

EMPLOYMENT | JANUARY 2024

NEW DELEGATES' RIGHTS PROVISIONS HAVE COMMENCED

As we have previously let you know, the Federal Government has tabled the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth), which has been referred to the Senate Education and Employment Legislation Committee due to report back on 1 February 2024. However, in December the Federal Government agreed to split the Bill and as a result new provisions which provide a framework for workplace delegates' rights have now been passed by both Houses of Parliament and have become law. The new provisions also require that from 1 July 2024 modern awards, enterprise agreements and workplace determinations must include a delegates' rights term.

In this fourth update on the Bill, **Kristen Barratt** considers the **new provisions dealing with workplace delegates' rights**.

What has changed?

The amendments to the *Fair Work Act 2009* (Cth) (**FW Act**):

- introduce new statutory workplace rights to support the role of workplace delegates in representing workers;
- introduce specific protections for workplace delegates to facilitate the exercise of those workplace rights; and
- provide for modern awards, enterprise agreements and workplace determinations to contain details as to the specific workplace rights for workplace delegates in various industries, occupations and workplaces by 1 July 2024.

Workplace delegates

Workplace delegates are persons appointed under the rules of a registered employee organisation (i.e a union) to represent members and other persons eligible to be members (**potential members**) in a particular enterprise. A registered organisation is an organisation which is registered under the *Fair Work (Registered Organisations) Act 2009* (Cth).

If a workplace delegate is appointed by an unregistered employee organisation (for example the Retail and Fast-Food Workers Union), those delegates are not afforded the rights and protections set out in the FW Act.

Workplace delegates' rights

A workplace delegate is entitled to represent the industrial interests of members and potential members, including in a dispute with their employer.

To facilitate the exercise of these representational rights, workplace delegates are entitled to:

- reasonable communication with members and potential members in relation to their industrial interests;
- reasonable access to the workplace and workplace facilities where the enterprise is being carried on; and

- unless the employer of the workplace delegate is a small business employer, reasonable access to paid time, during normal working hours, for the purposes of related training.

The new provisions do not create any obligation on workers. Importantly, a worker is not required to accept representation from a workplace delegate.

Obligations on employers in respect of workplace delegates' rights

An employer must afford the workplace delegates these rights.

If an employer has complied with the terms of a fair work instrument that applies to the workplace delegate (see below), then the employer is taken to have afforded the workplace delegates these rights.

Otherwise, in determining what is reasonable in affording the workplace delegates these rights, the Fair Work Commission (**FWC**) will have regard to the size and nature of the enterprise, the resources of the employer of the workplace delegate and the facilities available at the enterprise.

Protections for workplace delegates

An employer is prohibited from:

- unreasonably failing or refusing to deal with a workplace delegate;
- knowingly or recklessly making a false or misleading representation to a workplace delegate; or
- unreasonably hindering, obstructing or preventing the exercise of the rights of a workplace delegate.

The FW Act makes it clear that these protections are only enlivened when an employer is dealing with a workplace delegate acting in that capacity.

A failure to comply with the new provisions may lead to the imposition of financial penalties for breaching the FW Act. If, in proceedings, a workplace delegate establishes that an employer unreasonably failed or refused to deal with them, or unreasonably hindered, obstructed or prevented the exercise of their rights, the burden will shift to the employer to demonstrate the reasonableness of their acts or omissions.

Industrial instruments to provide a workplace delegates' rights term

From 1 July 2024, modern awards, new enterprise agreements and workplace determinations must include a workplace delegates' rights term. The FWC has established a timetable for consultation and variation of modern awards for this purpose.

If the terms of a new enterprise agreement about workplace delegates' rights are less favourable than the workplace delegates' rights term in one or more modern awards that cover the workplaces delegates, then those terms of the enterprise agreement will have no effect and the most favourable workplace delegates' rights term in the modern awards applying will be taken to be a term of the enterprise agreement.

Key take aways

As workplace delegates are appointed in workplaces, employers will receive claims by workplace delegates for:

- paid time during normal work hours to attend training "relating" to their role as a workplace delegate provided by both unions and training organisations;
- paid time to communicate with their members and potential members and to represent their industrial interests; and
- access to workplace facilities such as an office, telephone, photocopier, internet and mail to perform their duties.

Given the potential for a dispute in relation to these matters (particularly before industrial instruments are varied to contain a delegates' rights term) and the imposition of penalties for breach of the protections afforded to workplace delegates, it is important for employers to have reasonable policies and procedures in place to deal with these claims and ensure that their managers are trained about the rights of workplace delegates and the protections which are afforded to them.

Please contact a team member if you have any questions or would like to know more about the changes.

For more information, please contact the authors of this alert.



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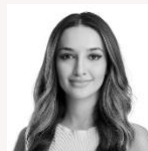
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