

SAPS Injury Management Practice Note

Employer's Duty to Provide Work

Objectives, Targets & Performance Indicators

Objective	Target	Performance Indicator
South Australian Public Sector (SAPS) agencies have procedures regarding duty to provide work to work injured employees	All SAPS agencies	Implemented policy / procedure

Purpose

To ensure consistent application of the provisions of the Return to Work Act 2014 (the RTW Act) that focus on the obligation of agencies of the Crown to provide suitable employment to workers.

Definitions

SAPS agencies: The Crown and any agency or instrumentality of the Crown that is taken to be registered as self-insured employers pursuant to s.130 of the RTW Act.

Remuneration: Base rate of pay, as per employment contract inclusive of attraction/retention allowance - but not inclusive of other non-base pay such as penalty rates.

Context

The RTW Act provides:

The Corporation will:

- view a worker's recovery and return to work as the primary goal if a worker is injured while at work
- ensure that early and timely intervention occurs to improve recovery and return to work outcomes including after retraining (if required)
- with the active assistance and participation of the worker and the pre-injury employer, consistent with their obligations under this Act, ensure that recovery and return to work processes focus on maintaining the relationship between the worker and the pre-injury employer

Schedule 5
Part 2 – The standards
Sections 4(a),
4(b) and 4(c)

If a worker who has been incapacitated for work in consequence of a work injury is able to return to work (whether on a full-time or part-time basis and whether or not to his or her previous employment), the pre-injury employer must provide suitable employment for the worker (the employment being employment for which the worker is fit and, subject to that qualification and section 18 of the RTW Act, so far as reasonably practicable the same as, or equivalent to, the employment in which the worker was working immediately before the incapacity).

Section 18(1)

<p>A worker who has suffered a work injury must, in a manner consistent with the objects of the Act –</p> <ul style="list-style-type: none"> (a) participate in all activities designed to enable the worker to recover and return to work as soon as is reasonably practicable; and (b) without limiting paragraph (a)- <ul style="list-style-type: none"> (i) participate and cooperate in the establishment of a recovery/return to work plan; and (ii) comply with obligations imposed on the worker by or under a recovery/return to work plan; and (d) return to suitable employment when reasonably able to do so. 	<p>Subsections 15(3)(a), (b) and (d)</p>
<p>Return to work obligations of worker –</p> <p>A worker who has current work capacity must, in cooperation with the employer, make reasonable efforts to return to work in suitable employment or pre-injury employment at the worker’s place of employment or at another place of employment.</p> <p>For the purposes of this section, a worker is to be treated as making a reasonable effort to return to work in suitable employment or pre-injury employment during any reasonable period in which –</p> <ul style="list-style-type: none"> (a) the worker is waiting for the commencement of any recovery / return to work services that are required to be provided under a recovery / return to work plan for the worker; or (b) the worker is waiting for a response to a request for suitable employment or pre-injury employment made by the worker and received by the employer; or (c) if the employer’s response is that suitable employment or pre-injury employment will be provided at some time, the worker is waiting for suitable employment or pre-injury employment to commence. 	<p>Section 43 (1)</p> <p>Section 43(2)</p>
<p>Suitable employment means employment in work for which the worker is currently suited, whether or not work is available, having regard to the following:</p> <ul style="list-style-type: none"> • the nature of the worker’s incapacity and previous employment; • the worker’s age, education, skills and work experience; • the worker’s place of residence; • medical information relating to the worker that is reasonably available, including in any medical certificate or report; • if any recovery/return to work services are provided to or for the worker; and • the worker’s recovery/ return to work plan (if any). 	<p>Section 4</p>

<p>The obligation in subsection 18(1) of the RTW Act to provide suitable employment does not apply if:</p> <ul style="list-style-type: none"> • it is not reasonably practicable to provide suitable employment in accordance with section 18(1) of the RTW (and the onus of establishing that lies on the employer); or • the worker left the employment of that employer before the commencement of the incapacity for work; or • the worker terminated the employment with the pre-injury employer after the commencement of the incapacity for work; or • new or other employment options have been agreed between the worker, the pre-injury employer and the Corporation under section 25(10) of the RTW Act; or • the worker has otherwise returned to work with the pre-injury employer or another employer. 	Section 18(2)
<p>If a worker who has been incapacitated for work as a result of a work injury seeks employment with the pre-injury employer consistent with the requirements of Section 18(1) of the RTW Act by written notice to the pre-injury employer; and</p> <ul style="list-style-type: none"> • confirms that she/he is ready, willing and able to return to work with the pre-injury employer; and • provides information about the type of employment that the worker considers that she/he is capable of performing; and • complies with any other requirements prescribed by the regulations; and • if the employer fails, within a reasonable time, to provide suitable employment to the worker, <p>the worker may apply to the South Australian Employment Tribunal (“the Tribunal”) for an order under section 18(5) of the RTW Act.</p>	Section 18(3)
<p>If a pre-injury employer fails to provide suitable employment under section 18(3) of the RTW Act within one month after the worker seeks such employment (“the prescribed period”) in accordance with section 15 (3), the worker can apply to the Tribunal within 1 month after the end of the prescribed period unless the Tribunal allows an extension of time.</p>	Sections 18(4)
<p>Suitable employment under section 18 includes employment in respect of which:</p> <ol style="list-style-type: none"> (a) the number of hours each day or week that the worker performs work; or (b) the range of duties the worker performs, <p>is suitably increased in stages (in accordance with a recovery/return to work plan or otherwise).</p>	Section 18(17)
<p>If a worker who has been incapacitated for work as a result of a work injury undertakes alternative or modified duties under employment or an arrangement that falls outside the worker’s contract of service for the employment from which the injury arose, the employer must pay an appropriate wage or salary in respect of those duties unless otherwise determined by the Corporation</p>	Section 19
<p>Part 3 of the RTW Act (which does not include section 18 of the RTW Act) may apply to a worker even if it has not been finally established that the worker’s injury is a work injury.</p>	Section 23(3)

If a worker who has been incapacitated for work as a result of a work injury has not, after 6 months from the date of first incapacity, returned to work in employment that is the same as, or equivalent to, the employment in which they were working immediately before the incapacity, and the worker is not working to his or her full capacity, new or other employment options for the worker need to be taken into account in order to assist the worker to return to work in suitable employment.

Section 25(10)

The RTW Act does not distinguish the obligations of the Crown and its agencies from private sector employers.

General Information

Suitable employment:

A current, alternative or modified role, duties or position at the employee's classification / remuneration level (or lower if current capacity dictates) will be determined as suitable through an assessment against the employee's education, skills and competencies, and medical information relating to the worker.

Employees must be accommodated in, or transferred to, an available or modified role, duties or position if they are capable of performing the relevant duties and functions to:

- a reasonable standard
- within a reasonable period of time
- with a reasonable level of training, education and/or other support.

The suitability of, and any required modification to, a role, duties or position will be determined also having regard to the following criteria:

- the nature of the worker's incapacity and previous employment
- medical information or assessments relating to the worker that is reasonably available or undertaken, including in any medical certificate or report
- any recovery/return to work services provided to or for the worker
- the worker's recovery/ return to work plan (if any).

Exceptions to the obligation to provide suitable employment:

In considering the obligation to provide suitable employment to a work-injured employee, whether or not the obligation arises as a result of a written application from the worker under section 18(3), the agency will consider the following criteria under section 18(2), which remove this obligation:

- it is not reasonably practicable to provide suitable employment in accordance with section 18(1) of the RTW (and the onus of establishing that lies on the employer); or
- the worker left the employment of that employer before the commencement of the incapacity for work; or
- the worker terminated the employment with the pre-injury employer after the commencement of the incapacity for work; or
- new or other employment options have been agreed between the worker, the pre-injury employer and the Corporation under section 25(10) of the RTW Act; or
- the worker has otherwise returned to work with the pre-injury employer or another employer.

Obligation on the Crown and its Agencies

Provision of suitable employment with the pre-injury agency	<p>The agency must provide suitable employment, whether it is the worker's pre-injury or different employment within the worker's own agency in the first instance, in line with the worker's medical certification.</p> <p>The agency must determine and pay the worker an appropriate wage or salary in respect of the duties performed, as advised by the agency's HR department. If the worker's earnings from the duties performed are less than their pre-injury average weekly earnings, a determination regarding the payment of income support must be made.</p>
Provision of suitable employment external to the pre-injury agency	If suitable employment cannot be provided within the employing agency or agency where the worker sustained their incapacity for work in consequence of a work injury, the agency in which the employee is employed in must locate suitable employment elsewhere in the public sector, or with the employee's agreement, outside the public sector.
Receipt of written notice from worker	Agencies must ensure that when a written notice is received from a worker seeking employment under s18(3), a copy of the notice is provided to the injury management section and HR.
Timeframes to provide suitable employment after receiving written notice from worker	Agencies must offer suitable employment to workers after receiving a worker's written notice in a prescribed form requesting the type of employment that the worker considers that he or she is capable of performing suitable employment (as per section 18(3)(a)and(b)) within four weeks from the date of receiving the notice.
New or other employment options after 6 months	If a worker is not working at his or her full capacity in employment that is the same as, or equivalent to (with regards to remuneration), their pre-injury employment after 6 months from the first date of incapacity for work, the agency will consult with the worker regarding suitable alternate employment options for their return to work.
New contract of employment	If transfer to alternate employment elsewhere in the agency or SAPS is required: <ul style="list-style-type: none"> • consultation must occur with the worker • legislative mechanisms for transfer to alternative employment options may be required.

Practice Guidelines

In all cases, SAPS agencies must provide suitable employment for a worker incapacitated for work in consequence of a work injury. Work injured employees are to be provided priority placement ahead of all other employees. The following practice guidelines are to be adopted (in order listed or hierarchy presented):

UP TO 6 MONTHS

Employer's Duty to Provide Work, v1, 12.05.2016

1. Injury Management (IM) services within the agency receive the claim and work with the employee's manager to establish modifications to work practices to enable continued employment in the pre-injury role, or suitable alternative employment options in the pre-injury area.
2. Alternative employment options will be considered where the worker has capacity for work but is unable to productively perform their pre-injury role or modified role in the pre-injury area as a result of the work injury. Consideration of alternative employment options will give regard to medical reports/certificates indicating prognosis; and the long-term goal of the Return to Work planning.
3. The agency has a procedure, outlining responsible people, if return to suitable employment in pre-injury work area is not possible and alternate suitable employment needs to be located within the agency.
4. The agency has a procedure, outlining responsible people, if a placement external to the pre-injury agency is required to facilitate a return to work.
5. Agreed actions for a worker's return to work are documented in a recovery/ return to work plan.
6. The agency will ensure a procedure for confirming and monitoring a valid contract of employment is in place, prior to the cessation of Return to Work support services.

AT 6 MONTH

1. The agency consults with the worker and considers new or other employment options 6 months (or earlier if sufficient evidence exists) post work incapacity if the worker has not been able to return to work equivalent to their previous employment, in line with the requirements of 25(10). The agency has a procedure, outlining responsible people, and protocols for:
 - a. the identification and negotiation of new or other employment option
 - b. the transition of the worker into suitable employment
 - c. amendment to any required employment documentation
2. Agencies may consider acquiring supporting documentation to assist them in identifying suitable alternative duties, such as Vocational Assessments; Functional Capacity Assessments and medical reports (from treating or independent medical practitioners)
3. Agreed actions for a worker's return to work are documented in the recovery/ return to work plan.
4. The agency will ensure a procedure for confirming and monitoring a valid contract of employment is in place, prior to the cessation of Return to Work support services.

6 MONTHS to 104 WEEKS

1. The agency has a procedure, outlining responsible people and the management of the worker's return to maximum possible capacity in suitable employment no later than 104 weeks from the date of first incapacity for work.
2. Actions relating to supporting the worker to transition into new or other employment options (if required) should be documented in the recovery/ return to work plan during this period. These actions may include engaging the worker in formal training or on-the-job developmental opportunities; seeking feedback on work capabilities and addressing identified areas for improvement; and actively seeking transition into new employment.

3. Agreed actions for a worker's return to work are documented in the recovery/ return to work plan.
4. The agency will ensure a procedure for confirming and monitoring a valid contract of employment is in place, prior to the cessation of Return to Work support services.

104 WEEKS AFTER DATE OF 1st INCAPACITY

1. The agency has a procedure, outlining responsible people and the management of a worker's return to work at the cessation of their entitlement to income support.
2. Agreed actions for a worker's return to work are documented in the recovery/ return to work plan.
3. The agency will ensure a procedure for confirming and monitoring a valid contract of employment is in place, prior to the cessation of Return to Work support services.

Transfer between South Australia Crown agencies (Where there are no EBA complexities)

Agencies that have exhausted all opportunities and strategies to place an injured employee into suitable employment within their agency can transfer an employee into suitable employment identified in another agency, however agencies with injured employees in rural/remote areas may prioritise employment opportunities available with other agencies in the same region after considering intra-agency relocation issues.

When suitable employment in another agency is identified by the pre-injury agency and the other agency rejects the transfer, the other agency must provide documented reasons for rejecting the transfer to the pre-injury agency.

When a pre-injury agency and potential receiving agency are unable to agree on an employee's suitability for a target role, the matter will be escalated for resolution by negotiation between each agency's Chief Executive, or their delegate. If agreement on transfer still remains unresolved after exhausting all avenues for resolution, the matter may be referred to the Commissioner for Public Sector Employment for consideration and advice.

If any agency is served an Employee's Section 18 Application which affects another agency then the other agency Chief Executive and Commissioner for Public Sector Employment, Office for the Public Sector (OPS), are to be notified expeditiously.

Return to Work Service Provision Considerations

The agency will consider the provision of the following services to the worker:

- Access to vocational counselling
- Access to counselling and support services (to be extended to immediate family or significant others)
- Information about training / retraining
- Access to job interview skills
- Access to job seeking skills and techniques

- Access to career assessment and guidance
- Developmental opportunities such as volunteering or trial job placement.

Services may be provided by Injury Management Units, Return to Work (RTW) practitioners, human resource (HR) practitioners, OPS or an External Service Provider such as ReCONNECT.

Useful Links

ReCONNECT <https://www.rtwsa.com/claims/returning-to-work/reconnect>

Return to Work Services <http://publicsector.sa.gov.au/policies-standards/health-and-safety/injury-management-services/>

Return to Work Services for agencies

<http://publicsector.sa.gov.au/policies-standards/health-and-safety/injury-management-agencies/>

Redeployment, Retraining and Redundancy (RRR)

<http://publicsector.sa.gov.au/policies-standards/award-info/redeployment-retraining-redundancy/>

Jobs SA <http://www.jobs.sa.gov.au/>

Workforce Information (State of the Sector Reports, Workforce Information, Data Dashboards)

<http://publicsector.sa.gov.au/about/our-public-sector/>

Regional area placement challenges - contact HR Leaders. Contact the Office for the Public Sector for a distribution list.

Email: publicsector@sa.gov.au

Phone: 8226 2700