



## Changes to state employment laws in WA

# New employee protections provisions

June 2022

New provisions have been introduced for the state industrial relations system to increase employee protections and assist in combatting wage theft.

These new provisions in the *Industrial Relations Act 1979* (IR Act) and *Minimum Conditions of Employment Act 1993* (MCE Act) were introduced by the *Industrial Relations Legislation Amendment Act 2021* and commenced on 20 June 2022.

This fact sheet provides details on the new provisions prohibiting:

- employers taking ‘damaging action’ against employees because they are able to make an employment-related inquiry or complaint;
- employers advertising for employees at a rate of pay below the legal minimum;
- employers compelling an employee to accept goods, accommodation or other services of any kind instead of money as part of the employee’s pay (‘payment in kind’);
- employers unreasonably requiring employees to spend their money in a particular way, or pay back their wages to the employer or another person (sometimes known as ‘cash backs’);
- sham contracting; and
- terms in a WA award, industrial agreement or contract of employment that:
  - permit the deduction from monies owed to an employee that are for the benefit of the employer or a party related to the employer, and are unreasonable; and
  - permit deductions or requirement to pay an amount of money to the employer or another person in relation to an employee under the age of 18, unless the deduction or payment is agreed to in writing by the employee’s parent or guardian.

### State employment laws have changed

This fact sheet is part of a suite of information on the changes to state employment laws that commenced on 20 June 2022. For details on the changes visit [www.dmirs.wa.gov.au/new-employment-laws](http://www.dmirs.wa.gov.au/new-employment-laws).

## Damaging action

New protections in the IR Act prohibit an employer from taking **damaging action** against an employee because the employee is able to make an **employment-related inquiry or complaint** to their employer or another person or organisation.

Damaging action includes:

- dismissing an employee, altering an employee's position to their disadvantage, refusing to promote or transfer an employee, or injuring an employee in their employment with the employer or another person (or threatening to do any of these things); and
- refusing to employ a prospective employee, or discriminating against a prospective employee, in their proposed terms and conditions of employment (or threatening to do either of these things).

An employment-related inquiry or complaint is one that an employee is able to make based on an entitlement or right that the employee has under a contract of employment, an industrial instrument or legislation relating to the employment.

The employee's complaint must be made genuinely, in good faith and for a proper purpose.

An employee is able to seek a civil penalty and relief in the Industrial Magistrates Court (IMC) if their employer has taken damaging action against them because the employee made (or proposed to make) an inquiry or complaint. Industrial inspectors and unions are also able to take proceedings to the IMC for damaging action.

When determining whether damaging action has occurred, there is a reverse onus of proof on the employer to prove that they did not take the action because the employee made (or proposed to make) an inquiry or complaint.

If the IMC determines that an employer has engaged in damaging action against an employee, it may impose a maximum penalty of \$13,000 for an individual and \$65,000 for a body corporate (in the case of a knowingly committed 'serious contravention', the maximum penalties are 10 times higher). The IMC may also make an order for relief to:

- reinstate the employee if they were dismissed from employment;
- employ a prospective employee who was refused employment; and
- pay the employee compensation for loss or injury suffered as a result of the contravention.

If the IMC makes an order for relief, the employer is required to comply with it. Failure to comply constitutes an offence, which will carry a maximum fine of \$13,000 and a daily fine of \$1,000 for each day or part day during which the offence continues.

The IMC cannot make an order in relation to damaging action if the employee has applied for relief in relation to the same damaging action (e.g. the same dismissal, or the same refusal to promote or transfer the employee) under another provision of the IR Act or any other written law. For example, an employee could not obtain an order from the IMC if the damaging action was dismissal and the employee had made an unfair dismissal claim to the Western Australian Industrial Relations Commission.

The IMC can also order a third party to stop taking any damaging action against the employee and to take any action necessary to give effect to an order in relation to damaging action.

## Certain advertising prohibited

New provisions in the IR Act prohibit an employer from advertising employment at a rate of pay that is less than the minimum wage applicable to the job under the MCE Act or a state award, order or industrial agreement.

Enforcement action can be taken in the IMC against an employer who has unlawfully advertised employment at a rate of pay below the legal minimum. The IMC can impose a penalty of up to \$13,000 (or \$130,000 in the case of a serious contravention) for individuals or a penalty of up to \$65,000 (or \$650,000 in the case of a serious contravention) for bodies corporate, and make an order to prevent the employer from unlawfully advertising in the future.

To help eliminate exploitative working arrangements, provisions in the MCE Act dealing with the payment of wages have been amended to prevent an employer from directly or indirectly compelling an employee to accept goods, accommodation or other services of any kind instead of money as any part of the employee's pay.

Enforcement action can be taken in the IMC against an employer who fails to pay an employee in full. It can impose a penalty of up to \$13,000 (or \$130,000 in the case of a serious contravention) for individuals or a penalty of up to \$65,000 (or \$650,000 in the case of a serious contravention) for bodies corporate.

## Prohibiting cash back arrangements

An employer is not able to directly or indirectly require an employee to spend, or pay to the employer or another person, an amount of the employee's money or the whole or any part of an amount payable to an employee in relation to the performance of work if:

- the requirement is unreasonable in the circumstances; and
- in the case of a payment, the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

A prospective employer is not able to directly or indirectly require a prospective employee to spend, or pay to the employer or another person, an amount of the prospective employee's money if:

- the requirement to pay money is in connection with employment or potential employment of the prospective employee by the prospective employer; and
- the requirement is unreasonable in the circumstances; and
- in the case of a payment, the payment is directly or indirectly for the benefit of the prospective employer or a party related to the prospective employer.

To illustrate, it is unlawful for:

- a prospective employer to require a prospective employee to pay them money in order to obtain employment;
- an employer to ask an employee to pay back some of their wages to the employer in order to keep their job; and
- an employer to require an employee to spend part of their pay on goods the employer sells to the public.

Asking an employee for any amount to be spent, or money to be paid, in a particular way that involves undue influence, duress or coercion, is also prohibited under the new provisions.

The new provisions do not prevent legitimate, mutual agreements being reached between an employer and an employee for overpayments to be paid back by an employee to the employer.

Enforcement action can be taken in the IMC against an employer who contravenes these provisions. If the IMC determines that an employer has contravened these provisions, it may order the employer to pay to the employee or prospective employee compensation for any loss or injury suffered as a result of the contravention.

The IMC may also impose a penalty of up to \$13,000 (or up to \$130,000 if it is a serious contravention) for individuals or a penalty of up to \$65,000 (or up to \$650,000 in the case of a serious contravention) for bodies corporate, for a contravention of these provisions.

In addition, the MCE Act now provides that a term of a WA award, industrial agreement or contract of employment has no effect to the extent that the term permits an employer to require an employee to spend or pay an amount of money in contravention of the MCE Act provisions or requires an employee to spend or pay an amount of money if the requirement would contravene the MCE Act provisions if it had been made by the employer.

### **Prohibiting sham contracting**

There are new provisions in the IR Act prohibiting sham contracting. An employer is prohibited from representing, or telling an employee or prospective employee, that a contract of employment (where the worker is an employee and entitled to minimum wages and other protections) is a contract for services (where the worker is an independent contractor).

It is a defence for the employer to prove that, when the representation was made, they did not know (and could not reasonably be expected to have known) that the contract was a contract of employment rather than a contract for services. The onus is on the employer to prove this.

An employer is prohibited from dismissing (or threatening to dismiss) an employee performing particular work for the employer in order to engage them to perform the same (or substantially the same) work under a contract for services. If enforcement proceedings are taken against the employer in the IMC for breaching the sham contracting provisions, the employer bears the onus of proving that they did not dismiss (or threaten to dismiss) the employee for the prohibited reason.

An employer is prohibited from making a statement that the employer knows (or could reasonably be expected to know) is false in order to persuade an employee to enter into a contract for services to perform the same (or substantially the same) work. If enforcement proceedings are taken against the employer in the IMC for breaching the sham contracting provisions, the employer bears the onus of proving that they did not make the statement for the prohibited reason.

If the IMC determines that an employer has breached the provisions preventing sham contracting, it may impose a penalty on the employer, and may make an order to:

- reinstate the employee if they were dismissed from employment;
- employ a prospective employee who was refused employment; and
- pay the employee compensation for loss or injury suffered as a result of the contravention.

The IMC is not able to make an order in relation to sham contracting if the employee has applied for relief in relation to the matter (e.g. the same dismissal) under another provision of the IR Act or any other written law.

## **Unreasonable deductions and terms relating to employees aged under 18 years**

New provisions in the MCE Act stipulate that a term of a WA award, industrial agreement or contract of employment has no effect to the extent that it permits an employer to deduct an amount from an employee's pay if the deduction is for the benefit of the employer or a party related to an employer and is unreasonable in the circumstances. For example, a provision in an employment contract that enables an employer to deduct a grossly inflated amount of rent (beyond market value) from an employee's pay for employer-provided accommodation could constitute an unreasonable deduction.

The MCE Act also provides that a term of a contract of employment, WA award or industrial agreement which permits deductions from an employee's pay or requires payments by an employee for the benefit of the employer or another person in relation to an employee under 18 years will be of no effect, unless the deduction or payment is agreed to in writing by the employee's parent or guardian.

### **Disclaimer**

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