

Workplace Entry - WHS Entry Permit Holders

Part 7 of the *Work Health and Safety Act 2012 (SA)* (WHS Act) enables union officials who hold WHS entry permits to enter workplaces to inquire about suspected contravention(s) of the WHS Act¹. As soon as reasonably practicable after entering the workplace, the WHS Entry Permit Holder must notify the PCBU of the entry and of the suspected contravention(s). However, such notice is not required if it would defeat the purpose of the entry or unreasonably delay the WHS entry permit holder in an urgent case².

In addition, a WHS entry permit holder may enter a workplace to consult on work health and safety matters and provide advice on those matters³. Notice in relation to entry for this purpose must be provided at least 24 hours but not more than 14 days before the intended entry⁴.

It is important to understand that a union official who holds a WHS entry permit may access the workplace despite not having union members at that workplace. All that is required for entry to be lawful is for there to be eligible members at that workplace.

After entering the workplace a WHS entry permit holder may, amongst other things, warn any person to whom the WHS entry holder reasonably believes is exposed to a serious risk to his or her safety⁵, inspect work systems, consult with PCBUs and require PCBUs to inspect and make copies of documents; including employee records that are directly related to the suspected contravention⁶.

Unreasonably hindering or refusing to co-operate with the lawful entry of a WHS entry permit holder who exercises

rights pursuant to section 118(1)(d) may result in the imposition of a WHS civil penalty which in the case of an individual is a maximum of \$10,000 and a corporation is a maximum of \$50,000⁷.

After considerable debate surrounding the right of entry, the government introduced a number of purported safeguards which were intended to prevent WHS entry permit holders from entering unlawfully.

Section 117 specifically requires that a WHS entry permit holder must consider whether it is reasonably practicable to give notice of his or her intended entry to the Executive Director of SafeWork; affording a SafeWork Inspector the opportunity to accompany the WHS entry permit holder at the workplace. If the WHS entry permit holder determines that it is not reasonably practicable to give such notice to the Executive Director then he or she is required to furnish the Executive Director with a report on the outcome of his or her inquiries at the workplace.

In reality these safeguards will have little practical impact on whether a WHS entry permit holder will exercise his or her right to enter a workplace. Arguably, the checks and balances actually enable SafeWork to gather more information about suspected contravention(s) than its current workforce allows.

Regardless, it is important you are aware of your rights and obligations prescribed by the WHS Act in these circumstances and that you give consideration to your other legal obligations before handing over documents to a WHS entry permit holder.



You must only hand over documents requested by the WHS entry permit holder which directly relate to the suspected contravention(s), provided that you do not have a reasonable excuse to refuse such a request.

Implicit in this requirement is that you must know what the suspected contravention is before you can possibly know whether the documents you have been requested to hand over directly relate to it.

In circumstances where a WHS entry permit holder has not notified you of the suspected contravention, it will be difficult if not impossible for you to know whether the documents that have been requested have any bearing on the matter at hand. In such circumstances you should seek legal advice before handing any documents over.

If you have been told the details of the suspected contravention(s), and you believe that your documentation may incriminate you then, in our view, it is entirely reasonable for you to refuse to hand such documents over until you have obtained legal advice.

You should also be mindful of your obligations to your staff and others regarding the confidentiality of their personal information. There could be applicable privacy laws and requirements set out in workers compensation legislation which will prohibit the production of such documents to a WHS entry permit holder. If you are unsure of these obligations, it is entirely reasonable to seek legal advice before handing documents to a WHS entry permit holder.

Importantly, the requirement to provide documents to a WHS entry permit holder is subject to the direction of a SafeWork Inspector⁸. If a SafeWork Inspector happens to enter with a WHS Entry Permit Holder you should seek

clarification from the Inspector as to the request to provide documents. In such circumstances you ought to be mindful of your right not to incriminate yourself by the provision of answers or documentation⁹. Certainly seeking legal advice before answering a question or providing a document to a SafeWork Inspector would constitute a 'reasonable excuse' within the meaning of section 171(6) of the Act.

Finally, you must ensure that all persons who enter your workplace regardless of whether they are WHS entry permit holders, SafeWork Inspectors or visitors comply with your reasonable directions in relation to safety. We recommend you review your visitor management policy to ensure that it encompasses all visitors and potential visitors to your workplace.

If you require further information regarding WHS entry permit holders or entry by SafeWork Inspectors please do not hesitate to contact Jodie Bradbrook on (08) 8227 2829.

Endnotes

1. s117
2. s119(2)
3. s121(1)
4. s122(3)
5. s121(2)
6. s117 & s118
7. s118(3) & s145
8. s120(6)
9. s172

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