

## UNION RIGHT OF ENTRY

### Introduction

The Right of Entry ("ROE") provisions of the Fair Work Act 2009 (Cth) ("FW Act") allows union officials who hold valid entry permits issued by Fair Work Commission ("FWC") to enter employers' businesses for certain purposes. Employers must allow union officials to access the worksite, provided certain pre-requirements have been met.

On July 1 2019 the *Fair Work Amendment (Modernising Right of Entry) Regulations 2019* changed some of the requirements for entry permits.

### Requirements for Right of Entry (ROE)

Certain rights and obligations exist in relation to unions exercising a ROE.

1. The union official seeking to access the employer site must hold a valid and current right-of entry (ROE) permit from FWC.
2. The union official who has been issued the permit ("permit holder") must provide an employer with written notice ("entry notice") before entering a workplace, no less than 24 hours and no more than 14 days before the proposed visit. Access to the workplace for discussions would normally be during breaks, however, an exemption to this requirement may be given by FWC under certain circumstances.
3. The ROE permit must include the following:
  - a. The permit holder's full name
  - b. The name of the organisation that applied for the entry permit
  - c. An expiry date for the entry permit
  - d. A recent photograph of the permit holder that:
    - i. Shows the holder's full face and
    - ii. Meets requirements that are considered appropriate by the FWC
  - e. The permit holder's signature

*3d and 3e are requirements for entry permits from July 1 2019*

### From 1 October 2019 photographic identification is to be produced with certain entry permits

If a permit holder produces for inspection an entry permit that was issued before 1 July 2019, the permit holder must also produce for inspection with the entry permit a document that:

- a. Is issued:
  - i. By the government of the Commonwealth, a State or a Territory; or
  - ii. By an authority established for a public purpose by or under a law of the Commonwealth, a State or a Territory; and
- b. Is in force, or ceased to be in force not more than 2 years before the document is produced; and
- c. Provides photographic identification of the permit holder.

### Entry Notices

 See Fair Work Act s. 518

An entry notice must include details of:

- > the premises to be entered;
- > the day of entry;

- > the organisation the permit holder belongs to; and
- > the section of the FW Act that authorises the entry.

If ROE is intended to investigate suspected contraventions, the entry notice must also specify:

- > details of the suspected contraventions;
- > a declaration by the permit holder that he/she represents an employee union member who works on the premises;
- > detail relating to whom the suspected breach relates;
- > details of the union member(s) affected by the suspected breach; and
- > specify the provision of the union's rules that entitles the union to represent the employee.

If ROE is intended for discussion purposes, the entry notice must:

- > specify that section as the provision that authorises the entry;
- > contain a declaration by the permit holder for the entry that the permit holder's union is entitled to represent the industrial interests of an employee who performs work on the premises; and
- > specify the provision of the union's rules that entitles the union to represent the employee.

## Right of Entry (ROE)

A union official must show his/her ROE Permit when asked by the person who occupies the premises or the employer. The union official must also show this ROE Permit (upon request) when they require access to documents relating to a suspected breach.

The entry allows the union official to access the site for three purposes only:

1. to investigate suspected contraventions of the FW Act and other instruments (such as a collective agreement or Award); or
2. to hold discussions with employees who are entitled to be represented by the union; or
3. to exercise rights under Occupational Health and Safety (OH&S) laws.

Lastly, a ROE to a workplace can only take place during that worksite's working hours.

## Grounds for Right of Entry

### a) Entry to Investigate a Suspected Contravention

ROE can be sought to investigate a suspected contravention of the FW Act, or a term of a fair work instrument, that relates to, or affects, at least one member of that union who performs work on the premises.

The permit holder must reasonably suspect that the contravention has occurred, or is occurring. The burden of proving that the suspicion is reasonable lies on the permit holder. If the employer suspects the permit holder is seeking ROE without providing specific enough detail of the alleged contravention two outcomes may result:

- > the employer can lawfully refuse the permit holder access, or continued access, to the premises on the grounds that the ROE pre-approval requirements have not been met; and
- > the permit holder will be liable to be penalised under subsection 503(1) of the FW Act (which deals with misrepresentations about matters authorised under ROE) and may face their ROE Permit being modified, suspended or revoked (see below).

## Rights on Site

Once the permit holder obtains entry to the premises he/she can do the following:

- > inspect any work, process or object relevant to the suspected contravention as detailed; and/or
- > interview any person about the suspected contravention who agrees to be interviewed and whose industrial interests are covered by the permit holders union.

## Accessing Documents

During a ROE the permit holder may also require the occupier or an affected employer to allow the permit holder to inspect, and make copies of, any record or document that is directly relevant to the suspected contravention and that is kept on the premises, or is accessible from a computer that is kept on the premises.

Records, including employees' personal information, can only be accessed if they directly relate to the suspected breach. Records could include time sheets, pay slips, work rosters and/or leave records.

There is no obligation to disclose to the union documents that relate to non-union members of the permit holder's union and that do not substantially relate to the employment of a union member employee. In order to access such documents a permit holder must apply to FWC to inspect such documents under s483AA of the FW Act, or obtain the consent of that employee.

The permit holder may also request, by written notice, access to records and documents at a later time. The permit holder is required to produce their entry permit and a copy of their entry notice for inspection (upon request) before exercising any right to inspect records or documents.

Note: The use or disclosure of personal information obtained under the FW Act is regulated under the Privacy Act 1988 (Cth). An occupier or affected employer is not required under the FW Act to allow the permit holder to inspect, or make copies of, a record or document if to do so would contravene the Privacy Act 1988 (Cth), any other law of the Commonwealth, State or Territory.

## b) Entry to hold discussions with employees

 See Fair Work Act s. 484

A permit holder may enter premises for the purposes of holding discussions with one or more employees:

- > who perform work on the premises; and
- > is eligible to become a member of the permit holder's union; and
- > who wish to participate in those discussions.

After entering the site to hold discussions, the union official is able to hold discussions with interested employees, but not on paid time. This is usually done in the lunchroom during the employee's lunch break. A union official can't hold discussions with employees during paid work time or request that all employees are assembled for a "mass meeting" or other form of 'stop work' gathering. Discussions must take place during meal times, other breaks or at the conclusion of the shift / work day.

## c) Entry for OH&S purposes

 See Fair Work Act s. 494-499

A permit holder can obtain ROE to a workplace pursuant to State or Territory OH&S laws.

A permit holder must not exercise a State or Territory OH&S right to inspect or otherwise access an employee record of an employee, unless he/she has given the employer a written notice setting out his/her intention to exercise the ROE, and reasons for doing so.

**Note:** In this circumstance only, the 24 hour notice period is not needed.

## As a 1 January 2014

Amendments to FW Act affecting ROE will be introduced from 1 January 2014. These amendments will change the rights and obligations of employers and unions in relation to:

- > the location of interviews or discussions with employees;
- > the route taken to the location of the room or area for interviews or discussions;
- > the frequency with which the permit holder/s enter premises for discussions with employees; and
- > right of entry arrangements for organisations in remote areas.

### a) The location of interviews or discussions with employees

The amendments provide for interviews/discussions to be held in rooms or areas agreed to by the occupier and permit holder. Previously employers could direct meetings to be conducted in a location that was deemed 'reasonable'. However, under the new amendments, in the absence of agreement as to where such a reasonable location may be, the union may do so in the workplace lunchroom. That is, any room or area:

- > Whereby one of more of the persons who may be interviewed or participate in the discussion ordinarily take meal or other breaks; and
- > That is provided by the occupier for the purpose of taking meal or other breaks.

### b) The location of interviews or discussions with employees

Under these changes, a permit holder must comply with any reasonable request by an employer to take a particular route to reach the meeting room or area. A permit holder may apply to FWC if they feel the route to the room or area is not reasonable as prescribed by the *Fair Work Regulations 2009*.

### c) The frequency with which the permit holder/s enter premises for discussions with employees

An occupier may apply to the Fair Work Commission if they wish to dispute the frequency with which the permit holder/s of the relevant union enters the premises. FWC may only make an order if they are satisfied that the frequency of by the permit holder/s would require an unreasonable distraction of the company's critical resources. These orders may include the following:

- > imposing conditions on the permit holder/s entry permit;
- > suspending the permit holder/s entry permit;
- > revoking the permit holder/s entry permit;
- > an order about the future issue of entry permits to one or more persons; or

- > any other order FWC finds appropriate

## **d) The location of interviews or discussions with employees**

Occupiers and permit holder/s will be required to reach agreement in circumstances where a permit holder wishes to exercise their rights in remote areas.

**Note:** The word ‘remote’ is broadly defined in the Act as a premises that is located in an area that is not reasonably accessible to the permit holder/s unless the occupier of the premises on which the rights are to be exercised provides accommodation and/or transport or causes it to be provided.

In order for an employer to be required to enter into an accommodation or transport arrangement with a permit holder/s all the following conditions must be satisfied:

- > to provide accommodation and/or, or cause accommodation and/or transport to be provided, to the permit holder would not cause the occupier undue inconvenience;
- > the permit holder, or the organisation of which the permit holder is an official, requests the occupier to provide, or cause to be provided, accommodation and or transport for the purpose of assisting the permit holder to exercise rights on the premises;
- > the request is made within a reasonable period before accommodation and/or transport is required; and
- > the permit holder, and the organisation of which the permit holder is an official, have been unable to enter into an accommodation and/or transport arrangement with the occupier by consent.

If an occupier is required to enter into an accommodation and/or transport arrangement with the permit holder/s, the occupier can charge a fee that is necessary to only cover the cost of providing transport and/or accommodation.

## **Right of Entry Responsibilities and Obligations on site**

### **Conduct requirements**

ROE Permit holders must:

- > Abide by conditions imposed on their ROE Permit;
- > Produce a valid entry permit upon request;
- > Obey reasonable requests to comply with any OH&S requirements on the worksite;
- > Hold discussions with the employees only during either meal or break time;
- > Comply with reasonable requests to hold discussions in a particular room or area;
- > Comply with reasonable requests that certain routes be taken to a room or area;
- > Act in a proper manner and not intentionally hinder or obstruct others; and
- > Not seek entry to, or enter, any part of the premises used for residential purposes.

### **A permit holder must not:**

- > Intentionally hinder or obstruct any person or act in an otherwise improper manner;

- > Be refused or delayed legitimate entry to the premises;
- > Be refused the right to inspect and copy records or documents regarding a suspected breach following a legitimate request;
- > Be hindered or obstructed from exercising their legitimate rights;
- > Give the impression that they are authorised to do things they are not (such as being able to address employees during paid time), nor be reckless about giving that impression, knowing that they do not have such authorisation; and/or
- > Use information for any purposes other than the investigation of the suspected contravention.

A breach of any of the above offences may result in a fine of up to \$66,600 (300 penalty units) for a body corporate and up to \$13,320 (60 penalty units) for an individual as at 1 July 2020.

## Frequently Asked Questions

### **If the union arrives at an inconvenient time for me / the business do I have to let them on-site or can I tell them to come back at a more convenient time?**

No, on the provision a union official has a valid ROE Permit and has complied with the relevant requirements in the FW Act, an employer must not stop him/her from entering the workplace. If an employer stops the union official, penalties may apply for refusing, delaying or obstructing entry as well as for other breaches of the FW Act.

### **I don't have a lunchroom / I have had complaints from employees that they just want to be left alone to eat their lunch without being recruited for union membership. Can I direct the union organiser to another area of the site so that he/she can meet with interested employees in private, and uninterested employees can be free to eat their lunch uninterrupted?**

Yes. Under s.492 of the FW Act a permit holder must comply with any reasonable request by the occupier of the premises to conduct interviews or hold discussions in a particular room or area of the premises or take a particular route to reach a particular room or area of the premises.

Under the FW Act a request from an employer is unreasonable if the room or area is not fit for the purpose of conducting the interviews or holding the discussions (i.e. it is unsafe, unventilated, too small for the purpose, a bathroom etc.); or the request is made with the intention of:

- > intimidating employees who might participate in the interviews or discussions; or
- > discouraging employees from participating in the interviews or discussions; or
- > making it difficult for employees to participate in the interviews or discussions, whether because the room or area is not easily accessible during mealtimes or other breaks, or for some other reason (such as being a long distance from the lunchroom and/or work station, or the nominated room is in full view of management offices etc.).

However, the FW Act also provides that a request is not unreasonable only because the room, area or route is not that which the permit holder would have chosen (or because the union organiser may prefer another room (such as the lunchroom).

If there is a dispute about the reasonableness of an employer request regarding location or route, FWC may deal with it under clause 505 of the FW Act.

### **If “our business has a safety breach”, is that sufficient explanation from a union official in order for him/her to access your site for OH&S purposes?**

Unlikely. Section 495(1)(a) of the FW Act states a permit holder must provide an entry notice specifying the “reasons for doing so”. The exact safety risk will need to be named if a permit holder is seeking to access a worksite under ROE for OH&S purposes. For example “*defective and unsafe plant*” would not be considered sufficient, but “*insufficient guarding on cutting machines on lines 4,5 and 6 which constitute a safety risk*” likely would.

It is important for the union to provide some detail as to the reason for the site visit. Specifically, what are the safety concerns and where are they located. Case law to date has provided inconsistent decisions surrounding this matter

therefore you are strongly advised to contact the Workplace Relations Advice Line directly, before denying a union official access to your worksite on this basis.

## **What happens if I believe a union official with an ROE Permit is no longer fit to hold such a permit?**

The responsibilities and behaviour of a ROE Permit holder are outlined in the FW Act. If you think a breach has occurred, this can either be referred directly to FWC by yourself or your industry association. Alternatively, the ROE permit holder or the union can also instigate an investigation if they have believe they are not being able to exercise their rights.

FWC may make Orders including:

- > imposing conditions on a ROE Permit;
- > suspending a ROE Permit;
- > revoking a ROE Permit;
- > about future issue of entry permits to one or more persons..

## **Contacting the Victorian Chamber of Commerce and Industry**

The Victorian Chamber's team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on **(03) 8662 5222**.

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