



INTERPRETIVE GUIDELINE

Discriminatory, coercive and misleading conduct

Disclaimer

The information contained in this publication is guidance material only. It is provided in good faith and believed to be reliable and accurate at the time of publication.

To ensure you understand and comply with your legal obligations, this information must be read in conjunction with the appropriate Acts and Regulations which are available from the Parliamentary Counsel's Office <https://www.legislation.wa.gov.au/>.

The State disclaims all responsibility and all liability (including without limitation liability in negligence) for all expenses, losses, damages and costs you might incur as a result of the information being inaccurate or incomplete in any way, and for any reason.

In this disclaimer:

State means the State of Western Australia and includes every Minister, agent, agency, department, statutory body corporate and instrumentality thereof and each employee or agent of any of them.

Information includes information, data, representations, advice, statements and opinions, expressly or implied set out in this publication.

Loss includes loss, damage, liability, cost, expense, illness and injury (including death).

Acknowledgement

This publication was produced by WorkSafe Western Australia using information originally developed by Safe Work Australia.



WorkSafe Commissioner

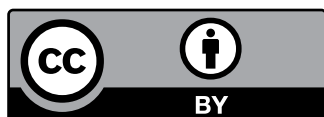
303 Sevenoaks Street CANNINGTON WA 6107

Telephone: 1300 307 877

NRS: 13 36 77

Email: commissioner@worksafe.wa.gov.au

The State of Western Australia supports and encourages the dissemination and exchange of its information. The copyright in this publication is licensed under a Creative Commons Attribution 4.0 International (CC BY) licence.



Under this licence, with the exception of the Government of Western Australia Coat of Arms, the WorkSafe logo, any material protected by a trade mark or licence and where otherwise noted, you are free, without having to seek our permission, to use this publication in accordance with the licence terms.

We also request that you observe and retain any copyright or related notices that may accompany this material as part of the attribution. This is also a requirement of the Creative Commons Licences.

For more information on this licence, visit creativecommons.org/licenses/by/4.0/legalcode

Introduction

The *Work Health and Safety Act 2020* (WHS Act) aims to provide a balanced and nationally consistent framework to protect the health and safety of workers and workplaces.

Part 6 (sections 104 – 115) of the WHS Act prohibits discriminatory, coercive and misleading conduct in relation to work health and safety (WHS) matters. These protections allow individuals to perform WHS roles and activities, as well as raise health and safety issues or concerns at their workplace, without fear of discrimination or coercion.

Both criminal and civil actions can be brought against a person who engages in discriminatory, coercive or misleading conduct in relation to WHS matters.

Discrimination

The WHS Act prohibits an individual or business from engaging in discriminatory conduct against a person because of the person's WHS roles or activities.

Protected workers

Workers and prospective workers are protected by the prohibition on discriminatory conduct.

The prohibition also applies to commercial arrangements. A person must not be refused a contract or have a contract terminated because of their WHS roles or activities.

Discriminatory conduct

Examples of discriminatory conduct could include:

- firing a worker
- terminating a contract for services with a worker
- changing a worker's position to their detriment, e.g. by decreasing their salary or by demotion
- treating a worker differently from others
- not hiring someone
- offering a prospective worker less favourable terms and conditions
- terminating a commercial arrangement, e.g. a contract to supply materials to a workplace, or a sub-contracting arrangement.

Organising, or threatening to organise or take, any of the above action is also discriminatory conduct. In addition, a person must not request, instruct, induce, encourage, authorise or assist someone else to engage in discriminatory conduct.

Prohibited reason

Not all discriminatory conduct is unlawful. To be unlawful, discriminatory conduct must be engaged in for a prohibited reason.

The WHS Act specifies when discriminatory conduct is engaged in for a prohibited reason. This includes conduct that is engaged in because the worker, prospective worker or person engaged in a commercial arrangement:

- is a health and safety representative (HSR) or a member of a health and safety committee, or undertakes another role under the WHS Act
- does or does not exercise their powers or perform their functions under the WHS Act
- does or does not exercise their powers or perform their functions under the WHS Act in a particular way

- assists or gives information to persons exercising a power or performing a function under the WHS Act
- raises an issue or concern about WHS with persons such as a PCBU, a WorkSafe inspector, an HSR, a member of a health and safety committee, another worker or any other duty holder or person exercising a power or performing a function under the WHS Act.

Consequences

If the prohibited reason is the *dominant reason* for the discriminatory conduct, that can lead to **criminal action** and penalties.

- ‘Dominant’ means ‘ruling, prevailing or most influential’.
- The dominant reason for a person’s conduct is assessed objectively based on all available and relevant information and circumstances.
- This involves determining whether a prohibited reason, more than any other reason, was the dominant reason why a person acted as they did.

If a person is convicted or found guilty in a criminal action, the Magistrate’s Court can impose penalties and make orders, e.g. an order for compensation or an order that a worker is reinstated or re-employed.

If the prohibited reason is a *substantial reason* for the discriminatory conduct, that can lead to **civil action** through the WHS Tribunal.

- While a substantial reason does not need to be the dominant or the only reason for the conduct, it is not sufficient to establish that it was simply one of a number of reasons.
- A defendant may not be liable if they can prove that the conduct was reasonable in the circumstances and that a substantial reason for the conduct was to comply with WHS laws.

If the Magistrate’s Court or WHS Tribunal establishes that a person has engaged in unlawful discriminatory conduct in a civil action, the Magistrate’s Court can make a range of orders. For example, an order for compensation, an order that a worker is reinstated or re-employed or any other order that the Magistrate’s Court considers appropriate (including a declaratory order, which defines the rights of the parties regarding the legal matter).

Both civil and criminal actions can be brought against a person for the same conduct. However, the Magistrate’s Court cannot make the same orders against a person in both criminal and civil actions.

For **criminal and civil actions**, if it is established that a person has engaged in discriminatory conduct, that person must prove that the conduct was not unlawful by proving that the alleged prohibited reason was not the dominant or substantial reason for the conduct.

Coercion or inducement

A person must not take any action intended to intimidate, force or cause a person to exercise, or not exercise, a health and safety power, function or role. This includes organising, or threatening to organise or take such action.

There is an exception for emergencies. This allows an emergency worker to give reasonable directions in an emergency without it amounting to unlawful coercion or inducement.

If a person has engaged in coercion or inducement, that can lead to criminal or civil action.

In criminal action, a person convicted or found guilty of coercion or inducement can face a penalty. In civil action, the relevant court or tribunal can issue an injunction (to make a person stop an action or to take certain action) or any other order it considers appropriate (including a declaratory order).

Misrepresentation

It is an offence for a person to knowingly or recklessly make a false or misleading representation about another person's:

- rights or obligations under the WHS laws, e.g. the right to cease work
- ability to initiate or participate in, a process or proceedings under the WHS laws, e.g. the right to request the election of an HSR or the right of a majority of workers of a work group to remove an HSR elected by them
- ability to make a complaint or inquiry to a person or body empowered under the WHS Act to seek compliance, e.g. claiming that the circumstances do not allow a WorkSafe inspector to be called in to resolve an issue.

This does not apply if the person to whom the representation is made would not be expected to rely on it.

If a person has made misrepresentations, that can lead to criminal action and penalties.

Further advice

If you need help or you believe you have been subject to discriminatory, coercive or misleading conduct in relation to work health and safety, please contact WorkSafe Contact Centre by email WorkSafeCallCentre@dmirs.wa.gov.au or telephone 1300 307 877.

Other state, territory and Commonwealth laws also provide protections from discriminatory, coercive and misleading conduct. For example, the general protections in the *Fair Work Act 2009* (Cth) or the *Equal Opportunity Act 1984* (WA). For further information on the *Fair Work Act 2009*, please contact the [Fair Work Commission](#) or the [Fair Work Ombudsman](#).