

Industrial action

What is industrial action?

Industrial action can take several forms. For employees, this is usually going on strike (refusing to attend or perform work) or imposing work bans (refusing 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 Fair Work Act (FW Act), industrial action is defined as:

- employees performing work in a manner different to how it is normally performed
- employees adopting a work practice that restricts, limits or delays the performance of work
- a ban, limitation or restriction by employees on performing, accepting or offering to work
- employees failing or refusing 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 action by:

- employees that is authorised or agreed to by the employer
- an employer that is authorised or agreed to by, or on behalf of, their employees
- 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 (except for a proposed greenfields agreement or cooperative workplace 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 a proposed 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 a registered agreement
 - parties genuinely trying to reach agreement
 - observing the notice requirements set out below
 - complying with any relevant orders or declarations, including an order made by the Fair Work Commission (the Commission) directing bargaining representatives to attend a mediation or conciliation conference
 - 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 a registered agreement may be subject to penalties of up to \$19,800 per breach for an individual and \$99,000 per breach for a company.

The FW Act identifies the following as bargaining representatives for a proposed 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 Commission for a supported bargaining 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 Commission for a protected action ballot order.

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

If the Commission makes a protected action ballot order, all bargaining representatives must also attend a mandatory conciliation conference during the ballot period. This is to facilitate agreement on some or all of the unresolved issues before any industrial action is taken.

For information on how to organise a protected action ballot visit fwc.gov.au/issues-we-help/industrial-action.

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, at least 120 hours notice of the planned action must be given (unless the protected action ballot order states a longer period) for a proposed multi-enterprise agreement or otherwise 3 working days.

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 Commission can suspend or terminate protected industrial action.

The Commission 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 Commission 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 Commission 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 Commission 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 \$19,800 per breach for an individual and \$99,000 per breach for a company.

What if industrial action is not protected industrial action?

The Commission 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 Commission 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 Commission 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 Commission can result in penalties of up to \$19,800 per breach for an individual and \$99,000 per breach for a company.

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 \$19,800 per breach for an individual and \$99,000 per breach for a company 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 instruments.

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 4 hours on a day, the employer must withhold a minimum of 4 hours payment from the employee.

If the period of unprotected industrial action exceeds 4 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 instruments.

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 \$19,800 per breach for an individual and \$99,000 per breach for a company. 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 Commission 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 Commission 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.

For more information, read our Compliance and enforcement policy at fairwork.gov.au/compliancepolicy.

What role does the Fair Work Commission play?

The Commission 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 Commission for a protected action ballot authorising the industrial action.

In granting a protected action ballot order the Commission must make orders directing all bargaining parties for a proposed enterprise agreement to attend a conference before the Commission during the ballot period.

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

Further, members of the Commission are experienced in a range of alternative dispute resolution techniques including conciliation, mediation, and arbitration.

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

Further information

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

For further information on the agreement making process and industrial action please visit the Commission's Industrial action page at [fwc.gov.au/issues-we-help/industrial-action](https://www.fwc.gov.au/issues-we-help/industrial-action).

CONTACT US

Fair Work online: [fairwork.gov.au](https://www.fairwork.gov.au)

Fair Work Infoline: **13 13 94**

Need language help?

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

Help for people who are deaf or have hearing or speech difficulties

You can contact us through the National Relay Service (NRS).

Select your [preferred access option](#) and give our phone number: **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.

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