

Practical guide... union right of entry

The *Fair Work Act 2009* (Cth) (FWA) provides significant rights of entry (ROE) for unions and potentially provides unions with a powerful recruiting weapon.

OVERVIEW

There are three types of ROE for union officials seeking to enter 'workplaces' under the FW Act:

- 1) To hold discussions with employees whose interests the union is entitled to represent
- 2) To investigate suspected contraventions of the FW Act, industrial instruments and like instruments
- 3) To investigate workplace health and safety (WHS) matters.

NB: The term used to describe a workplace in the FWA is by way of the definition of 'premises', which is broadly defined as 'any land, building, structure, mine, mine working, aircraft, ship, vessel, vehicle or place'.

Key features of the FWA

- To enter a workplace to hold discussions with employees, a union official only needs to show that their union is entitled to represent those employees. It is not necessary for the union to have any members in the workplace or for the union to be bound by an award or statutory industrial agreement that applies to that workplace.
- To enter a workplace to investigate a suspected contravention of the FW Act, industrial instrument or like instrument, a union official only needs to show there is at least one member of their union who works in the workplace and to whom the suspected contravention relates.
- When a union official suspects there has been a breach of WHS laws, they can enter the workplace for the purpose of investigating the suspected WHS breach as long as the suspected breach relates to an employee or employees the union is entitled to represent.
- The WHS entry can be made without notice, unless the union official is seeking to inspect documents.

The ROE permit

Fair Work Commission (FWCA) may issue a federal ROE permit to a union official if it is satisfied the official is a fit and proper person to hold the permit.

Union ROE to hold discussions

Under the FWA, a union official has the right to enter a workplace to hold discussions with employees during meal or other breaks as long as the union is entitled to represent those employees. The union does not need to be bound by an award or collective agreement that applies in the workplace. There is also no need for the union to have any members in the workplace. This new provision clearly allows unions that have had no presence in a workplace to enter, hold discussions and, in practice, to recruit new members.

Q&A – ROE TO HOLD DISCUSSIONS

Does the union official need to give notice of their intention to enter my workplace to hold discussions?

Yes. The union must give written notice (eg by mail, by facsimile, hand delivered) during working hours of at least 24 hours before the proposed entry but no more than 14 days before the proposed entry.

Does the ROE notice need to specify on what basis the union is entitled to represent the employee(s)?

Yes, the ROE notice must specify which provision of the union rules entitles the union to represent the employee(s).

What conduct is required of union officials while in the workplace to hold discussions?

The union official must agree to:



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T_ +61 7 3204 8830
E_ admin@akyra.com.au
W_ www.akyra.com.au

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- Hold discussions in the room or area suitable for the purpose, and which they are directed to use by the employer
- Take a particular route to that room or area and not to deviate from that route
- Only hold discussions during meal breaks or other breaks
- Comply with all the OHS requirements at the site.

NB: This would include a safety induction, as long as that did not unduly delay the exercise of the ROE. It would be reasonable for a representative of management to escort the union official when en route to the room or area designated for discussions with employees.

Who must/can meet with the union official?

While entry must be for the purpose of holding discussions with a 'class of workers' referred to in the ROE notice, this does not mean that if other employees choose to attend or participate in discussions, that the entry is invalid or contrary to the FW Act.

The proviso that employees must wish to participate in discussions operates only after entry. The union official does not need to demonstrate before entry that there is a particular employee(s) on the premises who wishes to talk to the union official.

NB: A union official seeking a ROE to hold discussions with employees in the workplace does not need to have any members the workplace. The union official only needs to demonstrate that the union is entitled to represent those employees.

ROE for WHS purposes

A duly accredited union official can seek a ROE for the purpose of investigating a suspected breach of state OHS laws. To exercise ROE, the union official must be able to:

- Show that there are employees eligible to join the union official's union working on the site
- Describe in general terms the nature of the alleged suspected OHS breach that it is investigating
- As well as the ROE permit, it must also show that it has authority under the relevant state laws and from the relevant state OHS body to investigate the breach.

If the above conditions are met, the union official can enter the premises without prior notice to the employer. However, written notice must be provided to the employer if the union official intends to also inspect documents.

Q&A – ROE FOR OHS PURPOSES

Can the union official enter the premises at any time?

No. The union official can only enter the premises during working hours.

How much notice does the union need to provide if it wishes to access and inspect documents on entry to workplace?

If the union official intends to access, inspect or make copies of "employee records" (or other documents) relevant to the suspected breach that are kept on the premises, the union official has to give the occupier and any affected employer written notice of no less than 24 hours of its intention to do so.

Can the union official obtain access to the records if the records are not kept in the workplace?

Yes. The union official can have access to, inspect or make copies of "employee records" (or other documents) relevant to the suspected breach that are not kept on the premises, as long as the union official has given the employer written notice of not less than 48 hours of its intention to do so.



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WHS ROE and industrial action

Stop-work meetings and strikes on the basis of WHS issues are not included in the definition of 'industrial action' if the action is taken as a result of a legitimate concern of an imminent risk to employees' health or safety. Under the FWA, the onus of proof of these matters is not imposed upon employees. It is much more likely that an exercise of a WHS ROE by a union official could lead to immediate industrial activity and disruption to the business by employees.

ROE to investigate contraventions

A duly accredited union official can seek a ROE for the purpose of investigating a suspected contravention of the FW Act, the former *Workplace Relations Act 1996* (Cth) or "industrial instruments".

The 'industrial instruments' that may be the subject of investigation include new agreements made from 1 July 2009 under the FWA (most obviously, enterprise agreements), modern awards from when they came into operation on 1 January 2010. The union official can enter only during working hours and must first:

- Show a current federal ROE permit
- Have given written notice in the approved form to the occupier and any affected employer at least 24 hours before the attempted entry
- Declare on the ROE notice that the union is entitled to represent the industrial interests of at least one member who works on the premises
- Specify the particulars of the suspected contravention(s).

NB: An 'affected employer' is any employer who employs a member of the union official's union who works at the premises and is affected by the suspected contravention. Employers and occupiers should make sure the industrial instrument the union wishes to investigate does actually apply at the premises the union seeks to enter, and that it applies to at least one member of the official's union.

Q & A – ROE TO INVESTIGATE CONTRAVENTIONS

Can the union access records relating to a suspected contravention?

Yes, in certain cases the union official may access records relevant to the suspected contravention that are kept on the premises and relate to their members, however the union has no right to access non-member records unless each non-member has authorised such access in writing.

Can the union access records relating to a suspected contravention that are not kept on the premises?

Yes, provided that the union gives written notice at the time of the entry, or within five days afterwards. In addition, the date on which the off-site records are to be provided must be at least 14 days after receipt of the notice. Again, access to non-member records must be authorised in writing by the non-members.

What conduct is required of unions while in the workplace to investigate contraventions?

The union official may inspect any work, process or object relevant to the suspected contravention. The union official is not entitled to inspect any work, process or object that is not relevant to the suspected contravention (eg work performed by employees who are not covered by the industrial instrument that is said to have been contravened). The union official must agree to:

- Hold interviews in the room or area (suitable for the purpose) that they are directed to use by the employer
- Take a particular route to that room or area and not to deviate from that route
- Comply with all the OHS requirements at the site.

NB: This would include a safety induction, as long as that did not unduly delay the exercise of the ROE. It would be reasonable for a representative of management to escort the union official when en route to the room or area designated for discussions with employees.



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Can the union official inspect all areas of the premises?

There is no right for the union official to wander the premises at large. The union official can only inspect the areas of the premises that are relevant to the investigation of work, processes or objects relevant to the suspected contravention.

COMPLIANCE CHECKLIST

- ✓ Do you have an up-to-date ROE protocol to inform your staff of what steps to follow when presented with a union official seeking to enter your premises?
- ✓ Is your existing ROE protocol or policy compliant with the FW Act? It is essential that staff who control access points to your premises understand their responsibilities in ensuring that only lawful entries are allowed.
- ✓ Has your staff received any recent training in how to deal with attempted entries by union officials?
- ✓ Do you understand the rights to (and limits on) access by union officials to your employees and other records?
- ✓ Is your staff familiar with the approved format of notices of entry and able to assess whether such notices are valid?
- ✓ Do you understand the circumstances in which a refusal to allow entry to a union official will be unlawful?

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