

WORKERS' RIGHTS ADVERSE ACTION



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Workplace Rights - General Protections

You have the right to a workplace that is free from discrimination and where you are able to exercise your general workplace rights without fear of reprisal. Under the General Protections provisions of the Fair Work Act 2009 it is unlawful for an employer to threaten to or actually dismiss you, negatively alter your position or treat you differently because:

- You have a workplace right;
- You make an inquiry or complaint in relation to your employment or workplace rights;
- You join the Union or participate in lawful activities such as voting on an agreement or taking protected industrial action;
- You perform a representative role in your workplace. This includes occupational health and safety representatives, harassment officers and union delegates;
- Of your 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.

What is an Adverse Action?

It is unlawful for an employer to place undue influence or pressure on you to agree to change certain employment arrangements. For example your employer can not pressure you to sign an Individual Flexibility Arrangement.

Under the Fair Work Act 2009, an employer takes an adverse action against an employee when they:

- dismiss the employee;
- injure them in their employment;
- alter their position to their detriment (e.g. demotion); or
- discriminate between them and other employees.

Some examples of being injured in your employment are having your hours reduced, having responsibility taken away from you, having a leave application refused unreasonably or being offered lesser conditions than a co-worker who does the same job.

It is unlawful for an employer to coerce you to exercise your workplace rights in a particular way. For example your employer cannot pressure you not to take leave to which you are entitled.

In order for the adverse action to be unlawful under the General Protections provision, it has to be taken for a discriminatory reason.

What is a workplace right?

According to the Fair Work Act 2009, a workplace right exists where a person is entitled to a benefit or has a role or responsibility under a workplace law, workplace instrument (such as an award or agreement) or an order made by an industrial body. A workplace right also exists when a person is able to initiate or participate in a process or proceedings under a workplace law or workplace instrument, including making a complaint or inquiry to a person or body to seek compliance with that law or instrument or simply when they make a complaint or inquiry regarding their employment (including their employer). Workplace rights include, for example, taking leave, joining or not joining a union, making an enquiry about your working conditions or pay or reporting dangerous equipment or practices.

For example, an employer will be in contravention of this provision where an employee is overlooked for promotion, and a substantial reason for the decision is that the employee makes persistent complaints to his or her union or safety committee about alleged safety breaches.

What kind of discrimination is covered?

The Fair Work Act 2009 specifically prohibits adverse action being taken against an employee or a 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.

Discriminatory action may not be prohibited if the action is based on the inherent requirements of the position or where it is taken within an institution run in accordance with religious beliefs and is taken in good faith to protect those religious beliefs.

An example of discriminatory adverse action would be an employer refusing to provide an annual pay increment to an employee because the employee was pregnant and would be going on parental leave, despite there being no performance issues and all other employees receiving their annual increase.

What can I do about it?

If you have been subject to an adverse action that is not a dismissal and you wish to make a complaint:

1. You can lodge a complaint with the Fair Work Ombudsman who has the power to investigate the allegations and where a contravention is identified, and may initiate legal action. This process is at no cost to you, however the Fair Work Ombudsman will make the final decision whether or not to take legal action; or
2. You may make an application to the Fair Work Commission. This is known as a General Protections Dispute Application. If the adverse action was not a dismissal, you have six years to lodge this application. If both parties agree, then FWC must hold a private conference to try to resolve the dispute. If the dispute is not resolved, you may make an application for a court to deal with it.

An employee, union or Fair Work Inspector can enforce a workplace right. Please note that applications relating to General Protections which involve a dismissal must be lodged with Fair Work Commission within 21 days. Check the Fact Sheet on Termination of Employment for more information.

Depending on the circumstances, another option if you have been discriminated against at work may be to make a complaint through either the South Australian Equal Opportunity Commission or the Australian Human Rights Commission. Every situation is different so seek advice before you decide which is the best option for you.

Other General Protection provisions

As well as protection from adverse action on discriminatory or workplace rights grounds, the Fair Work Act 2009 provides for a number of other protections:

- Industrial activities – all employers, employees and independent contractors are free to choose whether or not they join an industrial association such as a trade union or association and whether or not they choose to engage or not engage in industrial activity, and must not be victimised for their decision.

- Coercion – it is unlawful for a person to organise, take, or threaten to take, action in order to coerce a person to use or not use a workplace right, join a union or take industrial action, employ or not employ another person, engage or not engage a contractor or to allocate duties.
- Misrepresentation – a person must not knowingly or recklessly make a false or misleading representation about the workplace rights of another person, the use or effect of the use of a workplace right by another person, another persons' obligation to take part in industrial action, or another person's obligation to tell anyone whether they or someone else are a member of an industrial association or are taking part in any industrial activity.
- Undue influence – it is unlawful for an employer to exert significant or inappropriate pressure on an employee to modify or alter their conditions of employment.

If you have experienced any of these then seek advice as you may be able to take action.

Where can I get more help?

Your union

SA Unions
Ph: (08) 8279 2222
www.saunions.org.au

Working Women's Centre

Ph: 1800 652 697
www.wwc.org.au

1st Floor, Station Arcade
52 Hindley Street
Adelaide, SA, 5000

Legal Services Commission

Ph: 1300 366 424
www.lsc.sa.gov.au

82-98 Wakefield Street
Adelaide SA 5000

Young Workers Legal Service

Ph: (08) 8279 2233
www.ywls.org.au

Fair Work Commission (FWC)

Ph: 1300 799 675
www.fwc.gov.au

Level 6, Riverside Centre,
Nth Terrace, Adelaide, 5000

PO Box 8072
Station Arcade, Adelaide, 5000

Telephone: (08) 8308 9863
Facsimile: (08) 8308 9864
Out of hs emergency: 0419 563 601
Email: adelaide@fwc.gov.au

Fair Work Ombudsman (FWO)

Ph: 13 13 94
www.fairwork.gov.au

Level 2, 148 Frome St.
Adelaide SA, 5000

Fair Work Ombudsman
Complaints Assessment Team
GPO Box 2567, Adelaide, SA, 5001

Australian Human Rights Commission

Ph: (02) 9284 9600
Complaints Infoline: 1300 656 419

Telephone Interpreter Service

Ph: 13 14 50



Legal disclaimer: The Fair Work Ombudsman (FWO) is committed to providing useful, reliable information to help you understand your rights and obligations under workplace laws. The information contained in this publication within the FWO's jurisdiction as set out in the Fair Work Act 2009 is: general in nature and may not deal with all aspects of the law that are relevant to your specific situation; and not legal advice. Therefore, you may wish to seek independent professional advice to ensure all the factors relevant to your circumstances have been properly considered. This information was published on 8 June 2011. The FWO does not accept legal liability arising from or connected to the accuracy, reliability, currency or completeness of this information. This material has been funded by the Australian Government through a Fair Work Ombudsman initiative to produce educative materials on the Fair Work Act.