Notice to WA Workers' Compensation Clients

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EBM
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About This Document

This notice is meant as a general overview of the *Workers' Compensation and Injury Management Act 1981* (WA) (the Act). It is not intended to be comprehensive and does not constitute legal advice.

Please contact your EBM Account Manager for further information or assistance.

Alternatively, you may wish to contact your legal advisor or WorkCover WA (www.workcover.wa.gov.au) or the WorkCover WA Infoline on 1300 794 744.

Under the Workers' Compensation and Injury Management Act 1981 (WA) (the Act), we draw your attention to the following:

Primary definition of a Worker

This part of the Act covers any person who works under a **contract of service** or apprenticeship with an employer. The contract may be expressed or implied, oral or written.

A large part of the workforce would come under this part of the definition, and it usually covers workers who:

- Are on a salary or wages
- Work for only one employer
- Have set hours of work
- Are supervised and controlled
- May have their employment terminated by the employer.

The definition excludes casual workers who are doing work which is not for the normal purpose of the employer's trade or business.

Working Directors

Only private companies (not public companies) have the option of covering their working directors under Section 10A of the Act.

In relation to private companies, a working director means a director of a company:

a. who executes work for or on behalf of a company; and

b. whose earnings as a director of the company by whatever means are in substance for personal manual labour or services.

To obtain cover, the name of each working director must be individually noted on the Policy and their total earnings must be declared, including wages, salary and other remuneration (including non-cash benefits). Employer contributions under the *Superannuation Guarantee (Administration) Act 1992* should not be included.

There is a mechanism for determining disputes as to whether a director is a 'working director' prior to the policy of insurance being issued. You or your insurer may lodge an application with the Conciliation or Arbitration Services to have the issue determined.

Once a policy has been issued, an insurer cannot decline to indemnify you on the basis that the working director is not a 'worker', or the company is not the employer of the working director. However, liability can be declined by the insurer if the information provided by the company, is false or misleading, and the decision of the insurer to issue the policy was materially affected by that misrepresentation.

Statutory benefits cover is provided for named working directors. Common law cover may not be provided for claims by working directors unless amongst other things, they can establish they were working under a **contract of service** for the Company.

WorkCover WA has provided the following examples to illustrate how weekly compensation is calculated for working directors in different circumstances.

Scenario 1: Company statement of estimated earnings of working director is $80,000. At the end of the policy period the company declares the amount of the working director's earnings is $100,000. Three months after the last statement of actual earnings the working director is incapacitated for work.

Weekly compensation is based on the annual amount of $100,000 last declared as the actual earnings of the working director.

Scenario 2: Company provides statement of estimated or actual earnings to insurer with nil remuneration declared for working director.

No weekly compensation is payable as the company has declared the working director receives no earnings.

Scenario 3: Working director working for company less than one year. Statement of working director's estimated earnings of $80,000 provided to insurer but no statement of actual earnings. At time of injury no remuneration received.

Weekly compensation based on the estimated earnings of $80,000 p/a declared by the company to the insurer at the beginning of the policy period.

Scenario 4: Working director working for company less than one year. Statement of working director's estimated earnings of $80,000 provided to insurer but no statement of actual earnings. At time of injury working director's weekly earnings averaged $1,000 p/w over 3 month period.

Weekly compensation based on average earnings of $1,000 p/w.

For further information regarding the above, please refer to WorkCover WA (www.workcover.wa.gov.au).

Failure to nominate a working director on the Salary & Wages Declaration form will result in such person(s) not being insured for workers' compensation.

In some cases, it may be preferable to effect alternative income protection options for working directors. Please ask your EBM Account Manager for details.

Extended Definition of a Worker

This part covers any person who works under a **contract for service(s)**.

Many people who work on a contract, or sub-contract, or casual basis, may come under this part of the definition and it may cover workers regardless of the fact they:

- Are paid on piece rates, hourly rates or per job
- Work for more than one employer
- Work for the employer on a 'one-off' or per job basis
- Do not have set hours of work
- Work unsupervised
- May not have their employment terminated by the employer
- Pay 20% prescribed payments (sub-contractor's tax)
- Are described in the contract as a contractor or sub-contractor.

This part of the definition may also include any person to whose service any industrial award or agreement applies.

When is the Contractor/Sub-Contractor a Worker under the extended definition of a Worker?

A contractor or sub-contractor may be defined as a 'worker', if the contractor/sub-contractor:

a. is engaged by another person to do work which is for the purpose of the other person's trade or business; and

b. is paid in substance for their personal manual labour or services.

Example 1:

A builder's normal trade or business is building. Activities which are part of that trade include bricklaying, carpentry etc. It may also be said that repairing equipment associated with these activities is part of the builder's business.

Any sub-contractor is likely to be considered as being paid in substance for their personal manual labour or services.

Example 2:

A farmer's normal trade or business is farming. Activities which are part of that business include seeding, fencing, shearing and general repairs.

A shearing shed worker, who may sometimes be referred to as a sub-contractor, is paid in substance for their work as a wool classer or shearer or shed-hand.

In both these cases, the sub-contractor uses their own hand tools but this is not a significant factor in calculating the amount they are paid. In each case, if the sub-contractor does not supply materials and does not employ any workers, they may be defined as being paid in substance for their personal manual labour or services.

On this basis, a person may still be defined as a 'worker' despite the fact they may pay tax at a sub-contactor's rate (20% prescribed payments), have their own ABN, may work for various employers, may work unsupervised, may set their own hours of work and/or be described as a contractor or sub-contractor.

If the contractor/sub-contractor supplies materials and/or employs workers, then there is doubt whether they would be a 'worker' under the Act either under the primary definition or the secondary definition of a Worker.

Some Points to Consider

- Payment 'in kind' such as goods in return for work does not rule out an employer/worker relationship. There still needs to be a workers' compensation policy.
- Many sub-contractors work as teams and believe no cover is required. If one of the team members has the right to hire and fire and supervises the others, then there may be an employer/worker relationship and the team leader would be required to take out a workers' compensation policy to cover the other members of the team.

Cover for the Contractor's Workers

Under Section 175 of the Act, if a person (the *'principal'*) contracts with another person (the *'contractor'*) to perform work which is for the purpose of the principal's normal trade or business, then both the principal and the contractor are liable to cover the contractor's employees. In other words, each must have a workers' compensation policy.

If the contractor in turn sub-contracts the work to a sub-contractor, then all parties, including the principal, the contractor and the sub-contractor, are liable to cover any employees of the sub-contractor.

If one of the contractor's employees has an injury at work, a claim for compensation could be made on either the principal or the contractor. If however, the principal does have to pay the claim in the first instance, the principal can sue and recover the full cost of the claim from the contractor.

It is therefore in the interest of the principal to ensure the contractor holds a current workers' compensation policy.

It is worth noting, that while both parties in this situation are liable to declare the wages of the contractor's workers, suitable arrangements may be made with an insurance company for an appropriate premium.

Submitting Workers' Compensation Claims

Employers have five (5) working days to lodge a workers' compensation claim with their insurer once they have received the completed workers' compensation claim form, along with the WorkCover WA prescribed first certificate of capacity from the injured worker. An employer's report of injury form is also required to be completed. Failure to meet this statutory requirement may result in WorkCover WA imposing a financial penalty of $1,000.

Prescribed Amount

This is indexed annually on 1 July each year. As of 1 July 2021, it equates to $239,179.

Weekly Compensation Payments - Indexed Annually 1 July

Subject to proving an incapacity, injured workers are entitled to receive weekly payments, and the rate of weekly payments is determined based on whether the worker was paid pursuant to an award (an award worker), or not paid pursuant to an award (a non-award worker).

Workers are entitled to receive their average weekly pay for the first 13 weeks of incapacity before it steps down (there may not be a step down in all cases). Effective 1 July 2021, the capped prescribed weekly compensation rate is $2,772.00 (maximum weekly entitlement).

Award Workers

An award worker is a worker whose earnings are prescribed by an industrial award when the injury occurs. An industrial award includes enterprise orders, collective agreements and enterprise bargaining agreements.

Even if the employer pays the worker without regard to an award, a worker can still be an 'award worker'. A worker's earnings are prescribed by an award if they are subject to that award, irrespective of whether the contract of employment imports the award into its provisions or was made with reference to its terms.

Example:

A welder working in a manufacturing business may agree to be paid $50 per hour without regard to any award. The worker would nevertheless be considered an award worker, because the worker's earnings would be prescribed by the Manufacturing and Associated Industries' and Occupations' Award 2010.

An award worker's weekly payments are averaged over a 13-week period prior to their incapacity, including any over award or service payments paid on a regular basis plus overtime, bonuses and allowances.

From the 14th week onwards, weekly payments will consist of:

- the rate of weekly payments payable under the relevant industrial award, plus any over award or service payments paid on a regular basis
- plus any allowance paid on a regular basis as part of the worker's earnings and related to the number or pattern of hours worked; plus any other allowance prescribed by the regulations
- other allowances, overtime and bonuses are not paid from week 14 onwards unless the allowances, overtime and bonuses can be classified as being payments paid on a regular basis and related to the number or pattern of hours worked by the worker.

Therefore, a worker who is paid allowances and overtime on a regular basis and related to the number or pattern of hours, would still have the average of the allowances and overtime included in his/her rate from the 14th week, and there may not be a step down in the rate of weekly payments.

Non-Award Workers

If a worker's earnings are not prescribed by an award, the rate of weekly payments for the first 13 weeks is assessed by averaging the earnings (including overtime, any bonus or allowance) over 12 months prior to the injury, and in the employment in which the employee was injured. If employed for a period of less than one year, earnings will be averaged over the lesser period.

From week 14 onwards, weekly payments will 'step down' to consist of 85% of the average weekly earnings up to the current cap.

Payment of Weekly Payments

If liability has been accepted for weekly payments, the worker must be paid weekly payments in the same manner and regularity as the worker was paid before the injury. It is unlawful to reduce or cease payment of weekly payments unless certain criteria have been met.

If the weekly payments are reduced or ceased unlawfully, the employer commits an offence and is liable to a fine of $2,000. We suggest you continue to pay weekly payments until advised not to do so by your insurer.

Other Entitlements - Indexed Annually 1 July

Medical and Related Expenses

For reasonable hospital, medical and ancillary expenses, to a maximum of 30% of the Prescribed Amount, which equates to $71,754. The insurer must notify the worker when they have paid 60% of the medical entitlement. An extension may be granted of up to $50,000.

Vocational Rehabilitation Expenses

For approved vocational rehabilitation providers to assist workers back to work, to a maximum of 7% of the Prescribed Amount which equates to $16,743.

Travel Expenses

For reasonable travel expenses as per the prescribed rate per kilometre, which equates to $0.48.

Lump Sum Settlements

Lump Sum Settlements are available in certain circumstances and maximums are calculated on the balance of the Prescribed Amount.

Note: Age based entitlement limitations have been removed such that, from 1 October 2011, injured workers aged 65 years and older are able to access weekly payments. There is no retrospective entitlement for workers injured prior to 1 October 2011.

Specialised Retraining Program

A specialised retraining program is available to injured workers who are unable to return to work and who have a whole of person impairment of not less than 10% but less than 15%. These workers will need to meet all the retraining criteria to be eligible. An extension of up to 75% of the Prescribed Amount is available to enable eligible workers to undertake formal vocational training or study.

Common Law

Common Law is based on a worker's degree of permanent whole of person impairment (PWPI).

There are certain legislative provisions including eligibility requirements that need to be met by the worker.

WorkCover WA advises in order to pursue a common law damages claim a worker must:

- Have a PWPI of at least 15%
- Advise of intention to pursue a Common Law claim by lodging an **Election to Retain Right to Seek Damages form** available on the Workers forms page with the Director, Conciliation.

There may be statutory limitation periods that affect when legal proceedings need to commence, such as those stipulated in the *Limitation Act 2005*.

An election may affect their workers' compensation entitlements and, once made, is irreversible. It is strongly recommended that a worker seek independent legal advice before making a decision.

- A worker who has a PWPI of at least 15% and less than 25% will have their claim for damages capped. Once a worker elects to pursue a capped common law claim, their entitlement to statutory benefits ceases and their remaining weekly payment entitlements are reduced over a period of 6 months.
- A worker who has a PWPI of at least 25% has no cap on their damages claim and their entitlements to statutory benefits and weekly compensation payments continue in accordance with the provisions of the Act.

Workers' Compensation Substitutes are Illegal

An employer cannot contract out of his/her liability under the Act.

- A personal sickness and accident policy cannot be substituted for a workers' compensation policy. An employer must have a workers' compensation policy regardless of the fact that the worker may also choose to take out a personal accident policy
- Sometimes a contractor/sub-contractor is asked to sign an agreement with the employer to the effect that the contractor/sub-contractor is not entitled to claim workers' compensation. If the contractor/sub-contractor is defined as a 'worker' under the Act, then this agreement is prohibited and invalid
- An employer must not deduct monies for payment of a workers' compensation policy from any workers' wages. If deducted, all deductions, may be recovered from the employer or the insurance company who deducted it.

Avoidance Arrangements

An 'avoidance arrangement' is an arrangement which is contrived to enable a person (E) to have the benefit of the services of another person (W) by entering into an arrangement that results in W not being deemed a worker as defined by the Act.

As part of the arrangement, W must execute work principally for E as director or worker of a company that undertakes work that is part of the process in the trade or business of E.

For an 'avoidance arrangement' to be deemed contrived, substantially similar services must have been previously provided by W as a worker of E. Alternatively, if W was not previously a worker of E and E intimated they were not prepared to enter into an arrangement for the provision of W's services, that would have resulted in W being deemed a worker.

If it is determined a worker was undertaking work under an 'avoidance arrangement', which was entered into on or after 14 November 2005, when the injury occurred, the employer will be liable to pay workers' compensation entitlements in accordance with the Act and will not have the protection of any insurance cover.

In addition, the employer commits an offence and may be subject to a penalty.

Dispute Resolution

If a dispute arises, it is intended that the dispute first be referred to a conciliator under the Workers' Compensation Conciliation Service with a view to the parties resolving the dispute by way of conciliation.

A conciliator has the power to make interim orders for weekly payments (up to 12 weeks) if the conciliator is convinced that the outcome is likely to result in an order for weekly payments. The conciliator may also make interim orders ceasing/suspending and/or reducing payments to a worker.

If the dispute can not be (or is not) resolved through the conciliation process, a party to the dispute can seek that the matter be dealt with via arbitration under the Arbitration Service.

Appeals from an arbitrator (on questions of law and with leave) rest with the District Court of Western Australia.

Workers Employed Across State Boundaries

The Act now provides that the worker's compensation premium payable and entitlement for injured workers are determined by each worker's "State of Connection".

A worker's State of Connection is determined by applying the following sequential tests:

a. The State in which the worker usually works in that employment

b. If no State is identified by test (a), the State in which the worker is usually based for the purposes of that employment

c. If no State is identified by test (a) or (b), the State in which the employer's principal place of business in Australia is located.

This applies to all workers interstate or overseas and the Act extends to cover those workers for six months only. If your worker is going to be out of the State for longer than six months then it is essential that the following action is taken:

- You advise EBM and we will negotiate with your insurer to arrange a policy to cover that worker, if possible and if required; or
- You take out an Employers' Liability policy in that State or Country if possible and if required.

Extra Territorial Workers' Compensation

If any members of your managerial, clerical, sales or technical staff go overseas on business, you should consider effecting Extra Territorial Workers' Compensation Insurance cover. This cover is usually incorporated as an extension of a Corporate Travel Policy.

You should be aware that workers' compensation is dealt with differently in all overseas countries.

Documentation you are required to have

Even if you only employ one person you are now required by the Workers' Compensation Code of Practice (Injury Management) 1981 to have in place an Injury Management System which includes a Return to Work Program (RTWP). A RTWP is required if a worker is certified fit to return to work in a restricted capacity. An employer must develop (in writing) and implement a RTWP in consultation with the worker and the treating doctor.

You can transfer your obligation to establish a RTWP to your insurer by putting that request in writing when you submit the claim, however you must still cooperate in the process.

A $2,000 penalty applies to all employers for not having an Injury Management System in place which is in accordance with the Code of Practice and/or non-compliance with a RTWP.

On the WorkCover WA website there are templates available that you can download and modify to your requirements. See these at: www.workcover.wa.gov.au.

Otherwise please contact your EBM Account Manager who will arrange for EBM's Injury Management team to provide assistance in developing your Injury Management System.

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