

## **About the Author.**



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Larry Drewsen has a wealth of experience — over 35 years — in the realm of Workplace Health and Safety (WHS). His experience spans across the NSW Department of Health, the NSW WorkCover Authority, and Employsure.

Over the past two decades, Larry has led and managed a range of teams within WorkCover – one of which conducted audits for several of the Sydney Olympic Games' facilities.

Now, Larry works for Employsure, where he channels his extensive knowledge and experience to assist small businesses. He helps employers to develop their WHS Management Systems across producing legal documentation, implementing practical strategies, and organisational training.



## Introduction.

The Building and Construction Industry faces not only unique but also multi-faceted challenges.

The project-based nature of the industry means that worksites are constantly changing, and each site brings with it its own set of risks and hazards. Employees need to be briefed and inducted to each new site.

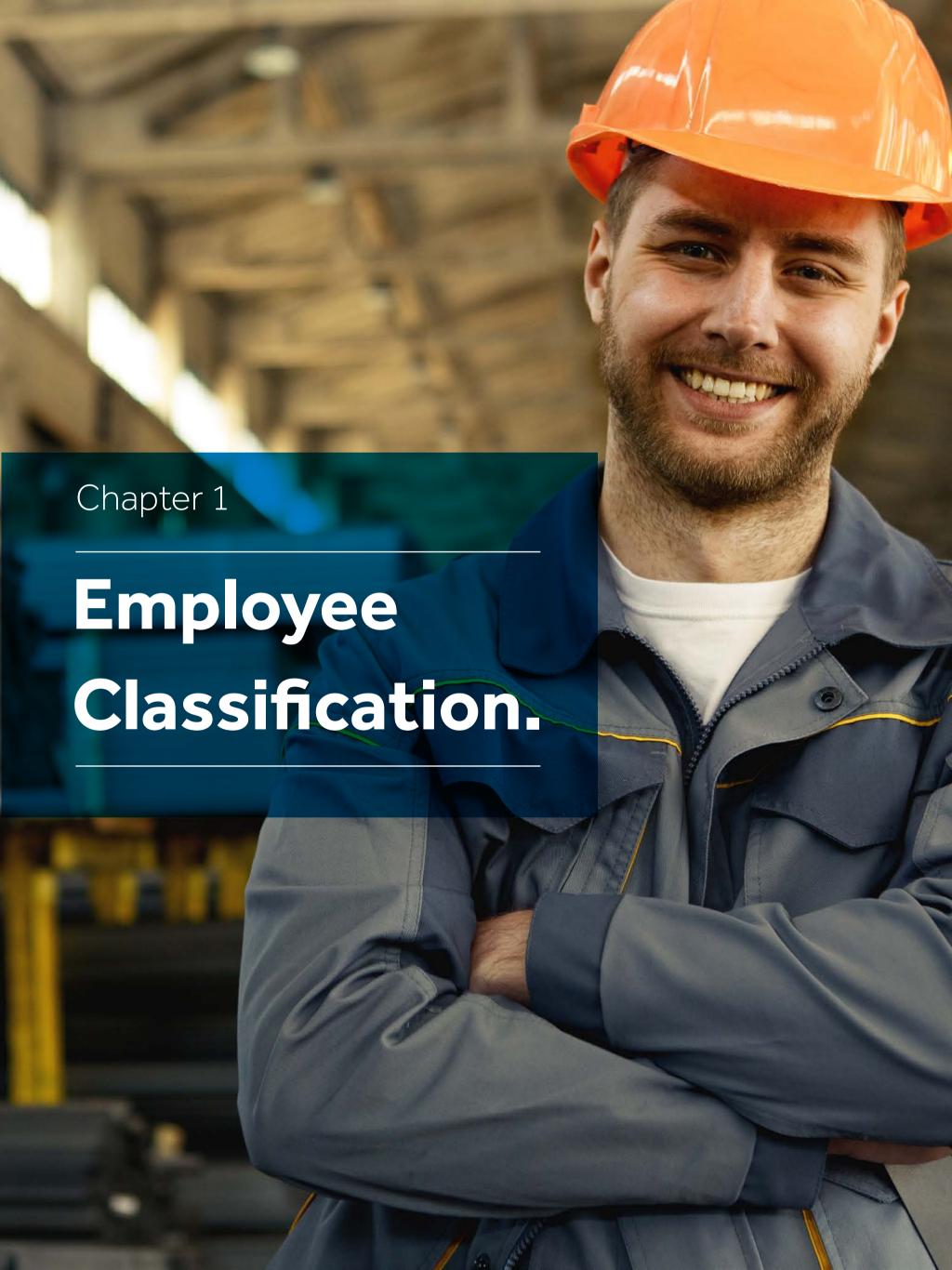
If the site is regarded as high-risk construction, the Safe Work Method Statements (SWMS) will need to be reviewed and modified accordingly. On top of ensuring workers' safety, business owners also need to be certain that they understand their employees' entitlements. Each category of employment comes with different levels of flexibility and specifications.

This e-quide is tailored specifically for small business owners in the Building and Construction Industry. It provides advice on employee classifications and their entitlements, Enterprise Agreements, employer's rights during Right of Entry, and Workplace and Safety policies.

The construction industry is one of three industries responsible for the most workplace fatalities in Australia.

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## **Employee Classifications.**

Employment flexibility is highly valued in the building and construction industry. Given the project-based nature of the industry, having mobility of staff is considered to be beneficial for most employers.

This flexibility is often achieved with a number of different types of employees. For instance, many businesses have a contingent of permanent workers and rely upon casual workers in times of peak demand.

Therefore it is crucial to understand the different types of employment that are available under the Building and Construction General Onsite Award.

## **Types of Employment.**

Each employment type has its pros and cons for employers. It is therefore important to understand these fully and plan your financial and business model accordingly. Employers need to weigh up the requirements of the business against its financial capacities.

In the Building and Construction General Onsite Award, employees generally fall into one of three categories (not including apprenticeship):

- (i) Daily Hire
- (ii) Weekly Hire (part-time & full-time)
- (iii) Casual

### **Daily Hire Employees**

Daily hire employees receive entitlements such as annual leave and sick leave – like a permanent employee would. However, their notice period and routine of work hours may differ from that of permanent employees.

Below are some of the defining characteristics unique to daily hires:

- One day notice to end employment this applies to both termination and resignation
- Entitlements to paid leave and redundancy
- Ability to work full-time or part-time hours
- Follow the job loading applied on their rate of pay
   Follow the job loading is an additional amount incorporated in
   salaries to reimburse employees for the time spent
   between jobs

### Weekly hire employees

Weekly hire is the industry term for full-time and part-time workers. The most prominent difference between a full-time and part-time employee is their hours of work.

- Full-time weekly hire: works an average of 38 hours per week
- Part-time weekly hire: works on average less than 38 hours per week

For part-time weekly hire employees, it is necessary for the employer and employee to agree in writing to the employee's regular pattern of work. This written agreement should clearly outline:

- i) Days of work
- ii) Start time
- iii) Finish time
- iv) Classification
- v) The period of part-time employment

Any deviations from the initial agreement should be clearly highlighted in writing and secured with the consent of both parties.

### **Important Tip:**

Not all employees in the industry can be employed as daily hires. This category of employment is only applicable to tradespersons and labourers.

### **Casual Employees**

Unlike permanent employees, casual employees do not receive the same level of job security and entitlements. They **do not** receive:

- Paid leave entitlements
- Termination notice
- Redundancy entitlements
- · Public holiday payments

To compensate for that, casual employees are given 25% casual loading. This means they receive an additional 25% per hour of the standard rate. For example, if a weekly hire gets \$20 an hour, the casual employee will receive \$25 an hour.

Casual employees also have a minimum duration of work. They are required to be hired for a minimum of four hours per engagement or, failing that, receive pay totalling to at least four hours.

Engaging casual employees is a popular option for small business owners due to its flexible nature. However, if employers hire casuals on an on-going and regular basis there are three things in particular to take note of:

- 1) cumulating cost of casual loading: casuals are paid 25% more per hour in comparison to daily and weekly hires
- **2)** casual conversion: if a casual employee has been regularly engaged for more than six months, they are entitled to request for a conversion to become a weekly hire employee per engagement.
- **3)** unfair dismissal protection: casuals engaged on a regular and systematic basis for a period of six months have unfair dismissal protection

<sup>\*</sup>This period will be extended to 12 months for a business with fewer than 15 employees

### **Apprentices**

An apprentice is an employee hired to learn a particular trade or profession on the job while they are completing posttertiary studies to become a qualified tradesperson.

A worker is only considered an apprentice once they have entered into a fixed term contract of training with both the appropriate State or Territory training authority (STA), and the employer.

There is no obligation for the employer to maintain the employment of the apprentice beyond the conclusion of the apprenticeship.

### **Apprentice Contract and Entitlements**

An important inclusion in an apprentice's contract of training is the training plan, which will require attendance at an approved course of training – such as institutions, formal workplace training, or self-paced learning. The apprentice is permitted to be absent from the workplace to attend these trainings without loss of pay.

Apprentices are also entitled to all National Employment Standards (NES) and Award derived entitlements that other permanent employees receive with the exception of redundancy payment.

However, if the worker enters into the contract of training at the age of 21 years or older, the employee is considered an adult apprentice and may receive a different base rate of pay.

If an **adult apprentice** was employed immediately prior to commencing their apprenticeship, they will not suffer a reduction in the ordinary time hourly rate of pay by virtue of entering into the contract of training.



## Wages, Allowances and Record Keeping.

Every Modern Award has its own specifications and criteria. The Building and Construction General On-Site Award 2010 has been adapted to best reflect the nature of the industry.

It is essential that employers are fully aware of the details of the applicable industry Award or instrument. Not adhering to the conditions of the Award, even unintentionally, can be very costly to business owners. This chapter breaks down and explains important employee entitlements pertinent to the Award.

## Travel Allowance.

Given the frequent changes in worksites across the building and construction industry, almost all employees are entitled to some form of compensation for travel.

Calculating the exact amount of travel allowance in accordance to the Building and Construction Award will depend on several factors:

- Location of the worksite
- Is the employee transported to the worksite or do they use their own vehicle?
- Whether the employee is required to live away from their residence

Even within the same business, each and every project is accompanied with its own distinct conditions. The travel allowance varies accordingly – determined by the project, as well as the employee's category.

## All-Purpose Allowances.

All-purpose allowances are included in the employee's base rate of pay. These are intended to compensate employees for industry and occupational specific challenges and maintain relativities across the Modern Award system.

It is important to identify any all-purpose allowances your employees may be entitled to and ensure that they are paid. To calculate the cumulative sum of the all-purpose allowance, employers need to take several factors into consideration. These include, but are not limited to, the:



**Employee's occupation** 



Nature of worksite



License requirements



Use of tools and equipment



Leading hand



Employee's responsibilities – are they in charge of plant and machinery?

For business owners to remain compliant, it is necessary that they provide employees with the right allowance as specified in the Award. The factors above are an outline to guide employers through the process. For specific advice on allowances, please seek advice from a workplace relations specialist.

## Inclement Weather Payment.

As a large portion of the work in this industry takes place outdoors, weather plays an important role in shaping the outcome of a work day. There will be occasions where it is not reasonable or safe for an employee to work.

These occasions are referred to as inclement weather which means rain or any other unfavourable climatic conditions. Examples of inclement weather include:

- Hail
- Extreme cold
- · High winds
- Severe dust storms
- Extreme high temperatures

On occasions like these, where an employee has to be directed off the site and the employer has no other work that needs to be performed in a different location, the employee is entitled to receive inclement weather pay.

It is important to note that all employees (including casuals) must still be paid despite having been sent home. The maximum amount that they can be paid is 32 hours over a four-week period (pro-rata for a part-time employee).

The entitlement is subject to following the procedures set out in the Award.

## **Annualised Salaries.**

An annualised salary is an agreement between employer and employee where a fixed annual salary is agreed upon. The salary cannot be below what the employee would receive if all Award allowances, overtime and penalty payment obligations are being met. So it is important that any annualised salary calculation is compared against the Award and adjusted if needed.

The major benefit of this arrangement is that it frees employers of the complexities and inefficiencies of administrative costs. The downfall of an annualised salary is that it does not encourage flexibility as changing work hours can result in overpayment or underpayment when compared to the Award.

There may also be ramifications in regard to superannuation, particularly in circumstances whereby overtime is converted and incorporated into a flat rate. As calculations can be complex, it is best to consult a workplace specialist before offering an annualised salary to staff.

To simplify administrative arrangements many employers choose to offer annualised salaries.

## Pay Slip Obligations.

The emphasis on record keeping, including pay slip obligations, has been growing. In fact, as of September 2017, penalties for non-compliance of record keeping have increased and employers who cannot give a reasonable excuse for their lack of record keeping must disprove wage related claims in court.

Pay slips are an important factor of record keeping. Employers must issue a pay slip within one working day of paying an employee, and these can be either electronic or a hard copy.

All pay slips must contain the following:

- Employer's name and ABN
- Employee's name
- Pay period dates
- Date the payment was made
- Employee's hourly rate
- Number of hours worked
- Gross and net amounts of the payment
- Bonuses, loadings, allowances, penalty rates, commissions
- Details of any deductions from the employee's pay
- Details of any superannuation contributions made

## Record Keeping.

Regardless of size and industry, all employers need to keep employee records for seven years. In addition to what type of information needs to be kept, employers need to be aware of who can access the records and what happens if records aren't kept. Below is a list of records that employers have to keep:

- Employee's name
- ABN
- Type of employment
- Employee start date and end date
- The rate of pay paid to the employee
- Gross and net amounts paid
- Details of any deductions from the gross amount
- Details of any incentive based payment
- Details of any bonus, loading or penalty rate or other monetary allowance or separately identifiable entitlement to be paid
- Hours of work records
- Pay slips
- Any overtime paid
- Details of any arrangements made to average hours
- Leave entitlements
- Leave taken
- Leave cashed out
- Full details of superannuation contributions made
- All details of termination
- Workplace flexibility agreements
- Guarantees of annual earnings given to employees
- Termination records
- Transfer of business records



## Leave Obligations.

The annual leave entitlements outlined in the Building and Construction Award align with those stated in the National Employment Standards (NES). There are, however, other types of leave that are modified to suit the industry better. This chapter covers them.

## **Annual Close Down.**

Annual close down, also referred to as annual shut down, is when a business briefly stops operations during certain slow periods of the year for instance the Christmas and New Year stretch.

The Building and Construction Award does permit an employer to direct their members of staff to take annual leave during the business' close down period, allowing for a complete or partial shutdown of the business.

If an employee does not have sufficient accrued annual leave for the period of the shutdown, then the employee may be required to take leave without pay for the balance of the shutdown period for which leave is not accrued.

If the employer decides to give the full amount of annual leave due, they must give at least two months' notice to the affected employees.



To enforce an annual close down, employers have to provide at least two months' notice to all affected staff.

## Portable Long Service Leave.

Employees in most industries are entitled to long service leave after having worked for the same employer for a prolonged period of time. The duration of employment and length of leave differs in each state and territory.

As construction and building is mostly project-based, employees may be covered by state specific portable long service leave schemes. This means that an employee is not required to remain with the same employer for an extended period to be entitled to their long service leave. Instead, they can 'carry service' or accumulate their time worked from previous employers forward to the next one.

For business owners, it is important to note that they need to be a registered employer and also register their employees to a scheme; and in some situations for regular payments. This may include the requirement to pay a levy or seek a reimbursement for contributions made to employees.



Penalties exist for failure to register or update employment details with the relevant state-based regulator.

## Public Holidays.

The dynamic nature of the industry means that quite often, employees are expected to work on public holidays. Although this is frequently a necessity in the business, employers need to be aware of their employees' entitlements.

#### **Entitlement**

An employee is ordinarily entitled to be absent from work on public holidays. However, an employer may request their employee to work on a public holiday – the request needs to be reasonable. The employee can then only refuse to work if they have reasonable grounds to do so.

### Determining what is reasonable

In determining whether a request or a refusal is reasonable, the following factors must be taken into account:

- The nature of the employer's workplace and the nature of the work performed by the employee
- The employee's personal circumstances, including family responsibilities
- Whether the employee could reasonably expect the employer might request work on the public holiday
- Whether the employee is entitled to receive a level of remuneration which reflects an expectation of working the public holiday such as overtime payments, penalty rates or other forms of compensation
- The type of employment (such as daily, weekly, casual)
- The amount of notice the employer provides before the request
- In relation to the refusal of a request, how much before the public holiday did the employee refuse
- Any other relevant matter

## Do I have to pay my employees if they are absent from work on a public holiday?

If a permanent employee is absent from work on a public holiday in accordance with the National Employment Standards, they are entitled to payment for their ordinary hours of work on that day. Casual workers are not entitled to be paid if they do not work.

### Are employees entitled to penalty rates or a day in lieu?

Arrangements for payment of penalty rates or days in lieu when an employee works on a public holiday are not set out in the National Employment Standards (NES). These entitlements are generally provided through Modern Awards, agreements or contracts of employment and can vary. Employers should consult the Award their employee falls under for further information.



## **Enterprise Agreements (EA).**

National Employment Standards (NES) provide the foundation of employment conditions in Australia; while Modern Awards are modified for specific industries and occupations.

Enterprise Agreements (EA) are even more tailored and specific. An EA can be customised to the requirements of individual enterprises or businesses.

Essentially, EAs are collective agreements that set out minimum employment entitlements. They may replace or build upon Modern Award entitlements.

Although each business' EA may vary in the specifics of their content, there are certain guidelines and criteria that have to be maintained as every agreement is regulated and approved by the Fair Work Commission.

There are mandatory terms that need to be included, permitted matters that can be included, and unlawful terms that employers need to stay clear of.

### Mandatory terms to include in EA

Under the Act there are certain terms that **must be included** in an EA, such as:

- Coverage Term detailing exactly who the agreement covers
- Flexibility Term this provides both the employer and employee the option to create variations within the EA to better meet their needs
- Consultation Term employers need to consult with employees in the event of any major workplace changes
- Dispute Resolution Term permits independent parties (including Fair Work Commission) to settle disputes
- Nominal expiry date no later than four years after the day of Fair Work Commission (FWC) approval

An Enterprise Agreement is an agreement between an employer and a group of employees that outline terms and conditions of employment.

### Permitted matters for EA

In addition to the mandatory terms, an EA can only contain 'permitted matters'. These include:

- Rates of pay
- Penalty rates
- Overtime
- Allowances
- Standard hours
- Annual leave
- Personal/Carer's leave
- Deduction from wages

### **Unlawful terms**

There are certain terms that cannot be included in an EA, specifically:

- Discriminatory terms
- Objectionable terms such as terms that require or permit breach of the general protections
- Terms that are inconsistent with the unfair dismissal provisions of the Act
- Terms that are inconsistent with the industrial action provisions of the Act
- Terms that are inconsistent with the right of entry provisions of the Act

### **Bargaining and Approval**

Once an EA is drafted, the negotiation and approval process commences. Employers need to notify employees covered by the upcoming EA at least 14 days before the start of the bargaining process. During this period, the employee can choose to represent himself/herself or elect a bargaining representative to negotiate on their behalf.

Once the negotiations for an EA have concluded, a vote must be conducted among employees covered by the EA to determine general approval of the agreement. The EA then needs to be sent to the FWC – this has to occur within 14 days of the successive vote.

The FWC will then ensure that the EA meets with all its necessary requirements, making sure that it passes the Better Off Overall Test (BOOT). The EA will be approved if the FWC believes that employees covered by the EA will be better off overall under the terms of the EA than they would be if the relevant Modern Award applied.

Enterprise Agreements
have to provide better
entitlements than those
stipulated in Industry and
Modern Awards.

## Right of Entry.

Right of Entry is a law that enables permit holders to enter worksites if they suspect a violation or breach of employee entitlements. This law does not apply to everyone and every matter, so it is crucial for employers to know their rights as well.

#### Who can enter a worksite?

Only persons with valid permits are entitled to enter a worksite. This can include organisation officials and government officials.

The FWC issues entry permits to organisation officials (such as a trade union) if they fulfill certain criteria such as having undergone training, their past records, and more.

Although employers are obligated by law to give access to a permit holder, there is a certain process that ought to be followed. It is important for employers to know that union officials do not have an automatic right to enter the work premise. Permit holders can only enter a worksite if they suspect a breach and would like to conduct one of the three stated 'rights'. Also, in most cases, permits holders are required to provide 24 hours' notice before entering a worksite.

Government officials such as Fair Work Inspectors are also authorised to enter work premises when they have a reasonable cause to believe a breach of workplace laws. Although Fair Work Inspectors have the right to enter worksites, their rights are separate and distinct from that of Right of Entry.

### **Types of Entry**

There are 3 types of rights that can be exercised under the Fair Work Act:

- **1.** Entry to investigate suspected contraventions inspect any work, process or object relevant to suspected breach
- **2.** Entry to hold discussions with employee this is provided that the employee agrees and the permit holder's organisation is entitled to represent the interest of that employee
- 3. Entry for workplace health and safety purposes

Permit holders are also allowed to make copies of any record or document relating to a member that is directly relevant to the suspected breach. They can also request for copies after having left the premise if it is within 5 days of the date of entry.



## Workplace Health & Safety (WHS).

According to SafeWork Australia, there were a total of 182 fatalities across Australia in 2016, with a total of 35 reported in the Construction Industry alone. As a matter of fact, building and construction was amongst the top 3 industries for fatalities.

## Site Inductions.

It is essential to get things right from the start. A well-trained team is less likely to be involved in workplace accidents. In building and construction, however, it is not just new starters that need to be trained in WHS. Given the frequently changing work sites, it is important that every worker is inducted for each of the new sites they work on.

Among other things, the inductions should include discussions of the site layout, identification of hazards, a runthrough of emergency procedures of the site and the safe operation procedures relevant to their role.

### More specifically, workplace specific induction training may cover the following:

- Hazards and control measures relevant to the site
- Location of underground services
- Site specific safety documents, policies and plans
- Supervisory, consultation and reporting arrangements
- Site safety rules
- Workplace facilities, including their location, use and maintenance
- First aid provisions and emergency procedures, including after-hours emergency contacts
- Health monitoring requirements and procedures
- Access, egress and security for the site
- How safety issues are resolved

## Industry Specific Training and Requirements.

To be able to carry out construction work, a person must complete an introductory safety training course called 'General Construction Induction Training'. This is also commonly known as 'White Card' training.

Under the WHS Act model, a PCBU (person conducting a business or undertaking) must make sure every worker has completed White Card training. This also includes those who have completed training in the past but have not carried out construction work in the last two years. Once a person has completed his/her training they may apply to a WHS regulator for a white card.

A white card issued in one state or territory or by the Commonwealth is generally recognised Australia wide.

## Safe Work Method Statements (SWMS).

Safe Work Method Statements (SWMS) are typically required before high-risk construction work starts.

A SWMS needs to account for the circumstances at the workplace that may affect the way in which the high-risk construction work is carried out. This includes understanding the nature of the work, the workers involved, and the work environment itself.

Although a generic SWMS may be prepared and used for high risk construction work activities that are carried out on a regular basis, it must also be reviewed regularly to take into account specific hazards and risks of changing worksites and revised accordingly.

A person conducting a business or undertaking (PCBU) must prepare a SWMS—or ensure a SWMS has been prepared before high risk construction work starts.

### **Other safety** documentation required (aside from SWMS) for construction work include:

- Training records such as copies of licenses, white cards, high risk licenses, and more
- Safety Data Sheets (SDS) and Hazardous chemical register
- Site induction records

### Providing information and instruction

All workers involved in high risk construction work must be provided with information and instruction so they:

- Understand the hazards and risks arising from the work
- Understand and implement the risk controls in a SWMS
- Know what to do if the work is not being conducted in accordance with the SWMS

This information and instruction may be provided during general construction induction training, workplace-specific training or during a toolbox talk by the principal contractor, contractor or subcontractor.

### Accessibility of SWMS

The SWMS must be kept and made available to any person engaged to carry out high-risk construction work. It also needs to be kept for inspection for at least two years after the completion of the high-risk work.

### Reviewing a SWMS

The review process should be carried out in consultation with workers and their health and safety representatives (if any). If the revisions affect contractors and subcontractors, they need to be included in the consultation as well. The review should include:

- Advising workers involved in the high-risk construction that a revision to a SWMS has been made
- Advising workers on how to implement the changes
- Providing workers with the necessary information and instructions to understand and implement changes

## **Accidents at Work.**

### **Register of Injuries**

An employer cannot always prevent accidents from happening at work, but they have a duty to minimise risks as far as is reasonably practicable. An employer must keep a record of every workplace accident (often called a register of injuries).

The register of injuries must be available at all times. It has to include several details, some of which are:

- Name of the injured person
- Date and time of injury
- Brief description of what happened
- Where it happened
- Cause of the accident

The register is not exclusive to employees. Anyone injured on the worksite, including an agency worker, contractor, visitor, must be on the register of injuries. Personal data must be stored carefully in line with privacy law.



An employer must keep a 'register of injuries' which is a record of every workplace accident.

## First Aid Kits.

All employees must be able to easily access a first aid kit. The quantity of first aid kits depend on the size of the workplace and risk level. Building and construction sites are considered high-risk workplaces, as employees are exposed to hazards which could result in serious injury or illness, and hence it requires a kit with more medical content.

The exact contents of a first aid kit should be based on the specific risk assessment conducted for your workplace. A first aider who has had the adequate training should be nominated to maintain the first aid kit.

Maintaining high standards of health and safety will also see benefits to the business and protect it from any bad publicity or potential employee unrest that might follow a serious accident or prosecution.

For more information on workplace health and safety, as well as employment relations, contact Employsure on

1300 832 795



The first aid kit should be easily identifiable and made from material which will protect its contents from dust, moisture and contamination.

## Why Employsure?

At Employsure, we believe all Australian employers, no matter the size, deserve access to comprehensive, quality, honest advice and support that is scalable to the needs of their business.

Since the introduction of the Fair Work Act in 2009. workplace obligations have become more complex and difficult to manage, especially for overstretched small business owners.

Employsure was established in response to these challenges. It is our aim to ensure Australian business owners have access to cost-effective, professional advice on all employment relations and workplace health and safety matters.

What our Clients have to say:

### What We Offer

Employsure provides customised documentation, unlimited advice, policy and procedure review, insurance and legal representation for small business owners.

Being an Employsure client means no surprises – we keep our clients updated on Award changes, wage updates and essential compliance issues. Our expert advisers are available 24 hours a day to guide employers through any difficulties they may face.



Employsure is the largest provider of employment relations and workplace health and safety services in Australia - servicing over 20,000 clients nationally.



Employsure has given me the freedom to run my business in a way that I need to. It's given me the time and it's actually taken away a lot of worry that I previously had.

Kieran Syme DentFree AutoTree



Google can only help you so far. Sooner or later you need to actually talk to somebody who is an expert in the field and that's where I found Employsure.

Ursula Zajaczkowski The Source Bulk Foods



Biggest thing from Employsure, it gives us certainty. Where we have guidance and help of what we need in place, how to put it in place, and how to implement the systems for HR.

**Jonathon Grealy** Niche Reform



# Navigating workplace relations can be confusing.

Employsure works directly with employers to ensure they stay on top of rapidly changing legislation and provide a fair and safe workplace for their staff.

Whether it be dealing with a difficult employee, facing a tribunal claim or reviewing workplace health and safety, our clients can rest assured we have them covered.

Get in touch with us today to find out how we can help your business grow.

1300 832 795

www.employsure.com.au

