

Practical steps to address the hazard of Obstructive Sleep Apnea (OSA)

How can we implement testing in the workplace?

Fit for Duty recommends that employers require workers who are performing, or directing, safety sensitive work, to undertake testing for OSA. Employers can require testing for OSA by:

- inserting a clause into the employment agreement
- inserting a clause requiring testing into a health and safety policy

Having this employment documentation in place means that an employer can impose the requirement for OSA testing and treatment, if required.



What if a worker refuses testing?

If a worker refuses OSA testing, they may be refusing to carry out a reasonable instruction from their employer. An employer could take disciplinary steps related to this. This may include removing the worker from safety sensitive duties until the problem is resolved. Provision for refusal to undertake testing could also be included in a policy and/or the employment agreement.

We can refer an employer for specific legal guidance on how to manage this situation.

What can an employer do if a worker has a positive test for OSA?

If a worker has a positive test for sleep apnea, in most cases, they will require CPAP treatment. If a worker is involved with safety sensitive work, we recommend that treatment and on-going monitoring is a requirement of continued employment. Employment processes relating to management of health/medical conditions can be used if necessary.

The New Zealand Transport Agency (NZTA) has released a guidance document, **Medical Aspects of Fitness to Drive** which recommends that, where a worker's role involves driving a vehicle, driving should cease, and not be resumed until the worker's OSA is adequately treated, and symptoms satisfactorily controlled. This is particularly important for those driving passenger vehicles or heavy traffic vehicles that would cause the most harm in the event of an accident. In accordance with this guidance, alternative duties for the worker may need to be considered while the worker receives treatment. Where a medical practitioner considers that a worker is unfit to drive as a result of OSA, the practitioner has the ability to notify the NZTA of that opinion.

What if a worker has a positive test for OSA and refuses treatment?

If a worker, who carries out safety sensitive work, has a positive test for OSA and refuses treatment, we recommend that the worker is not permitted to continue in their role, or with any safety sensitive work, until they have undertaken treatment.

It will be important for employers to have the documentation in place to impose the requirement on workers to have this medical condition treated, in order for the risk of harm, to the employee and to others, to be minimised. Employment processes may be required. We can refer an employer for more specific legal guidance on any such situations.

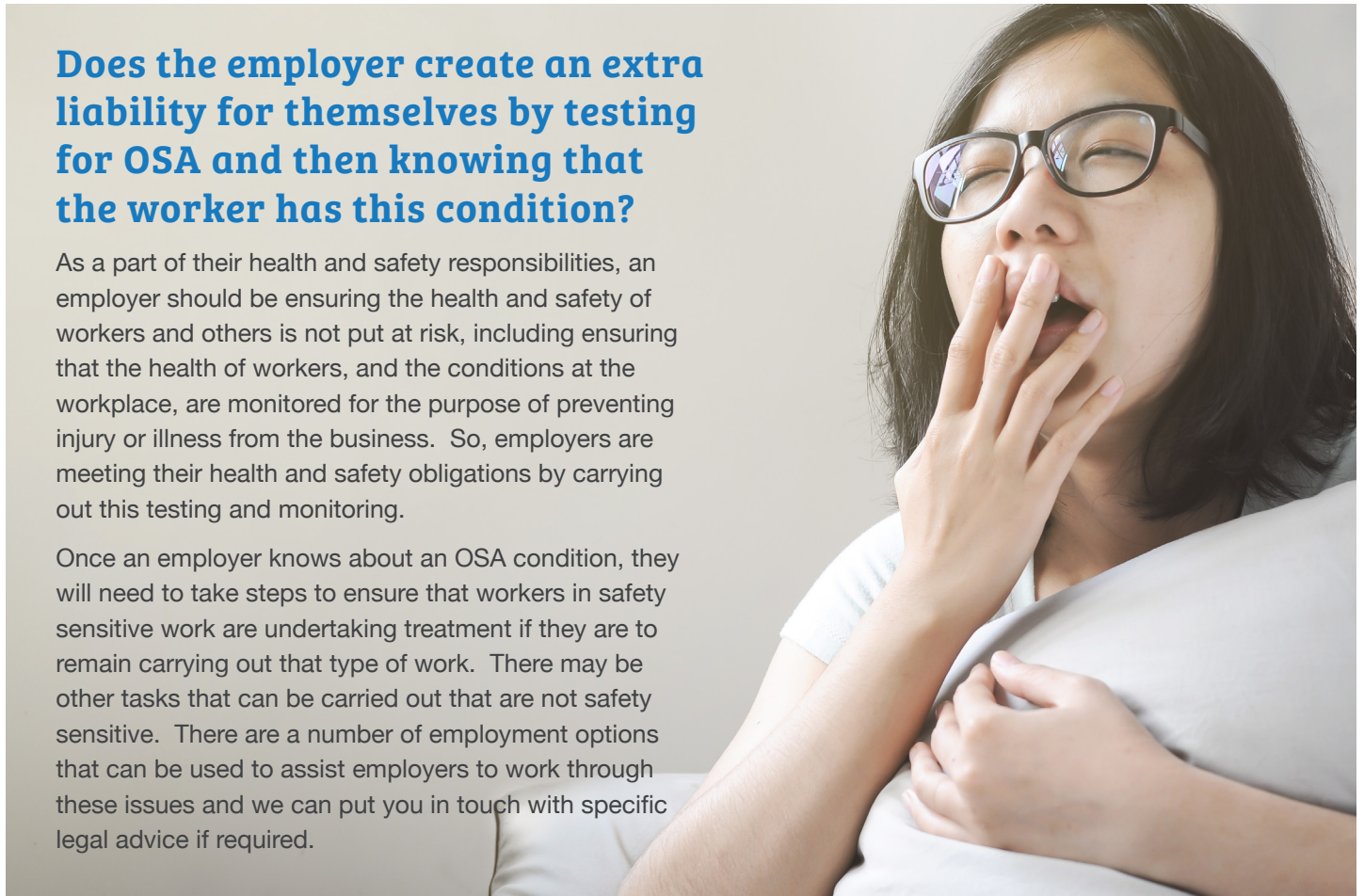
If a worker has a positive test for OSA, will the employer be liable to meet the cost of treatment?

No, the employer is not necessarily liable for the cost of treatment. A positive test for OSA is ultimately the responsibility of the worker, like any other health condition. However, the employer may choose to meet, or contribute to, the cost of treatment. This may be as part of a wellness programme, or to allow a worker performing safety sensitive tasks to remain working in their role.

Does the employer create an extra liability for themselves by testing for OSA and then knowing that the worker has this condition?

As a part of their health and safety responsibilities, an employer should be ensuring the health and safety of workers and others is not put at risk, including ensuring that the health of workers, and the conditions at the workplace, are monitored for the purpose of preventing injury or illness from the business. So, employers are meeting their health and safety obligations by carrying out this testing and monitoring.

Once an employer knows about an OSA condition, they will need to take steps to ensure that workers in safety sensitive work are undertaking treatment if they are to remain carrying out that type of work. There may be other tasks that can be carried out that are not safety sensitive. There are a number of employment options that can be used to assist employers to work through these issues and we can put you in touch with specific legal advice if required.



How long is treatment required?

This will vary between individuals and Fit for Duty can provide this information on an individual basis.

It is important to note that, while OSA cannot be cured, it can be successfully treated and managed. Treatment is relatively simple and inexpensive using a CPAP machine. Various purchase, lease or OPEX funded plans are available, including the option for compliance monitoring to ensure peace of mind.

Who pays for treatment?

Depending on the circumstances, either the worker or the employer can pay for the treatment.

An employer may require the worker to fund the cost of treatment, just as a worker would normally be responsible for meeting the cost of dealing with their own medical issues.

An employer may elect to fund all, or part, of the cost of CPAP treatment. For example, an employer may choose to fund the 4 week CPAP trial with the employee paying for on-going treatment. Where this is the case, the employer may choose to "bind" the worker to working for the employer for a period of time during and/or following the treatment, so that the employer has the benefit of the investment in the worker. We can refer an employer for more specific legal advice on how to set this up.

The employer may choose to impose a requirement on the worker to obtain treatment for OSA and to provide proof of that treatment, for the worker to continue with their normal duties. The right employment documentation and process will be needed for this.



How can an employer ensure that treatment continues?

In order to ensure that a worker continues with the treatment for OSA, which may be necessary to ensure that the condition is managed, the employer may make on-going treatment or monitoring a condition of continued employment. This may include follow-up checks by the employer.

Where does an organisation start?

Before proceeding with testing, employers should:

- Check their employment agreements and/or health and safety policy to see what, if anything, those documents provide for in terms of testing for medical conditions in employment. We can refer employers for specific advice on useful tools to ensure that employers can take action if OSA is an issue for a worker.
- Consider the pool of workers to be tested for OSA and what the possible outcomes if a worker does have OSA.
- Provide workers with a consent form, and obtain written consent of the worker to OSA testing. The consent form sets out the purpose of the testing for OSA, and what steps may be taken by the employer if a worker tests positive for sleep apnea, and what action will then be required. The consent form also consents to the sharing of the outcome of the OSA test with the employer, which is a requirement of the Privacy Act 1993. We can provide employers with a consent form to use, as part of the testing process.

This Question and Answer Guide was prepared with the assistance of Wynn Williams Lawyers. This document is intended to be a guideline only and does not constitute legal advice. Employers should seek legal advice on any of the issues covered in this Question and Answer Guide.

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