Industrial action

What is industrial action?

A key objective of the Fair Work Act 2009 (FW Act) is achieving productivity and fairness in the workplace through the implementation of collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Industrial action can take several forms. Employees may go on strike (refuse to attend or perform work) or impose work bans (refuse to perform all their normal duties). In response to employee industrial action, employers may lock out their employees (close the doors or gates of a workplace and refuse to allow them to work).

Under the FW Act, industrial action is defined as the following actions:

- employees performing work in a manner different to how it is normally performed
- employees adopting a practice that restricts, limits or delays the performance of work
- a ban, limitation or restriction by employees on performing or accepting work
- a failure or refusal by employees to attend for work or perform any work
- the lockout of employees from their employment by their employer.

A person is under no obligation to either take part, or not take part, in any form of industrial action unless they wish to do so.

Under the FW Act, industrial action does not include any of the following:

- action by employees that is authorised or agreed to by the employer
- action by an employer that is authorised or agreed to by, or on behalf of, employees
- action taken by an employee if:
    - it was based on a reasonable concern about an imminent risk to their health or safety; and
    - the employee did not unreasonably fail to comply with a direction of their employer to perform other work that was safe and appropriate for them to do.

Industrial action under the FW Act can be protected or unprotected.

What is protected industrial action?

Employees and employers can only take protected industrial action when they are negotiating on a proposed enterprise agreement and that agreement is not a greenfields agreement or a multi-enterprise agreement.

The main importance of industrial action being protected is that it gives immunity from civil liability under State or Territory law (unless that action is likely to involve personal injury or damage, destruction or taking of property).

Industrial action is only protected if:

- it is action taken by employees (or their bargaining representatives) to support claims in relation to an enterprise agreement (employee claim action) or
- it is action taken by employers or employees in response to industrial action taken by the other party (employer or employee response action) and
- the action meets the common and additional requirements for protection, which include:
    - not taking action before the nominal expiry date of an industrial agreement (including those workplace agreements made under the previous Workplace Relations Act 1996, for example, collective agreements, Australian Workplace Agreements (AWAs) and Individual Transitional Employment Agreements (ITEAs))
    - parties genuinely trying to reach agreement
    - observing the notice requirements set out below
    - complying with any relevant orders or declarations
    - not taking action in relation to a demarcation dispute (employee claim or response action)
    - not taking action in relation to unlawful terms or as part of pattern

bargaining (for employee claim action only)

- authorisation by secret ballot (for employee claim action only).

An employer, employee, employee organisation (such as a trade union), or official of an employee organisation that organises or engages in industrial action before the nominal expiry date of an industrial agreement as set out above may be subject to penalties of up to $13,320 for an individual and $66,600 for a corporation.

The FW Act identifies the following as bargaining representatives in making an enterprise agreement:

- an employer that will be covered by the agreement
- a trade union who has a member that would be covered by the agreement (unless the member has specified in writing that he or she does not wish to be represented by the trade union, or has appointed someone else)
- a trade union that has applied to the Fair Work Commission (FWC) for a low paid authorisation that relates to the agreement
- a person specified in writing as their bargaining representative by either an employer or employee who would be covered by the agreement.

For employees, the default bargaining representative is a trade union. However, employees can generally appoint whoever they wish as their bargaining representative, including themselves.

How does someone initiate protected industrial action?

In order to initiate protected industrial action, a bargaining representative for an employee who will be covered by an enterprise agreement must apply to the FWC for a protected action ballot order. This application can only be made if the employer has issued a notice of representational rights to their employees. The application must specify the group of employees to be balloted, and the questions that will be put to them (which include details of the proposed industrial action).

A copy of the application must be provided to the employer and the proposed ballot agent (the party that will conduct the ballot – usually the Australian Electoral Commission) within 24 hours of the application.

The FWC will then consider the application. If it meets the requirements, the FWC will issue a protected action ballot order. This is required to be given to the applicant, the employer and the ballot agent.

Protected action ballots are secret ballots that give employees the chance to vote on whether or not they want to initiate protected industrial action.

Before the ballot takes place the ballot agent will prepare a roll of eligible voters included in the protected action ballot order, which includes employees covered by the proposed agreement and are represented by the bargaining representative.

For a protected action ballot to authorise industrial action:

- the industrial action must relate to the questions that formed part of the ballot application order
- at least 50% of employees on the roll of voters in the ballot voted
- more than 50% of those valid votes approve the industrial action
- the action must start within 30 days of the declaration of the results of the ballot (unless this period is extended by the FWC).

Does notice need to be given before taking industrial action?

Before employees take industrial action, written notice must be given to the employer.

Unless the action is in response to industrial action taken by the employer, three days notice of the planned action must be given (unless the protected action ballot order states a longer period).

Before an employer takes industrial action, written notice must be given to each bargaining representative of an employee to be covered by the agreement. The employer must also take all reasonable steps to notify the employees to be covered by the proposed agreement of the action.

In all cases, the written notice must specify the nature of the action that will be taken and the day it will start.

Can protected industrial action be suspended or terminated?

The FWC can suspend or terminate protected industrial action.

The FWC can make an order to suspend or terminate protected industrial action on its own initiative, or on application by:

- a bargaining representative for the enterprise agreement
- the Minister for Employment
- a Minister of a State or Territory that has referred certain industrial relations powers to the Commonwealth.

The FWC can make such an order in the following circumstances when:

- the action has threatened, is threatening, or would threaten:
    - to endanger the life, personal safety, health or welfare of the population or part of it
    - to cause significant damage to the Australian economy or an important part of it
- the action is protracted and is causing, or is going to cause, significant economic harm to the employer or employees who will be covered by the agreement.

The FWC can also make an order to suspend protected industrial action if:

- the action is both adversely affecting the employer or employees, and is threatening to cause significant harm to a third party. This can occur on application by:
    - the Minister for Employment
    - a Minister of a State or Territory that has referred certain industrial relations powers to the Commonwealth
    - a person, body, or organisation directly affected by the industrial action (this cannot be a bargaining representative for the proposed agreement, or an employee who will be covered by the agreement)
- bargaining representatives would benefit from a cooling-off period (on application by a bargaining representative).

Furthermore, the Minister for Employment can make a ministerial declaration terminating protected industrial action if that action is threatening or would threaten to:

- endanger the life, personal safety, health or welfare of the population or part of it
- cause significant damage to the Australian economy or an important part of it.

The Minister must inform the FWC and the bargaining representatives of the declaration and publish it in the Gazette. The declaration comes into operation the day it is made.

After making the declaration, the Minister can also give directions to bargaining representatives or employees who will be covered by the agreement to take or not take specified actions. Contravening those directions is also unlawful.

Contravening a Ministerial direction can result in penalties of up to $13,320 for an individual and $66,600 for a corporation.

What if industrial action is not protected industrial action?

The FWC can make an order regarding industrial action that is not protected, or if taken, would not be protected:

- to stop the unprotected industrial action when it is already occurring
- to prevent the unprotected industrial action from occurring when it is threatened, impending, probable, or being organised.

The FWC can make this order on its own initiative, or upon application by either a person affected by the industrial action or an organisation representing that person.

Where the FWC has issued an order to stop or prevent unprotected industrial action, it is unlawful for that industrial action to occur or continue in contravention of the order.

Contravening an order made by the FWC can result in penalties of up to $13,320 for an individual and $66,600 for a corporation.

What are the payment arrangements for a period of industrial action?

The FW Act establishes rules governing payment to employees for periods of industrial action. Where an employer is prohibited from making payment under the FW Act, it is a contravention for both the employer to make the payment and the employee (or employee organisation) to ask for, or accept payment for such periods. Penalties of up to $13,320 for an individual and $66,600 for a corporation may apply.

Protected industrial action

An employer is prohibited from making payment to an employee for the total duration that the employee is engaged in protected industrial action.

However, if the industrial action is an overtime ban, employers can only withhold payment when the employer requires or requests an employee to work overtime, and the refusal is in contravention of the employee's obligations under a contract of employment, agreement or other industrial instrument.

Employees (and employee organisations) must not ask for or accept such payment. However, where the industrial action is taken in the form of a partial work ban, proportional payment rules apply. The employer may give the employees a partial work ban notice that contains details of the proportion of the reduction in payment. Alternatively, the employer may give a notice that no payment will be made to employees during the partial work ban. The notice must further provide that the employer will not accept any work from the employee until they resume normal duties.

Unprotected industrial action

Where a period of unprotected industrial action is taken for less than four hours on a day, the employer must withhold a minimum of four hours payment from the employee.

If the period of unprotected industrial action exceeds four hours on a day, then there can be no payment for the total duration of the industrial action that day.

However, if the industrial action is an overtime ban, employers can only withhold payment when the employer requires, or requests, an employee to work overtime, and the refusal is in contravention of the employee's obligations under a contract of employment, agreement or other industrial instrument.

Employees (and employee organisations) must not ask for, or accept such payment.

Are there protections when engaging in industrial action?

The FW Act prohibits a person from taking adverse action against a person because that person takes part in, or proposed to take part in, an industrial activity.

This includes:

- becoming or not becoming a member of a trade union
- organising lawful activity on behalf of a trade union
- representing a trade union or seeking to be represented by one
- exercising a workplace right (such as participating in protected industrial action, or in a protected action ballot).

The FW Act also prohibits a person from taking adverse action against another person because they do not take part in, or propose not to take part in, industrial action or against an employer who does not make payments to persons engaging in industrial action.

Contravening these protections can result in penalties of up to $13,320 for an individual and $66,600 for a corporation. For more information, see our Protections at work fact sheet at fairwork.gov.au/factsheets

What role does the Fair Work Ombudsman play?

The Fair Work Ombudsman (FWO) investigates allegations of contraventions of the industrial action provisions of the FW Act, including:

- industrial action taken prior to the nominal expiry date of an existing industrial agreement
- contraventions of orders made by the FWC to stop or prevent industrial action taking place
- contravening a Ministerial direction to take, or not take, specified actions

- payment made in relation to certain periods of industrial action in contravention of the FW Act
- any adverse action taken against a person in relation to their right to engage in industrial activities
- unlawful conduct in relation to protected action ballots
- the requirement for a person to comply with an order or direction from the FWC with respect to a protected action ballot.

If the FWO identifies a contravention of a civil remedy provision under the FW Act, there are a range of compliance tools available.

These include:

- Letters of caution – a letter of caution may be issued where the Fair Work Inspector determines that the contravention(s) is inadvertent or relatively minor. A letter of caution may be issued as an alternative to litigation.
- Enforceable undertakings – where it is in the public interest, a written undertaking (in the form of a deed between the wrongdoer and the FWO), may be accepted by the FWO in lieu of litigation.
- Injunctions – a Fair Work Inspector may make application to the Federal Court or Federal Circuit Court of Australia in relation to certain contraventions.
- Litigation – where there is sufficient evidence of the contravention and it is in the public interest to do so, the FWO may commence litigation. Penalties of up to $13,320 for an individual and $66,600 for a corporation apply for contraventions under the FW Act.

What role does the Fair Work Commission play?

The FWC plays a role in ensuring that the bargaining process, and any associated industrial action, occurs according to relevant Commonwealth workplace laws. Bargaining representatives of employees wishing to take industrial action to support their claims must first seek an order from the FWC for a protected action ballot authorising the industrial action.

The FWC has the power to suspend or terminate protected industrial action. The FWC may also make orders to stop or prevent unprotected industrial action. Such orders are enforceable in the courts.

Further, members of the FWC are experienced in a range of alternative dispute resolution techniques including conciliation, mediation, and arbitration. They are skilled in helping employers and employees resolve workplace disputes and can suggest means of resolving differences that may not have been immediately apparent to those directly involved.

Depending on the circumstances, the FWC can exercise statutory powers that enable disputes to be resolved on a final basis.

The main types of disputes that may be referred to the FWC are:

- disputes under the terms of an award, collective or enterprise agreement
- bargaining disputes
- disputes arising under the general protections provisions of the FW Act.

Further information

Industrial action is provided for by sections 406–477 of the FW Act.

For further information on the agreement making process please see our Enterprise bargaining fact sheet at fairwork.gov.au/factsheets

For further information on resolving disputes, please see our Effective dispute resolution best practice guide at fairwork.gov.au/bestpracticeguides

CONTACT US

Fair Work Online: www.fairwork.gov.au

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on **13 14 50**

Hearing & speech assistance

Call through the National Relay Service (NRS):

For TTY: **13 36 77**. Ask for the Fair Work Infoline **13 13 94**

Speak & Listen: **1300 555 727**. Ask for the Fair Work Infoline **13 13 94**

The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

Last updated: November 2022
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