

TAKING PROTECTED INDUSTRIAL ACTION

FREQUENTLY ASKED QUESTIONS

What is protected industrial action?

Taking industrial action during bargaining for a new enterprise agreement is part of the bargaining system of the *Fair Work Act 2009* (“the Act”).

Taking “protected” industrial action means that the action is entirely lawful and members taking the action are protected from the employer suing them, sacking them or otherwise victimising them.

Industrial action is only protected in the following circumstances:

- The CPSU obtains an Order from Fair Work Australia to conduct a Protected Action Ballot of members to see if they generally approve taking action during the bargaining for a new agreement; and
- CPSU members vote Yes to the types of industrial action set out in the questions in the Protected Action Ballot; and
- The union gives the employer at least 3 working days notice of the specific action that will take place; and
- The action starts within 30 days of the Ballot result being declared.

What types of protected action can be taken?

It is only the types of action that are authorised in the Ballot that can be taken by members. For example, if the ballot asked members if they authorised 2 hour stoppages of work and a majority approve that action, then 2 hour stoppages can be taken.

Who can take Protected Action?

All members of the union in the particular agency can take protected industrial action provided that they are a member when the action is taken. It is not necessary for members to have voted in the Protected Action Ballot to take protected action. Employees who join the union between when the ballot is held and when the action is taken can take the protected action.

Do I get paid during periods of industrial action?

The Fair Work Act sets out rules about when an employer can pay, or not pay, employees when they are taking protected industrial action.

Stoppage of all work: An employer cannot pay employees for any time they stop all work (or do not attend to work at all). For example, if the protected action is to stop all work for 2 hours then the employer cannot pay for those two hours: if the action is a 4 hours stoppage then the employer cannot pay for those 4 hours.

Bans (except for Overtime Bans):

1. Partial payment

An employer can decide to only partially pay employees for taking protected action which imposes bans on particular work while still performing other work (eg “a ban on using particular equipment” or “a ban on doing a particular function”).

If an employer wants to only partially pay an employee who is imposing a ban, the employer must give the employee written notice that, because of the ban, the employee’s wages will be reduced by a proportion specified in the notice. For example, the employer can give notice to an employee who intends to impose a ban that it will reduce that employees’ wages by 25% for the day(s) the ban is imposed.

However, the employee or the union can apply to Fair Work Australia if the employer proposes to impose an unreasonable reduction in wages for employees who are imposing a ban. If Fair Work Australia finds that the proposed reduction in wages is unreasonable it may order changing the proposed reduction in wages while the bans are imposed.

2. Full payment

An employer does not have to dock wages and can pay employees in full whilst a ban is in place. Indeed if an employer does not give employees notice of a reduction in their wages due to the ban, the employer must pay employees their full wages.

3. No payment

An employer can also refuse to pay any wages to employees who impose bans; but only if the employer refuses to accept any work by the employee until the employee is prepared to perform all their normal duties (ie lift the ban and do all normal work), and the employer gives written notice prior to the action starting.

- **Overtime Bans:** Special rules apply If the ban is a ban on performing overtime. The employer can only refuse to pay for the period the overtime ban is imposed if:

- the employer requests the employee to work specific overtime; AND
- the employee refuses to work the overtime; AND
- the refusal to work overtime was contrary to the employee’s obligation under the enterprise agreement or contract of employment and that refusal was because of the overtime ban, and not a refusal based upon an employee’s ability to refuse to perform unreasonable overtime under certain circumstances including *the employee’s personal circumstances (including family responsibilities)*).

If you work normal hours, but ban overtime, your employer can only not pay for the period of overtime which has been banned and must pay for the normal hours worked.

Does the union have to give notice of the industrial action to the employer?

The union must give the employer written notice of the specific action that will be taken. The purpose of this notice is to allow the employer to take steps to minimise the impact of the industrial action.

The notice to the employer must give at least 3 working days notice of the action (and up to 7 days if FWA decides so), and the timing and location of the action.

Do I have to tell my employer that I intend taking protected action?

The union has to give the employer notice written notice of industrial action. Individual employees do not have the same responsibility to notify the employer under the *Fair Work Act*.

The employer is generally entitled to ask if you intend taking action. However, you are not obliged to assist their employer's attempt to minimise the effectiveness of the union's industrial action.

Hence if asked if you are going to take protected action you can:

- say nothing;
- say they have not decided whether or not they intend to take the action
- say they are not prepared to tell their employer.

The employer cannot take adverse action against or in any way threaten an employee who takes, or decides not to take, protected action.

Can my employer take action against employees taking protected action?

The *Fair Work Act* ensures that employers cannot take adverse action against an employee for taking protected industrial action which is a workplace right. Adverse action the employer cannot take includes: injuring the employee in his or her employment, altering the position of the employee, discriminating between the employee and other employees, or bullying and/or harassing an employee.

However, as noted above, the employer is obliged to not pay employees when they stop work or do not attend for work and entitled to only partly pay employees when they impose bans. In addition, the employer can stand down employees without pay (ie the employer takes employer response action).