# Entertainers

A guide to deemed workers

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# This guide has been produced to help employers and/or workers who may be uncertain about coverage under the *Return to Work Act 2014* (the Act). For further information please call ReturnToWorkSA (RTWSA) on 13 18 55.

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# Who is a worker?

The Act provides for the recovery and financial support of workers who suffer a work injury arising from their employment. The Act requires that an employer register with RTWSA and pay an insurance premium based on remuneration paid to workers in their employ (unless they are exempted – see the RTWSA website for information on the small employer registration exemption). Under the Act, ‘worker’ has a broader definition than ‘employee’.

Whether someone is a worker under the Act needs to be considered on a case-by-case basis, from the viewpoint of the ‘worker’-‘employer’ relationship, against the provisions of the Act and well-tested common law principles.

The definition of ‘contract of service’ under the Act includes a contract, arrangement or understanding under which 1 person (the worker) works for another (the principal) in certain types of work i.e. prescribed work or work of a prescribed class - and this includes otherwise independent contractors. In these circumstances the principal is taken to be the ‘employer’ of the ‘worker’.

# Important notes

Whether a worker is engaged to perform work on an ongoing basis or for a short period e.g. for as little as one hour on a given day, or on a casual basis, an obligation exists on the employer to include remuneration paid to any such worker(s) in the calculation of premium payable.

A principal should ensure that an otherwise independent contractor who employs a worker(s) is, at all times when performing work for the principal, registered as an employer with RTWSA. If a contractor (who employs a worker(s)) is not registered, then under section 4(4) of the Act the principal is taken to be the employer of workers employed by the contractor. It is therefore in the principal’s best interests to ensure that any contractors who also employ workers are registered with RTWSA by requesting them to provide a copy of a certificate of registration.

Section 4(4) of the Act – states:

*Where in a prescribed industry or in prescribed circumstances a person (the* ***principal****) contracts with another person (the* ***contractor)*** *for the performance by the contractor of work undertaken by the principal, the principal will, for the purposes of this Act, be taken to be the employer of workers employed by the contractor.*

Regulation 5(8) of the *Return to Work Regulations 2015* (the Regulations) states:

*For the purposes of section 4(4) of the Act, a prescribed circumstance is where a person (the principal) contracts with another person (the contractor) who is not registered as an employer under the Act.*

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# How the law relates specifically to entertainers

Depending on the terms of the arrangement, a person engaged as an ‘entertainer’ may have a common law contract of service and therefore be a worker for the purposes of the Act.

If there is no common law contract of service, the ‘entertainer’ may be taken to be a worker under the provisions of the *Return to Work Regulations 2015*. Regulation 5 includes workers “performing as a singer, dancer, musician, comedian or other entertainer at a hotel, restaurant, club, or other similar venue” but excludes “work as an actor, model or mannequin, or as any other type of entertainer, in performing as part of a circus, concert recital, opera, operetta, mime, play or other similar performance.”

Entertainers are considered to be working under a contract of service and have the corresponding status of a worker where entertainers are engaged to perform individually or as a group (unless they are a registered company) and:

1. the work is carried out by 1 person to the contract, arrangement or understanding (worker) in the course of or for the purposes of the trade or business of the other party to the contract, arrangement or understanding (employer), (eg, a pianist performing for, and in, a restaurant, a band performing for, and in, a hotel) and
2. the work is performed personally by the worker (whether or not the worker supplies any tools, plant or equipment), and
3. the worker does not employ any other person to carry out any part of the work, and
4. the value of materials supplied or reasonably expected to be supplied by the worker does not exceed $146 in 2023 (indexed).

(It is expected that performers do not generally supply materials. Musical instruments, props, equipment, etc are not materials.)

An ‘entertainer’ (or members of a band or group of entertainers) may establish a separate legal entity by incorporating, and that would impose certain obligations on that entity in respect of its workers, including the requirement to register with RTWSA.

There may be instances where the hirer (or end-user eg, a hotel) believes a premium is not payable on their entertainers due to arrangements with agents/booking agencies. Where the engagement is by means of an entertainer through an agent, with an agency agreement, the hirer (end-user) would have the liability for the associated premium.

If a band or other entertainer organises an event at a venue which it hires and it is agreed with the venue owner that it receive the door takings directly, the arrangement is likely to fall outside the Act and Regulations. However if the hiring venue organises and receives door takings and pays the band/entertainer an agreed percentage of, or amount from, those proceeds then the amount paid is considered as remuneration paid by the venue to the entertainer.

The following questions and answers may assist your understanding.

# Frequently asked questions

**Do hotels have to keep details of band members?**

Yes.

**Is it the case that bands incorporated as businesses are excluded from the Act?**

The act of incorporation will prevent the regulation relevant to entertainers from applying. However, the act of incorporation will place certain obligations on the entity incorporated in respect of its workers which most likely would see the respective members of the band being workers of the incorporated entity and not the end-user (eg, hotel)

**Are sound mixers, lighting technicians and road crews covered by the definition of entertainers under the Act? If not, who pays their insurance premium?**

Sound mixers, lighting technicians and ‘roadies’ are not considered to be entertainers under the Regulations. Such persons are more likely to be employed by the band, and the normal contract of service provisions would apply. In this case, the band as an employer would be required to register with RTWSA and pay a premium based on the remuneration payments made to its workers.

**Do the Regulations mean that hotels have to pay superannuation for entertainers?**

No. Superannuation is governed by Federal Legislation. The Regulations do not affect superannuation requirements.

**Do the Regulations mean that hotels have to give entertainers group certificates?**

No. Income tax legislation is Federal legislation.

**Can hotels avoid issues of workers compensation coverage by using DJs instead of live entertainers?**

No. If the arrangement with the DJ is for the purpose of the trade or business of the venue, it is likely that the Regulations will apply as a DJ is likely to be found to be “other entertainer” within the meaning of regulation 5(f) of the Regulations.

**Does applicable GST and the use of ABN numbers have any impact?**

No, as these provisions are intended to apply to specified independent contractors.

**What do venues have to provide to RTWSA?**

Employers are not required to provide the names of each and every worker or details about how many workers they employ or their roles, just the total remuneration paid or payable to workers at each of their business locations.

**Is it the case that bands accepting a door deal with the venue are not classified as workers under the Act, but those being paid a set fee are?**

If a band or other entertainer organises an event at a venue which it hires and it is agreed with the venue owner that it receive the door takings directly, the arrangement is likely to fall outside the Act and Regulations. However if the hiring venue organises and receives door takings and pays the band/entertainer an amount from those proceeds, then the amount paid is considered remuneration paid by the venue to the entertainer.

**Does the Act apply to buskers in the mall?**

A ‘busker in the mall’ is generally not engaged by anyone, is self-employed and on this basis the provisions of the regulation would not apply. However, if for some reason a busker was engaged by someone for the purpose of attracting business or some other business activity, then it is likely that the regulation for entertainers would apply.

**Does the Act apply to bands performing at private weddings or parties?**

These are viewed as not being for the purpose of the trade or business of the engaging party (private wedding and parties) and therefore the regulation for entertainers does not apply. The exception to this is where they are engaged by a professional wedding organiser or event management firm and the band would be entitled to coverage under the Regulations.

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