

Fact Sheet

Working Directors and Avoidance Arrangements

Working Directors

Changes to the *Workers' Compensation and Injury Management Act 1981* (the Act) provide greater certainty for companies who actively choose to cover working directors for workers' compensation. These changes are effective from 14 November 2005.

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Changes to the Act provide a definition of 'working director', that supercedes the definition of 'worker' contained in section 5 of the Act. The changes also provide a mechanism for resolving disputes as to whether a working director is a 'worker' under the Act before a policy of insurance is issued.

Changes to the Act will also ensure all employers will be required to insure their workers for workers' compensation, regardless of whether they enter into an 'avoidance arrangement' to minimise their statutory obligations.

How are working directors now defined under the Act?

A working director, in relation to a company, means a director of the company who executes work for or on behalf of the company, and whose earnings as a director of the company by whatever means, are in substance for personal manual labour or services.

Is it mandatory for working directors to be covered for workers' compensation?

No, it is optional for a working director's company to cover their directors for workers' compensation.

What is the process for a working director obtaining insurance?

The director's company applies for insurance on the basis their director is a 'working director' as defined in the Act. The company provides the necessary information to the insurer concerning the working director's remuneration when issuing or renewing the insurance policy. Once the policy is in effect, the working director is deemed a worker under the Act.

Contact an approved insurer if you would like to seek workers' compensation cover for 'working directors'.

Will the changes affect my current policy covering me as a working director?

Contact your insurer should you wish to cover your working directors named on your current policy from 14 November 2005 to discuss whether additional information is required to ensure continuity of coverage under the new legislation. Your insurer may need to amend your existing policy or issue a new policy as directors are deemed workers only in the circumstances described in the new section 10A which is effective from 14 November 2005.

In short, for a director to be covered a company must have applied to an approved insurance office under section 160(2) on the basis that a "working director" of the company is a worker. The changes include a new definition of working director therefore it is recommended that if existing policies are to be modified companies provide a declaration that their director(s) identified in the current policy meets the definition of working director and provide the required details relating to the director's remuneration to the insurer.

Can the insurer dispute whether a person is a working director of the company?

There is a mechanism for determining disputes regarding whether a director is a 'working director' prior to the policy of insurance being issued. An employer or insurer may apply to have the matter determined by an arbitrator of WorkCover WA's Dispute Resolution Directorate.

Once a policy has been issued, an insurer cannot decline to indemnify the employer on the basis the working director is not a 'worker' or the company is not the employer of the working director.

However, liability can be declined should the information provided by the company, in respect of the director when applying for the policy or contract of insurance, be false or misleading in a material particular and the decision of the insurer to issue the policy was materially affected by that misrepresentation.

What if I have a claim prior to 14 November 2005?

Should you suffer a compensable injury prior to 14 November 2005 and were entitled to receive compensation under the Act, there is a provision in the Act that protects your right to workers' compensation after 14 November 2005.

Can non-working directors or public company directors be covered?

Non-working directors are excluded. A director registered under the Corporations Act 2001 of the Commonwealth must be a working director, as defined by the Act.

Public company directors are also excluded. Only a company, as a separate legal entity, may apply to insure a working director and the definition of company, contained in section 10A of the Act, excludes public companies from obtaining cover for its directors.

Avoidance Arrangements

What is an avoidance arrangement?

An "avoidance arrangement" is an arrangement which is contrived to enable a person (E) to have the benefit of the services of another person (W) by entering into an arrangement that results in W not being deemed a worker as defined by the Act.

As part of the arrangement, W must execute work principally for E as director or worker of a company that undertakes work that is part of the process in the trade or business of E.

For an avoidance arrangement to be deemed contrived, substantially similar services must have been previously provided by W as a worker of E. Alternatively, if W was not previously a worker of E and E intimated they were not prepared to enter into an arrangement for the provision of W's services that would have resulted in W being deemed a worker.

"What happens if an employer enters into an "avoidance arrangement"?"

If it is determined a worker was undertaking work under an avoidance arrangement, which was entered into on or after 14 November 2005, when the injury occurred, the employer will be liable to pay workers' compensation entitlements in accordance with the Act.

In addition the employer commits an offence and may be subject to a penalty of \$5 000.

For further information about workers' compensation obligations concerning working directors and avoidance agreements, please access WorkCover WA's website at www.workcover.wa.gov.au or contact WorkCover WA's Infoline on 1300 794 744.