work-related events; - unreasonable work expectations, including too much or too little work, or work below or beyond a worker's skill level; - displaying offensive material; and - pressure to behave in an appropriate manner. • "Reasonable management action" carried out in a reasonable manner will not be considered bullying. • The FWC has given the following examples of "reasonable management action": - performance management processes; - disciplinary action for misconduct; - informing a worker about unsatisfactory work performance or inappropriate work behaviour; - directing a worker to perform duties in keeping with their job; and - maintaining reasonable workplace goals and standards.

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