# *Return to Work Act 2014*

## Summary of changes

*Return to Work (Employment and Progressive Injuries) Amendment Act 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).

The table below is an overview of the detail; however, for full context, we would encourage you to read the legislation - *Return to Work (Employment and Progressive Injuries) Amendment Act 2024.*

| **An employer's duty to provide suitable employment to an injured worker** | | |
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| Amendment | What has changed? | Previous legislative provision |
| Section 18(1)<br><br>*Ceased to be incapacitated* | The duty to provide suitable employment carries on even once the worker has ceased to be incapacitated for work in consequence of the work injury. | The duty was linked to the worker having an incapacity for work in consequence of the work injury. |
| Section 18(2)(ca)<br><br>*Misconduct* | Employers won't be required to provide suitable employment where the worker's employment was properly terminated on the ground of serious and wilful misconduct. | There was no explicit exception covering an employee terminated on the grounds of serious and wilful misconduct. |
| Section 18(3)and(4)<br><br>*Process* | A worker who has not been provided with suitable employment can give their pre-injury employer and any host employer notice of their request for suitable employment, including evidence of their medical capacity for work and the type of work they consider they are capable of performing.<br><br>If the employer cannot provide suitable employment, they must provide a written response indicating whether they will refuse the worker's request or whether they can provide other suitable employment. | Previously there was less clarity under the Act regarding the procedure relevant to a worker requesting suitable employment and no obligation on the employer to respond in writing. |

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| | Time limits, evidentiary and other procedural requirements which both the worker and employer must abide by are also set out in the provision. | |
| Section 18(5) | Updated section reference | |
| Section 18(5a)-(5h)<br><br>*Orders of the Tribunal* | The Tribunal can now:<br><br>• make an order specifying the nature, range, hours, timing and adjustments required to enable the worker to perform suitable employment<br>• make an order for backpay for the wages or salary the worker would have received if the suitable employment had been provided<br>• make an order regarding a host employer<br>• make an order for a different member of the self-insured employer group to provide suitable employment (noting the order should be directed to the pre-injury employer unless there are good reasons for it to be provided by a different member of the self-insured group)<br>• make an order for the Crown or an agency or instrumentality of the Crown to provide suitable employment. | No specific powers to order backpay covering any dispute period.<br><br>Less clarity about what the Tribunal can order and orders are restricted to the pre-injury employer rather than extending to members of related bodies corporate or to the Crown or other agencies or instrumentalities of the Crown. |
| Section 18(6), (7),<br><br>*Cost orders* | Employers will be entitled to have their legal costs paid in the same way as workers, in accordance with the cost's provisions of the Act, up to prescribed limits. | If the Tribunal declined to make an order in favour of the worker, the employer could have their reasonable costs of the proceedings before the Tribunal paid. |
| Section 18(7a) –(7d)<br><br>*Powers of the Tribunal* | These subsections outline the procedural obligations of the Tribunal and the compensating authority.<br><br>The Tribunal has the power to hear and determine a section 18 dispute concurrently with any other proceeding under the Act and can also determine whether the worker has been incapacitated for work in consequence of a work injury if that question has not been previously determined. | A suitable employment dispute could not be combined with a dispute that relates to whether the worker's injury is compensable. |

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| | The Tribunal may have regard to medical and factual developments that arise during litigation when making an order for suitable employment. | |
| Section 18(9)<br><br>*Cost orders* | The Tribunal may decline an order for costs if a party (the worker or the employer) acted unreasonably, frivolously or vexatiously. | Only related to a worker's costs. |
| Section 18(14) & (16) | Updated reference | |
| Section 18(16a)-(16b)<br><br>*Labour hire* | A host employer, as defined in the Act, must co-operate with a labour hire employer by:<br><br>• communicating regarding the provision of any suitable employment requested by a worker<br>• participating in RRTW planning<br>• providing access to the workplace for the performance of duties by the injured worker. | New provision placing obligations on host employers, as defined in the Act. |
| | Clarifies that nothing in the Act requires a host employer to directly employ a labour hire worker following a work injury. | New provision |
| Section 18(16c)-(16d)<br><br>*Group employers* | If a worker is injured working for a self-insured employer that is a member of a group of self-insured employers comprised of related bodies corporate, the duty to provide suitable employment applies across the group and is not restricted to the pre-injury employer alone. The section 18(3) notice can be given to the lead employer in the group.<br><br>Similarly, if a pre-injury employer is an agency or instrumentality of the Crown, the duty to provide suitable employment applies to all such agencies and instrumentalities of the Crown. | The duty to provide suitable employment applied only to the pre-injury employer. |
| Section 18(17)<br><br>*Labour hire* | Provides definitions of: host employer, labour hire employer, labour hire worker and related bodies corporate as these are newly introduced concepts. | New provision |

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| Section 37(ba)<br>*Designated weekly earnings* | Clarifies that backpay orders do not constitute designated weekly earnings. | New provision |

| **Prescribed Dust / Fibre Diseases** | | |
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| Amendment | What has changed? | Previous legislative provision |
| Section 5<br>*Average weekly earnings election* | A worker injured with a prescribed dust/fibre disease will be able to elect whether their average weekly earnings are calculated with reference to the date they were exposed to the hazardous dust/fibres that caused their injury, or the date they were diagnosed with the dust/fibre disease.<br>The list of applicable dust/fibre disease will be prescribed by regulation on the recommendation of the Minister, following consultation with, at a minimum, the AMA, ReturnToWorkSA and the Minister's Advisory Committee. | Average weekly earnings calculated with reference to the employment the worker was in at the date they were exposed to hazardous dust/fibre that caused their injury. Section 5(6), a discretionary provision, could also be applied where, for example, it was not possible to arrive at a fair average. |
| Section 42<br>*Federal minimum wage* | This is a consequential change to ensure the relevant date and employment match up where a worker makes an election. | The only relevant date was the date on which the injury occurred. |

| **Permanent Impairment** | | |
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| Amendment | What has changed? | Previous legislative provision |
| Section 4(18), (19), (20)<br>*Definitions* | Provides new definitions of:<br>• when a work injury has stabilised<br>• a terminal condition<br>for the purpose of seeking a permanent impairment assessment. | The Act referred to the term stabilised, but there was no legislative definition.The Impairment Assessment Guidelines also referred to maximum medical improvement. |

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| Section 22(7) & (7a)<br><br>*Assessment* | A permanent impairment assessment can only occur where the work injury has stabilised, unless the worker has a terminal condition or a condition prescribed in the Regulations.<br><br>Before prescribing a condition in the Regulations, the Minister must consult with the Australian Medical Association (SA), ReturnToWorkSA and the Minister's Advisory Committee.<br><br>It is intended that the prescribed conditions will be ones that have a long latency period and/or progressively deteriorate over time, and as such, do not technically meet the definition of stabilised. | New provision |
| Section 122(6), (6a)<br><br>*Assessment and referral - IMA* | Mirrors the changes introducing the concept of stabilised and its exceptions.<br><br>Sets out a mirrored consultation process required for prescribing a condition in the regulations that can be assessed for permanent impairment in the absence of being stabilised. | New provision |
| *Section 22(6a) and (6b)*<br><br>*Changing Impairment Assessment Guidelines* | Clarifies that when changing from one set of Guidelines to another, the guidelines that will apply to the worker are the guidelines in force at the time their injuries have stabilised (or met one of the exceptions) and they attend their first appointment for assessment of permanent impairment. | New provision |

| Attendance at medical examinations | | |
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| Amendment | What has changed? | Previous legislative provision |
| Section 17A<br><br>*Employer & ReturnToWorkSA not to be present* | Employers (including any third party agent acting on their behalf) and ReturnToWorkSA (which includes its claims agents) are not allowed to be present while an injured worker is being physically or clinically examined, or treated by a health practitioner, or undergoing diagnostic examination or tests required for treatment purposes. The exceptions to this provision are where a worker provides express written consent (using a form to be published by ReturnToWorkSA) or in any circumstances set out by the Regulations (and there are none at present).<br><br>The worker's employer (including a third party agent acting on the employer's behalf.) and ReturnToWorkSA (including its agents) can still be present during a consultation involving the worker and a health practitioner to discuss their recovery and return to work. | There was no explicit prohibition on attending. |

| Recovery and Return to Work Plans | | |
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| Amendment | What has changed? | Previous legislative provision |
| Section 25(5)(c)(i)<br><br>*Preparing the plan* | As far as is reasonably practicable, when preparing a plan medical records relevant to the worker's condition should be reviewed and consultation should occur with any health practitioner who is treating the worker for a relevant injury. | Allowed for medical plans to be reviewed or consultation with the health practitioner. |
| Section 25(7)<br><br>*Distributing the plan* | The completed plan must be provided to the worker, their employer, any host employer and as far as is reasonably practicable, any health practitioner who is treating the worker for a relevant work injury. | Distribution was required to the worker and the employer only. |

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| Section 25(10a)<br><br>*New or other employment options* | Any proposed new or other employment options for a worker must be agreed to by the worker before they can form part of the recovery or return to work plan. | New provision |
| Section 25(12), (13) and (14)<br><br>*Grouped self-insured employers, and Crown employers* | Where an injured worker's employer is a grouped self-insured employer and the duty to provide suitable employment has been extended to a related body corporate, any reference to employer includes the related body corporate.<br><br>Where an injured worker's employer is the Crown or an agency or instrumentality of the Crown and the duty to provide suitable employment has been extended to another agency or instrumentality, a reference to employer includes the other agency or instrumentality. | New provision |
| Section 25(3), (4) and (5)(a)<br><br>*Host employer* | Consequential amendments to enable a recovery and return to work plan to include obligations for host employers, as defined in the Act. | New provision |
| Section 18(2)(d)<br><br>*New or other employment options* | Consequential update of the wording. | Previously it referred to the new or other employment options being agreed between the worker, the employer and the Corporation |

| Miscellaneous changes | | |
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| Amendment | What has changed? | Previous legislative provision |
| Alternative duties | | |
| Section 19<br>*Payment determination* | A rarely used discretionary power of ReturnToWorkSA to determine the wage or salary to be paid for alternative duties has been removed.<br>This means that the employer has to pay an appropriate wage or salary in respect of the alternative or modified duties. | The employer must pay an appropriate wage or salary in respect of injured workers undertaking alternative or modified duties unless ReturnToWorkSA set a different amount. |
| South Australian Employment Tribunal | | |
| Section 19A<br>*Jurisdiction to determine monetary claims* | Provides the Tribunal with jurisdiction, for claims which fall outside a contract of employment and not covered under the *Fair Work Act 1994*, to hear and determine underpayment claims for wages or salary payable when a worker is undertaking alternative or modified duties.<br>This insertion is made to remove any uncertainty about whether the determination of such disputes is fully captured by their existing monetary claim jurisdiction. | New provision |
| Reduction or discontinuance | | |
| Section 48<br>*Termination* | A reduction or discontinuance of weekly payments can only occur when the worker has been "properly" terminated for serious and wilful misconduct.<br>In the event of a dispute this is a matter for the Tribunal to determine on the evidence. The mere assertion of serious and wilful misconduct by an employer or compensating authority is not sufficient if that misconduct is not supported by the evidence. | Weekly payments to a worker must not be discontinued unless "the worker is dismissed from employment for" serious and wilful misconduct. |

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| Self-insured employers | | |
| Section 129<br><br>*Contact details* | ReturnToWorkSA must publish the name of a self-insured employer along with a contact phone number and address. | This is a new provision as currently there is no requirement for the publication. |