

Act now

Whether your business is small or large, start preparing now for big changes to workplace health and safety that will come into effect from April 2015. Any breaches could attract a hefty fine.

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IN MARCH 2014, the Health and Safety Reform Bill was introduced into Parliament. The Bill forms a key part of the government's Working Safer reform package formulated to deal with New Zealand's poor workplace safety record, highlighted by the Pike River Mine tragedy in 2010.

The Bill will create the new Health and Safety at Work Act, replacing the current Health and Safety in Employment Act 1992.

It is currently before the Transport and Industrial Relations Select Committee and is expected to pass into law this year with effect from April 2015.

Will the new Act be that much different?

Yes. The introduction of this Act brings in significant change by doing away with the current regime in favour of a new system based on the Australian 'model' law.

Of particular interest will be:

- the new legal duty holder
- the new duty of consultation
- changes to the all practicable steps test
- the due diligence obligations imposed on directors.

These changes will bring new challenges for all sizes of business in the construction industry. In many cases, businesses are going to need to reassess their basic framework of operations to ensure compliance when the new legislation takes effect.

Wider responsibility for new duty holder

Under the Health and Safety at Work Act, the new primary duty

holder will be a 'person conducting a business or undertaking' (PCBU), alone or with others, whether for profit or gain or not.

The person may be a company or an individual. People involved in a company as workers or officers, including directors, are not the PCBU, but will have separate personal liability.

PCBUs will be required to ensure, as far as is reasonably practicable,

the health and safety of workers they engage and those whose activities in carrying out work are influenced or directed by them, including employees, contractors, subcontractors and others.

PCBUs will also owe a duty to other people who may be at risk from work carried out by the business or undertaking.

There are additional specific duties on PCBUs who are designers, manufacturers, importers or suppliers of plant, substances or structures and relating to people installing, constructing or commissioning plant or structures. These duties will apply to most businesses operating within the construction sector.

All businesses should be reassessing how they deal with health and safety now, particularly at senior management and director level.

It will pay to talk

The incoming Act will have a new duty of consultation. This will be particularly important for the construction industry where many different contractors and subcontractors are typically working together on the same site.

The duty to consult will require that, where more than one person has a duty under the Act in relation to the same matter, each person

must consult, cooperate and coordinate with the others as far as reasonably practicable to ensure compliance with the duty.

As an example, this will mean that, where two contractors have the same duty under the Health and Safety at Work Act to the installation, construction or commissioning of plant or structures, those contractors will need to work together to determine how best to ensure both parties comply with the duty for the benefit of others in the workplace.

In case incentive is lacking, the Act will make a failure to comply with the duty to consult a specific offence punishable by a maximum fine of \$20,000 for an individual or \$100,000 for any other person.

What's out, what's in?

The Act will require PCBUs to comply with their obligations 'so far as is reasonably practicable'. On the face of it, the test is not that different to the current one under the Health and Safety in Employment Act. However, the way in which cost is assessed as a factor will be very different.

Unlike the Health and Safety in Employment Act, the new Act will not place cost on an even footing with other considerations when deciding what is 'reasonably practicable'. Instead, there will be a clear presumption in favour of safety ahead of cost unless it is 'grossly disproportionate' to the risk.

This has the potential to hit small businesses hard. Much greater consideration will need to be given to how limited funds can be applied to delivering health and safety in the workplace, and some tasks may not be able to be undertaken when risks cannot be mitigated.

With power comes responsibility

Under the Act, more specific and onerous obligations will be imposed on 'officers'. This will capture those who are directors of

companies and any other persons who make decisions that affect the whole or a substantial part of the business of the PCBU.

The primary obligation on an officer will be to exercise due diligence to ensure the PCBU complies with its duties and obligations. Officers will need to have an intimate knowledge of health and safety and what is being done to comply with their PCBU's legal obligations.

It will no longer be enough for directors and senior management to simply receive meeting minutes or reports from a health and safety committee or health and safety manager without doing more.

These new obligations will have a particular impact on larger construction businesses where a greater disconnect exists between senior management and those physically completing the work.

Size doesn't matter

Smaller construction companies and owner-operated businesses will also be impacted. A director or officer can be prosecuted if a PCBU breaches its obligations, whether or not the PCBU is also prosecuted.

Similarly, a director or officer may face personal liability in addition to the prosecution of the PCBU. Simultaneous PCBU and director or officer prosecution is likely to present significant financial challenges for smaller companies in terms of dealing with penalties imposed.

Get ready now

While 2015 may seem an age away, all businesses should be reassessing how they deal with health and safety now, particularly at senior management and director level, to ensure compliance plans are in place and operating by the time the law changes.

The Health and Safety at Work Act won't give a grace period to get up to speed, so preparation is needed now. All businesses should investigate their likely new obligations and be starting to put in place systems and processes that will ensure compliance for the future. ◀

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