

Information Sheet

General Protections – National System Employer

February 2025

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 the person:

- 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. This includes when someone acts, plans or threatens to dismiss an employee and/or harming or injuring an employee by altering the employment, discriminating, refusing to hire a worker, offering potential employees different terms and conditions compared to others, ceasing or refusing to enter into a contract with an independent contractor, or threatening to take industrial 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.

What is not adverse action?

Someone can take action for genuine reasons, for example an employer is not taking adverse action if they decide to not hire a potential employee because they do not have a drivers license and the job requires a license or offering a lower salary to a job applicant because they have less experience.

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, social origin, or subjection to family and domestic violence.

The following are exceptions, and are lawful if:

- the action is not unlawful under any anti-discrimination law in force in the place where the action is taken;
- the action is taken because of the inherent requirements of the particular position concerned; or
- the action is taken against a staff member of an institution conducted in accordance with doctrines, beliefs, tenets or teachings of a religion or creed, and is 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 can 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.

Workplace Delegates

In accordance with the Fair Work Act Amendment (Closing Loopholes) Act 2023, new workplace rights and protections for union delegates were introduced. A workplace delegate is an employee appointed or elected under the rules of an employee organisation who represents members of the organisation in the workplace. Workplace delegate rights are now a protected workplace right and therefore protected from adverse action.

The changes introduced mean delegates are entitled to:

- represent the industrial interests of members and potential members of the employee organisations (including in disputes with their employer),
- reasonable communication with members and potential members about their industrial interests,
- reasonable access to the workplace and its facilities to represent those industrial interests,
- in addition, non-small businesses are also entitled to have reasonable access to paid time during normal working hours for workplace delegate training.

As of 26 August 2024, additional changes to workplace delegates will come into effect. Industrial instruments, such as enterprise agreements and modern awards will include a provision surrounding the exercise of rights of workplace delegates.

The above rights will also extend to cover workplace delegates who represent the interests of union members who are also regulated workers and will be entitled to represent the industrial interests of current or prospective union members. This will mean that the delegate can:

- make reasonable communication with regulated workers (including to members or potential members),
- access the workplace facilities provided by a regulated business for the purpose of representing those workers industrial interests,

- the regulated business will have to comply with any delegates rights terms in a minimum standards order.

Employers will be prohibited from taking certain actions against a workplace delegate who is a regulated worker and engaged under a services contract or has been arranged to facilitate entry into a services contract. Actions include:

- unreasonable refusing to deal with the workplace delegate,
- knowingly or recklessly making a false or misleading representation to the workplace delegate, or
- unreasonably hindering, obstructing or preventing the workplace delegate exercising their rights.
- taking adverse action against a workplace delegated because they have a delegate right.

Like to know more?

Our **e-learning** module **Discrimination and Equal Employment Opportunity** is designed to provide you develop a fair and harmonious work environment.

For more information, [click here](#).

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 a 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* (Cth) now gives the FWC the power to arbitrate general protections dismissal disputes and unlawful termination disputes with the consent of both parties. The new powers give the FWC the ability 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 \$18,780 for an individual or \$93,900 for a corporation.

CCIWA Publication

Our Equal **Opportunity and Diversity, Equity and Inclusion Guide** contains many helpful policies, such as **equal opportunity policy** and **sexual harassment policy**.

This guide offers practical information and guidance on how to calculate the eligibility and entitlement to long service leave for Western Australian employee.

Contact us on (08) 9365 7660 or at advice@cciwa.com for more information.

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, as 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; and
- 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 Helpline on (08) 9365 7660 or advice@cciwa.com.

Like to know more?

Our **Employment Law Fundamentals for HR Professionals** training is designed to help you understand your obligations under relevant industrial instruments and how to protect yourself against costly claims.

For more information, [click here](#).

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