Changes to *Return to Work Act 2014* from 1 December 2024

The Parliament of South Australia recently passed the *Return to Work (Employment and Progressive Injuries) Amendment Act 2024* which amends the *Return to Work Act 2014* (the Act).
Most changes come into effect on 1 December 2024

Employer's duty to provide suitable employment

The Act now provides greater clarity regarding an employer's duty to provide an injured worker with suitable employment following a work injury.

Employers have an obligation to provide suitable employment to an injured worker once that worker has the capacity to work. In most cases, the employer and worker, guided by the doctor, and with the support of the insurer, are able to identify suitable employment, without legal intervention.

However, if a worker has capacity and wishes to return to work and they have not been provided with suitable employment, they are required to advise their employer in writing of their request for suitable employment, including evidence of their medical capacity for work and the type of employment they consider they are capable of performing.

If the worker has ceased to be incapacitated for work in consequence of the work injury, they need to provide the request for suitable employment to the employer within 6 months of their ceasing to be incapacitated.

The employer then has one month to consider their request and advise them in writing whether they will provide suitable employment, either of the kind requested or any other kind of employment they are willing to provide. The employer must give reasons for any refusal to provide suitable employment or why they are proposing alternative employment options.

The worker can also ask ReturnToWorkSA to investigate and take action regarding a failure to provide suitable employment.

Exceptions to the duty

An employer does not have a duty to provide suitable employment where:

- it is not reasonably practicable to do so (and the onus of establishing that lies on the employer);
- the worker left their employment before the commencement of the incapacity for work;
- the worker terminated the employment after the commencement of the incapacity for work;
- the worker's employment was properly terminated on the ground of serious and wilful misconduct (and the onus of establishing that lies on the employer);
- new or other employment options have been agreed to by the worker in their Recovery/Return to Work Plan;
- the worker has returned to work with the pre-injury employer or another employer.

If the worker and employer cannot agree on suitable employment, either of the kind requested or any alternative proposed, the worker has one month after the date on which the pre-injury employer provided them with a written response to their request, to make an application to the South Australian Employment Tribunal to deal with the dispute.

If the Tribunal orders that the injured worker should have been provided suitable employment, it can now specify certain aspects of the employment to be provided. These can include the nature and range of duties, any adjustments to be made to enable the worker to perform those duties and the number of hours to be worked.

The Tribunal can also now order the employer to make a payment to the injured worker for the wages or salary they would have received if the suitable employment had been provided - considering any payment received from other employment during the intervening period.

Employers' legal costs in relation to an application to provide suitable employment will be paid in the same way as workers' legal costs.

Labour hire employers, host employers and self-insured employers

There are also changes affecting labour hire employers and host employers (as defined in the Act) and grouped self-insured employers and the Crown.

Host employers and labour hire employers (as defined in the Act)	Host employers are now required to cooperate with labour hire employers by communicating about suitable employment options, participating in return to work planning and providing the injured worker access to the workplace for the performance of duties. For clarity, there is nothing in the Act that requires a host employer to directly employ a labour hire worker following a work injury - it is expected the injured worker will remain employed by their pre-injury labour hire employer.

Grouped self-insured employers	As a grouped self-insured employer comprised of related bodies corporate, the duty to provide suitable employment for an injured worker extends across the group and not just to the employer where the worker was employed pre-injury. This means that if the pre-injury self-insured employer cannot provide suitable employment the group must explore whether one of the other body corporates could meet the obligation.
The Crown	In South Australia, the Crown and any agencies and instrumentalities of the Crown are deemed to be registered as self-insured employers. The Crown has a direct responsibility for managing its injured workers' return to work under the Act. This includes ensuring suitable employment is provided when a worker is able to return to work. The duty to provide suitable employment to injured workers is extended to the Crown and all agencies and instrumentalities of the Crown.