

Fair Work | Fact Sheet

General Protections

This information sheet concerns a broad range of persons, including national system employees and employers, industrial associations, principals and independent contractors.

The provisions will commence on 1 July 2009.

There are a number of noteworthy changes between the general protections found in Part 3-1 of the Fair Work Act 2009 (Cth) (FW Act) and the existing protections contained in the Workplace Relations Act (WR Act).

Whilst the unlawful termination and freedom of association protections found in the WR Act survive the reform process, the manner in which they are set out under the FW Act is different to that under the WR Act.

In addition, a number of protections provided under the WR Act have been consolidated and rationalised, with the result being that the protections contained in the FW Act are broader in their scope than those previously found in the WR Act.

Who is covered?

The general protections contained in Part 3-1 of the FW Act provide protections for:

- national system employers;
- national system employees; and
- organisations and other associations of national system employers or employees.

However, in certain circumstances, protections are also provided for:

- prospective employees;
- employers and employees in State industrial relations systems;
- independent contractors;
- principals;
- State registered industrial associations;
- other associations of State employer and employees.



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On its face, it may seem as though the workplace rights protections apply to a very broad range of persons. However, the definition of 'adverse action' (see below) limits the action that will give rise to a liability to specified action taken by specified persons against other specified persons.

Workplace rights

Division 3 of Part 3-1 of the FW Act provides protections in relation to a person's workplace rights.

What is a workplace right?

The workplace rights under the FW Act have been divided into three categories. Each of the categories are not intended to be mutually exclusive.

1. Entitlements, roles and responsibilities

A person has a workplace right if the person is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body. Examples of these benefits, roles and responsibilities include:

- an employee's right to have an enterprise agreement apply to them if it satisfies the better off overall test;
- an employee's right to be absent from work during parental leave;
- an employee's entitlement to the benefit of an enterprise agreement or an order of FWA; and
- an employee's position in a representative role, such as a health and safety representative or harassment officer.

2. Processes and proceedings under workplace laws and instruments

A person has a workplace right if the person is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument. Examples of a process or proceedings under a workplace law or workplace instrument include:

- a conference conducted or a hearing held by FWA;
- court proceedings under a workplace law or workplace instrument;
- protected industrial action;
- making, varying or terminating an enterprise agreement; and
- accepting a guarantee of annual earnings.

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3. Complaints or inquiries

A person has a workplace right if the person is able to make an inquiry or complaint about his or her employment. Under the FW Act, this would include situations where an employee makes an inquiry or complaint to his or her employer, a union or a body such as the Australian Competition and Consumer Commission.

Workplace rights of prospective employees

A prospective employee is taken to have the workplace rights they would have if they were employed in the prospective employment by the prospective employer. Therefore, an employer cannot make an offer of employment conditional on the person giving up an entitlement. For example, a prospective employer cannot make an offer of employment conditional on the prospective employee entering into an individual flexibility agreement, when they would otherwise be entitled to the benefit of a modern award or enterprise agreement.

There are two exceptions to the prospective employee protection. These are:

- An employer can make an offer of employment conditional on the person accepting a guarantee of annual earnings; and
- In a transfer of business situation, an employer may refuse (for reasons otherwise lawful) to employ an employee of the old employer for a reason that includes their entitlement to a benefit of an award or enterprise agreement.

What is adverse action?

What is adverse action depends on the relationship between the relevant persons involved. For instance, adverse action is taken by an employer against an employee, if the employer:

- dismisses the employee;
- injures the employee in his or her employment;
- alters the position of the employee to the employee's prejudice; or
- discriminates between the employee and other employees of the employer.

On the other hand, adverse action is taken by an employee against an employer, if the employee:

- ceases work in the service of the employer; or
- takes industrial action against the employer.

The other circumstances in which a person may take adverse action against another person are set out in the table contained in section 342(1) of the FW Act. It should be noted that adverse action includes threatening to take any action covered by the table, and the organisation of such action.



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Employees and unions will rely on the adverse action protections to challenge operational measures taken by employers that adversely affect significant sections of their workforce. For instance, if an employer decides to outsource a business function for reasons which include a desire to reduce labour costs, the employees in that function will face the prospect of being retrenched or taking lesser paid jobs. An employee could argue that the outsourcing decision was motivated by the fact that employees in that business had generous entitlements under an employment agreement and that this action is in breach of these employee protections.

Coercion

A person will contravene the FW Act if they coerce another person to exercise or not exercise a workplace right, or exercise or not exercise a workplace right in a particular way.

This provision replaces the existing prohibition in agreement-making contained in the WR Act.

Undue influence or pressure

Section 344 of the FW Act is a new provision that will prohibit an employer from exerting undue influence or undue pressure on an employee in relation to certain decisions by the employee, namely to:

- make or not make an arrangement under the NES;
- make or not make an agreement or arrangement under a term of a modern award or enterprise agreement;
- terminate, or agree to terminate, an individual flexibility arrangement;
- accept a guarantee of annual earnings; and
- agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

The prohibition is intended to apply where agreements are made between an employer and an individual employee. Undue influence or pressure is a lower threshold than coercion with the result that the prohibition is broader in scope.

Misrepresentation

The existing prohibition in section 401 of the WR Act regarding false or misleading statements in relation to agreement-making will be replaced by a new provision set out in section 345. The new provision, however, will cover all workplace rights.

Under section 345, a person will contravene the FW Act if he or she makes a false or misleading representation about another person's workplace rights, or the effect of them being exercised. Unlike section 401 of the WR Act, the new prohibition will be activated even if the statement did not cause the person to whom the representation was made to act in a particular way. However, the prohibition will not apply where the person would not be



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expected to rely on the representation, for example, where an employer makes an obvious joke about docking a worker's pay.

The provisions also apply to false and misleading statements made to prospective employees. Consequently, in recruitment situations, the provision will supplement the existing proscription in section 53B of the Trade Practices Act 1974 (Cth) against conduct that is liable to mislead persons seeking employment as to matters relating to the employment.

Industrial activity

Division 4 of Part 3-1 of the FW Act provides protections in relation to a person:

- being or not being a member or officer of an industrial association (freedom of association);
- participating, or not participating in, other lawful industrial activity; and
- not participating in unlawful industrial activity.

1. Membership and offices

In large part, the provisions in the FW Act relating to freedom of association reflect the current provisions in the WR Act. However, the FW Act will enhance some existing protections as outlined below.

- The existing prohibition against an employer, when making an agreement, from discriminating between employees because some employees are union members while other employees are not, will apply in circumstances unconnected with agreement-making.
- Employees will be protected against adverse action because they are a member of a particular union, not just because they are a union member.
- A person will be prohibited from organising or taking, or threatening to organise or take, any action against another person with intent to coerce that person or a third person to become, or not become, a member or an official of a union.
- A person will be prohibited from knowingly or recklessly making a false or misleading representation about another person's obligation to:
 - a) become, or not to become, or remain or cease to be, a union member or official;
 - b) disclose whether he or she, or a third person, is or is not, a union member or official; or
 - c) disclose whether he or she, or a third party, is becoming, or not becoming, or remaining or ceasing to be, an officer or member of an industrial association.

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This prohibition will not apply if the person to whom the representation is made would not be expected to rely on it.

- An employer is prohibited from inducing an employee to be or not be a member or officer of an industrial association. A person who has entered into a contract for services is prohibited for inducing an independent contractor to be or not be a member of an industrial association.

2. Participation and non-participation in lawful industrial activities

Persons are also protected from adverse action, coercion and misrepresentation in relation to participation and non-participation in lawful industrial activities. These include:

- becoming involved in establishing an industrial association;
- organising or promoting a lawful activity for, or on behalf of, an industrial association;
- representing or advancing the views, claims or interests of an industrial association;
- paying or not paying a fee to an industrial association; and
- seeking or not seeking to be represented by an industrial association.

3. Non-participation in unlawful industrial activities

Further protection from adverse action, coercion and misrepresentation is provided to persons who do not engage in the following unlawful industrial activities:

- organising or promoting an unlawful activity for, or on behalf of, an industrial association;
- encouraging, or participating in, an unlawful activity organised or promoted by an industrial association;
- complying with an unlawful request made by, or required of, an industrial association;
- taking part in industrial action; and
- making a payment that the person must not pay in relation to a period of industrial action.

Other protections

Division 5 of Part 3-2 of the FW Act contains a number of other protections. These protections are outlined briefly below.

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Discrimination

The FW Act protects an employee or prospective employee from workplace discrimination by prohibiting an employer from taking adverse action on discriminatory grounds. This means that an employer cannot take adverse action because of a 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.

The FW Act provides a number of exceptions to this prohibition, which broadly cover the existing exceptions in the WR Act. They are:

- the adverse action is authorised under a State or Territory anti-discrimination law;
- the adverse action is taken because of the inherent requirements of the particular position concerned;
- the adverse action is taken against certain persons in good faith to avoid injury to the religious susceptibilities of adherents of a particular religion or creed; and
- the adverse action is authorised by or under a law of the Commonwealth.

Temporary absence – illness or injury

An employee is protected from being dismissed on account of a temporary absence from work because of illness or injury of a kind prescribed by the regulations.

Bargaining service fees

An industrial association, or an officer or member of an industrial association, is prohibited from demanding a bargaining services fee. An exception to this prohibition is where a bargaining fee is payable to an industrial organisation under a contract for the provision of bargaining services.

Coverage by particular instruments

The FW Act also prohibits an employer from being discriminated against on the basis that its employees are covered or not covered by provisions of the NES, a particular kind of workplace instrument, or an enterprise agreement that does, or does not, cover a union or a particular union.

It has been suggested that this provision will prohibit a head contractor from refusing to engage a subcontractor because the subcontractor's employees are not covered by an enterprise agreement, for example.

Coercion – allocation of duties etc. to a particular person

The FW Act prohibits a person from organising or taking, or threatening to organise or take, any action against another person with intent to coerce that person or a third person to:

- employ, or not employ, a particular person;

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- engage, or not engage, a particular independent contractor;
- allocate, or not allocate, particular duties or responsibilities to a particular employee or independent contractor;
- designate a particular employee or independent contractor as having, or not having, particular duties or responsibilities.

These provisions are intended to prevent persons from being coerced to make certain employment or management decisions. For example, they will prevent a union from organising industrial action against a head contractor with the intent to coerce the head contractor to engage a specific employee as a site delegate or safety officer.

Objectionable terms

A term of a workplace agreement, or an agreement or arrangement, has no effect to the extent that it is an “objectionable term”. An objectionable term is a term that requires or permits a contravention of the provisions of Part 3-1 of the FW Act or the payment of a bargaining services fee. It will not matter whether the objectionable term is a written or unwritten term.

Sham arrangements

Division 6 of Part 3-1 of the FW Act prohibits an employer misrepresenting an employment or proposed employment relationship as an independent contracting relationship. A person breaches this prohibition unless they can prove that, when they made the representation, there was an independent contracting relationship and they did not know and were not reckless to the fact that the contract was a contract of employment rather than a contract for services.

A person is also prohibited from the following:

- Dismissing, or threatening to dismiss, an employee who performs particular work for the employer, in order to engage the individual as an independent contractor to perform the same, or substantially the same, work under a contract for services.
- Knowingly making a false statement to a current or former employee with the intention of persuading or influencing that worker to become an independent contractor to do the same, or substantially the same, work.



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Ancillary rules

Ancillary rules for Part 3-1 of the FW Act are contained in Division 7 of that Part.

- For the purposes of Part 3-1 of the FW Act (General Protections), a person takes action for a particular reason if the reasons include that reason. This broadens the test under the WR Act by excluding the 'sole or dominant purpose' reason formulation.
- In relation to civil proceedings for a contravention of Part 3-1 of the FW Act, the onus of proof is on the respondent to the allegation. That is, once a complainant has alleged that a person's actual or threatened action is motivated by a reason or intent that would contravene the relevant provision of Part 3-1, that person has to establish, on the balance of probabilities, that the conduct was not carried out unlawfully.
- A person cannot avoid being subject to the prohibitions in Part 3-1 of the FW Act by getting another party to carry out the prohibited conduct.
- Certain actions by individuals and groups can be deemed to be actions of an industrial association and, therefore, give rise to a liability on the part of the industrial association under Part 3-1 of the FW Act.

Compliance

Division 8 of Part 3-1 of the FW Act sets out the compliance framework for the general protection provisions.

For contraventions involving dismissal, the dispute will be dealt with at first instance in a conference conducted by FWA. If the dispute remains unsettled after the conclusion of this conference, the dismissed employee can then make a court application. An application in relation to a dismissal must be made within 60 days of the dismissal taking effect, although FWA has discretion to extend this timeframe if there are exceptional circumstances.

For all other contraventions, participation in an FWA conference is voluntary and a person can elect to proceed directly to Court by making an application.

Relevantly, Part 5-1 of the FW Act deals with procedural matters in respect of FWA and Part 4-1 of the FW Act deals with applications to court for civil remedy provisions.



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