



General Protections and Adverse Action in the Workplace



INFORMATION SHEET

General Protections

The *Fair Work Act 2009* (Cth) (the 'FW Act') affords general protections to all employees in the national workplace relations system, which covers the majority of businesses in Australia and Commonwealth Government employees, but does not include most state government public sector employees and most local government employees.

General protections prohibit certain actions such as adverse action, coercion, undue influence or undue pressure or misrepresentation.

What is adverse action?

'Adverse action' is action taken by an employer that is unlawful if it is taken for particular reasons. It may occur when an employer alters the position of, discriminates against, injures an employee's employment or dismisses an employee for a legally prohibited reason. Prospective employees and independent contractors are also protected from adverse action on specific grounds. It does not necessarily have to involve you being dismissed.

When is adverse action unlawful?

It is unlawful for an employer to take adverse action against you on the basis of:

- exercising, not exercising or proposing to exercise, your workplace rights;
- participation in, or you not participating in, industrial activity; or
- attributes you may have that are covered by anti-discrimination laws.

What is a 'workplace right'?

A workplace right includes:

- an entitlement to a benefit established under a workplace law or instrument (including awards, rights to parental leave, etc.);
- a right to initiate or participate in a process established under a workplace law or instrument (such as protected industrial action); and
- a right to make a complaint or enquiry about employment (which can be to an authority or your employer).

Other adverse action protections

Discrimination

An employer must not take adverse action against an employee or prospective employee because of their race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

An employer is only allowed to do so in limited circumstances when the action is:

- taken because of the inherent requirements of the particular position; or
- in accordance with doctrines, tenets, beliefs or teachings of a particular religion or creed and taken in good faith to avoid injury to the religious susceptibilities of that religion or creed; or
- not unlawful under any anti-discrimination law in force in the place the action is taken.

Temporary absence due to illness or injury

An employer must not dismiss an employee because they have been temporarily absent from work because of illness or injury if:

- they have a doctor's certificate (or other evidence under regulation 3.01 of the Fair Work Regulations 2009); and
- they are on paid sick leave or they have had less than three months unpaid sick leave in the last year.

What does not constitute adverse action?

Adverse action does not include certain circumstances. Examples include the following:

- Action that is authorised by any law.
- Where there are inherent requirements of the job (that is, parts of the job that cannot be altered or removed). Here, an employer may discriminate against persons who cannot perform those inherent requirements (for example, those with an impairment (disability), where the impairment prevents them from performing the inherent requirements of the job);
- An institution that has doctrines, tenets or beliefs, or is religious, may be able to take adverse action where it is taken in good faith, and it is taken in order to avoid injury to the religion.

Misrepresentation e.g. sham arrangements

An employer must not tell an employee that they are being hired as an independent contractor' if they are really an employee. For more information: <http://www.fairwork.gov.au/employment/independent-contractors/contractor-or-employee/pages/default.aspx>.

An employer must not dismiss or threaten to dismiss an employee in order to then re-hire them as an independent contractor doing the same or substantially the same work.

Making a General Protections application

There is a range of options open to an employee when seeking a remedy for a breach of the general protections legislation. An employee may be able to approach Fair Work Commission (FWC), the Fair Work Ombudsman (FWO) or the Federal Court or Federal Magistrates Court about breaches under the *Fair Work Act 2009*.

A person is eligible to make an application (known as a 'General Protections' complaint) for a remedy to adverse action if that person:

- is an employee or prospective employee of an employer who is under the federal industrial relations system (which covers most Queensland employers who are not state government agencies or local councils); or
- they are a contractor or prospective contractor who has entered into a contract with an employer that comes under the federal industrial relations system.

The Fair Work Commission can deal with matters related to the general protections provisions. However, there are different processes involved depending on whether or not the action involves a dismissal.

Where the matter involved dismissal from employment, you have **21 days** from the date of dismissal to lodge an application to the Fair Work Commission to deal with the dispute. This time limit may be extended in exceptional circumstances (which must be included and evidenced in your application form).

Where the matter does not involve dismissal, you can also apply to the Fair Work Commission to deal with the dispute. No time frame is specified in the Fair Work Act, although it is in your best interests to lodge such an application in a timely fashion. You cannot make a general protections dismissal application at the same time as an unfair dismissal application. You can only make one claim about a particular incident at any one time.

The Fair Work Ombudsman can also investigate adverse action complaints including where it results in termination of employment. Fair Work Inspectors may investigate matters and may bring a matter before the Federal Magistrates Court or Federal Court to seek compensation and/or penalty.

It is also important to note that it may be appropriate to seek a remedy under state or territory equal opportunity and anti-discrimination laws. These laws are not excluded by the *Fair Work Act 2009*.

The application form for adverse action can be found on the Fair Work Commission website (www.fwc.gov.au), or you can have the Commission post one to you by calling 1300 799 675. The form is called an "Application for FWC to deal with a General Protections Dispute" (Form F8). The fee for lodging is currently \$64.20 but may be subject to change.

The websites for the Fair Work Commission and the Fair Work Ombudsman provide further information including about how to lodge a complaint. You may wish to seek independent legal advice prior to lodging a complaint regarding the most favourable jurisdiction to suit your circumstances.

FOR MORE INFORMATION

Fair Work Infoline (For employees with wages, dismissal, employment conditions and discrimination complaints)

Ph: 13 13 94

www.fairwork.gov.au.

Fair Work Commission (For advice about dismissal and general protections information and application forms)

Ph: 1300 799 675

www.fwa.gov.au.

Queensland Council of Unions (for information about joining a union)

Ph: 3846 2468

www.qcu.asn.au.

Anti-Discrimination Commission Queensland

Ph: 1300 130 670

www.adcq.qld.gov.au.

Australian Human Rights Commission

Ph: 1300 656 419

www.ahrc.gov.au.

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