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BUSINESS

CENTRAL

Empowering Business

EMPLOYEE PARTICIPATION SYSTEMS

Our guide for Employers and Managers

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OVERVIEW

- 1 Changes to the Health and Safety in Employment Act 1992 in late 2002 included the new requirement for employers and their employees to develop, agree and implement a system for employee participation in health and safety process in the workplace within six months of the amendments becoming law.
- 2 When head-counting your employees to determine whether you must develop and implement an employee participation system, and for determining the maximum number of days' paid leave you must provide for health and safety training, you must include certain volunteers.
- 3 It is possible if your organisation has had a system for employee participation for that system to be revised and continued under the new law.
- 4 If your organisation has had a system for employee participation in the past but it is no longer functional then you will need to develop an employee participation system in accordance with the Act.
- 5 Employers who employ less than 30 employees do not have to develop and implement an employee participation system, unless required to do so by one or more employees, or their union.
- 6 Employers who employ 30 or more employees must develop and implement an employee participation system within six months of the new law (or employing 30 employees). If they do not then the Act's default employee participation system will apply.
- 7 An approved code of practice for employee participation in workplace health and safety is awaited from OSH.

INTRODUCTION

Amongst the changes made to the Health and Safety in Employment Act 1992 in late 2002 was the addition of Part 2A which introduced a mandatory requirement for employers to agree with their employees, on a system for employee participation in processes relating to health and safety in the workplace.

The thrust of the change is to create an obligation on you to involve all your employees in setting up a system for their input into health and safety issues so that they can have an ongoing say in those issues, either directly or through elected health and safety representatives.

One of the advantages of involving employees in health and safety processes is that you can draw on their relevant knowledge and expertise in making the workplace healthy and safe. You can get information from them about health and safety issues in practice when you make decisions that affect them in their work.

A timeframe is imposed for employers and employees to agree on an employee participation system. The timeframe varies depending on the circumstances, but if no agreement is reached within the prescribed timeframe then the Act provides a default system.

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The Act requires that employers, employees, and unions have an overriding duty to act in good faith towards each other in respect of employee participation in on-going processes for improvement of health and safety in the employees' places of work.

Once the employee participation system that was already in existence is amended to comply with the Act, or your employee participation system has been set up and is in force, the Act's only on-going requirement is that your system be maintained in accordance with the Act.

Your obligations have been dealt with in this A-Z Guide by treating employers who have an existing system (as specified by the Act) of employee participation in health and safety in the place of work as at 5 May 2003, and those employers who do not, separately. Employers are then further divided depending on the size of their workforce.

DEFINITIONS

Employee

Under this part of the Health and Safety in Employment Act 1992, employee means an employee who has worked for his or her employer for at least 180 hours over the previous 12-month period. This meaning applies to two provisions: (a) to the development of an employee participation system and (b) the calculation of the maximum total number of days' paid leave for health and safety training.

Note: This meaning of employee under this part of the Act includes volunteers who have worked for the employer for the requisite number of hours. The meaning of "worked" in the definition is not restricted by profit, reward, or pecuniary gain. It does not include loaned employees, on-the-job trainees and people in the workplace to gain work experience.

Health and safety committee

Means a committee established to support ongoing improvement of health and safety in a place of work.

Health and safety representative

Means an employee elected, as an individual or as a member of a health and safety committee, or both, to represent the views of employees in relation to health and safety at work.

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Reasonable opportunities

In respect of effective participation in on-going processes for the improvement of health and safety in the workplace, this means opportunities that are reasonable in the circumstances, having regard to relevant matters such as:

- ▶ The number of employees employed by the employer; and
- ▶ The number of different places of work for the employees and the distance between them; and
- ▶ The likely potential sources or causes of harm in the place of work; and
- ▶ The nature of the work that is performed and the way that it is arranged or managed by the employer; and
- ▶ The nature of the employment arrangements, including the extent and regularity of employment of seasonal or temporary employees; and
- ▶ The overriding duty to act in good faith.

Year

In respect of health and safety training, a year:

- ▶ Means a period of 12 months beginning on 1 April and ending on the close of 31 March.

ELECTIONS OF HEALTH AND SAFETY REPRESENTATIVES

The Act prescribes a method for the election of health and safety representatives. It applies to all elections for health and safety representatives, whether under an agreed or default employee participation system.

An election for a health and safety representative must:

- ▶ Involve candidates who:
 - Work sufficiently regularly and for a sufficient duration to enable them to carry out their functions effectively; and
 - Are willing to take on the position; and
- ▶ Be conducted through a secret ballot; and
- ▶ Give all employees, or all employees in a relevant grouping, a reasonable opportunity to vote; and
- ▶ Be determined by the majority of those who vote.

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GENERAL DUTIES OF EMPLOYERS

The Act requires that every employer must provide reasonable opportunities for the employer's employees to participate effectively in ongoing processes for improvement of health and safety in the employees' places of work.

Ongoing processes for improvement of health and safety include the following matters referred to as:

- ▶ The general duties of employers to ensure the safety of employees [section 6]; and
- ▶ The identification of hazards [section 7]; and
- ▶ The management of significant hazards [sections 8,9, and 10]; and
- ▶ The provision to employees of the results of biological monitoring [section 11]; and
- ▶ The information employers must provide to employees [section 12]; and
- ▶ The provision of training and supervision of employees [section 13].

You must also take into account any approved code of practice for employee participation in workplace health and safety that is applicable.

If either a health and safety committee or a health and safety representative makes a recommendation regarding health and safety in a place of work, you must either adopt the proposal or provide a written statement to the committee or representative setting out the reasons for not adopting the proposal.

OBLIGATIONS WHERE EMPLOYEE PARTICIPATION SYSTEMS ARE EXISTING

Under this heading the size of your workforce is not immediately relevant.

A system of employee participation in health and safety in the place of work that is in existence and was implemented before 5 May 2003, and that:

- ▶ provides reasonable opportunities for the employer's employees to participate effectively in ongoing processes for the improvement of health and safety in the employees' places of work; and
- ▶ Specifies a process for its review; and
- ▶ Is acceptable to the employer, the employees who wish to be involved, and/or the union or unions representing any of the employees; will be an employee participation system as required by the Act.

An existing system of employee participation can be amended to comply with the Act.

An existing system employee participation does not necessarily need to, but may, address:

- ▶ A provision about whether health and safety representatives are to act independently or as part of a health and safety committee; and

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- ▶ A provision about processes for ensuring regular and cooperative interaction between representatives of the employer and employees; and
- ▶ A provision about the functions of health and safety representatives; and
- ▶ A provision about paid leave for health and safety training for health and safety representatives.

OBLIGATIONS WHERE NO EMPLOYEE PARTICIPATION SYSTEMS EXIST

Note: Under this heading the size of your workforce is directly relevant, and the definition of “employee” is extended.

If your organisation has had an employee participation system but it is no longer in place or functioning then the Act requires you to develop, agree, implement and maintain a system in accordance with the Act.

For employers of less than 30 employees

If you employ fewer than 30 employees, and one or more of those employees, you must cooperate in good faith to seek to develop and agree upon an employee participation system with your employees which must be implemented and maintained as agreed.

Your organisation has six months from the date that you were required by an employee or union to develop such a system, to have agreed upon and implemented it.

If no employees (or unions representing them) require the development of an employee participation system, then you do not have to develop one.

System required and agreed

The agreed system must specify a process by which it must be reviewed. Otherwise, it may include any other matters that have been agreed upon.

In agreeing, the parties to the employee participation system must take into account (but there are no mandatory requirements):

- ▶ Whether health and safety representatives are to act independently or as part of a health and safety committee; and
- ▶ The processes for ensuring regular and cooperative interaction between employer representatives and employee representatives; and
- ▶ The functions of health and safety representatives.

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An agreed employee participation system may:

- ▶ Include a provision increasing or decreasing the maximum:
 - o number of days' paid leave that the employer is required to allow a health and safety representative to take for approved health and safety training;
 - o total number of days' paid leave that the employer is required to allow health and safety representatives to take for approved health and safety training;
- ▶ Allow for more than one health and safety representative or health and safety committee. Each representative or committee may represent a particular type of work, or place of work of the employer, or another grouping.

Any time after the expiry of 12 months from the date that your organisation's employee participation system is agreed, one or more employees may initiate the development of a new employee participation system in accordance with the Act. The Act does not specify how an employee initiates the development of a new employee participation system in accordance with the Act – this may yet be addressed in an approved code of practice for employee participation in workplace health and safety under section 19B.

System required but not agreed

If you were required to develop an employee participation system, but such a system has been neither agreed upon nor implemented six months after you were required to develop it, then the Act requires that you must use the default employee participation system.

In this circumstance, the employees, together with any unions representing them, must hold an election for at least one health and safety representative. The representative is to:

- ▶ Foster positive health and safety management practices in the place of work; and
- ▶ Identify and bring to the employer's attention hazards in the place of work and discuss with the employer ways that the hazards may be dealt with; and
- ▶ Consult with Inspectors on health and safety issues; and
- ▶ Promote the interests of employees in a health and safety context generally and, in particular, those employees who have been harmed at work. This is including in relation to arrangements for rehabilitation and return to work; and
- ▶ To carry out any functions conferred on them by the employer with the agreement of the representative or a union representing the representative, including any functions referred to in a code of practice.

Alternatively, the employees may notify you that they require you to hold the election for at least one health and safety representative. If you are so notified then you must hold the election within two months of the receipt of the notification.

No election is required for the position of health and safety representative if:

- ▶ There is only one candidate, in which case the appointment is automatic; or
- ▶ There are no candidates, in which case the position is unfilled.

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For employers of 30 or more employees

If you employ more than 30 employees, whether or not at a single location, you must cooperate in good faith to seek to develop and agree upon an employee participation system with your employees which must be implemented and maintained as agreed.

Your organisation has six months from either 5 May 2003, or, the date at which you employed 30 or more employees, to develop, agree upon and implement your employee participation system.

System agreed

The agreed system must specify a process by which it must be reviewed. Otherwise, it may include any other matters that have been agreed upon.

In agreeing, the parties to the employee participation system must take into account (but there are no mandatory requirements):

- ▶ Whether health and safety representatives are to act independently, or as part of a health and safety committee; and
- ▶ The processes for ensuring regular and cooperative interaction between employer representatives and employee representatives; and
- ▶ The functions of health and safety representatives.

An agreed employee participation system may:

- ▶ Include a provision increasing or decreasing the maximum:
 - number of days' paid leave that the employer is required to allow a health and safety representative to take for approved health and safety training;
 - total number of days' paid leave that the employer is required to allow health and safety representatives to take for approved health and safety training;
- ▶ Allow for more than one health and safety representative or health and safety committee. Each representative or committee may represent a particular type of work, or place of work of the employer, or another grouping.

Any time after the expiry of 12 months from the date that your organisation's employee participation system is agreed, one or more employees may initiate the development of a new employee participation system in accordance with the Act. The Act does not specify how an employee initiates the development of a new employee participation system in accordance with the Act – this may yet be addressed in an approved code of practice for employee participation in workplace health and safety under section 19B.

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System not agreed

If at six months from 5 May 2003, or, six months from the time at which you employed 30 or more employees (whichever is the later), your organisation has neither agreed upon nor implemented an employee participation system, the Act requires that you must use the default employee participation system.

In this circumstance the employees, together with any unions representing them, must hold an election for:

- ▶ At least one health and safety representative to carry out their functions independently; or
- ▶ Up to a maximum of five health and safety representatives to be members of a health and safety committee (and the representatives must comprise at least half of the committee).

Alternatively, the employees may notify you that they require you to hold the election for at least one health and safety representative. If you are so notified then you must hold the election within two months of the receipt of the notification.

In this circumstance, or where the employees elect at least one health and safety representative to carry out their functions independently, the functions of the health and safety representative are to:

- ▶ Foster positive health and safety management practices in the place of work; and
- ▶ Identify and bring to the employer's attention hazards in the place of work and discuss with the employer ways that the hazards may be dealt with; and
- ▶ Consult with Inspectors on health and safety issues; and
- ▶ Promote the interests of employees in a health and safety context generally and in particular those employees who have been harmed at work, including in relation to arrangements for rehabilitation and return to work; and
- ▶ To carry out any functions conferred on them by the employer with the agreement of the representative, including any functions referred to in a code of practice.

No election is required for the position of health and safety representative if:

- ▶ There is only one candidate, in which case the appointment is automatic; or
- ▶ There are no candidates, in which case the position is unfilled.

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HEALTH AND SAFETY TRAINING

Note: Under this heading the definition of “employee” is extended.

Specified date

Means: 1 April

Taking the leave

Subject to your organisation’s employee participation system, you may have an obligation to allow a health and safety representative two days’ paid leave each year to attend health and safety training as approved by the Minister of Labour.

If you have an obligation to allow a health and safety representative paid leave to attend health and safety training then the employee must, at least 14 days before the first day of such leave, tell you:

- ▶ That the employee proposes to take that leave; and
- ▶ The dates on which the employee proposes to take that leave; and
- ▶ The training that the employee proposes to undertake during that leave.

You may refuse to allow an employee to take such leave if you are satisfied that the employee taking leave on the dates notified would unreasonably disrupt your business.

You must pay the employee (unless they are a volunteer) their relevant daily pay for every day or part of a day taken by the employee as such leave, unless the employee is being paid weekly compensation under the Accident Compensation Act 2001.

Calculating the leave

The Act provides a “calculator” for determining the maximum total number of days’ paid leave for health and safety training that an employer is required to allow in a year. The calculator can be varied by agreement in your organisation’s employee participation system.

The calculation is based on the number of employees employed by you as at the specified date in the year, and can be determined in accordance with the following table:

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Employees as at the specified date in a year	Maximum total number of days' paid leave that employer is required to allow to be taken
1 – 5	2
6 – 50	6
51 – 280	1 day for every 8 employees or part of that number
281 or more	35 days plus 5 days for every 100 employees or part of that number

CONCLUSION

The Health and Safety in Employment Act 1992 provides organisations with the opportunity to either:

- ▶ Revise and perpetuate their existing systems for employee participation in health and safety processes in the workplace, if those systems comply with the Act; or
- ▶ Seek to develop an employee participation system by agreement in accordance with the Act; or
- ▶ Implement the default employee participation system provided by the Act as required by the Act or by agreement.

Conceivably, and until an approved code of practice is implemented, if your organisation elects to take either of the first two options then you may or may not be obliged to hold elections for health and safety representatives and provide paid days' leave for health and safety training.

Whatever your organisation agrees upon with respect to an employee participation system, the parties to that system have an obligation under the Act to cooperate in good faith while seeking to develop that system.

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Remember:

- ▶ Always call AdviceLine to check you have the latest guide (refer to the publication date below).
- ▶ Never hesitate to ask AdviceLine for help in interpreting and applying this guide to your fact situation.
- ▶ Use our AdviceLine employment advisors as a sounding board to test your views.
- ▶ Get one of our consultants to draft an agreement template that's tailor-made for your business.
- ▶ Visit our website www.businesscentral.org.nz regularly.
- ▶ Attend our member briefings (held bi-annually) to keep up to date with all changes.
- ▶ Send your staff to Business Central [training courses](#) and [conferences](#) designed for those who manage employees.

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