

DELEGATES' RIGHTS CLAUSE NOW INSERTED INTO MODERN AWARDS

Earlier this year, we published an update dealing with changes to the Fair Work Act 2009 (Cth) which conferred new rights and protections on workplace delegates. Part of those changes required the Fair Work Commission to develop a delegates' rights clause to be inserted into modern awards. The Fair Work Commission has now developed a model delegates' rights clause and all modern awards were varied with effect from 1 July 2024 to incorporate the new clause.

In this update, we consider the new delegates rights' clause and the implications for employers.

Delegates' rights clause

The table below summarises the rights of delegates under the new delegates rights' clause inserted into modern awards, together with the limitations which apply to the exercise of those rights. A reference to employees in the table below, is to employees who are members or eligible to become members of the relevant union.

Rights	Summary of rights	Limitations
Representation	<p>A delegate may represent the industrial interests of employees in various matters including:</p> <ul style="list-style-type: none">• consultation about major workplace change/ changes to rosters or hours of work;• resolution of disputes;• disciplinary processes;• enterprise bargaining; and• any process or procedure within an award, enterprise agreement or policy of the employer under which employees are entitled to be represented and which concerns their industrial interests.	<p>A delegate can <u>only</u> represent employees who want to be represented by the delegate.</p> <p>When exercising this right, and any right under the new clause, a delegate must comply with:</p> <ul style="list-style-type: none">• their duties and obligations owed as an employee; and• reasonable policies of the employer including codes of conduct and requirements in relation to workplace health and safety and acceptable use of IT resources.
Communication	<p>A delegate is entitled to communicate with employees to discuss union membership and to represent their industrial interests during working hours or work breaks, or before or after work.</p>	<p>A delegate must <u>not</u> hinder, obstruct or prevent the normal performance of work or employees exercise of their rights to freedom of association.</p>
Access to workplace and facilities	<p>A delegate must be provided with access to or use of:</p> <ul style="list-style-type: none">• a room or area to hold discussions that is fit for purpose, private and accessible;	<p>An employer does <u>not</u> need to provide access to or use of a facility if:</p> <ul style="list-style-type: none">• the workplace does not have the facility;

	<ul style="list-style-type: none"> • a physical or electronic notice board; • electronic means of communication ordinarily used in the workplace by the employer to communicate with employees; • a lockable filing cabinet or other secure document storage area; and • office equipment including printers, scanners and photocopiers. 	<ul style="list-style-type: none"> • due to operational requirements it is impracticable to provide access to or use of the facility; or • the employer does not have access to the facility and it is unable to obtain access after taking reasonable steps. <p>An employer does <u>not</u> need to provide a delegate with access to electronic means of communication in a way that discloses individual contact details of employees.</p>
Training	A delegate is entitled to up to 5 days of paid time during normal working hours for initial training when appointed, and at least 1 day each subsequent year, to attend training related to representation of the industrial interests of employees.	<u>Only</u> one delegate per 50 employees is allowed to access this right and it does <u>not</u> apply to small business employers.

What should employers expect?

Given the new delegates' rights clause inserted into modern awards together with the many changes to the Fair Work Act 2009 (Cth) which promote union activity introduced by the Federal Government in recent years, employers should expect:

- to see unions exercising 'right to entry' at their workplace to support membership drives;
- to receive notices from employees that they have been appointed union delegates;
- greater union involvement in consultation, performance management and disciplinary processes at their workplaces;
- to receive requests by delegates to access workplace facilities including work communication systems (e.g. emails) for the purposes of undertaking union business;
- to receive requests by delegates for paid leave to attend union training; and
- where they are involved in enterprise bargaining, logs of claims to include claims for enhanced delegates' rights.

We also expect to see the new delegates' rights to be tested over coming months and years as we consider there is much scope for disputation over the breadth of these rights having regard to the limitations placed on their exercise. For example, a delegate has a right to communicate with employees during work hours to discuss union membership, but the delegate must not obstruct or hinder the normal performance of work. Will a delegate calling an impromptu meeting of employees causing normal work to temporarily stop be considered obstructing or hindering the normal performance of work? A 'lawyers' picnic' we hear you say?

Key takeaways

In light of these changes, clients which have delegates appointed to their workplaces, should:

- provide training to managers about delegates' rights to minimise the risk of disputation and claims that they have breached the Fair Work Act 2009 (Cth) and the applicable modern award (or enterprise agreement);
- ensure that delegates are aware of the limitations which apply to the exercise of their rights and what constitutes unacceptable conduct; and
- consider how delegates will be able to access workplace facilities to undertake union business.

In addition, clients involved in enterprise bargaining will need to include a delegates' rights clause in their enterprise agreements which must not contain terms that are less favourable than the new delegates' rights clause inserted into modern awards.

Please contact any member of the HFW team if you would like advice about how your business can prepare for these changes.

Authors



MARK SANT

Partner, Sydney

T +61 (0)2 9320 4601

E mark.sant@hfw.com



MILLY KHAN

Associate, Sydney

T +61 (0)2 9320 4607

E milly.khan@hfw.com

Our Team



SIMON BILLING

Partner, Perth

T + 61 (0)8 9422 4716

E simon.billing@hfw.com



STEPHANIE NICOL

Legal Director, Sydney

T + 61 (0)2 9320 4686

E stephanie.nicol@hfw.com



SHEREE LUO

Associate, Sydney

T +61 (0)2 9320 4616

E sheree.luo@hfw.com



JAKE REDDIE

Senior Associate, Sydney

T +61 (0)2 9320 4606

E jake.reddie@hfw.com



RUSH JAYAWEERA

Associate, Sydney

T +61 (0)2 9320 4641

E rush.jayaweera@hfw.com



SERENA BILLING

Legal Director, Perth

T + 61 (0)8 9422 4715

E serena.billing@hfw.com



KRISTEN BARRATT

Special Counsel, Sydney

T + 61 (0)2 9320 4669

E kirsten.barratt@hfw.com



ISABELLA PAGANIN

Senior Associate, Sydney

T +61 (0)2 9320 4664

E isabella.paganin@hfw.com



BLADE ATTON

Senior Associate, Sydney

T +61 (0)2 9320 4654

E blade.atton@hfw.com



VANESSA YOL

Associate, Sydney

T +61 (0)2 9320 4660

E vanessa.yol@hfw.com

hfw.com

© 2024 Holman Fenwick Willan LLP. All rights reserved. Ref: ASIA\62485060-1

Whilst every care has been taken to ensure the accuracy of this information at the time of publication, the information is intended as guidance only. It should not be considered as legal advice. Holman Fenwick Willan LLP is the Data Controller for any data that it holds about you. To correct your personal details or change your mailing preferences please email hfwenquiries@hfw.com

Americas | Europe | Middle East | Asia Pacific