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## FAIR WORK ACT 2009 - FACT SHEET 6 Industrial Action

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Contrary to popular belief, there is a very limited right to strike or take other industrial action. Under the key Federal workplace relations legislation, the *Fair Work Act 2009* (FWA) the right to take industrial action is limited to **protected industrial action**. In broad terms, this is industrial action which is taken in relation to a proposed workplace agreement (e.g. a collective agreement with a union or employees) and which satisfies certain procedural requirements.



In this context, industrial action (*section 19*) is:

- performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee the result of which is a restriction or limitation on, or a delay in, the performance of the work;
- a ban, limitation or restriction on the performance of work by an employee or on the acceptance of or offering for work by an employer;
- a failure or refusal by employees to attend for work or a failure or refusal to perform any work at all by employees who attend for work;
- the lockout of employees from their employment by their employer.

Under the FWA, industrial action is protected when it is either:

- **employee claim action** (*section 409*) - which is action organised or engaged in for the purpose of supporting or advancing claims in relation to a workplace agreement that are about or are reasonably believed to be about permitted matters; and is organised or engaged in against an employer that will be covered by the agreement by a bargaining representative or an employee included in a group of employees specified in the protected action ballot order; and meets the common requirements for industrial action to be protected industrial action; and other requirements; or
- **employee response action** (*section 410*) - which is action organised or engaged in as a response to industrial action taken by an employer; and is organised or engaged in against an employer that will be covered by the agreement by a bargaining representative or an employee included in a group of employees specified in the protected action ballot order; and meets the common requirements for industrial action to be protected industrial action; and other requirements; or

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- **employer response action** (*section 411*) - which is action organised or engaged in as response to industrial action by a bargaining representative of an employer who will be covered by the agreement or an employee covered by the agreement; and is organised or engaged in by an employer that will be covered by the agreement; and meets the common requirements of industrial action in order to be protected industrial action; and other requirements.

The **common requirements** for industrial action to be protected action are:

- the action must not related to a proposed enterprise agreement that is a Greenfields agreement or multi-enterprise agreement (*section 413(2)*);
- if the person organising or engaging in the industrial action is either the bargaining representative or the employee, then the bargaining representative must be genuinely trying to reach agreement (*section 413(3)*);
- notice requirements must be satisfied (*section 413(4)*)- at least **three days written notice** (currently seven days) must be provided (*section 414*);
- employees and bargaining representatives the subject of relevant orders must not contravene these orders (*section 413(5)*);
- the action must not be taken prior to an existing agreement passing its **nominal expiry date** (*section 413(6)*);
- neither an order suspending or terminating the industrial action or a Ministerial declaration terminating the industrial action must be operation (*section 413(7)*).

The **other requirements** for industrial action to be protected action are:

- that the action was authorised by a protected action ballot (*section 409(2)*);
- that the action must not be in support of or to advance claims to include unlawful terms in the agreement (*section 409(3)*);
- the bargaining representative of an employee who will be covered by the agreement must not be engaging in **pattern bargaining** (*section 409(4)*);
- the action must not, if it is being organised or engaged in by a bargaining representative, relate to a significant extent to a demarcation dispute or contravene a Fair Work Australia order that relates to a significant extent to a demarcation dispute (*section 409(5)*);

Previously, under the WRA, industrial action was protected *if* a bargaining period was initiated by one of the parties to the proposed workplace agreement (the initiating party) *and*, where a workplace agreement is already in place, the action is not taken before the nominal expiry date of that workplace agreement has expired. The same approach is adopted in the FWA.

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Under the FWA industrial action of the kind referred to above may be taken during the bargaining period without the risk of penalty. The bargaining period comes to an end when any of the following events occur: a collective agreement is made by the negotiating parties; the initiating party tells the other negotiating party or parties in writing that it no longer wishes to reach a collective agreement; the bargaining period is terminated by the Fair Work Australia.

If industrial action is taken which is *not* protected industrial action Fair Work Australia may:

- order an **injunction** to stop the industrial action;
- impose **penalties** - the maximum penalty which may be imposed on a body corporate is 300 penalty units (\$33,000) for a body corporate and 60 penalty units (\$6600) in any other case.

Under the FWA, an employer must *not* make a payment in relation to the total duration of protected industrial action unless the action is a **partial work ban**: *section 470(1)*. A partial work ban is industrial action which is *not* a failure or refusal of an employee to attend for work or a failure or refusal by an employee who attends for work to perform any work at all or an overtime ban. In the case of action which does amount to a partial work ban, an employer may still reduce the payment made to the employee provided the required procedure is followed.

Under the FWA, if an employee engages in industrial action which is not protected, the employer must not pay him/her for four hours, if the duration of the action was less than four hours, or otherwise for the total duration of the action: *section 474*. As was the case under the WRA, an employee must not accept payment for a period of industrial action: *section 475, FWA*.

An employer must not dismiss an employee for engaging in protected industrial action: *section 448*. In the event of a breach, the applicable Court may order an injunction and may impose a maximum penalty of 300 penalty units (\$33,000) on a body corporate and 60 penalty units (\$6600) in any other case.

## DO YOU HAVE ANY QUESTIONS OR WOULD LIKE TO KNOW MORE?

Getting the answers you need is as easy as giving us a call or sending us an email. We look forward to hearing from you.

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