



Engaging Your Own Supports

A guide to assist you to consider your **legal considerations** when engaging your own supports.

Introduction

It is a person's fundamental right to be able to lead and direct their own life. Western Australia has a strong history of exploring and supporting ways that promote peoples' choice, control and ability to determine and direct their own lives. Self-Directed Support is about people directing their supports and services and deciding how best to use the resources available to them. People choosing to engage their own support persons is a way for people to:

- have more choice and control over their support and life;
- to be respected as an expert on their own life; and
- to determine and arrange their supports accordingly.

This resource is for people who have decided to engage their own support persons. It will assist you in understanding some of your key legal considerations when hiring your own workers and covers five (5) areas of responsibilities. Please note, that there are three (3) areas which are specific to WA. These are the areas of Industrial Relations, Workers' Compensation, and Health and Safety.

We recommend that you consider your responsibilities under **every** area included in this guide. As each area of responsibility is governed under different legislation with different definitions of "employee" or "worker", it is critical to work through each area **separately** and independent of each other.

WAI S works in partnership with KPMG, Perth, in relation to clarifying people's legal obligations as *employers*. We wish to acknowledge their support and contribution to this guide.

If you need any further information or support, please contact WAI S. If you need further clarity about your own circumstances, we recommend you seek your own legal advice.

WAI S Disclaimer:

This document is provided as general information only. It is not legal or financial advice. Please seek independent legal advice if you need it in relation to your own individual circumstances.

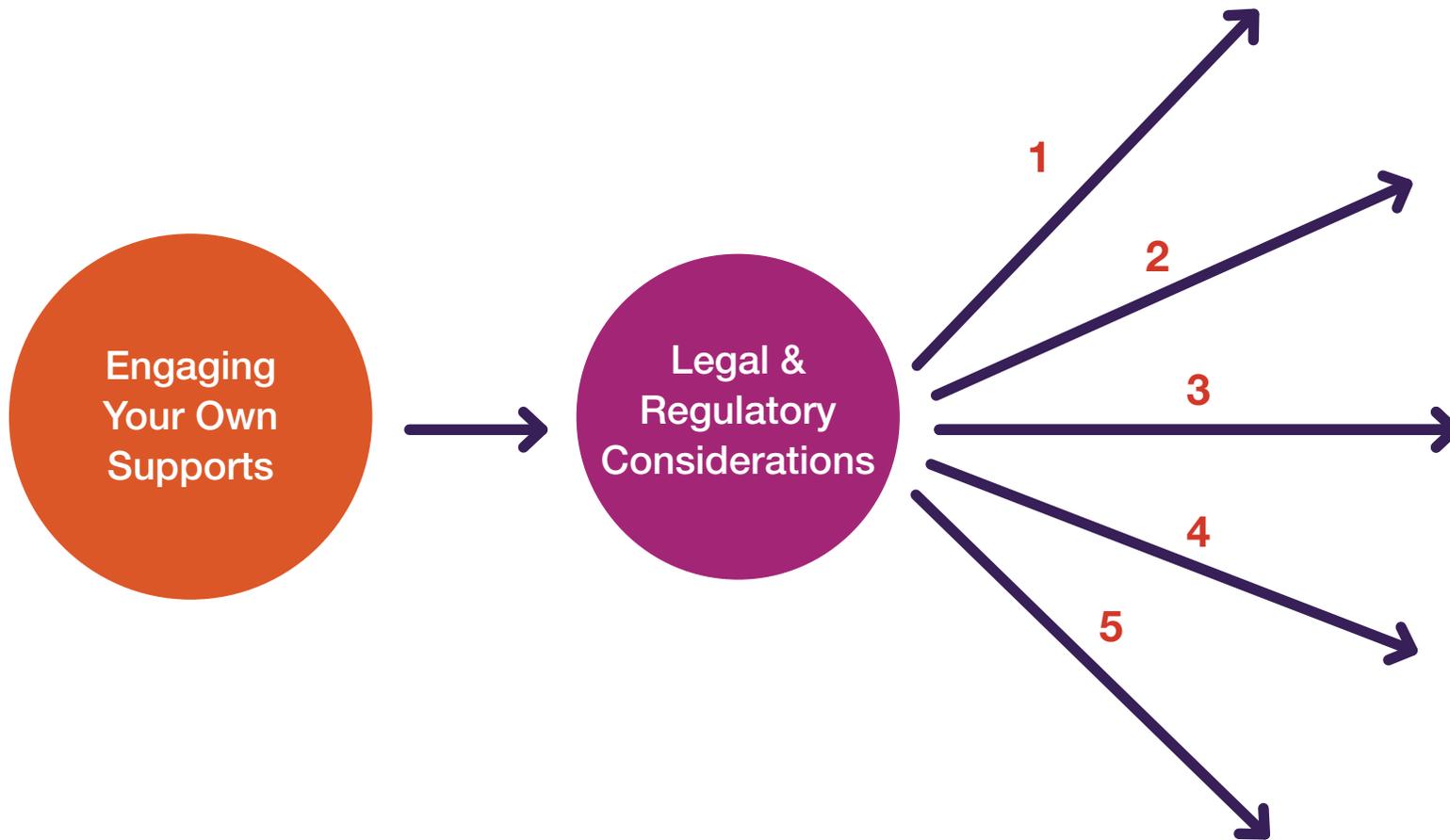
We have used SymbolStix symbolic language throughout these resources:
www.n2y.com/products/symbolstix

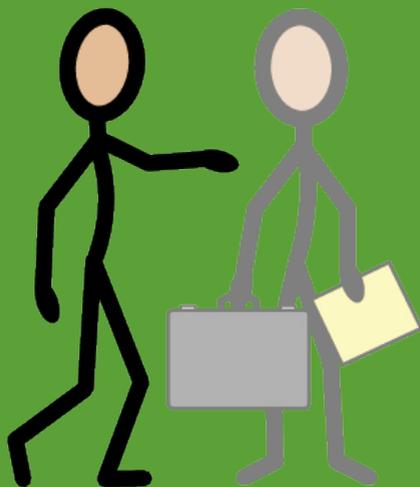
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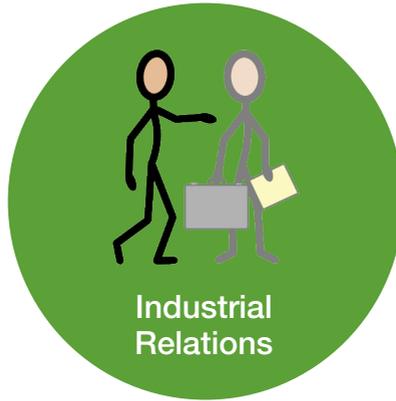


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Industrial Relations



Industrial Relations is the mutual rights and duties of employers and employees including the conditions of employment and wages and salaries.

Which Industrial Relations system applies – National or State?

Is my worker an employee for the purposes of the relevant system?



Relevant ONLY if employer is a CONSTITUTIONAL CORPORATION.
This is a financial corporation; trading corporation; or foreign corporation.

“Constitutional Corporation” means a corporation to which paragraph 51(xx) of the Constitution applies.



Does NOT apply to individuals / families personally engaging supports.

References:

s12 Fair Work Act 2009 (Cth)
<http://bit.ly/s12FairWorkAct2009>

s51(xx) Constitution of Australia



Is my worker an employee?

The Industrial Relations Act 1979 (WA), s.7(1) states:

- employee means:
 - a person who is employed by an employer to do work for hire or reward, including as an apprentice; or
 - a person whose usual status is that of an employee;

YES, person is employee



Need to:

- Pay at least the minimum wage
- Give at least the minimum leave entitlements
- Comply with other conditions of employment

Need to abide by:

- Industrial Relations Act 1979
<http://bit.ly/IRACT>
- Minimum Conditions of Employment Act 1993 (WA)
<http://bit.ly/MinimumConditionsofEmployment>
- Long Services Leave Act 1958
<https://bit.ly/LongServiceLeaveAct>

Further information:

Employment obligations for household employers:

www.dmir.wa.gov.au/householdemployers

Changes to state employment laws in Western Australia including fact sheets:

www.dmir.wa.gov.au/new-employment-laws

Minimum pay rates and entitlements summary:

www.commerce.wa.gov.au/publications/award-free-employees-minimum-pay-rates-and-entitlements-summary

Please note:

1. You must keep employment records
2. You must give your employee pay slips
3. You must appropriately manage employee performance, where needed - as employees are entitled to claim for unfair dismissal





Taxation



Employee or contractor?

When to check if workers are employees or contractors

With every worker you engage, you need to determine if they are an employee or a contractor in order to know what your tax responsibilities are.

How to determine if workers are employees or contractors

To correctly determine if a worker is an employee or a contractor, you need to look at the whole working arrangement. The ATO looks to a common law definition of “employee” and uses the following 6 indicators to decide if someone is an employee or contractor.

You need to go through all these indicators in order to assess and decide if your worker is an employee or contractor.

The ATO refers to employers as businesses throughout the indicator table. This does not mean you have to be a business. You can be a private individual employing workers.

You can find further information at <http://bit.ly/2bvDetP>

PAYG withholding and household employees
<http://bit.ly/2oSmuZ2>

Employee or Contractor?

Situation	Contractor	Employee
<p>Control over the work - who tells worker how to do the work?</p>	<p>Worker can do the work in any way they like as long as the work is completed to an agreed standard, or to the specific terms in their contract or agreement.</p>	<p>Worker follows any reasonable work requests of their supervisor or the business they work for.</p>
<p>Independence - Worker seen to be a part of the business or separate?</p>	<p>Worker operating their own business independently. Worker completes the tasks or services as agreed to in their contract or agreement and are free to accept or refuse extra work.</p>	<p>Worker seen to be part of the employer's business and are not independent from it.</p>
<p>Basis of payment - how does the person who pays the worker work out how much to pay?</p>	<p>Worker is paid all or the majority of the amount of their quote once they finish the work (to an agreed standard).</p> <p>Worker generally supplies an invoice to the other business before being paid.</p>	<p>Worker paid either:</p> <ul style="list-style-type: none"> • for the amount of time (normally hours or shifts worked) • a price for each item or for each activity done • a commission.

Ability to sub-contract or delegate - who does the work?

Worker free to pay someone else to do the work instead of the worker.

Worker can't pay someone else to do the work.

Equipment, tools and other assets - what worker needs to do their work?

Worker brings to the job all or most of the things they need to do their work.

Worker has to buy or hire their tools of trade or any equipment needed to do the work.

The business worked for provides worker with all or most of the things the worker needs to do their work.
or

Worker provides all or most of the things needed to do their work but the business they work for gives them an allowance or pays them back for the cost of the things bought.

Commercial risks - if worker makes a mistake, who pays to have it fixed?

Worker responsible for fixing their own mistakes at their own expense.

The business the worker works for is responsible if the worker makes a mistake. The business pays for the cost of fixing it.

If Employee...



MUST withhold tax

What you then need to do:

1. Register for PAYG withholding

Application to register a PAYG withholding account (NAT 3377). You will receive a WPN (Withholding Payer Number) in response to this application.

<http://bit.ly/2qsmyvW>

2. Get your worker to complete and provide you with a TFN (tax file number) Declaration (NAT 3092)

<http://bit.ly/TFNdeclaration>

Lodging TFN declaration data electronically

<https://bit.ly/LodgeTFN>

3. Withhold tax according to PAYG tax tables

The ATO has a tax withheld calculator you can use
<http://bit.ly/TaxWithheldCalculator>

4. Report and Pay withheld amounts to the ATO

<http://bit.ly/ReportWithheldAmounts>

5. Complete end of year summaries for all payments not reported through Single Touch Payroll.

<https://bit.ly/ATOAnnualReporting>

6. When your worker ceases to work for you

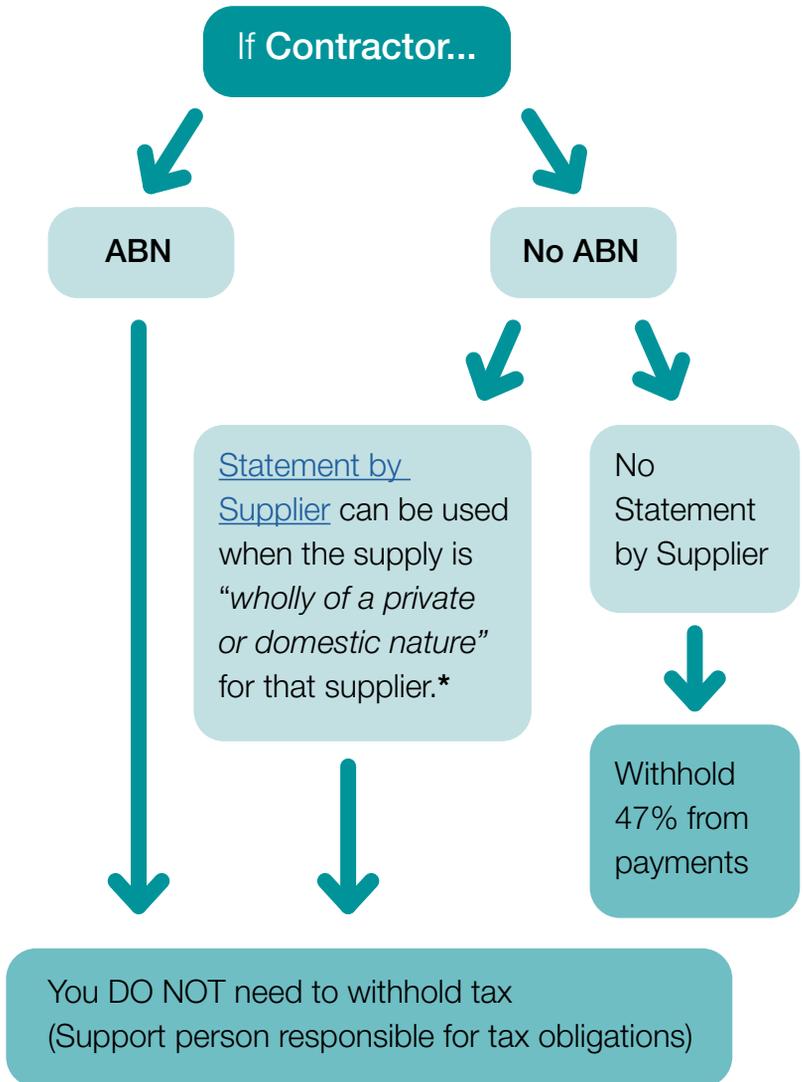
<https://bit.ly/ATOWorkerLeaves>

NOTE:

Employers with a withholding payer number (WPN) are exempt from STP reporting until 30 June 2033.

If you decide to make use of this exemption, you should keep records that support your decision.

<https://www.ato.gov.au/Business/Single-Touch-Payroll/Need-more-time/Exemptions-from-STP-reporting/>



*Suppliers cannot use this form if they are entitled to an ABN for the relevant activity

What you then need to ensure:

ABN

You will need to ask for their ABN and check that it's status is active at: <http://abr.business.gov.au/>

For a worker to register for an ABN go to:
www.ato.gov.au/business/registration

Most likely, they would use ABN registration for individuals (sole traders) (NAT 2938) <https://bit.ly/ATOsoletrader>

No ABN

When a business doesn't quote an ABN:
<https://bit.ly/WithholdingFromSuppliers>

Statement by Supplier
<https://bit.ly/StatementSupplier>

Volunteer..

There is no legal definition of 'volunteer' for tax purposes. A dictionary definition of volunteer is someone who enters into any service of their own free will, or who offers to perform a service or undertaking. A genuine volunteer does not work under a contractual obligation for remuneration and would not be an employee or independent contractor.

Please go to <https://bit.ly/NFPvolunteers> for further information.

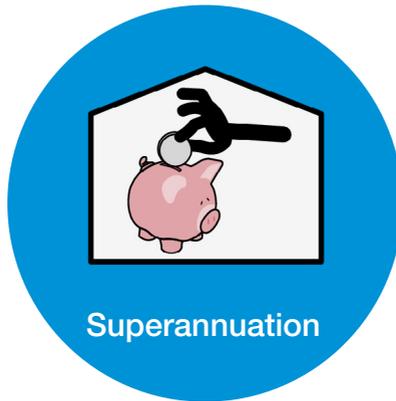
In particular, the ATO provides information in relation to:

- Paying volunteers;
- Expenses incurred by volunteers
- Volunteers and PAYG holding





Superannuation



Do I have to pay my employee/contractor superannuation?

When to check if workers are employees or contractors

With every worker you engage, you need to determine if they are an employee or a contractor in order to know what your superannuation responsibilities are.

How to determine if workers are employees or contractors

To correctly determine if a worker is an employee or a contractor, you need to look at the whole working arrangement. The ATO looks to a common law definition of “employee” and uses the following 6 indicators to decide if someone is an employee or contractor. (Refer to page 13)

You need to go through all these indicators in order to assess and decide if your worker is an employee or contractor.

<https://bit.ly/WorkOutSuper>

Super guarantee eligibility tool

<http://bit.ly/SuperEligibilityCalculator>

If Employee...



Superannuation Guarantee required regardless of how much they have earned (From 1 July 2022)



Unless Private or Domestic nature...

There is no formal definition of what constitutes private and domestic, however the ATO states that work of a domestic or private nature ordinarily means work relating personally to the individual making payment for the work; OR, to the person's house, home or family.



Superannuation Guarantee required when more than 30 hours per week worked

If Contractor...



Do I fall under Extended definition of an “employee”?

s12(3) Superannuation Guarantee (Administration) Act 1992 (Cth)

“If a person works under a contract that is wholly or principally for the labour of the person, the person is an employee of the other party to the contract.”

<http://bit.ly/SuperannuationGuarantee>



NO



No Superannuation
Guarantee required



YES

see next page
(pg. 25)

YES

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graph TD; A[YES] --> B[Superannuation Guarantee required regardless of how much they have earned (From 1 July 2022)]; B --> C[Unless Private or Domestic nature... There is no formal definition of what constitutes private and domestic, however the ATO states that work of a domestic or private nature ordinarily means work relating personally to the individual making payment for the work; OR, to the person's house, home or family.]; C --> D[Superannuation Guarantee required when more than 30 hours per week worked];
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Superannuation Guarantee required when more than 30 hours per week worked

If you need to pay Super Guarantee then:

1. Set up super

<http://bit.ly/SetupSuperforEmployers>

2. Calculate how much to pay

<https://bit.ly/HowMuchSupertoPay>

3. Pay the super contribution

<http://bit.ly/PaySuper>

Small Business Superannuation Clearing House – a free clearing house that distributes super payments to your employees superannuation funds.

<https://bit.ly/SBSuperClearingHouse>



Workers' Compensation



Do I need Workers' Compensation?

You must have workers' compensation insurance for anyone you employ who the Workers Compensation legislation defines as a 'worker'.

By keeping a current workers' compensation insurance policy and having an injury management system in place, you will ensure compliance with the Workers' Compensation and Injury Management Act 1981.

The definition of a 'worker' includes:

- full-time worker on a wage or salary
- part-time, casual and seasonal worker
- contractor and sub-contractor (in some circumstances)
- family member.

Generally, individual workers cannot cover themselves for workers' compensation, even if they are self-employed and have an ABN. An exception is when an individual is a working director of a company (Pty Ltd).

<http://bit.ly/WorkCoverWorkers>

Insurance Cover Required?



YES



Code 96010
Private Households
Employing Staff



NO

If a worker's ABN is Pty Ltd, Workers' Compensation cover may not be required. Please contact your insurer for advice.



No Workers' Compensation required

Further information:

Premium is calculated as follows

**Estimated Wages x Risk Rate = Base Premium + GST +
Broker Fee = Total Premium**

Premium is adjusted at the end of the policy period by declaring the Actual Wages.

These are subject to the Workcover WA minimum premium + GST + Broker Fee.

The minimum premium changes each financial year.

The risk rate changes each financial year.

Your rights & obligations:

<http://bit.ly/WorkCoverRights>

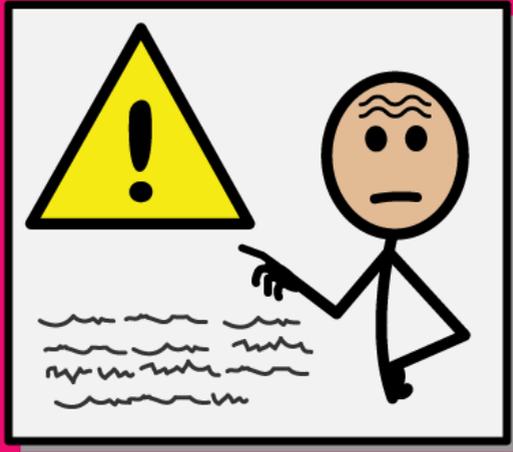
- covering them (taking out insurance)
- reporting accidents
- injury management
- managing claims and their return to work

Workers' Compensation: A Guide for Employers

<https://bit.ly/WCguideEmployers>

Injury Management: A Guide for Employers

<https://bit.ly/InjuryManagementGuide>



Health and Safety



Throughout this chapter, when a **PCBU (person conducting a business or undertaking)** is mentioned it will be replaced with the image .



PCBU = "PEEKABOO"

Safe and Healthy Workplace

Safety is a personal and ethical issue, not just a legal issue.

It is personal because we could potentially impact on the health and safety of someone else and as people who care about each other, we want to do what we can to prevent harm.

It is ethical because as citizens we have a responsibility to ourselves and each other, to be, and keep safe. It means making reasonable choices about how to do this with and for each other .

It also means people who have workers need to make reasonable choices about the resources, people, equipment, training, and technology that might be needed to make sure the people who work for them, can work safely.

The laws that cover health and safety is the Work Health and Safety Act 2020 (WA).

Who is covered under the Work Health and Safety Act 2020 (WA) (WHS Act)?

The WHS Act covers:

1. **workers** - who are people that carry out work in any capacity for a “person conducting a business or undertaking”  and whose activities in carrying out the work are influenced or directed by  and
2. **other people at a workplace** - like visitors.

Who has the main responsibility under the WHS Act?

The primary responsibility lies with the ‘person conducting a business or undertaking’ .

What is a ‘business’ or ‘undertaking’?

The usual meaning is:

- **business:** enterprises usually run to make a profit and have a degree of organisation, system and continuity; or
- **undertaking:** may have elements of organisation, systems, and possibly continuity, but are usually not profit-making or commercial

What or who can be a PCBU?

A  can be:

- a sole trader (a self-employed person);
- each partner within a partnership;
- a company;
- an unincorporated association; and
- a government department of public authority (including a municipal council).

A **private individual who is an employer** and has employees as support workers (full time, part time or casual) is a , as long as they conduct a business or undertaking.

Depending on the individual circumstances, a private individual who:

- hires a sole trader contractor as a support worker; and / or
- engages a volunteer to provide disability support,

may be a . This depends on whether the private individual conducts a business or undertaking, as well as whether the arrangement has elements of control, continuity and other considerations and the nature of the activity of the sole trader contractor / volunteer.

What are the ’s duties under the WHS Act?

All s must do what they can to make sure their workers are safe while they are at work. s can do this by working through what the risks are and doing what is needed to eliminate or minimise these risks, so far as is “reasonably practicable”.

s need to do this for other people who may be at risk from work carried out by their business or undertaking, not just their workers.

Some of the things a  must make sure of, as far as is “reasonably practicable”, are that:

- the work environment is as safe as possible;
- any equipment, structure and substances are safely managed (for example, toxic chemicals);
- there are adequate facilities for workers at work (for example, washrooms and a place to eat);
- workers are given information, instruction, training or supervision needed for them to work safely;
- any accommodation owned or under their control is safe for their workers .

What does ‘reasonably practicable’ mean?

This term is about us, as people, caring about each other, doing what could reasonably be done at a particular time to eliminate or minimise any risks to health and safety. What needs to be done takes into account and weighs up all things that could go wrong and the consequence.

There are some other things that a  needs to do.

These include:

- know about and understand the WHS Act;
- do regular checks of the workplace;
- identify health and safety risks and hazards, and put things in place to manage them;
- inform workers about:
 - what they need to do if they are injured;
 - their rights to workers compensation.
- know about and meet the legal reporting requirements for 'notifiable incidents' such as serious illness, injury or death of persons and dangerous incidents;
- have an emergency plan for the workplace, and provide this information to workers;
- inform workers about how to resolve any complaints or concerns about health and safety at work;
- not discriminate against a worker (for example dismiss a worker) because the worker has raised concerns about work health and safety;
- not making a worker:
 - use equipment if they are not authorised to use it; or
 - do work if they don't have the right qualifications or experience.

What are the duties of workers and other persons at the workplace under the WHS Act?

We all want to keep ourselves safe and we don't want to cause harm to anyone else. This means we all must (including workers and visitors):

- take reasonable care of our own health and safety and also the people around us; and
- do what we are asked, so far as reasonably able to, regarding any reasonable instruction given by a .

What to do when a work health and safety issue arises



Sometimes, there are health and safety issues or concerns that cannot be worked out. If this happens the WHS regulations say that the  and the worker affected must make reasonable efforts to find a solution, in good time, in a way that both parties agree.

If the issue or concern still remains after this process, then the WHS regulator can appoint an inspector to come to the workplace to assist in resolving the issue.

Further information:

About the *Work Health and Safety Act 2020 (WA)*:

Government of Western Australia Department of Mines, Industry Regulation and Safety (DMIRS), 'Overview of Western Australia's Work Health and Safety Act 2020'

www.dmirs.wa.gov.au/sites/default/files/atoms/files/overview_wa_whs_act_0_0.pdf

About the *Work Health and Safety (General Regulations) 2022 (WA)*:

DMIRS, 'Overview of Western Australia's Work Health and Safety (General Regulations) 2022'

www.dmirs.wa.gov.au/sites/default/files/atoms/files/overview_general_regulations.pdf

About the meaning of a 'person conducting a business or undertaking' (PCBU):

WorkSafe Western Australia, 'The meaning of 'person conducting a business or undertaking' (PCBU)'

www.wa.gov.au/system/files/2021-11/211100_GL_PCBU_0.pdf

About how to determine what is reasonably practical at a particular time to ensure health and safety measures are in place:

Page 7, DMIRS 'Overview of Western Australia's Work Health and Safety Act 2020'

www.dmirs.wa.gov.au/sites/default/files/atoms/files/overview_wa_whs_act_0_0.pdf

About incident notification:

Page 7, DMIRS ‘Overview of Western Australia’s Work Health and Safety Act 2020’

www.dmirs.wa.gov.au/sites/default/files/atoms/files/overview_wa_whs_act_0_0.pdf

About consultation with, and representation and participation of workers:

Pages 18 to 19 DMIRS, ‘Overview of Western Australia’s Work Health and Safety Act 2020’

www.dmirs.wa.gov.au/sites/default/files/atoms/files/overview_wa_whs_act_0_0.pdf

About work health and safety issue resolution procedures:

Pages 24 to 25 DMIRS, ‘Overview of Western Australia’s Work Health and Safety Act 2020’

www.dmirs.wa.gov.au/sites/default/files/atoms/files/overview_wa_whs_act_0_0.pdf

About work health and safety for small business – this link also contains a quick quiz “How does your workplace measure up?” to see if you have done enough to protect yourself and those within your duty of care:

<http://bit.ly/SmallBusinessSafety>

Home Based Care information and checklist

www.commerce.wa.gov.au/publications/home-based-care-information-and-checklist





Government of **Western Australia**
Department of **Communities**

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