**UNIONS**

**RIGHT OF ENTRY**

**HANDBOOK**

**NSW**

**Preface**

The Fair Work Act 2009 (FW Act) is the national system that governs minimum employment standards in the workplace. The Workplace Health and Safety Act 2011 (WHS Act) and Work Health and Safety Regulation 2011 (WHS Regulation) is the national system that governs safety in the workplace.

Under these systems, states and territories also have their own regulatory statutes to govern workplaces which are not always consistent with both national systems. However in instances where the state and territory systems are ambiguous the federal system prevails.

This handbook only relates to Right of Entry in NSW, and covers rights and obligations of both Unions and Employers to comply with the federal national and NSW state systems.

There are strict rules and practices for unions when exercising their rights of entry under NSW and National workplace laws, and it is critical that all employees are aware of these limitations to ensure they have the right to conduct business in a reasonable, harmonious and non-threatening environment.

Under no circumstances should an employer accept **Bullying, Intimidation, Harassment or Threatening Behaviour** as a method ofcommunication from any organisation or individual in the workplace. Additionally every employer should have written strict, clear and concise rules and policies within their organisation to stamp out and deal with this behaviour, and make all employees, contractors, clients and organisations they have dealings with aware of these policies and how to deal with this behaviour should it become evident in the workplace. This would include training all their employees on what actions they should take should bullying, harassment or intimidation occur in the workplace. At no time should exceptions be made for **Unions** under these circumstances.

For more information, or to resolve disputes the two governing bodies below are there to provide information, consultation and mediation.

**Fair Work Building and Construction** 1800 003 338

**WorkCover NSW** 13 10 50

**Unions and Right of Entry Permits**

For any union to enter a workplace, they must have two valid and current permits issued by the federal and state government. These two types of permits a union official must hold are explained below.

The first type is known as a Fair Work Permit (FW Permit). A FW Permit is issued by the Fair Work Commission and is Australia's national workplace relations tribunal. Under the FW Permit a Union has strict limited rights to investigate and access information relating to **Union Members Only** in a workplace. The FW Permit is limited to investigating breaches of working conditions that are not related to WHS. They are directly related to the ***National Working Standards*** (NES) (see appendix 1). This permit is in the form of an A4 sheet of paper stamped by the Commonwealth FW Commission and must be produced as an original document and checked for currency.

The second type is known as a Work Health and Safety Permit (WHS Permit). Under the WHS Permit a union has equally limited rights to enter a workplace for WHS purposes. These permits are issued under the WHS Act by the state or territory body, in the case of NSW WHS Permits are issued by the NSW Industrial Relations Commission. Under WHS law in NSW a Union has limited rights and responsibilities, and must adhere to a set of obligations and rules if entering a workplace under this permit. This permit is a small laminated card issued by the NSW Industrial Relations Commission.

**NOTE:** Both the FW Permit A4 sheet of paper and the WHS permit laminated card must be presented on request if a union is entering under WHS provisions, both must be current and must be original documents, copies are not acceptable. If both of these permits are not produced for entry under WHS you can refuse entry.

**A union does not have an automatic unconditional right in NSW to enter a workplace under a FW or WHS permit.**

There are three reasons a Union may (under strict conditions) enter a workplace under a permit.

1. Inquire into suspected WHS contraventions that affect or relate to ***relevant workers***.
2. Inspect employee records or information.
3. Consult and advise ***relevant workers*** who wish to participate about WHS matters.

**Relevant Worker:** *A relevant worker is a union member, or individual eligible to be a union member the WHS entry permit holder represents, whose industrial interests that union is entitled to represent and who works at the workplace entered.*

The words “*individual eligible”* is problematic and ambiguous and should be deleted because what it means is basically anyone working in that work place. However this can again be interpreted as; “anyone who is not a financial union member but would like to participate in union discussions or activities”. Non-union workers do not have to participate in any union activities or discussions unless they wish to. If there are no financial union members at the workplace and there are no workers at the workplace that want to engage with discussions or dealings with unions than unions have no right to be at the workplace.

**Entry Notice**

In addition to the above permits a union must also produce a detailed ***entry notice***. An entry notice must be in writing and be produced with their permit before entering the workplace. The entry notice must be written and contain the following information:

* Full name of permit holder
* Name of the union they represent
* The section of the Act they are entering under
* The name and address of the premises being entered
* The date of entry
* Particulars of the suspected contravention
* A declaration stating that the union is entitled to represent a member or eligible member at that workplace
* A provision in the unions rules that entitles the union to represent that worker
* The suspected contravention and how it relates to that worker

An entry notice must be given at least 24 hours in advance and not more than 14 days prior to entering the workplace. The only situation where written notice of entry does not have to be provided is strictly related to WHS only as follows:

1. Where it would defeat the purpose of entry to the workplace
2. Where there would be an unreasonable delay in an urgent matter such as working at heights with no fall protection, or working with asbestos without breathing apparatus.

To summarise, a union must give at least 24 hours’ notice before entering a workplace to inspect, make copies or access records relating to industrial matters and conditions no exceptions. Alternatively if a union waives this 24 hours’ notice to enter for WHS purposes they must still provide this notice prior to entry. And in absolute extreme cases may not require to give notice if there is immediate and imminent danger to life of limb. A union does not have an unconditional right to enter a workplace without a written entry notice.

It must be noted that an instance where a union would not require to give an entry notice would be extremely rare or non-existent in workplaces that follow a strict and detailed WHS policy, and that unions use these provisions to enter workplaces and disregard their obligations under WR and WHS laws and regulations and conditions of their entry permits to give notice and produce their permits. In such cases this behaviour should be classified as unacceptable, and a tactic to gain access to a workplace without authority, and could be deemed as dangerous behaviour in putting themselves and other workers at risk without prior induction and understanding the conditions of the site.

**Reasons for Refusing Entry**

* Union does not produce a FW Permit and a WHS Permit at the same time when investigating WHS matters
* There are no union members on site and the union is investigating a breach of the Fair Work Act
* The union does not produce an entry notice at least 24 hrs and not more than 14 days before entry when investigating a breach of the FW Act
* The union does not produce an exemption from the FW Commission for an entry notice
* One or both permits are not current or expired
* Bullying, swearing, intimidation, physical contact or harassment
* Union does not comply with worksite OHS requirements
* Union approaches workers without prior notice
* Union is filming or taking photos without permission
* Union does not produce photo identification
* Union does not complete a visitor induction

***Right of Entry can be refused or revoked at any time either before entry or any time after entry has been granted***

**Steps to Take When a Union Official Enters Your Site**

**Step 1:** Ask what the nature of their business is

1. If entering for the purpose of investigating matters relating to the National Working Standards (NES) under the FW Act (Appendix 1)

* A minimum of 24 hours’ notice must be given
* An entry notice must be produced
* A current FW Permit must be produced
* Photo identification must be produced

1. If entering for the purpose of investigating matters relating to WHS

* Both their current FW Permit and WHS Permit must be produced in original format
* In almost every case an entry notice must be given as a minimum at time of entry
* Photo identification must be produced

**Step 2:** Check permits and notices for validity (refuse entry if not valid and current)

**Step 3:** Check permits against photo identification (refuse entry if not validated)

**Step 4:** Decide whether or not to allow union to enter and make your decision clear

**Step 5:** Confirm that you do not permit filming or photographs on site (refuse entry if not compliant)

**Step 6:** Complete union sign in register (includes information on filming and taking photos)

**Step 7:** Do a visitor induction (this must include conduct and behaviour information)

* It is important that a full induction is not given to visitors such as unions or any other visitor to site. A visitor induction ensures that the visitor or union must be supervised at all times during the visit and can only access areas that they have been given permission to enter.
* Ensure that you state that the union must follow all site WHS rules

**Step 8:** Check that union is adequately dressed with correct PPE (refuse entry if not compliant)

**Step 9:** Direct union to what you deem to be an acceptable route and method of investigation to the matters at hand

**NOTE:** The right of entry you grant a union may be revoked at any time during the visit no matter what stage it is at, if the union becomes aggressive, non-compliant to your direction or is a danger to themselves or anyone else.

**Visitor Induction**

A visitor induction is a short concise formal induction that allows an individual to enter a workplace if they are under constant supervision by a selected company representative. Items that may be covered include:

* Access/egress
* No go zones
* PPE
* Emergency procedures (evacuation)
* Conduct while on site
* Prohibited activities or actions

**What to do if a Union Refuses to Leave**

* Call the police as the union is trespassing if you have asked them to leave your premises
* Call the FW Commission/Ombudsman
* Ring WorkCover if deemed necessary

**Under What Circumstances do you Have to Grant Entry to a Union**

* If a union has issued you with all the correct permits and notices and photo identification

and

* They have a right to represent financial members on site
* If there is an immediate danger to life due to an observed hazard on site
* If the union is investigating a serious incident or death on your site, in limited circumstances this may extend to other sites under your control

**What Can and What Can’t a Union Do**

* A union does not have to follow a certain path or use a particular room or time such as meal times or breaks when investigating NSW state WHS matters under a WHS Permit, however must comply with site WHS rules and regulations which stipulate where a visitor can and can’t go.
* A union can only address financial union members, and have discussion during breaks or meal times in an area designated by the person controlling the site if they are investigating a breach of the FW Act
* A union must act in an appropriate manner that does not disrupt work or the operations of the site or business
* A union does not have the power to determine a WHS contravention has occurred and/or direct what needs to be done to remedy a WHS contravention, this is controlled by WorkCover. They are merely observers and can give advice if they prove without any dounbt that they have a Right of Entry.

**APPENDIX 1**

**FAIR WORK ACT**

**NATIONAL EMPLOYMENT STANDARDS**

The Fair Work Act

The FW Act commenced on 1 July 2009. The FW Act requires small businesses to comply with:

* A safety net of minimum employment conditions including the National Employment Standards (NES) and modern awards
* unfair and unlawful dismissal laws
* agreement making obligations
* transfer of business rules, and
* workplace rights specified in the FW Act.

The cornerstone of the system is fairness and flexibility. Both employers and employees have rights and responsibilities to help achieve this.

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What are the National Employment Standards?

All national system employers must provide 10 minimum entitlements to full-time and part-time employees. These minimum entitlements are called the National Employment Standards (NES). Some of these entitlements do not apply to casual employees. You can visit the [National Employment Standards](https://www.fairwork.gov.au/Employee-entitlements/National-Employment-Standards/default) page or contact the Fair Work Infoline on 13 13 94 to find out more.

Parental leave entitlements and rules about notice of termination apply to all employees (including those covered by state or territory industrial laws).

In summary, the NES minimum entitlements are:

Hours of work

A maximum standard working week of 38 hours (plus reasonable additional hours) for a full-time employee.

Right to request flexible working arrangements

Where an employee (including some casual employees) has at least 12 months continuous service, they have a right to request flexible working arrangements if they require flexibility because they:

* are the parent, or have responsibility for the care, of a child who is of school age or younger
* are a carer (within the meaning of the *Carer Recognition Act 2010*)
* have a disability
* are 55 or older
* are experiencing violence from a member of their family, or
* provide care or support to a member of their immediate family or household, who requires care or support because they are experiencing violence from their family.

Flexible work arrangements may include changes in hours of work, patterns of work and location of work.

The employee's request must be in writing and should set out the details of the change sought and the reasons for the change. You must respond in writing to the employee's request within 21 days stating whether the request is granted or refused. If the request is refused you must include the reasons for the refusal in your response. You may only refuse such a request from an employee on reasonable business grounds.

Parental leave

Where an employee (including some casual employees) has at least 12 months continuous service they generally have a right to 12 months of unpaid parental leave after the birth or adoption of a child, and the right to request to extend the period by a further 12 months (which can only be refused on reasonable business grounds). Parental leave entitlements are extended to all employees, not just national system employees.

Annual leave

Four (4) weeks paid annual leave (other than for casual employees). Five (5) weeks paid annual leave for certain shift workers. Part-time employees get a proportion of this depending on how much they work. Paid annual leave may be taken at a time agreed between you and your employee. You may only refuse the taking of annual leave when it is reasonable to do so.

Personal/carer's leave and Compassionate leave

Ten (10) days paid personal/carer's leave each year for full-time, non-casual employees. Part-time employees get a proportion of this depending on how much they work. All employees (including casuals) can also access two (2) days unpaid carer's leave for each permissible occasion. Two (2) days paid compassionate leave for each permissible occasion when a member of the employee's immediate family or household sustains a serious illness, serious injury or dies. Casual employees have access to two (2) days unpaid compassionate leave in these circumstances.

Community service leave

The right to community service leave for eligible community service activities such as jury service or activities dealing with an emergency or natural disaster. An eligible employee is entitled to leave for the period of the actual activity and associated reasonable travel time and/or rest time immediately following the activity. Community service leave is unpaid, with the exception of jury service. Payment for jury service is capped at ten (10) days. An employee must give you notice of their absence as soon as reasonably practicable and must tell you how long they expect to be absent from work.

Long service leave

The right to accrue long service leave.

Public holidays

The right to a day off on public holidays and if the employee would usually have worked on that day, the right to be paid for their ordinary hours of work on that day. You may ask employees to work on a public holiday if this request is reasonable. An employee is entitled to refuse to work if your request is not reasonable or their reason for refusing is reasonable. What is 'reasonable' will depend on factors such as the kind of business run by the employer, the nature of the work performed by the employee, the employee's personal circumstances (including family responsibilities) and how much notice was given to the employee.

Notice and Redundancy Pay

A minimum amount of notice (in writing) prior to termination of the employment (or payment in lieu of notice). The amount of notice that must be provided depends on how long the employee has worked for you. Generally, this entitlement applies to all employees, not just national system employees. There is an entitlement to redundancy pay in some cases if the employee's employment is terminated either because the employer no longer requires the employee's job to be done by anyone or because of the insolvency or bankruptcy of the employer. Generally, the obligation to provide redundancy pay does not apply to employers with less than 15 employees or where an employee has had less than 12 months service. The amount of redundancy pay is calculated using the employee's base rate of pay and their length of service with the employer. The Fair Work Commission can also order a lesser amount of redundancy pay if the employer finds similar alternative employment that is no less favourable for a redundant employee or the business is unable to pay.

Fair Work Information Statement

Employers are required to provide a copy of the 'Fair Work Information Statement' to all new employees before or as soon as practicable after the commencement of employment. The Fair Work Information Statement is published by the Fair Work Ombudsman.

**APPENDIX 2**

**RIGHT OF ENTRY**

**CHECKLIST**

**Union Right of Entry Checklist**

*Prior to allowing Right of Entry, the following checklist must be satisfied:*

**Fair Work Permit ⃝ ←Tick**

-A4 sheet of paper issued by the Fair Work Commission (must be original document)

-Check for currency

**Workplace Health and Safety Permit ⃝ ←Tick**

Small card issued by the Industrial Relations Commission NSW (must be original document)

-Check for currency

**Entry Notice ⃝ ←Tick**

-Full name of permit holder

-Name of the union they represent

-The section of the Act they are entering under

-The name and address of the premises being entered

-The date of entry

-Particulars of the suspected contravention

-A declaration stating that the union is entitled to represent a member or eligible member at that workplace

-A provision in the unions rules that entitles the union to represent that worker

-The suspected contravention and how it relates to that worker

**Entry Notice Exemption ⃝ ←Tick**

-Must be issued by the Fair Work Commission or the Industrial Relations Commission

-Must be original document

**Photo Identification ⃝ ←Tick**

-Check against FW Permit and WHS Permit

**Visitor Induction ⃝ ←Tick**

-Access/egress

-No go zones

-PPE

-Emergency procedures (evacuation)

-Conduct while on site

-Prohibited activities or actions

**Sign-In Register ⃝ ←Tick**

-Union Permits

-Photo Identification

-Visitor Induction Completed

**Personal Protective Equipment ⃝ ←Tick**

-Hard Hat

-High Vis

-Protective Footwear

**NOTES:**

**APPENDIX 3**

**VISITOR INDUCTION**

**CHECKLIST**

**Visitor Induction**

*Prior to allowing Right of Entry, the following checklist must be satisfied:*

**Access/Egress ⃝ ←Tick**

-Discuss site entry and exit points

**No go zones⃝ ←Tick**

-Discuss areas to be accessed and areas that are off limits to visitors

-Visitor must be supervised by site manager or representative at all times

**PPE ⃝ ←Tick**

-Ensure minimum requirements of high vis, protective footwear and hard hats are met

**Emergency Procedures ⃝ ←Tick**

-Discuss muster point and exit points, first aid officers and supervisors

**Site Conduct ⃝ ←Tick**

-Outline site anti-bullying and harassment procedures

**Prohibited Activities ⃝ ←Tick**

-No videos of photographs to be taken while on site

-Visitor must comply with all requests made by site manager and site policies and procedures

**Management ⃝ ←Tick**

-Identify individual with control of site and site management

**SITE REPRESENTATIVE:**

**Print**

**Sign**

**VISITOR:**

**Print**

**Sign**