

> Industrial Relations Fair Work Information Sheet Industrial Action

This fact sheet is relevant to employers in Queensland

What is industrial action?

Industrial action is action taken by the employee, union or employer which limits, restricts or interrupts performance of work. It is usually in the form of strikes, work stoppages or lock outs.

Industrial action is only lawful (protected) when it is in the pursuits of a new enterprise agreement during an established bargaining period, and that agreement is not a greenfields or multi-enterprise agreement, but is not permissible at any time prior to the nominal expiry date of an existing agreement.

Following the passing of The Fair Work Amendment (State Referral and Other Measures) Bill 2009, the applicable legislation for all employers is the Fair Work Act 2009.

What is not industrial action?

Industrial action does not include action taken by the employee where such action has been authorised or agreed to by the employer, or vice versa.

Further, action taken based on a reasonable concern by the employee about an imminent risk to health and safety at the workplace will not constitute industrial action so long as the employee did not unreasonably fail to comply with direction to perform any other available duties.

What does 'protected' industrial action mean?

The significance of industrial action being 'protected' is that it provides an immunity to the person/s taking the action from any civil liability which could otherwise occur as a result of the industrial action being taken, with some exceptions which are outlined below.

Protected industrial action occurs when:

- A new agreement (that is not a Greenfield's or multi-enterprise agreement) is being negotiated;
- The nominal expiry date of any existing agreement has passed
- The bargaining representatives are genuinely trying to reach agreement
- All relevant notice requirements have been met
- Any orders relating to industrial action or bargaining for the agreement have been complied with
- There are not orders suspending or terminating the industrial action in place.

However, even if the action would otherwise be 'protected' the immunity will not extend to situation where:

- The industrial action threatens to cause significant damage to the Australian economy
- The action threatens the life, personal safety, health or welfare of a person/s
- The action causes or threatens to cause imminent significant economic harm to any employees (and in some cases employers) who'll be covered by the agreement
- The bargaining representatives would benefit from a cooling-off period
- The action threatens to significantly harm 3rd parties.

What is involved in taking protected industrial action?

Under the Fair Work Act 2009, when either party decides they wish to negotiate an enterprise agreement, a bargaining period must be entered into and begins once a notice of employees representational rights is issued as per section 174 of the Fair Work Act 2009.

If during the bargaining period, protected industrial action is to be taken, the bargaining representative of an employee who will be covered by the enterprise agreement must apply to Fair Work Australia for a protected action ballot order. A protected action ballot order authorises industrial action and must be undertaken before industrial action can be lawfully taken, except where the action is in response to industrial action by the other party in enterprise negotiations. A protected action ballot is a secret ballot which gives employees the opportunity to vote on whether to take protected industrial action.

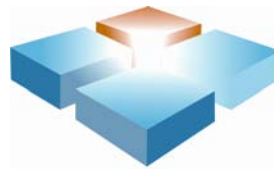
What are secret ballots?

The Fair Work Act 2009 requires that all industrial action taken by employees (except action in response to action already taken by the employer) must be authorised in advance by secret ballot. The party must apply to Fair Work Australia for an order to have a secret ballot to establish whether more than 50% of employees who voted supported the industrial action. At least 50 per cent of those on the voting roll participated in the ballot, and more than 50 per cent of votes cast were in favour of the industrial action.

If the ballot results are in favour of industrial action, the action must take place within 30 days of the declaration of the ballot results (unless extended by Fair Work Australia).

How much notice is required to commence industrial action?

Under the **Fair Work Act 2009**, once the ballot has been accepted, at least 3 days written notice must be given to the other party or parties stating the nature of the intended action and the day it will begin. For state employers under the **Industrial Relations Act 1999** 3 days written notice must be given stating the nature of the intended action and the day it will begin unless the protected action ballot order stipulates a long period of time.



What options does an employer have against protected industrial action?

Retaliatory industrial action:

Once employees have commenced protected action, an employer can respond with their own industrial action immediately after providing written notice to the other party. Usually industrial action by the employer will be in the form of lock-outs, where employees are refused entry to the workplace. An employer is not required to pay employees when they have been locked out under protected industrial action.

An employee cannot be disadvantaged for partaking or intending to partake in protected industrial action and employers may not:

- Dismiss an employee from their job
- Alter the employee's job position
- Remove benefits e.g. annual leave
- Threaten any of the above actions simply because the employee is engaging or has engaged in protected industrial action

What options does an employer have against unprotected industrial action?

Unprotected industrial action is illegal, and as such the employer has a number of rights and options for dealing with the situation.

Order to stop or prevent unprotected industrial action

Industrial action is only protected when it is in relation to bargaining of an agreement. The employer can make an application to stop or prevent industrial action to Fair Work Australia. Employers wishing to stop unprotected industrial action need to fill out form F14 on the Fair Work website.

Consider terminating employees involved

An employee is not immune from dismissal if the industrial action that they are engaged in is not protected. However, the employee must still meet the normal termination requirements to ensure that the dismissal is fair (not harsh, unjust or unreasonable) or lawful (not for an unlawful reason, such as trade union membership) if such obligations apply to that employer. A termination may be valid if the reason for the termination is related to the capacity or conduct of the employee or your operation requirements. If you are considering this course of action, it is strongly suggested that you see professional advice.

Consider applying for compensation for damages

As the industrial action is not protected by law, any damages that the employer suffers as a result of the industrial action may be recoverable from the employee or union by commencing legal proceedings in a common law court.

Submit a complaint with the appropriate authority

If the employer feels that the union has engaged in unconscionable conduct, has directly breached the legislation or has operated outside of the union's rule, they can submit a complaint to the appropriate Federal or State authority. The matter may result in a caution, suspension or financial penalty being ordered against the union.

Strike Pay

Under Fair Work Act 2009 it is illegal for an employer to pay and for an employee to accept payment for any period of protected or unprotected industrial action. If the duration of the industrial action is less than 4 hours, the employer must withhold a minimum of four hour's pay. If the duration of the industrial action exceeds 4 hours, the employer must withhold pay for the total duration of the industrial action.

Further Information

For public information regarding industrial action:

Federal Fair Work Australia – ph: 1300 799 675, Web: www.fairwork.gov.au

To download official forms referred to herein relating to the industrial action:
Federal Fair Work Australia – ph: 1300 799 675, Web: www.fairwork.gov.au

For further information contact the Chamber of Commerce and Industry Queensland's (CCIQ) Employer Assistance Line on 1300 135 822 or lodge a query at our Online Portal found on the CCIQ website under Employer Assistance Line.

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