



Legislation Changes August 2024 Regulations for 'Regulated Workers'

Released 12 August 2024

From the 26th of August, 2024, new workplace laws under the Closing Loopholes No. 2 Bill will come into effect. These laws will extend Fair Work Commission (FWC) protections to regulated workers working with digital platforms, such as food delivery apps, and those in the road transport industry.

Who is covered?

These new laws will affect independent contractors doing certain types of work. These types of contractors are known as "regulated workers."

Defining Regulated Workers

The law outlines 3 different types of regulated workers:

- 'employee-like workers' performing digital platform work "commonly known as gig workers"
- 'employee-like workers' in the road transport industry
- road transport contractors and employee-like workers in the road transport industry who are part of a road transport contractual chain

Digital platform work is a progressive form of employment where an online platform connects client or customer service requests with individuals 'doers,' offering paid work. A digital platform worker is someone who performs tasks or activities for pay or profit through an internet platform or mobile app.

This may include workers across many sectors in the economy- some examples include drivers on Uber, delivery riders on Menulog, those operating through Airtasker and disability support workers on Mable.

This table sets out the key features of the different kinds of regulated worker as defined by the Fair Work Act.

| Requirement | Employee-like Worker | Road transport employee-like Worker | Regulated road transport contract |
|--|----------------------|-------------------------------------|-----------------------------------|
| Must be party to a services contract | Yes | Yes | Yes |
| Performs all or a significant majority of the work under the services contract | Yes | Yes | Yes |
| Must not be an employee | Yes | Yes | Yes |

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| Performs all or a significant majority of the work under the services contract | Yes | Yes | Yes |
| Must not be an employee | Yes | Yes | Yes |
| Must perform digital work | Yes | Yes | |
| Must satisfy 2 or more of the following: <ul style="list-style-type: none"> low bargaining power remuneration at or below the rate of an employee performing comparable work low degree of authority other characteristics prescribed by regulations (none at this stage) | Yes | Yes | |
| In the road transport industry. Definition from Awards: <ul style="list-style-type: none"> Road transport and distribution industry Long distance operation in private road transport Waste management industry Cash in transit industry Passenger vehicle transportation industry (but not electric tramway, monorail, or light rail) any other industry prescribed by regulations (none at this stage). | | Yes | Yes |
| Is not an employee-like worker | | | Yes |

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Minimum Standards Orders Provision (MSO)

The new legislation will provide the FWC with the authority to establish minimum working conditions and standards for certain regulated workers by making a Minimum Standards Order (MSO).

The table below shows the matters that the Fair Work Act explicitly states may be covered in each type of minimum standard as well as matters that are explicitly prohibited. Additionally, the FWC can deal with matters that are not listed in the table.

| Minimum Standard Matter | Employee-Like Worker | Road transport employee-like Worker | Regulated road transport contract |
|-------------------------|----------------------|-------------------------------------|-----------------------------------|
| Payment Terms | ✓ | ✓ | |
| Deductions | ✓ | ✓ | |
| Record-Keeping | ✓ | ✓ | |
| Insurance | ✓ | ✓ | |
| Consultation | ✓ | ✓ | |
| Representation | ✓ | ✓ | |
| Delegates Rights | ✓ | ✓ | |
| Cost Recovery | ✓ | ✓ | ✓ |
| Payment Times | | | ✓ |
| Fuel Levies | | | ✓ |
| Rate Reviews | | | ✓ |
| Termination | | | ✓ |
| Overtime Rates | ✗ | ✗ | ✗ |

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Minimum Standards Orders Provision (cont.)

| Minimum Standard Matter | Employee-Like Worker | Road transport employee-like Worker | Regulated road transport contract |
|--|----------------------|-------------------------------------|-----------------------------------|
| Rostering Arrangements | × | × | × |
| Matters relating to road transport otherwise comprehensively dealt with by the Heavy Vehicle National Law or other laws. | × | × | × |
| Matters of a commercial nature that do not affect the terms and conditions of engagement of regulated workers | × | × | × |
| Matters relating to work health and safety that are comprehensively dealt with by other laws | × | × | × |
| Terms that would change the form of engagement or status of workers covered by the standards order (including by deeming them employees) | × | × | × |

When can the FWC make an MSO?

The FWC may make an MSO order in the following circumstances:

- on its own initiative; or
- upon application by:
 - an organisation that is entitled to represent the industrial interests of one or more regulated workers who would be covered by the proposed minimum standards order; or
 - an organisation that is entitled to represent the industrial interests of one or more of the regulated businesses that would be covered by the proposed minimum standards order; or
 - a regulated business that is included in a class of regulated businesses that would be covered by the proposed minimum standards order; or
 - the Minister.

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Minimum Standard Guidelines

When the FWC deems it appropriate, they may issue Minimum Standards Guidelines (MSG) rather than an MSO. Unlike an order, a guideline is not legally binding and instead offers non-binding advice or recommendations on how to comply with legislation or follow best practices.

These guidelines assist employers and employees in understanding their rights and obligations, serving as a resource for interpreting and applying specific rules or standards in practical situations.

Unfair Termination and Deactivation Provision

The Fair Work Act will introduce a new provision that will ultimately allow the FWC to grant a remedy to a person, on their application, if satisfied that:

- the person was protected from unfair termination or unfair deactivation at the time of being terminated or deactivated; and
- the person has been unfairly terminated or unfairly deactivated.

As such, a person who is protected from unfair deactivation or unfair termination that has been deactivated or terminated after the commencement of the new provisions, and who earns less than the contractor high income threshold (which will be prescribed by the Fair Work Regulations 2009), may apply to the FWC for an order granting a remedy.

The application must be made within 21 days after the deactivation or termination, or such further period as the FWC allows if it is satisfied there are exceptional circumstances.

Furthermore, deactivation or termination that occurs because of serious misconduct will not be considered unfair.

What classifies under unfair deactivation?

A person has been deactivated from a digital labour platform if:

- the person performed digital platform work through or by means of the digital labour platform; and
- the digital labour platform operator modified, suspended, or terminated the person's access to the digital labour platform; and
- the person is no longer able to perform work under an existing or prospective services contract.

A person will be considered to have been unfairly deactivated if the FWC is satisfied that:

- the person has been deactivated from a digital labour platform; and
- the deactivation was unfair; and
- the deactivation was not consistent with the Digital Labour Platform Deactivation Code.

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What classifies as unfair deactivation? (cont.)

In considering whether it is satisfied that a person's deactivation was unfair, the FWC will consider whether there was a valid reason for the deactivation related to the person's capacity or conduct, whether any processes set out in the Digital Labour Platform Deactivation Code were followed and any other matters that the FWC considers relevant.

What classifies under termination?

A person has been terminated if:

- the person performed work as a regulated road transport contractor under a services contract; and
- a road transport business received services under the services contract; and
- the services contract was terminated by, or as a result of the conduct of, the road transport business.

A person has been considered to be unfairly terminated if:

- the person was performing work in the road transport industry; and
- the person was terminated; and
- the termination was unfair; and
- the termination was not consistent with the Road Transport Industry Termination Code

In considering whether it is satisfied that a termination was unfair, the FWC will take into account whether there was a valid reason for the termination related to the person's capacity or conduct, whether any processes in the Road Transport Industry Termination Code were followed and any other matters that the FWC considers relevant.

Remedies

Unfair deactivation remedies

The FWC may order the reactivation of a person protected from unfair deactivation. The remedy of reactivation has the effect that the person is restored to the position that person would have been in but for the deactivation, including removing any suspension, termination, or modification prior to deactivation.

If the FWC makes a reactivation order, it may also make an order requiring the digital platform operator to pay to the person an amount for the remuneration lost, or likely to have been lost, by the person because of the deactivation, but must not order payment of compensation as a remedy for unfair deactivation.

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Remedies (cont.)

Unfair termination

The FWC may order that a new contract be entered into, or the payment of compensation to a regulated road transport contractor. The FWC will not order compensation unless satisfied that entering into a new services contract would be inappropriate.

An order for a new services contract must be an order for a new contract in the same terms as the terms of the services contract at the time of termination, or with such variations as the FWC considers appropriate. If the FWC makes an order for a new services contract, it may also make an order to restore lost pay.

Collective Agreements

The FWC will also have the authority to approve a collective agreement between a regulated business and an organisation entitled to represent the industrial interests of one or more employee-like workers.

A collective agreement can be established when both of the negotiating parties agree on the terms of the collective agreement and is approved by the FWC.

The FWC will have the authority to manage disputes related to the formation of a collective agreement but will not be able to issue a binding decision to settle any disputes.

Need advice with any of these legislative changes, or perhaps would like some clarity on how they can impact your business? Our team can help.

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