

Over the past few years, there has been growing concern and awareness over exposure to silica dust, causing silica-related diseases such as silicosis. Businesses may not realise, but their duty of care to workers under work health and safety (WHS) laws extends to the prevention of occupational lung diseases and other risks to health arising from hazardous chemicals, through regular health monitoring. Businesses can face a penalty for contravening this duty. However, what happens when a worker refuses to participate in health monitoring and what can businesses do to ensure their compliance with the law?

Health Monitoring Under WHS Law

Most states and territories in Australia have adopted the *Model Work Health and Safety Act (WHS Act)*, under which a person conducting a business or undertaking (PCBU) has a primary duty of care to ensure, so far as is reasonably practicable, that the health of workers and the conditions at the workplace are monitored for the purpose of preventing illness or injury arising from the conduct of the PCBU's business.

In addition, under the *Model Work Health and Safety Regulations (Regulations)*, a PCBU must ensure that health monitoring is provided to workers if either:

- The worker is carrying out ongoing work at a workplace using, handling, generating or storing hazardous chemicals and there is a significant risk to the worker's health because of exposure to certain hazardous chemicals
- The worker is carrying out ongoing asbestos removal work or asbestos-related work and is at risk of exposure to asbestos when carrying out the work

In both cases, a PCBU can be liable to a monetary penalty for noncompliance.

The prescribed hazardous chemicals and the type of health monitoring required for each is set out at Schedule 14 of the Regulations. For example, for "Crystalline silica", the type of health monitoring required is stated to be:

- Demographic, medical and occupational history
- Records of personal exposure
- Standardised respiratory questionnaire to be completed
- Standardised respiratory function test, for example, FEV1, FVC and FEV1/FVC
- Chest X-ray full size PA view

The Regulations provide that a PCBU must ensure that health monitoring of a worker includes health monitoring of a type referred to in an item in Schedule 14 unless:

- An equal or better type of health monitoring is available
- The use of that other type of monitoring is recommended by a registered medical practitioner with experience in health monitoring

The same maximum penalties apply for noncompliance with this requirement, which essentially means a PCBU must use the prescribed type of health monitoring in the Regulations, unless it can be shown that there is an equal or better way of health monitoring available that is recommended by an experienced medical practitioner.

What Can a PCBU Do If a Worker Refuses to Participate in Health Monitoring?

The effect of this framework is that where a worker carries out any work that involves potential exposure to certain hazardous chemicals, a PCBU has a positive duty, under the WHS Act and Regulations, to conduct health monitoring for those workers, and if it does not do so, it is in contravention of that duty and can be subject to penalties and prosecution by the relevant state or territory regulator.

Despite this, a worker may refuse to participate in health monitoring (or a particular procedure, such as undergoing X-rays) on ideological or religious grounds. In this context, does a PCBU's obligation to comply with its duties under WHS law outweigh the individual worker's beliefs in relation to health monitoring? Given the potential consequences for the worker and the PCBU if health monitoring is not carried out, the answer is yes.

If a PCBU is required to comply with health monitoring obligations, to ensure compliance and encourage cooperation from workers, the PCBU should:

- Consider including the requirement to participate in health monitoring in job offers and employment contracts as a condition of employment where a role requires a worker to work on an ongoing basis with hazardous chemicals or substances such as asbestos.
- Discuss and acknowledge any worker's concerns over health monitoring.
- Clearly explain to workers that the PCBU is required, under WHS legislation, to carry out health monitoring for any workers who are potentially exposed to a hazardous chemical and it can face penalties and prosecution if it does not comply with this requirement. This may include directing the workers to the relevant provisions of the Regulations.

Where a worker refuses to participate in health monitoring, a PCBU is required, by WHS law, to stop them from working with hazardous materials. In circumstances where this prevents the worker from continuing to perform their role, a PCBU may be required to modify the worker's role so that they are no longer exposed to hazardous chemicals.

If the worker's role cannot be modified, the PCBU may need to issue a lawful and reasonable direction for the worker to participate in health monitoring in accordance with the PCBU's duties under WHS law. If the worker refuses to comply with this direction, a PCBU may have to consider terminating the worker's employment on the basis that:

- They have refused to comply with a lawful and reasonable direction from their employer (which can constitute serious misconduct)

- As the PCBU cannot allow the worker to carry out any work that may expose them to hazardous substances if health monitoring does not occur without being in breach of its duties under WHS law, the worker can no longer fulfil the inherent requirements of their position
- The worker's refusal to agree to health monitoring exposes the PCBU to the risk of being fined or prosecuted by the relevant state or territory WHS regulator for breach of its statutory duties under WHS law

Our Labour & Employment team can assist and advise on queries on health monitoring and compliance with WHS law.

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