



GUIDE TO WORKPLACE RIGHT OF ENTRY BY WORK HEALTH AND SAFETY ENTRY PERMIT HOLDERS

SAFEWORK NSW

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INTRODUCTION

This guide provides an overview of part 7 of the *Work Health and Safety Act 2011* (WHS Act) and part 2.4 of Work Health and Safety Regulation 2011 (WHS Regulation). The guide describes the role of a work health and safety entry permit holder (EPH), the circumstances in which an EPH may enter a workplace and what an EPH may do after entry. The guide should be read in conjunction with those laws.

Unions may apply to the Industrial Relations Commission to have one or more of their officials granted a work health and safety entry permit. This permit allows union entry into workplaces for specified purposes. The Industrial Relations Commission maintains a publicly available register of current work health and safety EPHs lawlink.nsw.gov.au/irc

The WHS Act enables an EPH to enter a workplace to:

- inquire into a suspected contravention
- inspect employee records or other documents that are directly relevant to the suspected contravention

if the EPH reasonably suspects the contravention relates to a relevant worker.

The WHS Act also enables an EPH to enter a workplace to consult and advise relevant workers on work health and safety matters.

Note: ‘relevant worker’ means a worker:

- who is a member, or eligible to be a member, of the union that the EPH represents (relevant union)
- whose industrial interests the relevant union is entitled to represent
- who works at the workplace.

The WHS Act places certain requirements on EPHs and other persons with regards to the EPH’s exercise of right of entry to a workplace, and the EPH’s rights after entry. Some of these are general requirements and some are specific to the EPH’s purpose for entry.

If a dispute arises regarding an EPH’s right of entry and rights after entry, the WHS Act provides mechanisms to resolve the dispute. This includes the appointment by SafeWork NSW of an inspector to assist in resolving the dispute or the Industrial Relations Commission may deal with the dispute.

Notwithstanding their specific statutory rights and obligations, persons conducting a business or undertaking (PCBUs) and EPHs are encouraged to foster effective relationships with each other to meet the objective of the relevant provisions of work health and safety laws.

GENERAL REQUIREMENTS FOR ENTRY PERMIT HOLDERS

In order to exercise a right of entry to a workplace an EPH must:

- hold a current work health and safety entry permit issued by the NSW Industrial Relations Commission
- hold an entry permit under the *NSW Industrial Relations Act 1996* or the *Fair Work Act 2009* (Cth) (FW Act)
- only attempt to enter during the usual working hours at the workplace
- not enter any part of a workplace that is used only for residential purposes
- give notice of entry as required.

When at a workplace an EPH must:

- produce their work health and safety entry permit and photographic identification if requested
- comply with any reasonable request by the relevant person conducting a business or undertaking, or the person with management or control of the workplace, to comply with:
 - any work health and safety requirement that applies to any visitor to the workplace (eg site induction, requirement for specific PPE)
 - any other legislated requirement that applies to visitors to that type of workplace

- not contravene a condition imposed on their work health and safety entry permit
- not intentionally and unreasonably:
 - delay, hinder or obstruct any person, or
 - disrupt any work at the workplace
- otherwise not act in an improper manner (eg where an EPH seeks to enter the workplace without prior notification to consult with relevant workers).

Where an EPH enters a workplace to inquire into a suspected contravention, or to consult and advise relevant workers, they may only visit the area where the relevant workers work, or other work areas that directly affect the health or safety of those workers.

Note:

1. The identity of the relevant PCBU and the person with management or control of the workplace will depend on the purpose for which the EPH is entering the workplace.
2. An EPH is not required to disclose the name of any worker at the workplace to the relevant PCBU or the person with management or control of the workplace, and if the EPH wishes to disclose the name of any worker they may only do so with the consent of that worker.

REQUIREMENTS FOR OTHER PERSONS

A person (including the relevant PCBU and the person with management or control of the workplace) must not without reasonable excuse, refuse or unduly delay entry into a workplace by an EPH.

Examples of unreasonable refusal or delay may include:

- if a supervisor attempted to delay an EPH's entry until the supervisor's manager returned to the workplace the next day, even though the manager had left the supervisor in charge
- if a PCBU refused to allow the EPH entry until they disclosed the name of the worker who called them.

Examples of reasonable delay or refusal may include a PCBU delaying or refusing entry:

- if an EPH tries to enter the workplace to consult and advise relevant workers without providing prior notice of entry at least 24 hours in advance
- if the EPH does not show their permit when requested.

Additionally, a person must not intentionally and unreasonably hinder or obstruct an EPH from entering a workplace or in exercising any rights that an EPH has after entry to the workplace.

For example, if a manager refused to allow an EPH access to records of plant maintenance relating to the suspected contravention which were kept at or accessible from a computer at the workplace, this may constitute intentionally and unreasonably hindering an EPH in exercising their rights at the workplace. (Note that access by an EPH to certain documents which are 'employee records' requires prior notice of proposed entry to have been given – see Type of entry 2 see over page.)

If allowing an EPH to inspect or make copies of a document would cause a person to breach privacy laws, then they may refuse to provide the document and such refusal would not be considered an intentional and unreasonable hindrance or obstruction of an EPH's exercise of rights.

TYPES OF ENTRY

There are three types of entry which may be exercised by an EPH. If the EPH reasonably suspects the contravention relates to a relevant worker:

1. entry to inquire into a suspected contravention
2. entry to inspect employee records held by the relevant PCBU or information held by another person.

In other circumstances:

3. entry to consult and advise workers.

1. ENTRY TO INQUIRE INTO A SUSPECTED CONTRAVENTION

An EPH may enter a workplace to inquire into a suspected contravention that relates to or affects a relevant worker. The EPH must reasonably suspect before entering the workplace that this contravention has occurred or is occurring.

In order to have a reasonable suspicion, the EPH must have some information about activities in the workplace that would lead them to suspect there has been a contravention, or there is a contravention occurring. For example, a reasonable suspicion could be based on:

- a complaint made to an EPH that provides detail of incidents or processes at the workplace
- a direct observation by the EPH, while outside the workplace, of an incident or event that is likely to constitute a contravention
- a report in the media of an incident or event at the workplace.

The suspected contravention may include any acts or omissions by a duty holder that impact or may impact on the health and safety of relevant workers.

The following are some examples:

- plant and equipment – machine being operated with missing guards
- work systems – working at heights with no or inadequate fall protection
- chemicals – workers using certain chemicals without appropriate personal protective equipment
- consultation – workers not consulted on proposed changes to the work system which directly affect their health and safety
- workplace – inadequate lighting or poor ventilation
- amenities – unhygienic dining or toilet facilities.

DOES AN EPH NEED TO PROVIDE NOTICE OF ENTRY IN REGARD TO A SUSPECTED CONTRAVENTION?

An EPH must, as soon as is reasonably practicable after entry, provide written notice of entry.

There is no requirement to provide a notice of entry in situations where this would:

- defeat the purpose of entry to the workplace
- unreasonably delay the EPH in an urgent case (eg may relate to working at height without fall protection or demolishing asbestos containing material without breathing apparatus).

The notice of entry must be given to the relevant PCBU and the person with management or control of the workplace.

The relevant PCBU will be the PCBU to whom the suspected contravention relates.

If labour hire workers are affected by a suspected contravention by the host business or undertaking, the relevant PCBU will be the host business or undertaking. It is not necessary in these circumstances for the EPH to give notice of entry to the labour hire company.

If the relevant PCBU is also the person with management or control of the workplace, only one notice of entry is needed. For example when a principal contractor on a construction site is suspected of contravening the WHS Act, then the principal contractor will be both the relevant PCBU and the person with management and control.

Examples where the relevant PCBU may be different to the person with management or control of the workplace, requiring more than one notice of entry to be provided to different people, are:

- Where there is a principal contractor and subcontractors engaged by the principal contractor on a construction site, and the suspected contravention relates to an unsafe system of work by a subcontractor's (the relevant PCBU will be the subcontractor and the person with management and control will be the principal contractor).
- Where there is a cleaning company contracted to clean a public hospital, and the suspected contravention relates to workers engaged by the cleaning contractor using cleaning substances in an unsafe manner (the relevant PCBU will be the cleaning contractor, and the person with management and control will be the government department or statutory body in charge of the hospital).

The notice of entry should be given in person to the relevant PCBU and person with management or control of the workplace, or where these are entities, to the individual the EPH reasonably believes is an appropriate recipient on behalf of the entity, during the time the EPH is present at the workplace.

If the EPH has any doubt that the notice of entry will be received, they should provide the notice again by email or fax as soon as is reasonably practicable after leaving the workplace.

The notice of entry must be written and must contain:

- the full name of the EPH providing the notice
- the name of the union the EPH represents
- the section of the WHS Act that enables the EPH to enter the workplace
- the name and address of the workplace the EPH has entered
- the date of the entry
- so far as is practicable, the particulars of the suspected contravention to which the notice relates.

An EPH must provide sufficient information about the suspected contravention in order to enable the PCBU or an inspector to be able to determine the scope of the inquiry including general location(s) (eg suspected contravention in the provision of safe plant within production areas of the workplace). An EPH is not required to provide such specific detail that individual workers may be identified (eg lack of machine guarding on production line one stamping machines).

The notice must also include a declaration stating:

- the EPH's union is entitled to represent the industrial interests of a worker who carries out work at the workplace and is a member or eligible to be a member of that union
- the provision in the union's rules that entitles the union to represent the industrial interests of that worker
- the suspected contravention relates to or affects that worker.

WHAT MAY AN EPH DO WHEN THEY ARE AT THE WORKPLACE IN REGARD TO A SUSPECTED CONTRAVENTION?

While at the workplace the EPH may:

- Inspect any work system, plant, substance, structure or other thing relevant to the suspected contravention.
- Consult with the relevant workers in relation to the suspected contravention.
- Consult with the relevant PCBU about the suspected contravention.
- Require the relevant PCBU to allow the EPH to inspect and make copies of any document (other than employee records¹) that is directly relevant to the suspected contravention, and that is kept at the workplace or accessible from a computer kept at the workplace (eg licenses for operating high risk plant, safe work method statements, risk assessments, incident reports and investigations, maintenance records, material safety data sheets and plant manuals).
- Warn any person, whom the EPH reasonably believes to be exposed to a serious risk to his or her health or safety emanating from an immediate or imminent exposure to a hazard associated with the suspected contravention, of that risk.

Note:

1. The relevant PCBU is not required to allow an EPH to inspect or make copies of information if to do so would contravene a Commonwealth, State or Territory law.
2. The use or disclosure of personal information obtained by the EPH is regulated under the *Privacy Act 1988* (Cth) (Privacy Act).

AFTER AN EPH INQUIRES INTO A SUSPECTED CONTRAVENTION WHAT ACTION MAY THEY TAKE?

The EPH's role is to inquire into a suspected contravention with both the relevant workers and relevant PCBU, and provide suggestions on what could be done to resolve identified concerns. They do not have power to determine a contravention has occurred and/or direct what needs to be done to remedy the contravention.

2. ENTRY TO INSPECT EMPLOYEE RECORDS (HELD BY THE RELEVANT PERSON CONDUCTING A BUSINESS OR UNDERTAKING) OR INFORMATION HELD BY ANOTHER PERSON

An EPH may enter any workplace, for the purpose of inspecting or making copies of employee records or documents directly relevant to the suspected contravention.

Employee records may be held at the workplace of the relevant PCBU (eg employee training records).

Other documents, including employee records, may be held at the workplace of another person. Examples include:

- a contractor holding records on repairs and maintenance of plant and equipment
- a hygienist holding records relating to the workplace
- designers, manufacturers or suppliers of plant or substances holding records relating to tests undertaken concerning the safety of plant or substances
- a shopping centre manager holding records of air-conditioning tests and maintenance
- a document storage provider holding training records of employees.

¹ To inspect an 'employee record' prior notice of entry is required as for type of entry 2 referred to in this guide. Information about the meaning of 'employee record' is included in Appendix 2 of this guide.

DOES AN EPH NEED TO PROVIDE NOTICE OF ENTRY TO INSPECT EMPLOYEE RECORDS OR INFORMATION HELD BY ANOTHER PERSON?

An EPH must provide a 'notice of proposed entry' during usual working hours at the workplace, at least 24 hours but no more than 14 days prior to entering the workplace, if they wish to inspect employee records held² at the relevant PCBU's workplace or information held by another person.

The notice of proposed entry should be able to be read and understood and must contain:

- the full name of the EPH providing the notice
- the name of the union the EPH represents
- the section of the WHS Act that enables the EPH to enter the workplace
- the name and address of the workplace the EPH proposes to enter
- the date of the proposed entry
- so far as is practicable, the particulars of the suspected contravention to which the notice relates and a description of the employee records or documents, or the classes of employee records or documents, directly relevant to the suspected contravention, that are proposed to be inspected.

The notice must also include a declaration stating:

- the EPH's union is entitled to represent the industrial interests of a worker who is a member or eligible to be a member of that union
- the provision in the union's rules that entitles the union to represent the industrial interests of that worker
- the suspected contravention relates to or affects that worker
- the records and documents proposed to be inspected relate to that contravention.

The notice of proposed entry must be given to the person from whom the employee records or documents are requested and the relevant PCBU.

The relevant PCBU in this scenario will be the PCBU to whom the suspected contravention relates.

The person from whom the records or documents are requested will be the individual or entity who the EPH believes is in possession of the records or documents.

The notice of proposed entry can be given by email or fax if not given in person.

WHAT MAY AN EPH DO AT THE WORKPLACE AFTER ENTRY TO INSPECT OR MAKE COPIES OF EMPLOYEE RECORDS OR INFORMATION HELD BY ANOTHER PERSON?

The EPH may inspect or make copies of employee records or documents directly relevant to the suspected contravention. This may involve:

- taking notes about the information in the inspected records or documents
- photographing records or documents
- photocopying relevant records or documents
- sending relevant records or documents electronically to themselves (eg by fax or email).

Note: The use or disclosure of personal information obtained by the EPH is regulated under the Privacy Act.

3. ENTRY TO CONSULT AND ADVISE WORKERS

An EPH may enter a workplace to consult on work health and safety matters with, and provide advice on those matters to one or more relevant workers who wish to participate in the discussion.

If after entry, the EPH finds there are no relevant workers at the workplace, or that the relevant workers at the workplace do not want to engage in work health and safety discussions with the EPH, the EPH must leave.

² Information about the meaning of 'employee record' is included in Appendix 2 of this guide.

DOES AN EPH NEED TO PROVIDE NOTICE OF ENTRY IN REGARD TO ENTRY TO CONSULT AND ADVISE WORKERS?

An EPH must provide a 'notice of proposed entry' during usual working hours at the workplace, at least 24 hours but no more than 14 days prior to entering the workplace.

The notice of proposed entry should be able to be read and understood and must contain:

- the full name of the EPH providing the notice
- the name of the union the EPH represents
- the section of the WHS Act that enables the EPH to enter the workplace
- the name and address of the workplace the EPH proposes to enter
- the date of the proposed entry.

The notice of proposed entry must also include a declaration stating:

- that the EPH's union is entitled to represent the industrial interests of a worker who carries out work at the workplace and is a member or eligible to be a member of that union
- the provision in the union's rules that entitles the union to represent the industrial interests of that worker.

There is no requirement for the notice to include information on what matters will be the subject of consultation or advice.

The notice of proposed entry must be given to the relevant PCBU or PCBUs (this is the PCBUs who engaged the relevant workers to do the work at the workplace which the EPH wishes to enter).

WHAT IS A SUITABLE TIME AND PLACE TO CONSULT AND ADVISE RELEVANT WORKERS?

The EPH and the relevant PCBUs should negotiate a suitable time for the discussion between the EPH and relevant workers to be held, bearing in mind that the EPH must not intentionally and unreasonably disrupt work, and that the relevant PCBU must not intentionally hinder or obstruct the EPH in their efforts to consult and advise relevant workers. A suitable time may include relevant workers' meal

breaks, rest periods or pauses in work. However, unlike the provisions relating to entry under the FW Act, right of entry under the WHS Act is not restricted to meal times or other breaks.

This negotiation may take place before the 'notice of proposed entry' is provided, during the period after the 'notice of proposed entry' is provided but before the EPH enters the workplace, or after entry has taken place at the end of the notice period but before the EPH acts to consult and advise.

Note: The WHS Act does **not** require that the EPH comply with any request by the relevant PCBU to hold the discussion with relevant workers in a particular room or area, or to take a particular route to reach that room or area. (However, as noted on page 2, the EPH must comply with reasonable requests relating to work health and safety requirements applying to the workplace or any specific legislated requirement that applies to that type of workplace.)

WHAT MAY AN EPH DO AT THE WORKPLACE AFTER ENTRY TO CONSULT AND ADVISE RELEVANT WORKERS?

The EPH may consult on work health and safety matters with, and provide advice on those matters to, one or more relevant workers who wish to participate in the discussion. This discussion can focus on general health and safety topics or relate to health and safety matters the EPH wishes to discuss because they will be of interest to such workers.

While at the workplace, the EPH may also warn any person whom the EPH reasonably believes to be exposed to a serious risk to their health or safety, emanating from an immediate or imminent exposure to a hazard, of that risk.

For example, if an EPH while on a building site to consult workers observes a person working or about to work at height without fall protection, the EPH may inform that person of the serious risk arising from the work practice. The EPH may not direct the person to remove themselves from the risk but only warn them of the risk they are exposed to.

DEALING WITH DISPUTES

Situations can occur when an EPH's right of entry and exercise of powers after entry may be disputed. This may concern:

- the credentials of the EPH
- disagreement about the entitlement of the EPH's union to represent the industrial interests of the relevant workers
- the adequacy or otherwise of the notice of entry or notice of proposed entry, provided by the EPH
- disruption of work
- access to employee records or documents.

In these circumstances any party to the dispute may ask SafeWork to appoint an inspector to attend the workplace to assist in resolving the dispute. The inspector will discuss the matter with both parties to assist them to resolve the dispute (including informing the parties of his or her opinion about the matter and reasons for this opinion), but the inspector cannot make a decision on how the dispute must be resolved.

Note: Where the inspector believes the health and safety matter is sufficiently serious, the inspector may make a decision to enter the workplace to inquire into the matter and where necessary use their own compliance powers as required.

Alternatively, an application can be made to the Industrial Relations Commission to resolve the dispute. The Industrial Relations Commission can deal with the dispute in any way it thinks fit including by means of mediation, conciliation or making any order it considers appropriate following arbitration.

OFFENCES UNDER PART 7 OF THE WHS ACT

Legal proceedings can be commenced by SafeWork NSW and civil penalties apply in relation to any person who fails to meet the requirements of part 7 of the WHS Act that apply to them.

Note: This guidance relates only to part 7 of the WHS Act. This guidance does not cover the obligations of a PCBU to allow entry to a workplace under part 5 of the WHS Act to any person assisting a health and safety representative or any representative of a party to issue resolution. Union officials, whether or not holding a work health and safety entry permit, may also be such a person or representative.

APPENDIX 1 – SAMPLE NOTICE OF ENTRY



SafeWork NSW

SAMPLE NOTICE OF ENTRY

JULY 2016

Full name of entry permit holder

Name and address of workplace being entered

Name of union represented

Date of entry or proposed* entry (DD/MM/YYYY)

*For entry under section 120 or 121: 24 hours – 14 days notice must be given.

SECTION 1. PURPOSE OF ENTRY

- Section 117** – to inquire into a suspected contravention of the WHS Act.
- Section 120** – to inspect employee records held by the relevant PCBU or employee records and other documents held by another person that are directly relevant to a suspected contravention of the WHS Act.
- Section 121** – to consult and advise relevant workers on health and safety matters.

SECTION 2. ADDITIONAL – FOR ENTRY UNDER SECTIONS 117 AND 120

Details of the suspected contravention to which this notice relates (for example what are the concerns, how do they contravene the WHS Act and what area of the workplace is affected)

SECTION 3. ADDITIONAL – FOR ENTRY UNDER SECTION 120 TO INSPECT EMPLOYEE RECORDS HELD BY THE RELEVANT PCBU AND/OR EMPLOYEE RECORDS OR OTHER DOCUMENTS HELD BY ANOTHER PERSON

List of the employee records or other documents directly relevant to the suspected contravention which are proposed to be inspected or copied

SECTION 4. DECLARATION

Entry under sections 117 and 121 only:

- The above union is entitled to represent the industrial interests of relevant worker(s) at this workplace who are or are eligible to be a member of the union.
- The provision in the union's rules that entitles the union to represent the industrial interests of these worker(s) is:

Entry under sections 117 and 120 only:

- The suspected contravention relates to or affects worker(s) that the union is entitled to represent.

Entry under section 120 only:

- The employee records or other documents proposed to be inspected and/or copied are directly relevant to the suspected contravention referred to above.

Work health and safety EPH signature

Date (DD/MM/YYYY)

The legislation provides for civil penalties of up to \$10,000 for individuals and \$50,000 for a body corporate relating to breaches of right of entry laws.

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APPENDIX 2 – MEANING OF ‘EMPLOYEE RECORD’

The WHS Act requires prior notice of entry by an EPH to inspect and make copies of employee records that are directly relevant to a suspected contravention, whether held by the relevant PCBU or another person.

The Privacy Act provides useful guidance on the meaning of ‘employee record’. The requirements in the WHS Act relating to ‘employee records’ are intended to reflect those in the FW Act. In that Act, the term ‘employee record’ is defined to have the same meaning as in the Privacy Act.

Employee record means a record of personal information relating to the employment of the employee. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about all or any of the following:

- the engagement, training, disciplining or resignation of the employee
- the termination of the employment of the employee
- the terms and conditions of employment of the employee
- the employee’s personal and emergency contact details
- the employee’s performance or conduct
- the employee’s hours of employment
- the employee’s salary or wages
- the employee’s membership of a professional or trade association
- the employee’s trade union membership
- the employee’s recreation, long service, sick, personal, maternity, paternity or other leave
- the employee’s taxation, banking or superannuation affairs.

Personal information means information or an opinion (including information or an opinion forming part of a database), whether true or not, and whether recorded in a material form or not, about an individual whose identity is apparent,

or can reasonably be ascertained, from the information or opinion.

Health information means:

- information or an opinion about:
 - the health or a disability (at any time) of an individual
 - an individual’s expressed wishes about the future provision of health services to him or her
 - a health service provided, or to be provided, to an individual, that is also personal information, or
- other personal information collected to provide, or in providing, a health service
- other personal information about an individual collected in connection with the donation, or intended donation, by the individual of his or her body parts, organs or body substances, or
- genetic information about an individual in a form that is, or could be, predictive of the health of the individual or a genetic relative of the individual.

Health service means:

- an activity performed in relation to an individual that is intended or claimed (expressly or otherwise) by the individual or the person performing it:
 - to assess, record, maintain or improve the individual’s health
 - to diagnose the individual’s illness or disability
 - to treat the individual’s illness or disability or suspected illness or disability, or
 - the dispensing on prescription of a drug or medicinal preparation by a pharmacist.

Individual means a natural person.

