



Fair Work Act 2009

No. 28, 2009

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Division 3—Workplace rights

340 Protection

- (1) A person must not take adverse action against another person:
 - (a) because the other person:
 - (i) has a workplace right; or
 - (ii) has, or has not, exercised a workplace right; or
 - (iii) proposes or proposes not to, or has at any time proposed or proposed not to, exercise a workplace right; or
 - (b) to prevent the exercise of a workplace right by the other person.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) A person must not take adverse action against another person (the ***second person***) because a third person has exercised, or proposes or has at any time proposed to exercise, a workplace right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

Note: This subsection is a civil remedy provision (see Part 4-1).

341 Meaning of *workplace right*

Meaning of workplace right

- (1) A person has a ***workplace right*** if the person:
 - (a) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or
 - (b) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or
 - (c) is able to make a complaint or inquiry:
 - (i) to a person or body having the capacity under a workplace law to seek compliance with that law or a workplace instrument; or

- (ii) if the person is an employee—in relation to his or her employment.

Meaning of process or proceedings under a workplace law or workplace instrument

- (2) Each of the following is a ***process or proceedings under a workplace law or workplace instrument***:
 - (a) a conference conducted or hearing held by the FWC;
 - (b) court proceedings under a workplace law or workplace instrument;
 - (c) protected industrial action;
 - (d) a protected action ballot;
 - (e) making, varying or terminating an enterprise agreement;
 - (f) appointing, or terminating the appointment of, a bargaining representative;
 - (g) making or terminating an individual flexibility arrangement under a modern award or enterprise agreement;
 - (h) agreeing to cash out paid annual leave or paid personal/carer's leave;
 - (i) making a request under Division 4 of Part 2-2 (which deals with requests for flexible working arrangements);
 - (ia) giving a notification, or receiving an offer or notice, under Division 4A of Part 2-2 (which deals with casual employment);
 - (j) dispute settlement for which provision is made by, or under, a workplace law or workplace instrument;
 - (k) any other process or proceedings under a workplace law or workplace instrument.

Prospective employees taken to have workplace rights

- (3) A prospective employee is taken to have the workplace rights he or she would have if he or she were employed in the prospective employment by the prospective employer.

Note: Among other things, the effect of this subsection would be to prevent a prospective employer making an offer of employment conditional on entering an individual flexibility arrangement.

Exceptions relating to prospective employees

- (4) Despite subsection (3), a prospective employer does not contravene subsection 340(1) if the prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings.
- (5) Despite paragraph (1)(a), a prospective employer does not contravene subsection 340(1) if the prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 or 6-3A (which deal with transfer of business).

342 Meaning of *adverse action*

- (1) The following table sets out circumstances in which a person takes *adverse action* against another person.

Meaning of <i>adverse action</i>		
Item	Column 1	Column 2
	<i>Adverse action is taken by ...</i>	<i>if ...</i>
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective

Meaning of <i>adverse action</i>		
Item	Column 1	Column 2
	<i>Adverse action is taken by ...</i>	<i>if ...</i>
		employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the <i>principal</i>) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
3A	a digital labour platform operator that has entered into a contract with an employee-like worker for use of, or access to, a digital labour platform against the employee-like worker	the digital labour platform operator: (a) terminates the contract; or (b) injures the employee-like worker in relation to the terms and conditions of the contract; or (c) alters the position of the employee-like worker to the employee-like worker's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the employee-like worker; or (e) refuses to provide to the employee-like worker use of or access to the digital labour platform.
4	a person (the <i>principal</i>) proposing to enter into a contract for services with an	the principal: (a) refuses to engage the independent contractor; or

Meaning of <i>adverse action</i>		
Item	Column 1	Column 2
	<i>Adverse action is taken by ...</i>	<i>if ...</i>
	independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	(b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
4A	a digital labour platform operator that proposes to enter into a contract with an employee-like worker for use of, or access to, a digital labour platform against the employee-like worker	the digital labour platform operator: (a) refuses to agree to provide to the employee-like worker use of, or access to, the digital labour platform; or (b) discriminates against the employee-like worker in relation to the terms and conditions on which the digital labour platform operator agrees to provide to the employee-like worker use of, or access to, the digital labour platform; or (c) refuses to make use of, or agree to make use of, services offered by the employee-like worker.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.

Meaning of *adverse action*

Item	Column 1 <i>Adverse action is taken by ...</i>	Column 2 <i>if ...</i>
6A	an employee-like worker against a digital labour platform operator that has entered into a contract with the employee-like worker for use of, or access to, a digital labour platform	the employee-like worker takes industrial action against the digital labour platform operator.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).
8	an industrial association, or an officer or member of an industrial association, against an employee-like worker	the industrial association, or the officer or member of the industrial association, takes action that has the effect, directly or indirectly, of prejudicing the employee-like worker in relation to a contract for use of, or access to, a digital labour platform.

(2) *Adverse action* includes:

- (a) threatening to take action covered by the table in subsection (1); and
 - (b) organising such action.
- (3) **Adverse action** does not include action that is authorised by or under:
 - (a) this Act or any other law of the Commonwealth; or
 - (b) a law of a State or Territory prescribed by the regulations.
- (4) Without limiting subsection (3), **adverse action** does not include an employer standing down an employee who is:
 - (a) engaged in protected industrial action; and
 - (b) employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.

343 Coercion

- (1) A person must not organise or take, or threaten to organise or take, any action against another person with intent to coerce the other person, or a third person, to:
 - (a) exercise or not exercise, or propose to exercise or not exercise, a workplace right; or
 - (b) exercise, or propose to exercise, a workplace right in a particular way.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) Subsection (1) does not apply to protected industrial action.

344 Undue influence or pressure

An employer must not exert undue influence or undue pressure on an employee in relation to a decision by the employee to:

- (a) make, or not make, an agreement or arrangement under the National Employment Standards; or
- (b) make, or not make, an agreement or arrangement under a term of a modern award or enterprise agreement that is

permitted to be included in the award or agreement under subsection 55(2); or

- (c) agree to, or terminate, an individual flexibility arrangement; or
- (d) accept a guarantee of annual earnings; or
- (e) agree, or not agree, to a deduction from amounts payable to the employee in relation to the performance of work.

Note 1: This section is a civil remedy provision (see Part 4-1).

Note 2: This section can apply to decisions whether to consent to performing work on keeping in touch days (see subsection 79A(3)).

345 Misrepresentations

- (1) A person must not knowingly or recklessly make a false or misleading representation about:
 - (a) the workplace rights of another person; or
 - (b) the exercise, or the effect of the exercise, of a workplace right by another person.

Note: This subsection is a civil remedy provision (see Part 4-1).

- (2) Subsection (1) does not apply if the person to whom the representation is made would not be expected to rely on it.