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Alert

Workers Compensation & Self Insurance

Significant Changes to the Obligation to Provide Suitable Employment Ahead

The Government has released a draft Bill that proposes a range of significant changes to the obligation to provide suitable employment.

By Patrick Walsh

It would appear that after only recently making significant amendments to the *Return to Work Act 2014* (SA), the State Government cannot resist the temptation to continue tinkering with the legislation, which is likely to deliver a fresh set of challenges for employers – particularly large employers – who are already dealing with a range of issues due to the recent *Secure Jobs, Better Pay* reforms and volatile economic conditions. In anticipation of an article exploring the proposed changes in more depth, here are some of the key takeaways from the draft *Return to Work (Employment and Progressive Injuries) Amendment Bill 2023*:

- Workers who sustain a prescribed dust/fibre disease injury will be allowed to make an election that the relevant employment for the purpose of calculating average weekly earnings is the employment in which the worker is employed at the time of diagnosis.
- Employers will be relieved of the obligation to provide suitable employment in circumstances where the worker has been dismissed as a consequence of serious and wilful misconduct.
- In assessing whether it is reasonably practicable for an employer to provide suitable employment, the Tribunal will, in addition to anything else of relevance, be required to have regard to five factors:
    - the size of the employer;
    - the extent of any adjustments required to the role to accommodate the worker;
    - the risk of re-injury and potential for further harm;
    - whether the parties can maintain trust and confidence in the employment relationship; and
    - the impact on other employees.
- Labour-hire workers will be able to request the "host" employer's cooperation in the provision of suitable employment. Host employers will have an obligation to cooperate in this process but will not have standing as a party in respect of any dispute before the Tribunal regarding the provision of suitable employment.
- Workers who have returned to their pre-injury capacity will have a period of 6 months to bring an application for suitable employment (which begs the question as to whether such an application is for suitable employment or for reinstatement).

continued overleaf...

- The Tribunal will have the power to:
    - make orders as to the nature of the suitable employment being provided, which will include, amongst other things, the power to order a graduated increase in duties or hours of work;
    - order any member of a group of self-insured employers (even if it is not the pre-injury employer) to provide suitable employment and similar powers with respect to the Crown. In this regard, the obligation to provide suitable employment is extended to the group of self-insured employers or all agencies and instrumentalities of the Crown;
    - take into account any change in capacity for work and any other evidence before the Tribunal in determining suitable employment and is not limited to the type of employment nominated by the worker;
    - make an order for back pay (which has the potential to cause some tension in circumstances where the Tribunal makes an order for suitable employment that is different from any of the forms of suitable employment contemplated in the original application); and
    - determine whether the worker has suffered a work injury within the meaning of the Act, even if that injury has not been the subject of a previous claim for a species of compensation (which would mean that an applicant would not necessarily have to have previously lodged a claim and have that accepted before invoking the jurisdiction of the Tribunal under section 18).
- Clarification on the right of parties to be paid costs from the relevant Compensating Authority.
- A new jurisdiction to hear monetary claims in respect of workers who have been undertaking duties under employment or arrangement that falls outside the contract for service.
- Provision to allow for assessment of permanent impairment to proceed when the impairments may not be stable but the worker has a terminal condition or a prescribed injury.

Only a brief perusal of the draft Bill suggests that these amendments will have some quite complex and possibly unintended consequences. If passed, it is likely that the most significant impacts will be felt by larger employers (particularly groups of self-insured employers) and potentially those who use, or provide, labour-hire services.

Our careful analysis of the changes and the implications will follow shortly, but if you would like to get ahead of these changes to begin planning for the impact on your business, please contact our workers compensation team.

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