

Refusal of Indemnity

The *Workers Compensation and Injury Management Act 2023 (WCIMA23)* provides for regulations to prescribe circumstances in which a licensed insurer is permitted to refuse indemnity to an employer against its liability to pay compensation or damages for an injury to a worker.

Key Points

Act ref: s. 241. Regs ref: r. 102

- Under the 1981 Act insurers were able to refuse indemnity to an employer if an employer breaches a condition under a workers compensation policy. The 1981 Act placed some constraints on indemnity refusal relating to acts or omissions of the employer that did not contribute to the injury, but indemnity refusal was largely left to the policy of insurance terms and conditions (a matter of contract).
- The *WCIMA23* provides a licensed insurer who indemnifies an employer under a workers compensation policy against the employer's liability to pay compensation or damages in respect of an injury to a worker for which the employer is liable —
 - may in the permitted circumstances refuse to indemnify the employer against that liability
 - cannot refuse in any other circumstances to indemnify the employer against that liability despite any term or condition of a workers compensation policy.
- The regulations provide that an insurer may refuse to indemnify an employer if —
 - the employer knew, or ought to have known, about the risk of injury; and
 - the employer intentionally or recklessly failed to take reasonable precautions to prevent the injury occurring; and
 - the employer's conduct or intentional or reckless failure to take reasonable precautions caused or contributed to the injury for which damages are claimed.

Key Points

- In the event indemnity refusal is permitted, the *WCIMA23* provides for notification to WorkCover WA, the employer and worker within 5 days after the decision to refuse indemnity.
- The *WCIMA23* also addresses what happens to the claim if the notice is sent before or after the insurer is required to make a liability decision and how disputes about the indemnity refusal and the employer's liability for compensation are dealt with.

Questions & Answers

Q. Why are the circumstances for refusing indemnity in regulations?

A. There is a need to standardise policy terms including the basis, if any, of refusing to indemnify employers. Exclusions and conditions on indemnity should not be dealt with as contractual conditions up for negotiation. Ultimately all insurers contribute towards the cost of the compensation or damages where indemnity is refused and the employer cannot pay.