

## WORKERS COMPENSATION AND INJURY MANAGEMENT FACT SHEET 9

# INFORMATION FOR PRINCIPAL CONTRACTORS – SUBCONTRACTOR PREMIUMS

This Fact Sheet provides a guide to certain principal contractor responsibilities under workers compensation law. (Note: There are also specific requirements for principal contractors under OHS law – refer to WorkCover’s website for more information.)

Under workers compensation law, a principal contractor is anyone who enters into a contract with another person to carry out work for them. Farmers entering into contracts are considered principal contractors. A principal may be liable to pay workers compensation to workers employed by subcontractors in certain circumstances. If a subcontractor does not have a policy and there is a workplace injury, the worker may be entitled to receive compensation as if employed immediately by the principal (section 20 *Workers Compensation Act 1987*). This law has been in place for many years and, for this reason, a principal should always check that their subcontractor has workers compensation insurance before they commence work.

From 1 July 2003, principal contractors have obligations regarding workers compensation and their subcontractors (section 175B *Workers Compensation Act 1987*). In particular, a principal contractor may be liable for their subcontractor’s unpaid premiums when the principal has a contract for work that is carried out by their subcontractor’s workers.

A pro forma principal contractors statement can be downloaded from the WorkCover website. As well, employers can make their Certificates of Currency available electronically by email or on their websites.

The following checklist will help a principal contractor determine if they need to check that their subcontractor has the proper workers compensation insurance, and has paid all workers compensation premiums associated with that contract.

### STEP 1 – EXEMPTIONS

From July 2004, the phase-in exemption for farmers no longer applies. If you are a farmer you should complete this checklist.

1. Is the subcontractor a sole trader without workers or a partnership without workers? (Note: sole traders without workers and partnerships without workers may use the WorkCover subcontractor pro forma statement to declare their status.)	Yes/No
2. Is the work to your principal place of residence (including owner builders)?	Yes/No

If you answered **yes** to **either** question 1 or 2, you do not need to obtain a subcontractor declaration (see ‘Documents from the Subcontractor’, over page), however if circumstances change you need to review whether the exemption still applies.

If you answered **no** to question 1 **and** 2, go to step 2.

## STEP 2 – CHECKLIST FOR PRINCIPAL CONTRACTORS

3. Do you have a contract or agreement with a subcontractor for the provision of work connected to your business undertaking? (Note: the contract can be expressed or implied, written or verbal, and the subcontractor can be an individual, partnership or incorporated entity. Any contract for the carrying out of work is considered an aspect of your business undertaking.)	Yes/No
4. Does the subcontractor hire or employ (or intend to hire or employ) workers? (Note: a working director is considered a worker of that business).	Yes/No
5. Is the total <b>labour</b> component of all contracts with this subcontractor during a 12-month period greater than or, expected to be greater than, \$5,000?	Yes/No

If you answered **yes** to **all** of the questions 3 to 5, go to step 3.

If you answered **no** to **any** of the questions 3 to 5, you do not need to obtain a subcontractor declaration (see 'Documents from the Subcontractor', below), however if circumstances change you should review the checklist again.

## STEP 3 – DOCUMENTS FROM THE SUBCONTRACTOR

If you have reached this step, you should check that your subcontractor has the proper workers compensation insurance and has paid all workers compensation premiums associated with the contract. If you don't you may be liable for the pro rata share of any unpaid subcontractor's workers compensation premiums associated with the contract.

6. Have you obtained a copy of the subcontractor's Certificate of Currency? (This is a certificate from a licensed insurer stating that the contractor holds a current workers compensation policy.)	Yes/No
7. Have you obtained a signed statement from the subcontractor stating that there are no outstanding workers compensation premium liabilities? (A pro forma statement is available from WorkCover's website.)	Yes/No

If you answered **yes** to **both** questions 6 and 7, go to step 4.

If you answered **no** to **either** questions 6 or 7, you should either, get the documents from your subcontractor, or accept the risk that you may be liable for the pro rata share of your subcontractor's unpaid workers compensation premiums.

## STEP 4 – CHECK THE CERTIFICATE OF CURRENCY

8. Is it current (Certificates of Currency are only valid for up to four months)?	Yes/No
9. Is the subcontractor classified in the correct industry (ie. the industry stated on the certificate is the same as, or similar to, the work undertaken as part of the contract)? For example, an electrician providing electrical services should not be classified in Consulting Engineering Services.	Yes/No
10. Are the number of workers identified on the certificate realistic compared with the number of workers performing the work (whether on-site or off-site)? (The certificate should reflect the average number of workers the subcontractor hires throughout the year. You should check the worksite(s) covered by the contract(s) and only significant discrepancies should be questioned.)	Yes/No
11. Is the amount of wages declared on the certificate reasonable for a 12-month period? If the wages estimate appears too low discuss it with your subcontractor. For example, if the wages estimate is less than the labour value of your contract(s) you should discuss it with your subcontractor.	Yes/No

If the information appears reasonable, then you should accept the statement and Certificate of Currency. These documents and the above checks relieve you from the liability for the pro rata share of your subcontractor's unpaid workers compensation premium (including any outstanding penalties) and should be kept for seven years.

If you answered **no** to **any** of the questions 8 to 11, you should get the appropriate documentation from your subcontractor or accept the risk that you may be liable for the pro rata share of your subcontractor's unpaid workers compensation premium.

**Note:** It is an offence to alter Certificates of Currency. If changes are required, a new Certificate of Currency must be requested from the workers compensation insurer.

**WHEN WILL WORKCOVER RECOVER UNPAID SUBCONTRACTOR PREMIUMS FROM THE PRINCIPAL?**

WorkCover (and its agents) will seek payment if:

- after reasonable efforts, WorkCover (and its agents) has been unable to recover the premium from the subcontractor
- the total labour value of all contracts between the principal and the subcontractor is greater than \$5,000 (during the principal's financial year), and
- the principal has failed to obtain a copy of the subcontractor's Certificate of Currency and a signed statement from the subcontractor that the workers compensation premiums applicable for that work have been paid. The principal had no reason to believe the Certificate of Currency or statement is false.

The liability only applies to the subcontractor and their immediate principal. In the case of a chain of subcontracting arrangements, the principal is only liable for unpaid premium of the subcontractor(s) they directly engage.

Until 30 June 2005 WorkCover will only pursue unpaid subcontractor premiums from the principal contractor if it appears that the principal is engaged in systematic premium avoidance through action or inaction.

**AMOUNT OF LIABILITY**

A principal contractor's liability is limited to the pro rata share of any outstanding premium that would have payable on that contract for each year of the contract (see example below). That is, the liability will be calculated based on the policy year that the subcontractor was without proper insurance.

Subcontractors total annual wages	(A)	\$300,000
Subcontractors wages from this contract	(B)	\$8,000
Unpaid subcontractor insurance premium including penalties	(C)	\$15,000
<b>Principal's potential liability = [B/A] x C [(8,000/300,000) x 15,000]</b>		<b>\$400</b>

**Note:** The principal should get a subcontractor statement and Certificate of Currency from the time they know (or it is reasonable for WorkCover to expect them to know) that the total labour component of the contract(s) will be greater than \$5,000. WorkCover will not recover any unpaid subcontractor premium from the principal if it was reasonable to assume that the total labour component of the contract(s) was not going to exceed \$5,000. However, this exemption will not apply if it appears that the principal is engaged in systematic premium avoidance through action or inaction.

# FREQUENTLY ASKED QUESTIONS

## HOW MUCH WILL THE PRINCIPAL CONTRACTOR BE LIABLE FOR?

The principal contractor's liability is limited to their pro rata share of the subcontractor's unpaid premium associated with the contract (including any outstanding penalties).

**Note:** Under existing NSW law, the principal may be liable to pay compensation to workers employed by subcontractors in certain circumstances. If a subcontractor does not have a policy and there is a workplace injury, the worker may be entitled to receive compensation as if employed immediately by the principal. This law has been in place for many years. For this reason, a principal should always check that their subcontractor has workers compensation insurance before they commence work.

## IS IT COMPULSORY TO GET A CERTIFICATE OF CURRENCY AND SUBCONTRACTOR STATEMENT?

No. The principal can decide whether they will choose to obtain a Certificate of Currency and statement depending on the level of risk they are willing to bear in regard to their potential liability.

## HOW OFTEN SHOULD PRINCIPAL CONTRACTORS OBTAIN A STATEMENT AND A CERTIFICATE OF CURRENCY?

WorkCover recommends that a Certificate of Currency and statement be obtained at the beginning of a contract to ensure the subcontractor has valid workers compensation insurance.

Statements are valid for the term of the contract (provided that those dates are detailed on the statement). However, Certificates of Currency are only valid for up to four months and principals should ensure they always have an up-to-date certificate.

Keeping these records up-to-date and undertaking the checks previously outlined will relieve the principal from any liability for any unpaid subcontractor workers compensation premiums.

### EXAMPLE:

Contract from 1 July to 31 December; initial Certificate of Currency valid 30 June to 31 October.

<p><b>1 July</b></p> <ul style="list-style-type: none"><li>• obtain written statement to cover the entire contract if possible (1 July to 31 Dec) or a statement that indicates that there are currently no outstanding workers compensation premium liabilities and</li><li>• obtain a valid Certificate of Currency</li></ul>
<p><b>31 October</b></p> <ul style="list-style-type: none"><li>• check statement still applies so that there are currently no outstanding workers compensation premium liabilities</li><li>• obtain an up-to-date Certificate of Currency (valid from 31 October to 28 February)</li></ul>
<p><b>31 December</b></p> <ul style="list-style-type: none"><li>• before making final payment obtain another statement verifying that there are no outstanding workers compensation premium liabilities if contract is complete there are no additional documents required (if circumstances change you may need to do the checklist again)</li></ul>

## **WHY SHOULD A PRINCIPAL CONTRACTOR OBTAIN A CERTIFICATE OF CURRENCY AND A SUBCONTRACTOR STATEMENT?**

Obtaining a Certificate of Currency and statement from the subcontractor declaring that all premiums associated with that work have been paid plus undertaking the checks previously outlined will protect the principal from possibly having to pay their subcontractor's unpaid workers compensation premiums.

A principal contractor's liability is limited to the pro rata share of any outstanding premium that would have been payable on that contract.

A principal contractor may wish to take a risk management approach – ie. if the liability for the subcontractor's unpaid premiums is substantial, a principal should ensure they have the Certificate of Currency and statement. However, if the contract is small (in terms of wages) and the amount of premium is small, the principal may be prepared to accept the risk of becoming liable for the pro rata share of any unpaid premium. The decision is a matter for the principal.

## **HOW DOES A PRINCIPAL CONTRACTOR DETERMINE IF THE WAGES ESTIMATE ON THE CERTIFICATE OF CURRENCY IS REASONABLE?**

When checking the Certificate of Currency the principal should compare the estimate of wages with the labour value of the contract(s) with the subcontractor.

Average wages vary from industry to industry, and between types of workers within an industry. Further, workers performing work under the contract may be employed on a casual or part-time basis. Therefore, multiplying the number of workers on site by an estimate of annual wages for an average worker in the industry may not accurately reflect the wages paid by the subcontractor. The principal should make an assessment based on information available including, contract terms and the industry, or general knowledge.

Only significant discrepancies should be queried – eg. if the labour component of the contract is \$40,000 and the wages estimate on the Certificate of Currency is only \$10,000, the principal should not accept the statement and discuss the discrepancy with their subcontractor.

## **WHAT DOES A PRINCIPAL CONTRACTOR DO IF THE CERTIFICATE OF CURRENCY APPEARS INACCURATE OR THE STATEMENT SEEMS INCORRECT?**

In the first instance, the principal should speak with the subcontractor and ask them to supply an up-to-date certificate or new statement. It is an offence to alter Certificates of Currency. If changes to the certificate are required, a new Certificate of Currency must be requested from the workers compensation insurer.

If there is still no resolution, the principal may withhold payment, without penalty, until a correct statement and certificate is received. A decision to withhold payment must be transparent and defensible, and a principal contractor must not withhold payment without due cause.

**For the construction industry only** – where applicable, failure to supply a subcontractor's statement or Certificate of Currency is a valid reason to withhold payment under the *Building and Construction Industry Security of Payment Act 1999*. A principal contractor must, however, make a transparent and defensible decision when withholding a payment – eg. it would not be reasonable for a principal to withhold a \$20,000 payment if they were potentially liable for \$2,000 in unpaid workers compensation premiums. When completing a payment schedule under the above Act, principal contractors should explain in detail their reasons for withholding a payment or part-payment. This will assist adjudicators to adequately assess the case if it proceeds to appeal.

If there is still no resolution, the principal should contact WorkCover's Compliance Improvement Branch. It will assist to resolve disputes about the Certificate of Currency or the subcontractor statement.

## **WHAT DOES A SUBCONTRACTOR DO IF THEIR PRINCIPAL CONTRACTOR IS WITHHOLDING PAYMENT AND USING THIS LAW AS THE REASON?**

Principal contractors cannot withhold payment without due cause. The subcontractor should ensure that the information they provided to the principal contractor is current and correct – then speak with the principal contractor. If there is no resolution, the subcontractor should contact WorkCover's Compliance Improvement Branch. It will assist to resolve disputes about the Certificate of Currency or the subcontractor statement.

## **SHOULD FARMERS OBTAIN A CERTIFICATE OF CURRENCY AND SUBCONTRACTORS STATEMENT?**

Farmers who enter into contracts are principals and could potentially be liable to pay workers compensation premium in relation to workers employed by subcontractors, so it is wise to always obtain a Certificate of Currency and subcontractor statement from anyone you engage to carry out work. From July 2004 the exemption period for farmers no longer applies.

## **IF I ENGAGE WORKERS THROUGH A LABOUR HIRE AGENCY, DOES THIS CONTRACT FALL WITHIN THE REQUIREMENTS OF S. 175B?**

Yes. The provisions of s. 175B do apply to a contract between a host employer and a labour hire agency, where the contract relates to the provision of a person employed by the labour hire agency (the subcontractor), who in turn undertakes work for the host employer (the Principal Contractor). The decision to request a statement and Certificate of Currency from a subcontractor ultimately rests with the Principal Contractor concerned. Host employers should however be aware that they could potentially become liable for their pro rata share of any unpaid workers compensation premium in relation to labour hire workers they engage, unless they have a valid Certificate of Currency and subcontractor statement from the labour hire agency.

## **I HAVE ENGAGED A WORKER THROUGH AN EMPLOYMENT AGENCY, I HAVE EMPLOYED THE WORKER DIRECTLY AND I TAKE RESPONSIBILITY FOR THEIR REMUNERATION, SUPERANNUATION ETC, SHOULD I REQUEST A STATEMENT AND CERTIFICATE OF CURRENCY FROM THE EMPLOYMENT AGENCY?**

No. You have employed the worker directly and therefore they must be covered by your workers compensation policy, you must ensure that wages paid to that worker are declared to your insurance company.

## **FOR FURTHER INFORMATION**

WorkCover Compliance Improvement Branch (02) 4321 5755

[www.workcover.nsw.gov.au](http://www.workcover.nsw.gov.au)

WorkCover Assistance Service: **13 10 50**

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