



## General Protections - National System Employer

1 September 2020

The *Fair Work Act 2009* (Cth) (FW Act) details general protections for employees and the rights and responsibilities of employees, employers and organisations. Under General Protections, the FW Act:

- prescribes workplace protections including freedom of association; unlawful termination; sham contracting arrangements; coercion during bargaining; and includes prohibitions relating to making false or misleading statements;
- establishes "workplace rights" broadly grouped as employment entitlements, and freedom to exercise and enforce those workplace rights;
- prohibits any "adverse action" on discriminatory grounds including indirect or third-party actions;
- allows the Fair Work Commission (FWC) to conduct conferences by agreement;
- enables the FWC to arbitrate general protections dismissal disputes where the parties consent;
- provides the courts with considerable powers to deal with alleged contraventions; and
- prescribes remedies for breaches, including penalties and compensation.

### General protections and workplace rights - the essence

A person has a "workplace right" if he or she:

- is entitled to a 'benefit';
- has a 'role or responsibility';
- is able to initiate, or participate in a 'process or proceeding', or;
- is able to make an inquiry or complaint in relation to workplace law or instrument;

under a workplace law or instrument.

If Person A:

- has a workplace right;
- has (or has not) exercised a workplace right; or
- proposes (or does not propose) to exercise a workplace right;

another person must not take adverse action against Person A or prevent Person A from exercising a workplace right.

Third parties are also affected - i.e. it is unlawful for Person X to take adverse action against Person Y because Person Z exercises (or proposes to exercise) a workplace right.

### "Adverse action"

An adverse action may occur between:

- an employer against employee;
- a prospective employer against a prospective employee;
- a person with, or proposing to enter into, a contract for services, with an independent contractor against the independent contractor;
- an independent contractor against a person who has entered into a contract for services with the independent contractor;
- an employee against his or her employer, or;
- a union or employer organisation, or an officer or member of such organisation, against a person.

There are many types of adverse actions attracting liability for employers, employees, unions and employer organisations, including: dismissing, injuring, altering, discriminating, refusing, ceasing, organising, threatening or taking some other action.

Prohibited conduct includes: coercion; undue influence or pressure by employers; misrepresentations about workplace rights; industrial activities; discrimination; unfair dismissal; sham contracting arrangements; and advising, encouraging or inciting coercive action.

### Discrimination

The grounds for making application on the basis of discrimination in the workplace are race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

The following are exceptions and are lawful if:

- any action is sanctioned by "anti-discrimination law" in force where action taken;
- consistent with inherent requirements of the particular position concerned; or

- action taken against a staff member of an institution conducted in accordance with doctrines, beliefs, tenets or teachings of a religion or creed, and if taken in good faith and to avoid injury to the “religious susceptibilities”.

As evidenced in the state and federal equal opportunity jurisdictions, vexatious and trivial claims have the potential to absorb significant time and resources and will be exacerbated by ready access to the FWC.

The *Equal Opportunity Act 1984* (WA) continues to apply. Although a person is limited to a remedy under only one ‘anti-discrimination’ state or federal jurisdiction in relation to the same conduct, a complainant is also able to lodge the same claim with both state and federal anti-discrimination bodies. A claim may also be lodged with the FWC, however, the FW Act prevents a court application being made about the same matter if there is already a live claim to a state or federal anti-discrimination body.

## Onus of Proof

Where a breach of General Protections is alleged, the onus lies on the employer to prove that they did not act for a particular reason or with the particular intent (that constitutes the contravention).

## Role of the FWC and Fair Work Ombudsman

The FWC can also deal with alleged contraventions of the general protections provisions.

There are two main types of applications:

**Disputes** – If a person has not been dismissed but alleges that there has been some other contravention of the general protections provisions, they may make an application to the FWC to deal with the dispute

**Dismissals** – If a person believes they have been dismissed and alleges that their dismissal was in contravention of the general protections provisions, they should make an application to the FWC to deal with the dismissal in the first instance. A general protections dismissal application must be lodged within 21 days of the dismissal taking effect.

The FWC can conduct a mediation conference by agreement between the parties. If the matter is not resolved, an application can be made to the courts - their powers include: issuing interim interlocutory injunctions or imposing penalties and ordering compensation.

Additionally, the Fair Work Amendment Act 2013 now gives the FWC the power to arbitrate general protections dismissal disputes and unlawful termination disputes with the consent of both parties. With these new powers comes the ability for FWC to make an order for compensation. This effectively makes claims for compensation more accessible, as an applicant can pursue a claim via the FWC for a significantly lower cost due to the fact that there is no requirement to engage legal representation. However, if an applicant wishes to seek pecuniary penalties, as required by section 539 of the FW Act this can only be ordered by the Federal Court or Federal Circuit Court.

The Fair Work Ombudsman (FWO) is able to investigate allegations of discrimination in the workplace and initiate legal proceedings. The FWO can investigate allegations of contraventions of the general protections provisions. Where identified, the FWO can initiate legal action for penalties of up to \$13,320 for an individual or \$66,600 for a corporation.

## Minimising risks associated with General Protections provisions

Under the FW Act, the expanded workplace rights, protections and actions provide more opportunities to make claims, especially for employees and unions. Claims are easier to make and are likely to be more frequent than under previous legislation.

Although one of the priorities of the FWO is education, broadening its compliance activities is another – there is no longer a reliance on voluntary compliance. Employers should be aware of targeted industry campaigns and an increased number of prosecutions.

In order to minimise risks of a General Protections claim CCIWA recommends the following:

- becoming familiar with the provisions outlined in the National Employment Standards (NES).
- reviewing employment contracts and agreements to ensure they are compliant with the NES.
- establishing a formal grievance policy which clearly outlines the steps taken by the Employer to address employees’ grievances, therefore enabling employers to effectively respond to employee concerns.
- ensuring that all current policies and procedures do not contain any provisions that may be viewed as discriminatory.

For more information on general protections contact the CCIWA Employee Relations Advice Centre on (08) 9365 7660 or [advice@cciwa.com](mailto:advice@cciwa.com).

***Disclaimer:** This information is current as at the date of this information sheet. CCIWA has taken all reasonable care in preparing this information, however, it is provided as a guide only. It is not legal advice and should not be relied upon as such. CCIWA does not accept liability for any claim which may arise from any person acting or refraining from acting on this information. This document is subject to copyright. Its reproduction and use outside its intended purpose is not permitted without prior written permission.*