

CLIENT BRIEFING

HEALTH AND SAFETY AT WORK ACT - WHAT ARE YOU LIABLE FOR UNDER THE NEW ACT?

The Health and Safety at Work Act has been passed and will come into effect on the 4th of April 2016. This will replace the existing Health and Safety in Employment Act 1992.

Under the new Act, businesses of all sizes are required to have an effective strategy to develop worker engagement and safety practices. There will be a greater responsibility imposed on businesses and individuals to ensure compliance with health and safety processes.

All PCBU's (Persons Conducting a Business or Undertaking) will have a primary duty of care to ensure the health and safety of each individual in the workplace by using the "reasonably practicable" standard. Under this standard, all relevant factors must be taken into account and evaluated, including the potential harm caused by each risk, the likelihood of the risk occurring and how a risk may be mitigated or eliminated.

PCBUs that don't comply with the law face a range of enforcement possibilities, including both fines and jail sentences.

There are three categories of fines which can be summarised as:

Category 1: Reckless conduct exposing someone to death/serious injury

Category 2: failure to comply, exposing someone to death/serious injury

Category 3: Failure to comply with a health and safety duty

WorkSafe New Zealand will have up to two years to investigate any incidents and lay charges if necessary.

	CORPORATION	INDIVIDUAL AS PCBU OR OFFICER	INDIVIDUAL/EMPLOYEE
CATEGORY 1	\$3 million	\$600,000, five years in jail, or both	\$300,000, five years in jail, or both
CATEGORY 2	\$1.5 million	\$300,000	\$150,000
CATEGORY 3	\$500,000	\$100,000	\$50,000

WORKSAFE GOOD PRACTICE GUIDELINES

WorkSafe New Zealand, the agency responsible for regulating health and safety compliance in New Zealand, has released information on their website* providing practical advice to assist businesses in complying with the new Act.

*A guide to the Health and Safety at Work Act is expected to be released mid-March.

It is suggested that in addition to identifying, eliminating or minimising risks, companies should:

- **Actively engage** with workers on all health and safety matters, allowing and encouraging workers to respond with feedback.
 - For larger workplaces, the election of a worker representative may assist PCBUs in meeting their duty to engage with workers. This is someone that workers can approach about health and safety related issues, who in turn will convey these back to the relevant PCBU.
 - Alternatively, a Health and Safety Committee may be established by the PCBU at their own discretion or at the request of workers. For smaller businesses with less than 20 employees, a committee has to be formed if their industry is defined as “high risk”.
- **Develop health and safety practices** with worker participation to ensure these are most effective for their workplace.
- **Develop processes and procedures** to manage, advise workers and resolve any current or potential issues.

WorkSafe has further emphasised that everybody has a role in keeping their workplaces safe including workers, volunteers, contractors and those on work experience. Contractors are also responsible for themselves and others while at a workplace.

EXAMPLES OF WORKSAFE INVESTIGATIONS/ INCIDENTS IN 2015

- Company A and Company B were ordered to pay \$76,500 in fines and \$25,000 in reparations after an employee lost three fingers in an unguarded grinder machine.
- After a lack of operational and safety management training, a Company C employee was fatally injured while operating a forklift. The company was ordered to pay \$76,994 in reparations and a \$52,000 fine.
- After six children were injured at the Masterton A&P Show following the collapse of an inflatable slide, the director and owner of Company D was fined \$115,000 for failing to provide sufficient information and documentation for WorkSafe’s investigation.

RESPONSE AND APPLICATION OF INSURANCE

Under the new Act it will remain illegal for any insurance to provide cover for fines issued under health and safety legislation. Insurers however remain able to advance defence costs for investigation and prosecutions by WorkSafe (private prosecutions are not generally covered by insurers) and to pay reparations for victims following conviction of an offence (always subject to policy terms and conditions).

Statutory Liability insurance commonly provides coverage for unintentional breaches of New Zealand health & safety legislation, subject to the limitations noted above. Directors’ and Officers’ Liability Insurance policies may also respond to provide defence costs cover if legal action is brought against an insured individual, eg if a director has failed to exercise due diligence to ensure the development and compliance of health and safety process in their organisation.

Marsh is **seeing a trend amongst our clients increasing their levels of insurance coverage** (Statutory Liability insurance and to a lesser extent Directors & Officers Liability insurance) in preparation for the new Act. The separation of defence costs from the main limit of indemnity has also found some favour, following the Bridgecorp judgement in 2014.

Please contact your Marsh broker to discuss what these changes may mean for you and your company and what insurances you have in place that are relevant to this change in legislation.

FOR FURTHER INFORMATION

Your Marsh Client Executive will be happy to discuss this further with you.

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