Return to Work Compliance Guidelines

1 July 2017

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# Introduction

As part of our role as the regulator of the Return to Work scheme, ReturnToWorkSA must maintain effective procedures to ensure that as far reasonably practicable and as early as is possible, workers are returned to suitable employment with their pre-injury employers. This applies to both registered and self-insured employers.

Section 18 of the *Return to Work Act* 2014 (‘the Act’) establishes the employer’s obligation to provide suitable employment. To ensure compliance with the Act, ReturnToWorkSA will:

* act on requests for investigations lodged by workers under section 15(2)
* consider allegations of non-compliance received from other sources
* review suspected breaches of termination notification obligations of workers with active claims and
* make sure employers understand and are compliant with their legislative obligations about return to work coordinators.

ReturnToWorkSA does this using an effective mix of communication, engagement, training, compliance monitoring and appropriate application of sanctions to encourage and ensure employer compliance with the Act. Our focus is primarily on communication, engagement and education. The use of sanctions is reserved for serious or wilful non-compliance or recidivism.

# Suitable employment principles

## Suitable employment obligations

The key objective of the Act is to facilitate a safe and sustainable return to work for injured workers as quickly as possible. This is explicitly outlined in section 3 of the Act, which states that the primary objectives of the Act are:

* *To realise the health benefits of work,*
* *recover from injury; and*
* *returning to work (including, if required, after retraining).*

The Act defines obligations for workers to participate in their recovery and return to work, and for employers to provide suitable employment. The specific provisions regarding the employer’s obligation are set out in subsection 18(1) of the Act. This section of the Act describes the circumstances in which an employer **must** provide suitable employment. There are exclusions to this obligation, which are covered in section 18(2):

*(2) Subsection (1) does not apply if—*

1. *it is not reasonably practicable to provide employment in accordance with that subsection (and the onus of establishing that lies on the employer); or*
2. *the worker left the employment of that employer before the commencement of the incapacity for work; or*
3. *the worker terminated the employment after the commencement of the incapacity for work; or*
4. *new or other employment options have been agreed between the worker, the employer and the Corporation under section 25(10) ; or*
5. *the worker has otherwise returned to work with the pre-injury employer or another employer.*

The exclusions specified in subsection 18(2)(a) cover a broad range of circumstances whereas subsections (2)(b) to (2)(e) are relatively straightforward. An explanation of each of these is set out below.

## Subsection 18(2)(a)

The obligation to provide suitable employment does not exist if the employer can establish it is not reasonably practicable to do so. There are a range of factors that may be considered, including:

* the employer’s size and range of duties available
* the worker’s skills, experience and other criteria specified in the definition of suitable employment in section 4 of the Act
* the worker’s capacity for work
* other employment issues not necessarily related to the injury and the worker’s capacity.

## Subsection 18(2)(b)

If the worker left their employment with the pre-injury employer prior to the commencement of their incapacity for work, the pre-injury employer is not obliged to provide suitable employment. The worker may have resigned or abandoned their employment. The evidence required to satisfy this condition in a compliance investigation could include a copy of a resignation letter, or documents that show the employer has made every attempt to contact the worker, facilitate their return to work and advise them of the implications of their continued unauthorised absence. Evidence that the worker might have been asked to confirm they have left their employment might also be relevant.

## Subsection 18(2)(c)

If the worker resigns or abandons their employment at any time after the commencement of the incapacity for work, the employer is no longer obliged to provide suitable employment. The evidence required to satisfy this condition in a compliance investigation would be the same as for subsection 18(2)(b).

## Subsection 18(2)(d)

An employer is required to make every effort to accommodate a worker’s medical restrictions, but sometimes the nature and extent of their injury means the worker cannot cope with the demands of their pre-injury employment and the return to work objective needs to be changed.

Subsection 18(2)(d) refers to subsection 25(10) of the Act, which says the return to work objective in a recovery/return to work plan for a worker must be reviewed at six months if the worker has not returned to work, working at their full capacity. The return to work objective can also be reviewed at any other time.

If the worker, the employer and the compensating authority have, in accordance with section 25(10) of the Act, agreed to change the return to work objective to return to work with a different employer, the pre-injury employer is not obliged to provide suitable employment for the worker. While the treating doctor is also likely to play a key part in making this decision, it is the worker, employer and Corporation who must agree to the change in return to work objective. In the case of a worker whose employer is self-insured, it is the worker and self-insured employer who must agree the change in return to work objective.

The evidence required to establish that a change of return to work objective has been agreed include contemporaneous notes that show the worker, employer and Corporation discussed and agreed to the change, a recovery/return to work plan that reflects the change and the parties’ compliance with the plan’s obligations.

## Subsection 18(2)(e)

The pre-injury employer does not have an obligation to provide suitable employment if the worker has returned to work. There are legal precedents that define return to work. The worker must be a *settled and established member of the wage earning workforce*. A return to work may be to a different role with the employer or it may even be to the pre-injury role with some permanent modifications to accommodate any ongoing medical restrictions. It can also be a return to work with a different employer entirely.

Suitable employment may be a collection of duties carried out within the pre-injury employer’s business. It does not have to be a role that currently exists or a role that is currently available.

An employer’s obligation to provide suitable employment exists independently of other employment related conditions, decisions and obligations, such as performance issues, company policies or industrial obligations. Once established under the Act, the obligation to provide suitable employment remains until one or more of the exclusionary criteria under section 18(2) are met.

## Termination notification obligations

An employer who is considering terminating the employment of a worker who has an accepted claim MUST give the worker and ReturnToWorkSA 28 days’ notice of the proposed termination. This allows ReturnToWorkSA to assess the employer’s compliance with its obligation to provide suitable employment. Section 20(2) of the Act sets out the circumstances when notice is not required. It is expected that the employer maintain documentary evidence to demonstrate any one or more of these circumstances.

The most common reason for terminating employment without notice is that the worker has engaged in serious and willful misconduct. For misconduct to be considered serious and wilful, both conditions need to be met. That is the potential consequences must be serious, the worker knew of the potential consequences, and yet carried out the misconduct regardless. Some of the kinds of misconduct which would be considered serious may be:

* failure to follow health and safety procedures
* assault
* verbal abuse
* theft
* failure of drug and alcohol screening tests.

Another exception to the requirement to provide 28 days’ notice of a proposed termination of employment is if the worker is employed under a federal award. In these cases the Employer is still required to provide notification to the Corporation of the actual or proposed termination, however the notification period is whatever is defined in their award or agreement under which they are employed.

## Suitable employment disagreements

Disagreement may arise between the worker and employer about the provision of suitable duties and/or termination of employment. There are avenues under the Act available to a worker who believes they are being denied suitable employment, including:

* **Section 15(2):** A worker can reasonably request ReturnToWorkSA to investigate any circumstance where it appears that the worker's employer is not complying with any requirement of this Act as to the retention, employment or re-employment of the worker.
* **Section 18(3) to (5):** A worker may make a written request to the employer asking for them to provide suitable employment. If the employer fails to provide suitable employment within 30 days, at the completion of the 30 day period the worker may make an application to the South Australian Employment Tribunal (‘SAET’) for an order that the employer be compelled to provide suitable employment.

When a worker makes a request under section 15(2), ReturnToWorkSA will investigate the employer’s compliance with their return to work obligations. ReturnToWorkSA will review the information it holds, as well as the information held by its service providers, and may interview employers and workers and request information from them.

Furthermore, should the Corporation become aware, through any other source, of an allegation or information that an employer is not complying with Act requirements regarding the retention, employment or re-employment of a worker, this information will be assessed and, where appropriate, investigated.

A worker may exercise both avenues of review (section 15(2) request and a section 18 application) at the same time.

## Expectations of Employers

ReturnToWorkSA expects employers to be fair and reasonable in dealing with their workers with respect to these obligations, and that they participate in the return to work process in good faith. ReturnToWorkSA acknowledges the commercial realities of doing business, particularly for smaller enterprises and will generally not apply sanctions if employers who are found to be non-compliant take steps to rectify the matter.

# Compliance options

There a variety of compliance interventions available to ReturnToWorkSA to encourage Scheme participants to comply with the Act and improve Scheme performance.

ReturnToWorkSA will use a risk based approach to apply an escalating range of compliance interventions, including:

1. **Provision of Information:** Public information about employer obligations will be up to date, relevant and accessible for employers, workers, providers and other stakeholders, such as industry and employee associations.
2. **Targeted Communication and Education Activities:** ReturnToWorkSA will regularly engage and communicate with key industry and employee stakeholders and groups to ensure they understand their obligations and to promote and encourage compliance. This will also include regular communication with service providers contracted to ReturnToWorkSA, to ensure they understand the relevant provisions of the act, lines of demarcation, referral procedures for suspected breaches and the role of ReturnToWorkSA.
3. **Review and Audit Activities:** ReturnToWorkSA will use a risk based approach to plan and undertake reviews and audits of employer compliance with their obligations under the Act. This activity may be targeted or random activities, undertaken in response to general or specific risks or as part of a general assurance processes. This may take the form of desktop reviews and/or site visits.
4. **Responsive Reviews:** ReturnToWorkSA will respond to allegations of breaches of employer obligations under section 18(2) and requests for section 15(2) reviews in a timely and effective manner. First response will occur within two business days.
5. **Application of Sanctions:** ReturnToWorkSA will make every effort to assist employers to achieve voluntary compliance with their obligations. Detected breaches of obligations will be treated through provision of education, issuing a formal warning and, in the case of registered employers, the imposition of supplementary payments through the Remission and Supplementary Payments (RASP) Scheme, approved by the Minister for Industrial Relations and published in the Government Gazette. The RASP Scheme includes supplementary payments for:
* failure to provide appropriate notice of proposed termination of employment
* failure to provide suitable employment
* failure to comply with an obligation under a recovery and return to work plan
* unsatisfactory conduct by the employer
* failure to remunerate correctly
* late advice of a claim
* failure to appoint or provide adequate facilities/assistance to return to work coordinators
* failure to provide information required by the Corporation or provision of materially incorrect, misleading or deceptive information.

Detected breaches of obligations by self-insured employers will be taken into account in deciding whether to renew, revoke or reduce the self-insured employer’s period of registration in accordance with section 129(11) of the Act, and may be the subject of a specific term or condition applied to their registration.



The following free information support services are available:

If you are deaf or have a hearing or speech impairment you can call ReturnToWorkSA on 13 18 55 through the National Relay Service (NRS) www.relayservice.gov.au.

For languages other than English call the Interpreting and Translating Centre on 1800 280 203 and ask for an interpreter to call ReturnToWorkSA on 13 18 55.

For braille, audio or e-text of the information in this brochure call 13 18 55.

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