

# Alert

## WORKERS COMPENSATION & SELF INSURANCE

### Managing Your Workforce in a Stand Down

What are the implications for workers performing modified duties pursuant to the Return to Work Act?

By Patrick Walsh

A lot of business are currently faced with having to make rapid decisions with respect to standing down employees (or making positions redundant) in order to try and preserve their business amid the restrictions being imposed to manage the threat posed by the COVID-19 pandemic.

One issue that has arisen is the effect that a stand-down (see section 524 of the *Fair Work Act 2009* (Cth) ('the FW Act')) has on workers in receipt of weekly payments under the *Return to Work Act 2014* (SA) ('the RTW Act'). I think it's safe to say that Parliament, when drafting the RTW Act, did not turn its mind to the effects of a pandemic on South Australian businesses and workers!

In my view, there is no aspect of the RTW Act that deals directly with the situation many employers are currently confronted with.

The first thing to note is that, although section 524(3) of the FW Act states that an employer is not required to make any payments to an employee during a stand-

down period, weekly payments pursuant to the RTW Act are not payments between an employer and employee; they are payments between the Compensating Authority (either Return to Work SA or the self-insured employer in its capacity as the Compensating Authority) and the injured worker.

The RTW Act states that *"...if a worker, other than a seriously injured worker, suffers a work injury that results in incapacity for work, the worker is entitled to weekly payments in respect of that incapacity in accordance with the following principles ..."*.

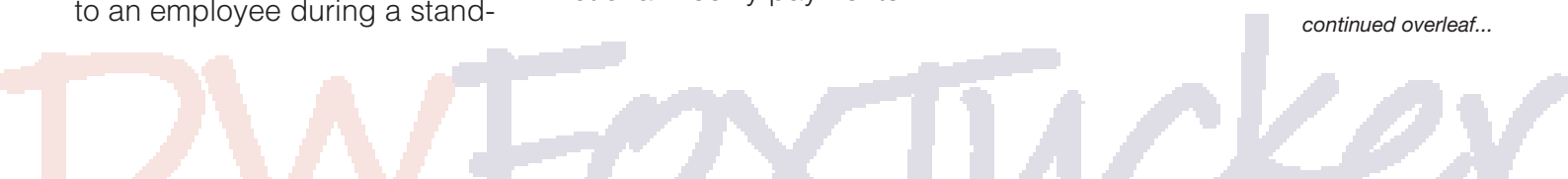
Practically, the RTW Act achieves this by subtracting an injured worker's designated weekly earnings from their notional weekly earnings. A worker's designated weekly earnings are their actual earnings from employment - or self-employment. This means that, in circumstances where a worker has capacity for work, but the employer does not provide it, the worker generally remains entitled to weekly payments up to, or 80% of, their notional weekly payments.

One of the important considerations in determining whether a stand down under section 524(1)(c) of the FW Act (which is the section most commonly being invoked by employers at this time) is lawful is whether the employer is able to derive any value or benefit from the employees being stood-down.

In the context of workers compensation, a stand-down under section 524(1)(c) of the FW Act means that an employer may not be able to provide suitable duties to a worker - to the extent that the relevant worker has capacity - that would otherwise be available because there are no duties that the injured worker can perform that would be of benefit or value to the employer **for circumstances that the employer cannot reasonably be held responsible.**

The Full Bench of the South Australian Employment Tribunal in [Dohnt, Jones & Kimber v Department for Health and Ageing \(SA Ambulance Service\) \[2019\] SAET 90](#) noted that section 47 of

*continued overleaf...*



the RTW Act could be used to:

1. adjust a worker's notional weekly earnings figure for the purposes of section 39; and
2. incorporate changes to a worker's base salary.

Section 47 of the RTW Act, however, does not appear to address the main issue with respect to employees that have been stood-down - which is the ability of a relevant employer to provide suitable employment.

This can be contrasted with section 48 of the RTW Act (and more specifically section 48(1)(d)), which specifically contemplates the reduction in the availability of overtime to an injured worker.

Section 48(1)(g) of the Act appears to be the section most suited to addressing the entitlement of an injured worker to weekly payments when they have been stood down. A Compensating Authority could potentially determine to reduce a worker's notional weekly earnings figure, to the extent that a worker has capacity for suitable duties, to reflect the fact that the stand-down has meant that, irrespective of whether the worker is injured or not, those duties are no longer available. This places the relevant worker into the same situation as other workers affected by the stand down, inasmuch as they would need to seek employment on the open market (to the extent that they have capacity)

if this is permitted under any applicable industrial agreement or instruments covering their employment.

A worker with no capacity for employment would be entitled to continue in receipt of their weekly payments as they have no ability to seek alternative employment on the open market.

As a practical example, a worker with notional weekly earnings of \$1,000 has sustained a work injury. As a consequence, they suffer a partial incapacity for work that reduces their capacity from 1 FTE to 0.5 FTE, which means that they are earning \$500 per week and receiving \$500 in weekly payments from the Compensating Authority. The workforce is stood down, such that the worker is no longer earning \$500 per week. As a consequence of the stand down, the Compensating Authority issues a determination pursuant to section 48(1)(g) of the Act reducing the notional weekly earnings figure to \$500. When the stand down finishes, the worker would then be able to resume suitable duties and make a claim for weekly payments to the extent that suitable duties are not provided by the employer.

This is one option that is open to self-insured employers (and ReturnToWorkSA) to try and treat injured workers no differently from the remainder of the workforce affected by a decision to stand down employees.

It is also worth bearing in mind that, to the extent that it applies to the workforce, the Federal Government's recent announcement of the JobKeeper subsidy is a very good option to ameliorate the cost of both salaries and weekly payments while employees are stood down.

At this time, it is not clear what the policy of Return to Work SA is regarding this issue.

Having regard to the number of small and medium-sized businesses in South Australia who have not been able to continue trading for a variety of reasons due to the COVID-19 pandemic, I would hope that consideration is being given to offering premium relief to business. This would go hand-in-hand with other forms of financial assistance being provided by the State and Federal Governments.



[MORE INFO](#)

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