



DELEGATES RIGHTS

The Fair Work Commission (FWC) has released the much anticipated “Delegates Rights” terms which have now been inserted into every modern award and took effect from the **1st July 2024**.

Decisions and actions of this nature would not normally spark the MTA into action but in the current political environment making changes to the rights and obligations to employers and employees our members need to be mindful of changes and possibilities moving forward.

Although the union movement is not currently active within our industry in general this is changing, and more and more members are being approached by “delegates” and “organisers”.

What you need to know as a member:

Who are we talking about?

A **workplace delegate** is a person or persons elected or appointed in accordance with the rules of a union. A delegate or representative must give their employer written notice of their appointment as a delegate.

Once this person or persons is identified you have an obligation to allow these delegates to perform the following:

1. Representation

The workplace delegate can represent the interests of all eligible employees within the business on the following.

- a. consultation on major workplace changes:
 - i. any change to “normal” rostering practices including but not limited to:
 1. Days of work
 2. Hours of work

- b. resolution of disputes:
 - i. any workplace disagreement can be challenged or arbitrated
- c. disciplinary processes:
 - i. All discipline processes should follow Fair Work rules
 - ii. If you are unsure of these contact your ER Advice Team at MTANSW.
 - iii. enterprise bargaining where the workplace delegate has been appointed as a bargaining representative or is assisting the union with enterprise bargaining; and
 - iv. any process or procedure outlined in an award, enterprise agreement, or employer policy that grants eligible employees the right to representation concerning their industrial interests

2. Communication

Workplace delegates are entitled to '**reasonable communication**' with '**eligible employees**.' These eligible employees are other workers in the workplace who are either members of the same union as the delegate or are eligible to be members of the same union.

Reasonable communication includes discussing union membership and representation of eligible employees. This communication can take place during working hours, work breaks, or before work, with due consideration for 'right to disconnect' laws. You should remind employees of their entitlement not to respond to a workplace delegate if contacted outside of their working hours.

3. Workplace facilities

Workplace delegates are entitled to access private spaces for discussions, a noticeboard, secure storage, email, and other standard office facilities such as printers, photocopiers, and Wi-Fi. However, an employer is not obligated to provide access to or use of these facilities when:

- a. they do not have the facility;

- b. due to operational requirements, it would be impracticable to provide access to or use of the facility in the manner sought; or
- c. they do not have access to the facility and are unable to obtain access after taking reasonable steps.

4. Delegate Paid Training

All employers excluding small business employers (being a businesses with 15 or less employees) are required to allow paid training for any delegate to attend training during normal work hours.

- a. No more than one workplace delegate per 50 eligible employees.
- b. No more than five days to attend initial training and at least one day each subsequent year.
- c. The delegate must give their employer the start and finish times of the training, the subject matter of the training and the name of the training provider at least five weeks before the training commences (or a shorter period where agreed).
- d. If requested by an employer, the delegate must provide employer with an outline of the training content.
- e. The delegate must provide evidence of attendance at the training to their employer within seven days of the training ending.

Protections for workplace delegates

Employers must not:

- ✓ unreasonably fail or refuse to deal with the workplace delegate; or
- ✓ make a false or misleading representation to the workplace delegate; or
- ✓ unreasonably hinder, obstruct or prevent the exercise of workplace delegates' rights under the Act, a modern award or an enterprise agreement.

Conditions on workplace delegates

Workplace delegates are subject to a number of vital conditions when seeking to exercise their delegates' rights, including that delegates:

- ✓ must comply with their duties and obligations as an employee.
- ✓ must comply with reasonable policies and procedures of their employer including in relation to safety and IT – email and social media and comply with the Right to Disconnect. If the employer does not contact employees outside of work hours nor should a union delegate.
- ✓ must not hinder, obstruct or prevent the normal performance of work; and
- ✓ must not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.

Common questions which members may ask?

1. Is this now finalised and settled?

The FWC has announced that they will review the direction in a further 12 months, during this period it is essential for all MTA members to report directly to the ER Team any interaction with a union delegate or representative. This gathering of information over the next 12 months will allow the MTA to make a recommendation to the Fair Work Commission at the completion of the 12-month period.

2. I have an enterprise agreement. Does this impact me?

Existing enterprise agreements are not affected immediately by the new delegates' rights term in modern awards, but employers are strongly encouraged to consider how the new rules will impact future bargaining.

3. Can a workplace delegate interrupt an employee in their ordinary work and stop them working?

There is nothing stopping a workplace delegate from communicating with employees during work hours so long as their communication is reasonable, and

they are doing so in relation to eligible employees' industrial interests. However, whilst workplace delegates have the right to communicate, there is no corresponding right on employees to allow them to stop work, including to have discussions with workplace delegates.

4. How does this impact investigations and disciplinary meetings?

Workplace delegates have the right to represent eligible employees in relation to disciplinary processes. This means, unlike the typical support person who may attend this type of meeting, but are not entitled to advocate for an employee, workplace delegates are allowed to speak/advocate/argue on an employee's behalf. This is a significant change, and will mean managers will need to be skilled at ensuring the responses they receive from a delegate truly represent an employee's views/account/opinion etc.

In addition, we are likely to see certain management processes such as investigations and performance management discussions, which can often start off as inquisitorial or supportive in nature, but which may ultimately result in disciplinary processes such as warnings or PIPs, become areas of dispute. Particularly where the line between when an investigation or performance management process ends and a disciplinary process begins, is unclear or blurred.

5. If I get this wrong what is the consequence?

Employers are prohibited under the Fair Work Act from:

- ✓ unreasonably failing or refusing to deal with a workplace delegate; or
- ✓ 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.

Employers in breach can face fines of up to \$19,800 for an individual and up to \$99,000 for a company.

The rights and entitlements of workplace delegates are also 'workplace rights'. Accordingly, if an employer was to take 'adverse action' (e.g. dismiss, treat them differently, demote them, cut their shifts) against an employee for exercising their rights as a delegate, they will have breached the general protections provisions of the Fair Work Act. and could face similar fines of up to \$19,800 for an individual and up to \$99,000 for a company per breach.

6. I've got a union delegate, but the union has never notified me

Under the modern award term, before exercising a workplace delegate entitlement, an employee who is a delegate must give their employer written notice of their appointment or election as a workplace delegate. If an employer requests proof or evidence this must also be provided. Similarly, if an employee ceases to be a delegate they must give written notice to their employer within 14 days under the modern award term. It is important to be aware that this obligation does not apply to employees who are not modern award covered, but who have delegates' rights and entitlements under the Fair Work Act.

Action required

We recommend all employers with award covered employees to review the new delegates' rights clause in detail and assess its implications for your organisation. You can read the full modern award delegates' rights determination from the Fair Work Commission here. [Delegates rights](#)

Given the immediate nature of these changes, MTA NSW also recommends the following steps to ensure compliance with the new requirements:

- ✓ Educate managers on the new delegates' rights term in modern awards, the entitlements it gives delegates in the workplace and the obligations on employers and managers when dealing with delegates, particularly in regards to workplace disciplinary proceedings and disputes;
- ✓ Ensure delegates and eligible employees are aware of the conditions attached to the exercising of the new delegates' rights; and
- ✓ Update payroll systems so that they can process requests for paid delegate training leave, where applicable.

To assist businesses and managers with navigating these changes in the workplace, MTA NSW will hold a webcast in the coming months to discuss these changes, their impact and answer questions you might have. Keep an eye out on the website for an update.

In the meantime, if you require any specific assistance as a result of the new delegates rights term our team is available to assist. Please do not hesitate to contact us at eradvice@mtansw.com.au for tailored advice and support.