# Workplace Delegates' Rights

## Employer Guide

Australian Chamber of Commerce and Industry

Canberra BUSINESS CHAMBER



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# 1. Introduction

**Commenced:** 15 December 2023 for legislation, 1 July 2024 for modern award term.

## Highlights

- The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* has amended the *Fair Work Act 2009* (FW Act) to provide specific rights and protections for workplace delegates in representing certain employees in the workplace.
- The FW Act now requires employers to allow workplace delegates to reasonably communicate with other union members (and potential members) in the workplace about matters of industrial concern and to represent them in any workplace disputes
- Employers are required to provide delegates with reasonable access to the workplace and workplace facilities to undertake their duties.
- Workplace delegates are entitled to paid time during normal working hours to attend training in relation to their role (except for employees of small businesses).
- From 1 July 2024 modern awards, new enterprise agreements and workplace determinations are required to contain clauses providing for these workplace delegate rights.
- Employers who unreasonably refuse to deal with delegates, mislead them or hinder and obstruct the exercise of their rights as delegates will be liable under the General Protections provisions of the FW Act.
- Employers should be educating managers and leaders on these changes to ensure they are well understood, and the general protections provisions of the FW Act are not breached.

## Overview

1.1 As a result of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth), the FW Act now contains new rights and protections for workplace delegates when they are carrying out their role in the workplace.

1.2 Whilst protections for workplace delegates' rights are not new,1 what is new is a codification of such rights being set out in detail in the FW Act and extending the general protections regime to them.

1.3 Under the new provisions in the FW Act, a workplace delegate now has the express right to:

a. **represent the industrial interests of members**, and any other persons eligible to be a member, including in a dispute with their employer;2

b. **reasonable communication with members**, and any persons eligible to be a member, in relation to their industrial interests;3

c. **reasonable access to the workplace and workplace facilities for the purpose of representing** those interests;4 and

d. **reasonable access to paid time for training**, during normal working hours for the purposes of workplace delegate related training. This right does not apply though if the delegate's employer is a small business. (i.e., employer with fewer than 15 employees at the time the delegate requests the training).5

1 Clauses providing protection for union delegates were commonly included in federal awards from the 1920s until the late 1990s. see for example the *Coal Trades Award 1952; Re Australian Public Service, General Employment Conditions Award 1995 and Other Awards (No 2)* (1998) 85 IR 361; FW Act ss *Award Modernisation* [2008] AIRCFB 1000.

2 350C(2) FW Act ss 350C(3) FW

3 Act ss 350C(3) FW Act ss 350C(3)

4

5

1.4 In addition to the new workplace delegates' rights and protections in the FW Act, all modern awards were varied by the Fair Work Commission (**FWC**) from 1 July 2024 to include a new term relating to the rights of workplace delegates.6

1.5 All enterprise agreements put to a vote on or after 1 July 2024 will also be required to contain a delegate's rights term.7

### New protections for delegates

1.6 In addition to the new rights for workplace delegates, the FW Act now also provides for a number of specific protections for workplace delegates.

1.7 Under the changes, employers are prohibited from:

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

b. knowingly or recklessly making a false or misleading misrepresentation to a workplace delegate; and

c. unreasonably hindering, obstructing or preventing the exercise of rights of a workplace delegate.8

1.8 This is a civil remedy provision, and only applies to an employer when they are dealing with a workplace delegate acting in that capacity.

1.9 In any proceeding, the onus will be on the employer to show that their conduct was not unreasonable.

### Using this Guide

1.10 This guide is intended to help employers navigate the recent changes and offer practical advice for complying with new obligations. It is important that employers familiarise themselves with these changes, particularly given the potential ramifications of not complying with the changes. Potential ramifications may include the possibility of breaching the general protections provisions of the FW Act from which damages and penalties may flow with liability under these provisions (noting also that the reverse onus will apply to employers).

1.11 The guide should serve as a starting point for understanding. It does not cover every single aspect of the workplace delegates right changes. Further advice should always be sought for the resolution of specific issues.

1.12 The guidance in this document was finalised on 6 August 2024 and may be subject to future revision.

### Non-employee regulated workers

1.13 The Closing Loopholes changes covered in this guide also require employers of non-employee regulated workers (i.e. employee-like workers and road transport contractors) to allow workplace delegates to communicate with other workers who are current or prospective union members at the workplace. Employers will be required to provide delegates with reasonable access to the workplace to undertake their duties as delegates. Workplace delegates will be entitled to paid time during normal working hours to attend training in relation to their role (except for small businesses). An employer who fails to provide a workplace delegate with the new entitlements afforded by the FW Act will be liable under the General Protections provisions of the FW Act.

1.14 These changes will commence from 6 August 2024 (or an earlier date fixed by proclamation).9

## Further Guidance

1.15 The Fair Work Commission has a new factsheet on workplace delegate's rights and general protections. The Fair

1.16 Work Ombudsman provides some general information on union membership and workplace delegates. The

1.17 Department of Employment and Workplace Relations (**DEWR**) has a factsheet on enhancing delegates' rights. The

1.18 Fair Work Commission has extensive advice relating to adverse action and workplace rights in its general protections benchbook.

6 FW Act ss 149E FW Act ss
7 205A; ss201(1A) FW Act ss
8 350A FW Act ss 350B
9

# 2. New workplace delegate rights terms in Modern Awards & Enterprise Agreements

## Modern Awards

### Overview of the FWC's task

2.1 In addition to the codification of workplace delegate rights in the FW Act, the Closing Loopholes changes also require modern awards to contain a term providing for workplace delegate rights (**delegates' rights term**) and for the FWC to vary existing modern awards to provide for this.

2.2 On 28 June 2024, the Fair Work Commission published a Statement setting out the final delegates' rights term (**'Delegates' Rights Term'**) to be inserted into all modern awards. The final determination varying all 155 modern awards to include the Delegates' Rights Term took effect on 1 July 2024.

2.3 The Commission also added an additional subclause for 38 modern awards to deal with the interaction of the Delegates' Rights term with other clauses of those awards which may be inconsistent with the term because they provide more favourable entitlements.

2.4 The new Delegates' Rights Term to be inserted into all modern awards does not amend or vary the rights contained for non-award covered workplace delegates in the FW Act.

2.5 This change to modern awards, provides for the exercise of the workplace delegates' rights that have been inserted into the FW Act.

2.6 Accordingly, an employer will be taken to be complying with the new delegates' rights in the FW Act where the employer complied with a modern award delegates' rights term.10 Employers can rely upon the new Delegates' Rights Term contained in all modern awards as the complete statement of their obligations in relation to workplace delegates' rights.

2.7 The Fair Work Commission will conduct a review of the term after 12 months of operation to deal with any issues which arise with respect to its operation, generally or in relation to individual modern awards.

*A copy of the Fair Work Commission Statement containing the new Delegates' Rights Term is attached to this Guide for reference.*
Key features of this Delegates' Rights term are outlined in sections 3, 4, 5, 6 and 7 that follow.

### Delegates rights' in modern awards

2.8 Whilst the availability of workplace delegates' training for the purpose of dispute resolution training was a feature of some Awards, it was not generally a feature across the Award system. Nor were the new delegates' rights concerning reasonable access to facilities and communication with members and potential members. Such entitlements were more commonly reflected in the terms of enterprise agreements with highly unionised workforces.

10 FW Act ss 350C(4)

## Enterprise Agreements

2.9 At the enterprise agreement level, all enterprise agreements that commenced their access period from 1 July 2024 (that is the employer has asked employees to vote on the enterprise agreement before that date), will need to have a "delegate's rights" clause that is **at least** as favourable as the new Delegates' Rights Term that would otherwise apply to the employee.

2.10 If there is no term in the proposed enterprise agreement, or the term is **not** as favourable as any aspect of the new Modern Award delegates' rights clause, then the Award clause applies as a term of the enterprise agreement.

### What happens if a delegate's rights term already existing in an enterprise agreement

2.11 Some employers may already provide rights for workplace delegates in their existing enterprise agreements.

2.12 The provisions requiring enterprise agreements to include a delegate's rights term do not apply to an enterprise agreement if the vote on that agreement commenced before 1 July 2024 (provided the vote is successful, and the FWC ultimately approves that agreement).

### What about workplace determinations?

2.13 The requirement to include a delegates' rights term also applies to workplace determinations made on or after 1 July 2024.

### What happens if I have a workplace delegates' rights term in my enterprise agreement and the award term underpinning it is subsequently changed or amended?

2.14 If an award later changes its delegates right term, the term of an enterprise agreement does not change.

## General Advice

### Bargaining

2.15 With the introduction and implementation of the new Delegates' Rights Term, employers will now have to explain and communicate to employees why they are putting such a term into an enterprise agreement (either initially or at the next round of bargaining). Employers should be prepared to have such explanatory discussions with their teams.

2.16 In light of the introduction of the new Delegates' Rights Term, employers, especially those in workplaces with a strong union presence, will need to consider their bargaining strategy, including what concessions, if any, they are prepared to make during bargaining in relation to delegates' rights issues.

2.17 It is likely that unions will view the rights and entitlements of workplace delegates in the FW Act and any applicable modern awards as a 'minimum'. This will therefore likely enliven claims for elevated workplace delegates' rights in enterprise bargaining.

2.18 Employers with limited or no union presence or who are likely to be negotiating an enterprise agreement without union participation still need to include the new Delegates' Rights Term in an agreement despite their limited practical or immediate utility in the short term. Such employers should remain cognisant of the prospect of these new powers being utilised to increase union membership at their workplace.

### Consequences

2.19 Under the Fair Work Act, employers are prohibited from:

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

b. knowingly or recklessly making a false or misleading representation to a workplace delegate; or

c. unreasonably hindering, obstructing or preventing the exercise of rights of a workplace delegate.

2.20 Employers in breach of such provisions can face fines of up to $19,900 for an individual and up to $90,000 for a company. These figures are calculated at the time of publication.

2.21 The rights and entitlements of workplace delegates are also considered to be 'workplace rights' under the Fair Work Act. *Please see Part 8 of this Guide for more information about the general protections regime and how it applies to workplace delegates' rights.*

# 3. Who is a workplace delegate?

## Overview

3.1 A workplace delegate (also previously known as 'shop stewards' or 'union reps') is a person who works in a business/organisation who has been appointed or elected, in accordance with the rules of an employee organisation (e.g. a registered union),11 to be a delegate or representative (however described) for members and prospective members of the union in the workplace.12

3.2 Most trade union rules provide for workplace delegates (the definition is sufficiently broad to capture workplace delegates across a range a union regardless of the language or naming protocols used to describe the role in each union) and how they are authorised as well as their role and responsibilities, etc. The identification of workplace delegates is therefore largely left to the trade union concerned under its registered rules.

### When will a workplace delegate be acting in that capacity?

3.3 A workplace delegate is only afforded protection in the Fair Work Act when the workplace delegate is "acting in that capacity".13

3.4 The FW Act is silent on when a workplace delegate will be "acting in that capacity".

3.5 It is likely that when a workplace delegate is conducting tasks in line with the duties of their employment, they are acting in their capacity as an employee rather than as a workplace delegate.

3.6 The High Court has however previously held that where an employee is acting lawfully in union activity, the individual's conduct cannot be divorced from the circumstances of their actions.14 It is likely that when a workplace delegate is "acting in their capacity" as a workplace delegate, their actions will be viewed through that lens, rather than viewing them as acting in their capacity as an employee.

**Example**

A workplace delegate is engaged in negotiation on behalf of union members and tells management that they are 'crazy'.

This would be seen not as an employee being insubordinate or insulting to management but rather as one negotiating party speaking to another.

Therefore the workplace delegate could not be disciplined for misconduct due to this incident. They are not acting in their capacity as an employee when they are negotiating. Any such discipline would likely be a form of adverse action in breach of the general protection's provisions of the FW Act.

11 FW Act ss 12; a registered union under the Registered Organisations Act
12 FW Act ss 350C (1)
13 FW Act ss 350A(2)
14 Construction, Forestry, Mining and Energy Union v BHP Coal Pty Ltd [2014] HCA 41 at [42]

### Workplace delegates are still employees

3.7 It is important to remember however that workplace delegates remain first and foremost employees. They are not a form of quasi union official, paid for by an employer.

3.8 Whilst being appointed or elected a workplace delegate confers on the delegate certain rights and protections whilst performing their duties as a workplace delegate, it is not a magic cloak that provides them with immunity from liability for wrongful actions.15

3.9 A workplace delegate is still subject to their ordinary contractual obligations as an employee including that the employee must continue to follow lawful and reasonable directions from their employer.16

3.10 In addition, whilst the employee is not acting in their workplace delegate capacity they are to be treated like any other employee.

### Modern Awards: Notification Requirements

3.11 Under the new Delegates' Rights Term, before exercising a workplace delegate entitlement, an employee who is a workplace delegate must give their employer written notice of their appointment or election as workplace delegate. In the event the employer requires proof of the workplace delegate's election or appointment, this must also be provided to the employer.

3.12 Similarly, in the event the employee ceases to be a workplace delegate, they must give written notice to their employer within 14 days under the new Delegates' Rights Term.

3.13 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 FW Act.

## Common Questions

### Will my workplace automatically have a workplace delegate as a result of the recent change in the law?

No, whilst many unions may see the new workplace delegate rights as an opportunity to grow union membership and influence workplaces that have not traditionally been unionised, the FW Act does not require workplaces to have a workplace delegate. All it does is provide for limited rights and protections for workplace delegates where they do exist in a workplace.

### Are workplace delegates the same as union organisers?

No, a workplace delegate is an employee appointed or elected by other union members in the same workplace to represent them. Whereas a union organiser is a union official who is employed by and works for union and is not an employee of the workplace.

A union organiser will typically liaise with multiple workplace delegates across multiple workplaces.

### Is it possible to have more than one workplace delegate in my workplace?

Yes, it is. Whilst the FW Act changes do not specifically address having more than one delegate (e.g. through co-delegates or head delegates), there are no specific restrictions on the number of employees who might be a workplace delegate in a particular workplace.

The union movement currently promotes workplaces having multiple delegates in order to ensure delegates aren't overwhelmed and to ensure they can cover and fill in for other delegates when they are sick, on holidays etc.17 Whilst unlikely, it is possible, this could in some circumstances lead to some gaming where a large number of employees are appointed as workplace delegates as an industrial tactic.

15 2 BHP Co Ltd (No 2) 1961 AR 48 at 66-7
16 Grubisic v Chubb Security Services Limited [2011] FWA 4322; Re F.E.D.F.A. and Garden Island Dockyard (1964) 2107 C.A.R. 806
17 Australian Unions, union delegates accessed at https://www.australianunions.org.au/factsheet/union-delegates/

### Will I know who is an authorised workplace delegate (through appointment or election) in my workplace?

For delegates seeking to exercise rights covered by the Delegates' Rights Term in modern awards, notification requirements apply (see paragraphs 3.10 to 3.12 above).

However, where the delegates are not exercising rights under the Delegates' Rights Term, there are no positive notification obligations. In these circumstances, you will likely need to initially accept an employee notifying you that they are a workplace delegate (which may first arise when they seek to exercise one of their new rights as workplace delegate).

If you are not covered by an award or enterprise agreement with such a clause, you will likely need to initially accept an employee notifying you that they are a workplace delegate (which may first arise when they seek to exercise one of their new rights as workplace delegate).

Following notification an employer could make inquiries with the relevant union requesting some form of written confirmation or evidence that the employee has been duly appointed or elected as a delegate. However under the law a union is not under any obligation to provide you with this information.

In addition, the courts have previously taken a 'common sense' approach to compliance with things like union rules and regulations so long as there is substantial compliance.18

### What is the difference between a workplace delegate and an HSR?

An HSR (health and safety representative) is also an employee appointed or elected by other union members in the same workplace to represent them. However, an HSR can only act on work health and safety issues (things that affect the physical and/or mental health of workers).

HSR's also have different powers to workplace delegates.

### Can an employee be a workplace delegate of an unregistered union?

Yes, however delegates of unregistered unions are not entitled to the specific rights and obligations under the new delegates' rights provisions, only delegates from registered unions who are elected or appointed in accordance with the registered unions rules.

### Do delegates get additional pay from the union?

No, delegates do not ordinarily receive remuneration from the union for being a delegate.

## General Advice

### Determine your union coverage

3.14 Consider which union or employee organisation(s) have eligibility rules which entitle them to represent your workers. This will assist you to more successfully prevent or avoid disputes regarding the operation of these provisions.

3.15 If you already have union members, this should be a relatively straight forward process. If you don't yet have any union members you will need to consider which unions eligibility rules will be reasonably likely to cover the employment of your employees.

3.16 Understanding which union(s) eligibility rules cover your business will enable you to determine under those roles how a workplace delegate can either be appointed or elected as a delegate in your workplace.

### Keep a record of who is/are your workplace delegate(s)

3.17 You should keep a record of who are workplace delegates in your workplace. This will help to educate your leaders and managers on who is covered by the new workplace delegates' rights and protections when acting in the capacity of a workplace delegate in the workplace.

18 Project Blue Sky Inc v Australian Broadcasting Authority [1998] HCA 28; Ramsay v Menso [2018] FCAFC 55

# 4. Representation right

## Overview

4.1 Workplace delegates have a new express right to represent the 'industrial interests' of union members and prospective union members, including in any workplace disputes (if the individual concerned so wishes).

4.2 All employers need to ensure any workplace delegates at their workplace are afforded this right.

### Industrial interests

4.3 'Industrial interests' is not defined in the FW Act. It is very likely that the parameters of 'industrial interests' will be tested and refined by the Fair Work Commission.

4.4 Interests which are 'industrial' are typically marked by what the Courts have described as an 'industrial character' taking place in the areas of disputation and bargaining (though this is not determinative).19 It is therefore likely that it will encompass matters affecting a union member or prospective member such as:

a. disputes involving an employee under an FW Act (and related legislation), modern awards and enterprise agreements;

b. consultation about major workplace change or changes to rosters or hours of work as defined within the existing model award terms for employee representative rights;

c. negotiating and bargaining; and

d. matters related to discipline and performance; and

e. matters related to working conditions and work practices.

4.5 At the very least, the industrial interests will likely be taken to encapsulate those identified in the new Delegates' Rights Term (addressed further below).

4.6 Conversely, it will be unlikely that workplace delegates will have a right to represent union and prospective union members in relation to matters which clearly do not constitute 'representing the industrial interest' of union members and prospective members in the workplace. These are likely to include:

a. attending social rallies;

b. engaging in community activism;

c. attending party political and/or union conferences; and

d. matters of a social nature or otherwise not related to work being performed.20

### Modern Awards: New Delegates' Rights Term

4.7 Under the new Delegates' Rights Term, the workplace delegate may represent the industrial interests of eligible employees who wish to be represented by the workplace delegate on matters including:

a. Consultation about major workplace change;

b. Consultation about changes to rosters or hours of work;

c. Resolution of disputes;

d. Disciplinary processes;

e. Enterprise bargaining where the workplace delegate has been appointed as a bargaining representative under section 176 of the Act or is assisting the delegate's organisation with enterprise bargaining; and

f. Any process or procedure within an award, enterprise agreement or policy of the employer under which eligible employees are entitled to be represented and which concerns their industrial interests.

19 Adams v Director of the Fair Work Building Industry Inspectorate [2017] FCAFC 228 at [54]; Viva Energy Refining Pty Ltd v Jones [2018] FWC 1542 at [38]

20 ABCC v CFMEU (The Cup of Tea Case) [2018] FCA 402 at [70]

### No obligation on employees to be represented — Freedom of association undisturbed

4.8 The new workplace delegates' right to represent the industrial interests of union members and prospective members does not compel a person to be represented by a workplace delegate even if they are a union member.

4.9 The FW Act protects freedom of association in the workplace by ensuring that persons are free to become, or not become, members of unions, are free to be represented, or not represented, by unions, and are free to participate, or not participate, in lawful industrial activities.21

4.10 Nothing in the Closing Loopholes Bill changes this foundational notion of freedom of association in the FW Act. In fact, there is a note included in the new workplace delegate representation right which states that it does not create any obligation on a person to be represented by a workplace delegate.22

**Example**

An employee, who is a member of the union, is direct by their employer to attend a meeting regarding a workplace altercation in order to resolve the issue.

There is a workplace delegate on site, however the employee does not wish for the workplace delegate to attend the meeting.

As the employee does not want the employee in the meeting, the workplace delegate does not have the right to attend to represent the employee's industrial interests.

## Common Questions

### Can an employee stop work to represent the industrial interest of a worker?

By its very nature, the right to represent the industrial interests of members and prospective members will take place inside the workplace. However, under the new Delegates' Rights Term and during the exercise of their entitlements, workplace must still comply with their duties and obligations as an employee, comply with all reasonable policies and procedures of the employer, no hinder, obstruct or prevent the normal performance of work and not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.

### Does it have to be reasonable for the workplace delegates to represent the industrial interests of members and prospective members?

No. Unlike all the other new workplace delegates' rights, the new right of workplace delegates to represent the industrial interests of members and prospective members is not conditioned or qualified by the requirement that such representation be 'reasonable'.

### Do employees have the right to be represented by a workplace delegate if there is one?

Technically no. Whilst workplace delegates have the right to represent the industrial interests of union members and prospective members, there is no corresponding right for employees to be represented by a workplace delegate (if there is one).

### How do the delegates' right reforms 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 the 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.

However, disciplinary processes can be distinguished from 'fact finding' or initial investigation processes. It is likely that some management discussions which can often start off as inquisitorial in nature might not be caught by the delegate rights of representation. However, this is likely to generate significant dispute over the coming months - particularly where the line between an investigation or performance management process ends and a disciplinary process begins, is unclear or blurred.

21 FW Act ss 336; ss 346; ss 347(b)(vii)
22 FW Act ss 350C(2)

# 5. Reasonable Communication Right

## Overview

5.1 Workplace delegates have the right to reasonable communication with members and prospective members, in relation to their 'industrial interests'.

5.2 Accordingly the communication right is not a right 'at large' to be used at will or as a general industrial tactic but rather is limited to a circumstances where the communication right is being exercised as part of representing the industrial interests of a member or prospective member.

5.3 All employers need to ensure any workplace delegates at their workplace are afforded this right.

### "Reasonable" communication

5.4 The right to communicate with members and prospective union members is limited to communication which is "reasonable" communication.

5.5 In doing so, it qualifies the entitlement of workplace delegates to communication by recognising that the practical application of workplace delegates' rights is likely to be contextual to the enterprise concerned.23 For example what may be reasonable in a steel works may not be reasonable in a kindergarten or a restaurant.

5.6 In considering whether the communication is "reasonable" regard must be had to:

a. the size and nature of the enterprise;

b. the resources of the employer of the workplace delegate; and

c. the facilities available at the enterprise.24

5.7 Whilst regard must be had to the above matters and circumstances, what is reasonable will likely require consideration of a variety of other circumstances present at a particular time and particular workplace that are relevant to the exercise of a workplace delegate's right.

### Industrial interests

5.8 The right of a workplace delegate to reasonable communication with members and prospective members only extends to communication which is 'in relation to' the union members' and prospective members' "industrial interests".

5.9 See section 4.3 to 4.5 above for more information on what is likely to constitute the "industrial interests" of union members and prospective members.

### Modern Awards: When the communication can take place

5.10 Under the new Delegates' Rights Term, the communication is permitted *"during working hours or work breaks, or before or after work."* However, the fact that delegates can communicate during working hours does not permit employees to cease conducting their normal working activities on paid work time to engage in industrial activities. Indeed, the Delegates' Rights Term expressly calls out that delegates must not *"hinder, obstruct or prevent the normal performance of work."*

23 FW Act ss 350C(5)
24 FW Act ss 350C(5)

## Common Questions

### Can a workplace delegate communicate during "paid time" with union members and prospective members?

The communication right does not make reference to "access to paid time" in order to communicate (unlike the right to paid time off for training).

Whilst not definitive, it is likely in most circumstances that to be reasonable, communication will need to be in non-paid time (for example during breaks) unless otherwise agreed with the employer.

This is somewhat reinforced by the new Delegates' Rights Term which entitles workplace delegates to communicate with eligible employees during working hours, work breaks or before or after work.

However, the fact that delegates can communicate during working hours does not permit employees to cease conducting their normal working activities on paid work time to engage in industrial activities. Indeed, the Delegates' Rights Term expressly calls out that delegates must not *"hinder, obstruct or prevent the normal performance of work"* when exercising delegates' rights under the modern awards.

### Can a workplace delegate cease work in order to communicate with union members and prospective members?

It will depend on the context as to whether such communication is "reasonable" communication. For example in a steel workers this might invoke a material issue of safety or in a childcare centre this may mean that the centre is failing to meet its mandatory staff ratios. In such circumstances a workplace delegate ceasing work to communicate would not be "reasonable" communication.

For delegates' rights exercised under a modern award, the Delegates' Rights Term makes it clear that when exercising their rights, the delegates must still comply with their duties and obligations as an employee and not hinder, obstruct or prevent the normal performance of work.

### Can employees (who are not a workplace delegate) cease work in order to communicate with a workplace delegate?

No, the FW Act extends no right or protection to union members and/or potential union members in terms of their communication with a workplace delegate and as such they have no right to cease work or leave their workstation without employer authorisation.

### Does the workplace delegates communication have to comply with an employer's IT policies and procedures?

This is likely to be a factor which tends towards the reasonableness of any communication. However, strictly speaking there is no prohibition in the legislation on a workplace delegate communicating with members and prospective members in breach of company IT policies and procedures.

However, when exercising their rights under the Delegates' Rights Term, the modern award specifically requires the delegate to comply with the reasonable policies and procedures of the employer including those pertaining to ICT resources.

### Does a workplace delegate have a right to employee records in order to be able to communicate with members and prospective members?

No. Employee's personal information remains protected and should continue to be dealt with in accordance with the *Privacy Act 1988* (Cth).

# 6. Reasonable Access to Workplace and Workplace Facilities Right

## Overview

6.1 Workplace delegates have the right to reasonable access to the workplace and workplace facilities where the business is being carried on, for the purpose of representing the industrial interests of members and prospective members.25

6.2 Given that the new Delegates' Rights Term provides a list of facilities delegates have a right to access, the right in the NES is likely to be applied in a manner aligned with the Delegates' Rights Term.

6.3 With this in mind, delegates likely have the following rights under both the Fair Work Act and the Delegates' Rights Term:

a. right to access private spaces to hold discussions;

b. a physical or electronic noticeboard;

c. secure storage (e.g., filing cabinet);

d. email and other standard office facilities. including printers, photocopiers and wi-fi.

6.4 However, an employer is not required to provide access or use of facilities under the Delegates' Rights Term (and likely also under the Fair Work Act) when:

a. they do not have the facility;

b. due to operational requirements, it would be impracticable to provide access to or use 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.

6.5 The access right is not a right 'at large' to be used at will or as a general industrial tactic but rather is limited to a circumstance where the access right is being exercised as part of representing the industrial interests if a member or prospective member.

6.6 A workplace delegate is only entitled to reasonable access to the workplace or workplace facilities in the context of representing the industrial interests of eligible employees.

6.7 All employers need to ensure any workplace delegates at their workplace are afforded this right.

### Reasonableness

6.8 The right to access to the workplace and workplace facilitates is limited to access which is "reasonable". In doing

6.9 so, it qualifies the entitlement of workplace delegates to access to the workplace and workplace facilities by recognising that the practical application of workplace delegates' rights is likely to be contextual to the enterprise concerned.26 In considering whether the communication is "reasonable" regard must be had

6.10 to:

a. the size and nature of the enterprise;

b. the resources of the employer of the workplace delegate; and

c. the facilities available at the enterprise.27

6.11 Whilst regard must be had to the above matters and circumstances, what is reasonable will likely require consideration of a variety of other circumstances present at a particular time and particular workplace that are relevant to the exercise of a workplace delegate's right.

25 FW Act ss350C(b)(i)
26 FW Act ss 350C(5)
27 FW Act ss 350C(5)

### Industrial interests

6.12 The access right is conditioned in that the access is for the "...purpose of representing those interests..." being the industrial interests in section 350C (2).

6.13 See section 4.3 to 4.5 above for more information on what is likely to constitute the "industrial interests" of union members and prospective members.

## Common Questions

### Can a workplace delegate access workplace facilities during "paid time"?

The access right does not refer to "access to paid time" in order to access workplace facilities (unlike the right to paid time off for training). Therefore any access during paid time will need to reasonable, this will be context and fact specific depending on the facilities accessed and for what purpose/use.

For delegates' rights exercised under a modern award, the Delegates' Rights Term makes it clear that when exercising their rights, the delegates must still comply with their duties and obligations as an employee and not hinder, obstruct or prevent the normal performance of work.

# 7. Reasonable Access to Paid Training Right

## Overview

7.1 Unless a workplace delegate works for a small business employer, they are entitled to reasonable access to paid time, during normal working hours, for the purposes of training related to representing the industrial interests of members and prospective members.28

7.2 Importantly small businesses are excluded from having to provide this right to workplace delegates.

7.3 The notion of trade union training leave is not a new concept. It has been a feature of the industrial relations landscape for decades original based on the Trade Union Training Authority.

7.4 All non-small business employers need to ensure any workplace delegates at their workplace are afforded this right.

### Small business exclusion

7.5 A small business employer is an employer with fewer than 15 employees at a particular time. This is the total number of individuals, not the full-time equivalent number. This can include people who are:

a. part time

b. full time

c. casual (only if they are engaged on a regular and systematic basis)

7.6 If an employer has 15 or more employees at a particular time, they are not a small business employer.

7.7 When counting the number of employees, employees of associated entities of an employer are included.

### Paid time

7.8 Paid time during normal working hours should be understood to be synonymous with leave from work in ordinary work hours without loss of pay.

7.9 It does not, for instance, lead to an employee whose regular pattern of attendance is between union training being scheduled for a Monday to Friday day worker on a weekend and expecting that they be paid at overtime rates.

7.10 Leave of absence whilst on training leave will be counted as service.

### Reasonable

7.11 The right to access paid time off for training is limited to situation in which it is "reasonable". In doing so, it qualifies the entitlement of workplace delegates to access paid time off for training by recognising that the practical application of workplace delegates' rights is likely to be contextual to the enterprise concerned.29

7.12 In considering whether the communication is "reasonable" regard must be had to:

a. the size and nature of the enterprise;

b. the resources of the employer of the workplace delegate; and

c. the facilities available at the enterprise.30

28 FW Act s35C(3)(b)
29 FW Act ss 350C(5)
30 FW Act ss 350C(5)

7.13 Whilst regard must be had to the above matters and circumstances, what is reasonable will likely require consideration of a variety of other circumstances present at a particular time and particular workplace that are relevant to the exercise of a workplace delegate's right such as:

a. how long the workplace delegate will be absent from work to attend the training;

b. how much notice is given by the employee (if any) to take the training;

c. whether the workplace delegate's absence due to attendance at the related training will adversely the operational requirements of the employer;

d. the content of the training;

e. the number of days that the workplace delegate has already been absent in the past 12 month period undertaking related training and the extent to which they have previously undertaken the training; and

f. the extent to which attendance at such training is necessary having regard to whether similar training has been attended in the past and/or whether other delegates working in the enterprise have already attended such training.

7.14 The modern award Delegates' Rights Term is likely to provide significant guidance on how the FW Act right might be determined by Courts for non-award covered employees. However, it remains possible that the Courts could identify certain paid training as reasonable that goes beyond (or differs from) the Delegates' Rights Term depending on the types of circumstances identified above.

### Modern Awards: paid training where delegates are covered by the Delegates' Rights Term

7.15 Under the Delegates' Rights Term, the requirements for employers to allow workplace delegates to access paid training are subject to the following conditions:

a. no more than one workplace delegate per fifty (50) eligible employees (see table below). This is to be determined on the day a delegate request to attend training and eligible employees includes full-time, part-time and regular casual employees.

b. no more than five (5) 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 give (5) weeks before the training commences (or a shorter period where agreed).

d. if requested by the employer, the delegate must provide the employer with an outline of the training content.

e. the delegate must provide evidence of attendance at the training to their employer within seven (7) days of the training ending.

f. the below table details the number of delegates entitled to training leave:

| Number of employees | Number of delegates with access to paid time for training |
|---|---|
| 0 – 14 eligible employees 15 – | No access to paid time for training |
| 99 eligible employees 100 – | Access to paid time for 1 delegate |
| 149 eligible employees 150 – | Access to paid time for 2 delegates |
| 199 eligible employees 200 – | Access to paid time for 3 delegates |
| 249 eligible employees 250 – | Access to paid time for 4 delegates |
| 299 eligible employees 300 – | Access to paid time for 5 delegates |
| 349 eligible employees 350 – | Access to paid time for 6 delegates |
| 399 eligible employees 400 – | Access to paid time for 7 delegates |
| 449 eligible employees 450 – | Access to paid time for 8 delegates |
| 499 eligible employees 500 – | Access to paid time for 9 delegates |
| 549 eligible employees | Access to paid time for 10 delegates and so on |

An employer may calculate the number of delegates entitled to training leave by using the following calculation:

*Number of employees / 50 = number of delegates entitled to training leave*

Where the result is not a whole number, round down to the nearest whole number.
For example, if the calculation yields a result of 2.98, the total number of entitled delegates will be 2.

# 8. Protections for workplace delegates & employer liability

## Overview

8.1 The rights and entitlements of workplace delegates will be 'workplace rights'. Accordingly, if an employer takes 'adverse action' (e.g., dismiss, treat them differently and to their detriment, demote them, cut shifts) against an employee for exercising such a right, they will have breached the general protections provisions of the FW Act (noting also that the reverse onus will apply). Consequently, employers could face fines of up to $19,800 for an individual and up to $99,000 for a company per breach.

8.2 In addition the Closing Loopholes changes have also introduced further protections with respect to workplace delegates which requires employer to ensure that they must not:

a. unreasonably fail or refuse to deal with the workplace delegate;

b. knowingly or recklessly make a false or misleading representation to the workplace delegate; or

c. unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate

(i.e. the right to reasonable communication, reasonable access to facilities and reasonable access to training for their role as a delegate).

8.3 The burden of proving that employer conduct is not unreasonable will lie with the employer.

**Example**

An employee who is a workplace delegate, attempted to attend a disciplinary meeting with another employee who is a member of the union and wanted the workplace delegate to attend the meeting.

At first the employer refused to allow the workplace delegate to attend the meeting, as the employer didn't want the delegate causing trouble.

After the workplace delegate was eventually allowed to join the meeting, the delegate was told by the employer that he was just to act as a support person and wasn't entitled to speak or answer questions on behalf of the employee.

After the meeting the workplace delegate made a successful adverse action application on the basis that the employer:

a. initially failed to deal with the delegate (by refusing his attendance at the disciplinary meeting to represent the industrial interests of the employee union member;

b. knowingly or recklessly make a false or misleading representation to the workplace delegate when he told the workplace delegate he was not entitled to talk or answer questions on behalf of the employee during the meeting; and

c. unreasonably hinder, obstruct or prevent the exercise of the rights of the workplace delegate by first preventing him from attending the meeting and secondly by refusing to allow him to speak and answer questions on behalf of the employee union member.

## General Advice

8.4 Internal policies and procedures will need to be updated so that these rights and entitlements are well understood. This is especially the case as the changes require employers to take a variety of steps to afford workplace delegates 'reasonable' access to the workplace and workplace facilities.

8.5 Given there is substantial scope for dispute as to the 'reasonableness' of the rights conferred on workplace delegates training for managers so that they understand their requirements will also assist in managing any potential disputation which may arise as a result.

# 9. Annexure A — Delegates' Rights: Manager Checklists

## Overview

### Who is a workplace delegate?

9.1 Do not get confused between delegates and union officials. A delegate is your employee who happens to be elected or authorised to be the unions delegate in your workplace/on your worksite.

Fair Work Act definition
A workplace delegate is a person appointed or elected by an employee organisation (e.g. a union) to be a delegate or representative for members working in a particular enterprise.

WORKPLACE DELEGATES HAVE CERTAIN 'RIGHTS' IN THE WORKPLACE.

They are allowed to do any of the following things:

- represent the industrial interests of members, and any other persons eligible to be a member, including in a dispute with their employer;
- reasonable communication with members, and any persons eligible to be a member, in relation to their industrial interests;
- reasonable access to the workplace and workplace facilities for the purpose of representing those interests, and
- reasonable access to paid time for training, during normal working hours for the purposes of workplace delegate related training. This right does not apply though if the delegate's employer is a small business.

What is considered reasonable will depend on a range of things including:

- size and nature of the business
- resources of the employer
- facilities available at the workplace.

### Where your behaviour can overstep the mark

As an employer of a workplace delegate, you must not:

- unreasonably fail or refuse to deal with a workplace delegate; or
- knowingly or recklessly make a false or misleading representation to a workplace delegate; or
- unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate

Be aware in any proceedings related to workplace delegates' rights, the onus will be on the employer to show that their conduct was not unreasonable.

## How to use the checklists

All workplace delegates have rights under the *Fair Work Act 2009* (Cth).

Employees covered by modern awards have the same rights, however modern award contains additional specific detail around the application of each of the rights and how they can be exercised in practice.

If an employee tells you they are a workplace delegate and they try to exercise a right as a delegate, first determine whether they are award covered or not. If they are not award covered, use Checklist 1. If they are award covered, used Checklist 2.

As the provisions in the FW Act are not as detailed as the modern award provisions, when seeking to determine whether the exercise of a particular right is reasonable or not the modern award provisions may be instructive for employers. For example, under the FW Act workplace delegates are entitled to "reasonable access to paid time off to attend paid training". The only further guidance provided in the FW Act regarding whether the delegate is being given "reasonable access to paid time off to attend training" is that regard must be had to the size, nature of the business, the resources of the employer and the facilities available at the business. Under the modern award delegate rights clauses however, further specific detail is provided as to what is reasonable. Accordingly, for non-award covered workplace delegate, the detail contained in modern awards, whilst not applicable or definitive it may still be instructive in some circumstances, in helping employer to assess what may be a 'reasonable' exercise of a workplace delegates' rights.

## What about enterprise agreements covered employees?

All enterprise agreements put to a vote on or after 1 July 2024 must also include the Delegates' Rights Term.

If a delegates' rights term in an enterprise agreement is less favourable than that of a relevant modern award, then the modern award term will be taken to be a term of the enterprise agreement.

For enterprise agreements already in existence or voted upon prior to 1 July 2025 the FW Act provisions will still apply. Enterprise agreement which incorporates modern awards may also be subject to their specific provisions in some circumstances.

The following checklists are directed at non-agreement (FW Act and Modern Award) covered employees.

We strongly recommend employers covered by an enterprise agreement seek further advice regarding their particular circumstances and the new workplace delegates' rights before utilising the checklists.

## Checklist A — Workplace Delegate's seeking to exercise Delegates' Rights under the Fair Work Act

A step-by-step process for managers: how to manage a workplace delegate

| Step 1: Check the employee's appointment or election as a workplace delegate | Notes |
|---|---|
| ☐ Is the employee an appointed or elected workplace delegate?<br>- Ask the employee for evidence of their appointment or election as a workplace delegate.<br>- If the employee is unwilling to provide evidence, contact the relevant union to confirm their status as an appointed or elected workplace delegate.<br>- **IMPORTANT:** Technically, there is no requirement under the Fair Work Act for a delegate to prove their status to you before exercising their rights. Therefore, if a workplace delegate is planning to carry out functions e.g. communicate to eligible employees, ask them to politely reschedule until evidence of their appointment can be presented. If met with refusal allow the workplace delegate to proceed — this will avoid potentially breaching any of theworkplace delegate's rights under the FW Act or relevant fair work instrument. In the meantime, immediately contact the relevant employee organisation to confirm appointment or election. | |
| ☐ Once satisfied that the employee is an appointed or elected workplace delegate, request that if they cease holding this position, they inform you as soon as practicable. | |
| ☐ Add the employee's name to your record of workplace delegates at the workplace for future reference. | |

| Step 2: Find out what industrial interest/s the workplace delegate is intending to represent for eligible employees | Notes |
|---|---|
| A workplace delegate is entitled to represent *'the industrial interests of union members, and any other persons eligible to be such union members, including in disputes with their employer'*.<br><br>☐ Ask the workplace delegate, "what is the industrial interest / matter that you are intending to discuss with eligible employees?"<br>- Such industrial interests / matters may include (non-exhaustive list):<br>☐ consultation about major workplace change;<br>☐ consultation about changes to rosters or hours of work;<br>☐ resolution of individual or collective grievances or disputes;<br>☐ performance management and disciplinary processes;<br>☐ enterprise bargaining;<br>☐ any process or procedure in which the employees are entitled to be represented.<br><br>⚠ The above is non-exhaustive list. If a workplace delegate seeks to exercise their rights for another reason, consider whether it is an "industrial interest / matter". If unsure seek professional/ legal advice before in any way obstructing or preventing the workplace delegate from acting.<br><br>IF NONE STILL PROCEED TO STEP 3 | Write the industrial interest / matter provided below: |

| Step 3: Assess whether the workplace delegate is seeking to exercise any entitlements related to their right to represent industrial interests | Notes |
|---|---|
| Is the workplace delegate potentially attempting to do any of the following:<br>☐ communicate with other employees who are either members or potential members of the union — **GO TO STEP 4**<br>☐ access the workplace and/or workplace facilities — **GO TO STEP 5**<br>☐ access paid time off for workplace delegate — **GO TO STEP 6**<br><br>If more than one of the above applies work through each applicable step. | Write all applicable steps here: |

| Step 4: Reasonable communication | Notes |
|---|---|
| *Workplace delegates are entitled to reasonable communication with union members, and any other persons eligible to be such union members, in relation to their industrial interests.*<br><br>☐ Is the workplace delegate seeking to communicate with employees who are union members or prospective members about their industrial interests?<br>- This can include discussing union membership and/or consulting employees on matters related to their representation.<br>- This can be individually or collectively<br>- This can be during working hours or work breaks, before or after the end of work<br><br>If no, the communication by the workplace delegate would **NOT** be reasonable.<br><br>If yes, move to next question.<br><br>If the workplace delegates communication hindering, obstructing or preventing the normal performance of work?<br>If yes, the communication by the workplace delegate would likely **NOT** be reasonable<br><br>If no, the communication is likely reasonable. | |

| Step 5: Reasonable access to the workplace & workplace facilities | Notes |
|---|---|
| *Workplace delegates are entitled to reasonable access to the workplace and workplace facilities where the enterprise is being carried on.*<br><br>If a workplace delegate makes a request to access any of the following for the purpose of representing employee union members and prospective members interests, it is likely to be unreasonable if you do not provide it to them unless you do not have what is requested:<br>☐ a room or area to hold discussions which is fit for purpose, private and accessible by the workplace delegate and eligible employees;<br>☐ a physical or electronic noticeboard;<br>☐ electronic means of communication that are ordinarily used by the employer to communicate with eligible employees in the workplace;<br>☐ a lockable filing cabinet or other secure document storage area;<br>☐ office facilities and equipment including printers, scanners, photocopiers and wi-fi. | |

| Step 6: Reasonable access to training | Notes |
|---|---|
| Workplace delegates of non-small business employers are entitled to reasonable access to paid time, during normal working hours, for the purposes of related training.<br><br>☐ Are you a non-small business employer?<br><br> You are a non-small business employer if you have fewer than 15 employees. This is the total number of individuals, not the full-time equivalent number. This can include employees who are:<br>- full-time and part-time employees; and<br>- casual employees only if they are employed on a regular and systematic basis (similar roster or pattern each time) with a reasonable expectation of ongoing employment.<br><br>If you are a non-small business employer, move to the next question.<br><br>If you are a small business employer (with less than 15 employees) your workplace delegate is **NOT** entitled to paid time during normal working hours for training.<br><br>☐ Is what your workplace delegate seeking "reasonable access to paid time for training related to their role as a workplace delegate"?<br><br>This will depend on the specifics of what the employee is requesting and the surrounding circumstances.<br><br>The following may in some circumstances be indicators what the employee is seeking to exercise is "unreasonable":<br>- The training is not related to their role as a workplace delegate.<br>- If the employee has not provided reasonable notice (e.g. at least 5 weeks' notice)<br>- If the employee will not provide you with details of the subject matter and daily start and finish times of the training.<br>- The employee has requested more than 5 days initial training in the first year or more than 1 additional day each subsequent year.<br>- If other workplace delegates (totalling at least 1 per 50 employees) have already attended delegate training in the past 12 months. | |

## Checklist B — Workplace Delegates' seeking to exercise Delegates Rights who are covered by a Modern Award

A step-by-step process for managers: how to manage a workplace delegate

| Step 1: Check the employee's appointment or election as a workplace delegate | Notes |
|---|---|
| ☐ Does the employee have evidence that he or she is an appointed or elected workplace delegate?<br>- Ask the employee for evidence of their appointment or election as a workplace delegate.<br>- If no evidence can be provided, ask the employee to obtain evidence as soon as possible or contact their relevant employee organisation to provide evidence to you of their appointment or election.<br><br>☐ Once satisfied that the employee is an appointed or elected workplace delegate, request that if they cease this position, they inform you as soon as practicable.<br><br>☐ Add the employees name to your record of workplace delegates at the workplace for future reference | Under all modern awards workplace delegates must provide you with evidence that would satisfy a 'reasonable person' of their appointment or election.<br><br>Ensure you keep a record of any evidence provided. |

| Step 2: Check the employee's appointment or election as a workplace delegate | Notes |
|---|---|
| A workplace delegate is entitled to represent *'the industrial interests of union members, and any other persons eligible to be such union members, including in disputes with their employer'*.<br><br>☐ Ask the workplace delegate, "what is the industrial interest / matter that you are intending to discuss with eligible employees?"<br>Such industrial interests / matters may include (non-exhaustive list):<br>☐ consultation about major workplace change;<br>☐ consultation about changes to rosters or hours of work;<br>☐ resolution of individual or collective grievances or disputes;<br>☐ performance management and disciplinary processes;<br>☐ enterprise bargaining;<br>☐ any process or procedure in which the employees are entitled to be represented.<br><br>⚠ The above is non-exhaustive list. If a workplace delegate seeks to exercise their rights for another reason, consider whether it is an "industrial interest / matter". If unsure seek professional/ legal advice before in any way obstructing or preventing the workplace delegate from acting. | Write the industrial interest / matter provided below: |

| Step 3: assess whether the workplace delegate is seeking to exercise any entitlements related to their right to represent industrial interests | Notes |
|---|---|
| Is the workplace delegate potentially attempting to do any of the following:<br>- communicate with other employees who are either members or potential members of the union — **GO TO STEP 4**<br>- access the workplace and/or workplace facilities — **GO TO STEP 5**<br>- access paid time off for workplace delegate — **GO TO STEP 6**<br><br>If more than one of the above applies work through each applicable step. | Write all applicable steps here: |

| Step 4: Reasonable communication | Notes |
|---|---|
| *Workplace delegates are entitled to reasonable communication with union members, and any other persons eligible to be such union members, in relation to their industrial interests.*<br><br>☐ Is the workplace delegate seeking to communicate with employees who are union members or prospective members about their industrial interests?<br>- This can include discussing union membership and/or consulting employees on matters related to their representation.<br>- This can be individually or collectively<br>- This can be during working hours or work breaks, before or after the end of work **BUT** cannot hinder, obstruct or prevent the normal performance of work.<br><br>If no, the communication by the workplace delegate would **NOT** be reasonable.<br><br>If yes, move to next question.<br><br>⚠ **IMPORTANT:** In communicating the workplace delegate MUST comply with your reasonable policies and procedures including codes of conduct, OH&S and ICT policies. | Write all applicable steps here: |

| Step 5: Reasonable access to the workplace & workplace facilities | Notes |
|---|---|
| *Workplace delegates are entitled to reasonable access to the workplace and workplace facilities where the enterprise is being carried on.*<br><br>If a workplace delegate makes a request to access any of the following for the purpose of representing employee union members and prospective members interests, you must provide it to them unless you do not have it:<br><br>☐ a room or area to hold discussions which is fit for purpose, private and accessible by the workplace delegate and eligible employees;<br>☐ a physical or electronic noticeboard;<br>☐ electronic means of communication that are ordinarily used by the employer to communicate with eligible employees in the workplace;<br>☐ a lockable filing cabinet or other secure document storage area;<br>☐ office facilities and equipment including printers, scanners, photocopiers and wi-fi.<br><br>⚠ **IMPORTANT:** In accessing these workplace facilities the workplace delegate MUST comply with your reasonable policies and procedures including codes of conduct, OH&S and ICT policies. | |

| Step 6: Reasonable access to training | Notes |
|---|---|

*Workplace delegates of non-small business employers are entitled to reasonable access to paid time, during normal working hours, for the purposes of related training.*

☐ Are you a non-small business employer?

You are a non-small business employer if you have 15 or more employees. This is the total number of individuals, not the full-time equivalent number. This can include employees who are:

- full-time and part-time employees; and
- casual employees only if they are employed on a regular and systematic basis (similar roster or pattern each time) with a reasonable expectation of ongoing employment.

If you are a non-small business employer, move to the next question.

If you are a small business employer (with less than 15 employees) your workplace delegate is **NOT** entitled to paid time during normal working hours for training.

☐ Have you already provided access to paid training to other workplace delegates in the workplace equating to at least 1 delegate per 50 employees in the past 12 months?

If yes, it would **NOT** be reasonable for the workplace delegate to access to training.

If no, move to next question.

☐ Has the delegate provided at least 5 weeks' notice, as well as the start and finishing times and subject matter of the training at least 5 weeks prior to its commencement?

If no, it would **NOT** be reasonable for the workplace delegate to access to training.

If yes, move to next question.

☐ Have you requested the outline of the training content and the employee has declined?

If yes, it would **NOT** be reasonable for the workplace delegate to access to training.

If no, it is reasonable for the workplace delegate to attend the training.

- You must advise the workplace delegate no less than 2 weeks before the training is scheduled to commence that their access has been approved.
- The workplace delegate must provide you with evidence that would satisfy a reasonable person of their attendance at the training within 7 days after the training ends.

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