

General protections – Guide 1

Overview of general protections laws

Overview

This guide is the first in a series of guides which explain the general protections process at the Fair Work Commission (the Commission). This guide provides an overview of general protections laws, the roles of the Commission and the Courts and where to get further information.

General protections seek to:

- protect workplace rights
- protect freedom of association
- provide protection from workplace discrimination
- provide effective relief for people who have been discriminated against, victimised, or have experienced other unlawful treatment.

The general protections provisions can be found in Part 3-1 of the *Fair Work Act 2009* (the Fair Work Act).

Who is covered by general protections laws?

General protections laws apply to:

- employees and prospective employees
- employers and prospective employers
- independent contractors and prospective independent contractors
- a person (the principal) who has entered into or who has proposed to enter into a contract for services with an independent contractor
- an industrial association, including an officer or member of an industrial association.

General protections laws provide protection from a range of actions (explained below) taken by, or that affect (or that could or are intended to affect, or are threatened to affect) constitutionally-covered entities, employers in the ACT or Northern Territory, or other trade or commerce employers. They also protect from actions taken in a Territory or a Commonwealth place.

A constitutionally covered entity can be any of the following:

- a constitutional corporation, which can either be a trading or financial corporation formed in Australia, or a foreign corporation that does business in Australia. They are often recognisable by having Proprietary Limited, Pty Ltd, Limited, Ltd, Incorporated or Inc. after their name.
- the Commonwealth (ie the federal government and its departments)
- a Commonwealth authority (such as the Fair Work Commission)
- a body corporate incorporated in a territory
- an organisation.

For more information see the General protections benchbook regarding coverage (www.fwc.gov.au/resources/benchbooks/general-protections-benchbook).

How do general protections work?

There are a number of general protections provisions. Some provisions protect employees from adverse action being taken **because** of a particular reason, such as action taken against someone **because** he or she has a particular right or attribute.

Adverse action against an employee or potential employee might include:

- dismissing them
- not giving them their legal entitlements
- changing their job to their disadvantage
- treating them differently than others
- not hiring them
- offering them different (and unfair) terms and conditions, compared to other employees.

Other provisions contain a direct ban on some types of action, such as applying pressure to an employee to do certain things. Others ban people from taking actions with a particular intent, such as taking action against someone with the intent of coercing them to do something.

What are the protections?

Workplace rights

A person (such as an employer), must not take any adverse action against another person (such as an employee), **because** that person has a workplace right, has exercised or not exercised a workplace right or proposes to exercise or not exercise that workplace right.

Workplace rights include:

- receiving a benefit or having a role or responsibility under a workplace law (such as the Fair Work Act), a workplace instrument (such as a modern award or enterprise agreement), or an order made by an industrial body (such as an order made by the Commission)
- commencing or participating in a process or proceeding under a workplace law (such as the Fair Work Act), or instrument (such as a modern award or enterprise agreement), such as taking court action
- being able to make a complaint or enquiry about one's employment.

New Jobkeeper and COVIDSafe workplace rights

New workplace rights were established by the Jobkeeper amendments to the Fair Work Act and the COVIDSafe amendments to the *Privacy Act 1988* (the Privacy Act).

Section 789GY of the Fair Work Act sets out new workplace rights relating to Jobkeeper directions and agreements. See the Protections section of the Jobkeeper disputes benchbook (www.fwc.gov.au/jobkeeper-benchbook/protections).

Section 94H(2) of the Privacy Act establishes new workplace rights relating to downloading and using the COVIDSafe app. See the COVIDSafe workplace rights page on the Commission's website (www.fwc.gov.au/about-us/coronavirus-covid-19-updates-advice/covidsafe-workplace-rights).

Industrial activities

A person must not take adverse action against another person **because** they engaged in or proposed to engage in industrial activity (such as belonging to or participating in a union), including refusing to participate in any industrial action.

Industrial activities cover activities associated with freedom of association including:

- becoming or not becoming a member of an industrial association (eg trade unions, employer organisations)

- representing or advancing the views, claims or interests of an industrial association
- taking part in protected industrial action or refusing to take part in industrial action.

Protection from discrimination

An employer must not take adverse action against an employee (or prospective employee)

because of their:

- race
- colour
- sex
- sexual orientation
- age
- physical or mental disability
- marital status
- family or carer's responsibilities
- pregnancy
- religion
- political opinion
- national extraction
- social origin.

Temporary absence

An employer must not dismiss an employee because the employee is temporarily absent from work because of an illness or injury of a kind prescribed by Regulation 3.01 of the *Fair Work Regulations 2009* (see Attachment 1).

Sham contracting arrangements

An employer must not tell an employee that they are being hired as a contractor if they are really an employee. An employer must not dismiss or threaten to dismiss an employee in order to hire them as an independent contractor doing the same or substantially the same work.

Coercion and misrepresentations

A person must not take or organise any action against another person, or threaten to do so, with the intent to coerce them, or anyone else, to:

- exercise or not exercise a workplace right
- propose to exercise or not exercise a workplace right, or
- exercise or propose to exercise a workplace right in a particular way.

A person must also not knowingly or recklessly make a false or misleading representation about another person's workplace rights, the exercise of those rights, or the effect of exercising those rights.

Undue influence or pressure

An employer must not put undue influence or pressure on an employee about a decision to:

- make or not make an agreement or arrangement under the National Employment Standards, a modern award or an enterprise agreement
- agree to or terminate an individual flexibility arrangement

- accept a guarantee of annual earnings, or
- agree or not agree to a deduction from their pay.

Note: some of the protections only apply to particular situations, such as a dismissal, and only certain people may be able to apply, such as an employee. For example, section 352 of the Fair Work Act, which deals with temporary absence due to illness or injury, applies only to an employee who has been dismissed.

For more information see the General protections benchbook regarding general protections laws (www.fwc.gov.au/resources/benchbooks/general-protections-benchbook).

Making and responding to an application

Any person wanting to make an application for the Commission to deal with a general protections dispute needs to complete and lodge Form F8 with the Commission. If the dispute involves a dismissal, they need to lodge the form within 21 calendar days after the day the dismissal took effect.

Information about the application process is available in Guide 2 – Making a general protections application.

The applicant must take reasonable care to correctly identify the employer or other respondents named in the application. This will assist the Commission to promptly notify the other parties and schedule a conference to deal with the dispute. It is helpful to include the respondent employer's ABN in the application form. An applicant should look at payslips for this information.

Employers or other respondents named in the application need to lodge a response with the Commission within seven calendar days of being served with the applicant's form. To do this, they need to complete and lodge Form F8A with the Commission.

Information about how to respond to an application is available in Guide 3 – Responding to a general protections application.

Process for dismissal disputes

When an application to deal with a general protections dismissal dispute is received, a Commission Member will hold a conference and assist the parties to try to reach an agreed resolution to the dispute.

Information about conferences before a Member is in Guide 4B – Conference before a Commission Member (all general protections disputes).

If the dispute is not resolved in a conference, the applicant and the respondent can agree to have the dispute arbitrated and therefore finally determined, by the Commission subject to any appeal rights. This is called consent arbitration. Information about consent arbitration is in Guide 5 – The consent arbitration process.

If one or both of the parties doesn't agree to participate in consent arbitration, the applicant can choose to make a separate application to a court that can deal with general protections disputes. Information about making a court application is in Guide 6 – General protections applications not resolved at the Commission.

Process for non-dismissal disputes

In non-dismissal disputes, a Commission Member will have a conference and assist the parties to try to reach an agreed resolution. The conference is voluntary, and will only be held if both parties agree to attend.

If the conference doesn't go ahead because one of the parties doesn't agree to participate, or if a conference is held but a resolution isn't reached, the applicant can choose to make a separate application to one of the courts that can deal with general protections disputes.

For more information about conferences before a Member, see Guide 4B – Conference before a Commission Member (all general protections disputes).

Court applications

An applicant can apply to the Federal Court of Australia or the Federal Circuit Court of Australia (the Courts) to deal with their general protections dispute if:

- the dispute relates to action taken other than a dismissal, and the respondent did not agree to participate in a conference at the Commission
- the dispute was not resolved at a conference at the Commission, and one or both of the parties did not consent to the matter being resolved through arbitration at the Commission, or
- the application for a dismissal dispute includes an application for an interim injunction.

Applications to a court about a general protections dismissal dispute must be made within 14 calendar days after the day the Commission has issued its certificate that all reasonable attempts to resolve the dispute have been or are likely to be unsuccessful.

General protections applications where the employee is still working for the employer don't need to have been heard at the Commission in order to progress to a Court.

In the event that a person is found by one of these Courts to have breached the general protections provisions of the Fair Work Act, the Courts have the power to make any order they consider appropriate, including an order to:

- issue a monetary penalty
- issue an injunction
- make an order for reinstatement
- make an order for compensation.

However the Courts may only make an order against a party for the payment of legal costs where the party has instituted the proceedings vexatiously or without reasonable cause, or the party's unreasonable act or omission caused the other party to incur costs, or where the party unreasonably refused to participate in a matter before the Commission which arose from the same facts as the proceedings.

For more information see the Role of Court page in the Commission's General protections benchbook (www.fwc.gov.au/general-protections-benchbook/role-of-the-court).

Legal advice

The Commission cannot provide legal advice.

As part of the general protections application process, parties may choose to obtain their own independent legal advice. There are community legal centres in each state and territory.

To find out more, please go to the Where to get legal advice page on the Commission's website (www.fwc.gov.au/resources/where-get-legal-advice).

Further information

For eligibility information, refer to the 'General Protections - Am I eligible?' checklist on the Commission's website (www.fwc.gov.au/termination-of-employment/general-protections/am-i-eligible).

You can also refer to the full set of general protections guides on the Commission's website:

- Guide 1 – General protections overview
- Guide 2 – Making a general protections application
- Guide 3 – Responding to a general protections application
- Guide 4A – Initial conference with a staff conciliator (dismissal disputes only)
- Guide 4B – Conference before a Commission Member (all general protections disputes)
- Guide 5 – The consent arbitration process

- Guide 6 – General protections applications not resolved at the Commission
- Guide 7 – Frequently asked questions
- Guide 8 – Glossary of common terms.

The General protections benchbook can also assist parties lodging or responding to general protections applications (www.fwc.gov.au/resources/benchbooks/general-protections-benchbook).

If you require further information or help, please refer to the Contact us page on the Commission's website (www.fwc.gov.au/about-us/contact-us).

Attachment 1 – Regulation 3.01 of the *Fair Work Regulations 2009*

3.01 Temporary absence – illness or injury

(1) For section 352 of the Act, this regulation prescribes kinds of illness or injury.

Note: Under section 352 of the Act, an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

- (2) A prescribed kind of illness or injury exists if the employee provides a medical certificate for the illness or injury, or a statutory declaration about the illness or injury, within:
- (a) 24 hours after the commencement of the absence; or
 - (b) such longer period as is reasonable in the circumstances. Note: The Act defines **medical certificate** in section 12.
- (3) A prescribed kind of illness or injury exists if the employee:
- (a) is required by the terms of a workplace instrument:
 - (i) to notify the employer of an absence from work; and
 - (ii) to substantiate the reason for the absence; and
 - (b) complies with those terms.
- (4) A prescribed kind of illness or injury exists if the employee has provided the employer with evidence, in accordance with paragraph 107(3) (a) of the Act, for taking paid personal/carer's leave for a personal illness or personal injury, as mentioned in paragraph 97(a) of the Act.

Note: Paragraph 97(a) of the Act provides that an employee may take paid personal/carer's leave if the leave is taken because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee.

- (5) An illness or injury is not a prescribed kind of illness or injury if:
- (a) either:
 - (i) the employee's absence extends for more than 3 months; or
 - (ii) the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries); and
 - (b) the employee is not on paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act for the duration of the absence.
- (6) In this regulation, a period of paid personal/carer's leave (however described) for a purpose mentioned in paragraph 97(a) of the Act does not include a period when the employee is absent from work while receiving compensation under a law of the Commonwealth, a State or a Territory that is about workers' compensation.