



RIGHT OF ENTRY

This Fact Sheet provides information about the right of entry requirements in the *Fair Work Act 2009* (Cth) (FW Act).

Right of entry permits

The right of entry provisions in the FW Act allow union officials who hold valid entry permits to enter employers' businesses for certain purposes. Union officials can apply to Fair Work Australia for a right of entry permit. Fair Work Australia will issue entry permits to officials who are 'fit and proper' persons. Permits are issued for three years.

Entry permits issued under the *Workplace Relations Act 1996* (WR Act) continue to have effect and are subject to any conditions imposed by that Act (including the expiry date). An entry notice given under the WR Act will be valid for entry under the FW Act as will a notice to produce records under in the WR Act.

When can a permit holder enter a workplace?

The FW Act allows a permit holder to enter premises for two specified purposes. The first is to investigate a suspected breach of the FW Act or a term of a fair work instrument (eg a modern award or enterprise agreement) and the second is to hold discussions with employees.

The FW Act also imposes additional conditions on a permit holder when entering premises under a State or Territory occupational health and safety (OH&S) law.

Requirements for entry under the Fair Work Act

Before a permit holder may enter an employer's premises, a permit holder must notify the occupier of the premises of the fact that they intend to enter, unless Fair Work Australia has issued an exemption certificate – see below. Notice must be provided during working hours and at least 24 hours, but not more than 14 days, before entry.

Entry can only occur during working hours and on a day specified in the notice. A permit holder may not enter that part of the premises used mainly for residential purposes.

The permit holder must also:

- Show his or her entry permit and entry notice on request and, where the permit holder is investigating a suspected breach, before inspecting or copying records or documents; and
- Comply with reasonable requests by an employer to adhere to occupational health and safety requirements or to meet in a certain part of the premises.

Investigating a suspected breach

A union official can only enter premises to investigate a suspected breach where three conditions are met:



1. The permit holder reasonably suspects that a breach of the FW Act or a fair work instrument (ie a modern award or enterprise agreement) has occurred or is occurring. A union may not engage in investigations where there is nothing to suggest that a breach has occurred.
2. The suspected breach relates to or affects a member of the permit holder's union who is working on the premises.
3. The permit holder's union is entitled to represent that member. This third condition differs to the previous arrangements – right of entry is linked to a union's entitlement to represent the industrial interests of the employee, rather than a requirement for the union to be bound to a particular instrument that covers employees at the workplace.

The union official must give the occupier of the premises and any affected employer at least 24 hours notice of their intention to enter the premises to investigate a suspected breach. The notice must be given during working hours and must include details of the alleged breach, a statement that the union is entitled to represent employees affected by the breach and a reference to the part of the union's rules that gives that right.

A union may apply to the Fair Work Australia for an exemption certificate so that entry into premises may occur without giving the required notice. Fair Work Australia must reasonably believe that advance notice might result in the destruction, concealment or alteration of relevant evidence. The exemption certificate must specify particulars of the suspected contravention, or contraventions, to which the entry relates.

For the purpose of investigating the suspected breach, the permit holder can inspect any work, process or object relevant to the suspected breach, interview any person about the suspected breach provided that the person consents and the union is entitled to represent the person's interest and inspect and obtain copies of records relevant to that suspected breach. A permit holder may not inspect non-member records unless the record substantially relates to a member, or the non-member consents in writing or the permit holder obtains an order from Fair Work Australia to permit access to non-member records. Within five days after examining records, a permit holder may request an affected employer to produce or give access to records directly relevant to the suspected breach. The affected employer must produce the records unless to do so would contravene a law of the Commonwealth or of a State or Territory.

Information obtained in the course of investigating a suspected breach must not be disclosed for a purpose other than rectifying the alleged breach. Information obtained under right of entry provisions is also protected by the *Privacy Act 1988* and the requirements of any State or Territory laws.

Holding discussions with employees

Union officials also have a right of entry to hold discussions with employees that the permit holder's union is entitled to represent. This is an important difference to the provisions of the *Workplace Relations Act 1996*, which restricted discussions to employees covered by an award or collective agreement that was binding on the relevant union and who were members of the union or eligible to become members of that union. Discussions can only be held during the employees' mealtimes or other breaks.



The union official must give the occupier of the premises at least 24 hours notice of their intention to enter the premises to hold discussions. The notice must be given during working hours and must:

- specify that the entry is authorised under section 484 of the FW Act;
- include a statement that the union is entitled to represent the interests of an employee who performs work on the premises; and
- include a reference to that part of the union's rules that gives that right.

A permit holder must comply with a reasonable request by an employer that discussions are held in a certain room of the premises. The room must be 'fit for purpose' and the request may not be made with the intention of intimidating, discouraging or making it difficult for people to participate in discussions. Builders can nominate a particular route that a permit holder must take to access a particular location.

Requirements for entry made under OH&S laws

A union official must not exercise a State or Territory OH&S right unless the official has been issued with a permit under the FW Act. In some situations a union official with a permit issued under the FW Act is unable, under State law, to exercise right of entry. For example, the New South Wales OH&S legislation only enables an officer of a union to exercise right of entry. Depending on the rules of the union, this can preclude an employee, such as a union organiser, from right of entry. Builders should seek professional advice on this issue.

Like other forms of entry, a State or Territory OH&S right may only be exercised during working hours and the permit holder must comply with any request by the employer to comply with OH&S requirements that applies to the premises.

If the prescribed State or Territory OH&S law gives the union official the right to inspect employment records, 24 hours notice of the intention to inspect the records must be provided, together with a reason for doing so. No advance notice is required in other circumstances. Master Builders supports safe and productive workplaces and can assist with advice about union rights of entry under State and Territory OH&S law.

What happens if union officials breach the provisions?

There are penalties for anyone who misuses his or her entry rights or provides misleading information about his or her eligibility to enter premises. Their entry permit can be revoked or suspended by Fair Work Australia and fines can be imposed for breaching the non-disclosure requirements for information obtained by a permit holder. Abuse of right of entry provisions may lead to the renewal of a permit being denied on the grounds that the person is no longer a 'fit and proper' person.

What should employers do?

If a union official wishes to exercise right of entry, employers should check that all of the requirements for right of entry have been met. Employers may direct the union to meet in a particular location and may nominate a particular route that a permit holder must take to access a particular location. Employers must not unduly delay entry onto premises by a permit holder who is entitled to enter the premises. Employers must also not intentionally hinder or obstruct a permit holder from exercising their right of entry.



FOR FURTHER INFORMATION

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Disclaimer: This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.