



A-Z OF EMPLOYING

# Health and Safety

**SUPPORTING,  
FACILITATING &  
REPRESENTING  
BUSINESS**

Business**Central** 

This is only a guide.  
It should not be a  
substitute for  
professional advice.

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from our Adviceline  
Team if you require  
specific assistance.

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## Introduction

The Health and Safety at Work Act 2015 (“the Act”) plus the key Regulations (“Regulations”), effective from 4 April 2016, represents the most significant changes to New Zealand’s health and safety legislation in over 20 years. The Act replaces the Health and Safety in Employment Act 1992.

The Act is part of the Government’s Working Safer package (the blue print for New Zealand’s Health and Safety reforms) resulting from recommendations of the Independent Taskforce on Workplace Health and Safety and the Royal Commission on the Pike River Coal Mine Tragedy. It aims to reduce New Zealand’s workplace serious injury and death toll by 25 per cent by 2020. The Act’s key emphasis is on everyone in the workplace being responsible for health and safety. Regulations will support the Act.

This guide has been prepared to assist Business Central members with understanding their obligations and duties under the new Act. It explains the Act’s main provisions, changes and relevance with the view of supporting Business Central members in understanding what the Act means for their businesses.

Further advice can be obtained from Business Central. Specialist advice, consultants and training are also available. Contact our AdviceLine team for more information.

## Objective

The main purpose of the Act is to provide for a balanced health and safety framework which:

- Protects individuals from harm;
- Provides for workplace representation;
- Encourages unions and employer organisations to take a constructive role in promoting improvements to workplace health and safety practices;
- Promotes compliance and the provision of health and safety advice and education;
- Ensures that the actions of persons exercising health and safety functions are subject to scrutiny;
- Provides a framework for continuous improvement and progressively higher standards of work health and safety.

Specifically, the Act seeks to ensure that workers and other persons be given the highest level of protection against harm to their health, safety, and welfare from hazards and risks arising from work as is reasonably practicable.

## Coverage

The Act binds the Crown. A Crown organisation must be treated as if it were a separate legal personality for the purposes of the Act and may be a PCBU in its own right. A Crown organisation may be prosecuted under its own name (Crown not cited as a defendant) in accordance with the Crown Organisations Act (Criminal Liability) 2002.

The Act does not apply to the armed forces while carrying out operational activities, for example – time of war, emergency, peace keeping etc. Additionally, the Act provides exceptions to intelligence and security agencies if an act or omission could reasonably prejudice the security or defence of New Zealand.

The Act applies to an aircraft in operation, wherever it may be, while the aircraft is operating on a flight beginning at a place in New Zealand and ending at that same place or at another place in New Zealand; or is operating outside New Zealand, if any workers on board the aircraft are employed or engaged under an employment agreement or contract for services governed by New Zealand law.

The Act applies to a New Zealand ship wherever it may be and also applies to a foreign ship on maritime charter to a New Zealand-based operator when it is operating in New Zealand.

The Act also applies to a workplace in the exclusive economic zone or in or on the continental shelf if an activity that is regulated under the Exclusive Economic Zone and Continental Shelf (Environmental Effects) Act 2012 or the Crown Minerals Act 1991 is carried out at the workplace. It also applies to any aircraft or ship (including a foreign ship) operating between New Zealand and the workplace in connection with an activity under the aforementioned legislation.

Unless your business, undertaking, organisation or entity falls within one of the statutory exceptions set out above or contained in the Act, for example a volunteer association or an occupier of a home engaging another person solely to do residential work, then the legislation will apply.

## Overview

The Act identifies duty holders and prescribes their duties. Assuming your business is a person conducting a business or undertaking (“PCBU”), you will need to consider how these duties apply to your individual business circumstances, industry standards and/or any approved codes of practice. This will require PCBUs to take a broad approach. Consider who is working in your business or undertaking who could potentially be affected by its conduct (in addition to your workers). Consider how the duties are linked to the work of your business or undertaking (not simply the physical workplace).

Health and safety risks must be eliminated or minimised so far as is reasonably practicable in the circumstances. PCBU’s will need to develop robust policies, procedures and practices that adequately identify any health and safety risks in their business or undertaking through elimination or minimisation processes to manage those risks, with the view of ensuring that all persons potentially affected by the conduct of business or undertaking are given the highest level of protection in the circumstances.

Some duties of PCBUs will require you to ensure something is without risk, or that health and safety is not put at risk. Such duties should be considered together with the overarching duty to manage such risks. This does not mean that the primary duty of care under the Act requires that all risks must be eliminated all the time. In some circumstances it will be reasonably practicable to eliminate risks, and in others it will not. Where it is not reasonably practicable to eliminate risks then they must be minimised, so far as is reasonably practicable.

Effectively, the Act requires a PCBU to consider who creates the risk and then for them to control that risk. It also encourages PCBU’s to concentrate on the greatest risks that could cause death or serious injury first and comprehensively.

The Act also introduces the concept of due diligence. This places a positive duty on those very senior individuals of a PCBU to be actively involved in health and safety matters relevant to the business or undertaking in order to ensure that the PCBU complies with any duty or obligation.

Furthermore, a PCBU must, as far as reasonably practicable, engage with workers likely to be directly affected by a health and safety matter in accordance with agreed procedures. The Act also requires a PCBU to have practices that provide reasonable opportunities for workers to participate in improving health and safety on an on-going basis. Workplaces with less than 20 workers that are considered to be low risk are not required to (but still could) have participation systems. The Act does not require the establishment of any kind of prescriptive systems or processes in regards to worker engagement and participation, although it does mean that PCBUs must be confident that they’re satisfied that there are effective practices in place which promote worker engagement and participation on health and safety matters relevant to the business or undertaking in the workplace.

## Key terms and definitions

### Person Conducting a Business or Undertaking (PCBU)

This is a key term under the Act and means a person conducting a business or undertaking whether the person conducts a business or undertaking alone or with others; and whether or not the business or undertaking is conducted for profit or gain.

Essentially, a PCBU is the business or business entity – often a company. However, a person might be a PCBU if they are a sole trader or a self-employed person. PCBUs will have the primary duty of care under the new Act as PCBUs are in the best position to control health and safety risks.

Examples of PCBUs include:

- A manufacturing business
- A retail business
- A wholesale business
- A partnership
- Government agencies
- Self-employed persons
- Franchisors and franchisees
- Principals and sub-contractors
- A not for profit organisation that employees staff
- Businesses which design, manufacture, import or supply plant, substances and structures to be used at work
- Businesses which control workplaces, fixtures, fittings, plant at workplaces.

The Act also provides for some clear exclusions from the definition of a PCBU. These are as follows:

- i. A person to the extent that the person is employed or engaged solely as a worker in, or as an officer of, the business or undertaking
- ii. A volunteer association
- iii. An occupier of a home to the extent that the occupier employs or engages another person solely to do residential work
- iv. A statutory officer to the extent that the officer is a worker in, or an officer of, the business or undertaking
- v. A person, or class of persons, that is declared by regulations not to be a PCBU for the purposes of the Act or any provision of the Act.

PCBUs have a primary duty of care to ensure, so far as is reasonably practicable:

- The health and safety of workers who work for the PCBU while the workers are at work in the business or undertaking; and
- Workers whose activities in carrying out work are influenced or directed by the PCBU, while the workers are carrying out the work.

A PCBU must also ensure, so far as is reasonably practicable, that the health and safety of other persons (for example, members of the public, visitors and customers) is not put at risk from work carried out as part of the conduct of the business or undertaking.

### **Multiple PCBUs**

The health and safety duties of PCBUs may overlap with the duties of other PCBUs, for instance in situations where workers work for more than one PCBU or in shared workplaces. In these types of situation the Act requires PCBUs to consult, cooperate and coordinate with each other, so far as is reasonably practicable. This means that where there are multiple PCBUs, each must do what is reasonable in terms of their ability to influence and control to keep workers safe.

### **Reasonably Practicable**

Another important term defined under the Act is reasonably practicable meaning that in relation to health and safety, PCBUs must ensure they do everything they are reasonably able to do taking into account and weighing up all relevant matters including:

- the likelihood of the hazard or risk occurring
- the likely degree of harm involved
- what the person concerned knows, or reasonably ought to know, about
  - the hazard or risk and
  - ways of eliminating or minimising it
- the availability or suitability of ways of eliminating the hazard or risk, and
- after assessing the extent of the risk and the available ways to eliminate or minimise the risk, the cost associated with those ways including whether the cost is grossly disproportionate to the risk.

The relevance of costs is secondary in the all reasonably practicable steps test and is met with an extremely high threshold - namely that the cost is grossly disproportionate to the risk. As such businesses can be relatively confident that the issue of costs will not be afforded much weight under the Act when it comes to health and safety prosecutions where they have failed to take all reasonably practicable steps in terms of managing risks to health and safety.

### **Officer**

An officer in relation to a PCBU means a person occupying a position in relation to the business or undertaking that allows the person to exercise significant influence over the management of the business or undertaking (for example, a chief executive, director, board member or partner).



## **Worker**

Unless the context otherwise requires, the Act defines a worker to mean an individual who carries out work in any capacity for a PCBU, including work as: an employee, a contractor or subcontractor, an employee of a contractor or subcontractor, an employee of a labour hire company who has been assigned to work in the business or undertaking, an outworker (including a homeworker), an apprentice or a trainee, a person gaining work experience or undertaking a work trial, a volunteer worker, or a person of a prescribed class.

## **Volunteer workers and Associations**

Volunteer workers and Associations Volunteer workers are people who regularly work for a PCBU with the knowledge or consent of the PCBU on an ongoing and regular basis and that is an integral part of the business or undertaking. In these circumstances a PCBU will owe a duty to ensure, so far as reasonably practicable the health and safety of volunteer workers as if they were any other worker.

However, the Act also provides for exceptions in situations where casual volunteers are doing certain activities which excludes them from the volunteer worker definition. For example participating in a fund-raising activity, assistance with sports or recreation for an educational institute, sports or recreation club, assistance with activities for an educational institution outside the premises of the educational institution, and providing care for another person in the volunteer's home.

The Act also excludes volunteer associations from the meaning of PCBU. The Act will not apply to these types of groups. A volunteer association is defined under the Act to mean a group of volunteers working together for community purposes where none of the volunteers, whether alone or jointly with any other volunteers, employs any person to carry out work for the volunteer association.

To avoid doubt a volunteer organisation which has one or more employees is a PCBU and will have the same duties as a PCBU to ensure, so far as reasonably practicable, the health and safety of its workers and others.

## **Workplace**

The Act defines a workplace to mean a place where work is carried out, or is customarily carried out, for a business or undertaking, and includes any place where a worker goes, or is likely to be, while at work. A "place" also includes a vehicle, vessel, aircraft, ship or other mobile structure and any waters and any installation on land, on the bed of any waters, or floating on any waters.

The relevance of the meaning of workplace has been further clarified in the case of farms, where for farmers managing or controlling workplaces, "workplace" will only extend to farm buildings and structures or part of the farm immediately surrounding the farm buildings that are necessary for the operation of the business or undertaking.

## **Supply**

Businesses or undertakings that are involved in the supply of things may also have obligations under the Act depending on that nature of the supply.

Supply means in relation to a thing, includes the supply (or resupply) of the thing, by way of sale, exchange, lease hire, or hire purchase, and whether as a principal or agent; but does not include the return of possession of a thing to the owner of the thing at the end of the lease or other agreement; or the supply of a thing by a person who does not control the supply or has no authority to make decisions about the supply (for example, a registered auctioneer who auctions a thing without having possession of the thing or a real estate agent acting in his or her capacity as a real estate agent); or prescribed supply.

The supply occurs on the passing of possession of the thing to the other person or agent to be supplied.

### **Notifiable injury or illness**

Unless context requires otherwise, a notifiable injury or illness, in relation to a person means any of the following injuries or illnesses that require the person to have immediate treatment (other than first aid).

- the amputation of any part of his or her body
- a serious head injury
- a serious eye injury
- a serious burnp
- the separation of his or her skin from underlying tissue (such as degloving or scalping)
- a spinal injury
- the loss of bodily function
- serious lacerations
- an injury that requires, or would usually require, the person to be admitted to hospital for immediate treatment
- an injury or illness that requires, or would usually require, the person to have medical treatment within 48hrs of exposure to a substance
- Any serious infection (including occupation zoonoses) to which the carrying out of work is a significant contributing factor, including any infection that is attributable to carrying out work
  - With micro-organisms
  - That involves providing treatment or care to a person
  - Involves contact with human blood or bodily substances
  - Involves handling or contact with animals, animal hides, animal skins, animal wool or hair, animal carcasses, or animal waste products
  - Involves handling or contact with fish or marine animals
- Any other injury or illness declared by regulations to be a notifiable injury or illness.

### **Notifiable incident**

Unless context otherwise requires, a notifiable incident means an unplanned or uncontrolled incident in relation to a workplace that exposes a worker or any other person to a serious risk to that person's health or safety arising from an immediate or imminent exposure to any of the following:

- An escape, a spillage, or leakage of a substance
- An implosion, explosion, or fire
- An escape of gas or steam
- An escape of a pressurised substance
- An electric shock
- The fall or release from a height of any plant, substance, or thing
- The collapse, overturning, failure, or malfunction of, or damage to, any plant that is required to be authorised for use in accordance with regulations
- The collapse or partial collapse of a structure
- The collapse or failure of an excavation or any shoring supporting an excavation
- The inrush of water, mud, or gas in workings in an underground excavation or tunnel
- The interruption of the main system of ventilation in an underground excavation or tunnel
- A collision between 2 vessels, a vessel capsize, or the inrush of water into a vessel
- Any other incident declared by regulations to be a notifiable incident.

### **Notifiable event**

Unless the context otherwise requires, a notifiable event means any of the following events that arise from work:

- The death of a person
- A notifiable injury or illness
- A notifiable incident.

## **General provisions**

### **PCBU must not levy workers**

A PCBU must not impose a levy or charge on a worker for anything done, or provided, in relation to health and safety. A PCBU will be treated as having levied or charged a worker who is its employee if the PCBU requires the employee to provide his or her own personal protective equipment as a pre-condition of employment or a term or condition in an employment agreement. A conviction under this section of the Act can see fines of up to \$25,000.

### **No contracting out**

A term of any agreement or contract that purports to exclude, limit or modify the operation of the Act, or any duty owed pursuant to it has no effect to the extent that it does so.

## Insurance against fines unlawful

To the extent that an insurance policy or contract indemnifies or purports to indemnify a person for the person's liability to pay a fine or infringement fee under the Act has no effect. Additionally, no court or tribunal has jurisdiction to grant relief in respect of such a policy or contract. A conviction under this section of the Act can see fines of up to \$250,000.

## Health and safety duties - key principles

### Management of risks

A duty imposed on a person under the Act requires the person to:

- To **eliminate** risks to health and safety, so far as is reasonably practicable; and
- If not reasonably practicable to eliminate risks to health and safety, to **minimise** those risks so far as is reasonably practicable.

A person must manage the risks in accordance with the standards prescribed under the Act to the extent to which the person has, or would reasonably be expected to have, the ability to influence and control the matter which relates to the risks.

### Duties not transferrable

A duty imposed on a person under the Act may not be transferred to another person.

### Person may have more than one duty

A person may have more than one duty imposed on the person under the Act if the person belongs to more than one class of duty holder.

### More than one person may have the same duty

More than one person may have the same duty imposed by or under the Act at the same time and each duty holder must comply with that duty to the required standard even if another duty holder has the same duty.

### PCBUs must consult other PCBUs with the same duty

If more than one PCBU has a duty in relation to the same matter imposed by or under the Act, each PCBU with the duty must, so far as reasonably practicable, consult, co-operate activities with all other PCBUs who have a duty in relation to the same matter.

## Duties of PCBUs

### PCBUs and the primary duty of care:

The primary duty of care means that PCBUs must ensure so far as reasonably practicable:

- The provision and maintenance of a work environment without risk to health and safety
- The provision and maintenance of safe plant and structures
- The provision and maintenance of safe systems of work
- The safe use, handling, and storage of plant, substances, and structures
- The provision of adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities

- The provision of any information, training, instruction or supervision that is necessary to protect all persons from risks to their health and safety arising from work carried out as part of the business or undertaking
- That the health of workers and the conditions at the workplace are monitored for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.

### **Duty of PCBU who manages or controls a workplace**

A PCBU who manages or controls a workplace must ensure so far as reasonably practicable, that the workplace, the means of entering and existing the workplace, and anything arising from the workplace are without risks to the health and safety of any person.

A PCBU who manages or controls a workplace does not owe a duty under the Act to any person who is at the workplace for an unlawful purpose.

Where a PCBU is conducting a farming business or undertaking, the duty owed by the PCBU applies only in relation to the farm buildings and any structure or part of the farm immediately surrounding the farm buildings that are necessary for the operation of the business or undertaking. The Act does not apply in relation to the main dwelling house on the farm (if any), or any other part of the farm, unless work is being carried out in that part at the time.

To avoid doubt, a PCBU who manages or controls a workplace, means a PCBU to the extent that the business or undertaking involves the management or control (whole or in part) of the workplace, but does not include – the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or a prescribed person.

### **Duty of PCBU who manages or controls fixtures, fittings, or plant at workplace**

Duties are also imposed on PCBUs who manage or control workplace fixtures, fittings or plant or are designers, manufacturers or importers of plant, substances or structures, or install, construct or commission plant, substances or structures (second hand goods where the onus falls on the purchaser are excluded).

A PCBU who manages or controls fixtures, fittings, or plant at a workplace must, so far as is reasonably practicable, ensure that the fixtures, fittings, or plant are without risks to the health and safety of any person.

Again, a PCBU who manages or controls fixtures, fittings, or plant at a workplace does not owe a duty under the Act to any person who is at the workplace for an unlawful purpose.

To avoid doubt, a PCBU in this context means a PCBU to the extent that the business or undertaking involves the management or control of fixtures, fittings, or plant (whole or in part) at a workplace; but does not include – the occupier of a residence, unless the residence is occupied for the purposes of, or as part of, the conduct of a business or undertaking; or a prescribed person.

### **Duty of PCBU who designs plant, substances, or structures**

The Act also applies to a PCBU (a designer) who conducts a business or undertaking that designs: plant, substances or structures that are to be used, or could reasonably be expected to be used, at a workplace.

This means the designer must, so far as is reasonably practicable, ensure that the plant, substance, or structure is designed to be without risks to health and safety of persons:

- who at a workplace, use the plant, substance, or structure for a purpose for which it was designed
- who handle the substance at a workplace
- who store the plant or substance at a workplace
- who construct the structure at a workplace
- who carry out any reasonably foreseeable activity (such as inspection, cleaning, maintenance or repair at a workplace) in relation to:
  - i. The manufacture, assembly, or use of the plant for a purpose for which it was designed, or the proper storage, decommissioning, dismantling, or disposal of the plant
  - ii. The manufacture or use of the substance for a purpose for which it was designed, or the proper handling, storage, or disposal of the substance
  - iii. The manufacture, assembly, or use of the structure for a purpose for which it was designed, or the proper demolition or disposal of the structure.

It also applies to persons who are at or in the vicinity of a workplace and who are exposed to the plant, substance, or structure at the workplace or whose health or safety may be affected by a use or an activity referred to above.

### **Duty of PCBU who manufactures plant, substances, or structures**

The Act applies to a PCBU (a manufacturer) who conducts a business or undertaking that manufactures: plant, substances or structures that are to be used, or that could reasonably be expected to be used, at a workplace.

This means the manufacturer must, so far as is reasonably practicable, ensure that the plant, substance, or structure is manufactured to be without risks to the health and safety of persons:

- who, at a workplace, use the plant, substance, or structure for a purpose for which it was designed or manufactured
- who handle the substance at a workplace
- who store the plant or substance at a workplace
- who construct the structure at a workplace
- who carry out any reasonably foreseeable activity (such as inspection, cleaning, maintenance, or repair) at a workplace in relation to:

- i. The assembly or use of the plant for a purpose for which it was designed or manufactured, or the proper storage, decommissioning, dismantling, or disposal of the plant
- ii. The use of the substance for a purpose for which it was designed of manufactured, or the proper handling, storage, or disposal of the substance
- iii. The assembly or use of the structure for a purpose for which it was designed or manufactured, or the proper demolition or disposal of the structure.

It also applies to persons who are at or in the vicinity of a workplace and who are exposed to the plant, substance, or structure at the workplace or whose health or safety may be affected by a use or an activity referred to above.

### **Duty of PCBU who imports plant, substances, or structures**

The Act applies to a PCBU (an importer) who conducts a business or undertaking that imports: plant, substances or structures that are to be used, or that could reasonably be expected to be used, at a workplace.

This means the importer must, so far as is reasonably practicable, ensure that the plant, substance, or structure is without risks to the health and safety of persons:

- who, at a workplace, use the plant, substance, or structure for a purpose for which it was designed or manufactured
- who handle the substance at a workplace
- who store the plant or substance at a workplace
- who construct the structure at a workplace
- who carry out any reasonably foreseeable activity (such as inspection, cleaning, maintenance, or repair) at a workplace in relation to:
  - i. The assembly or use of the plant for a purpose for which it was designed or manufactured, or the proper storage, decommissioning, dismantling, or disposal of the plant
  - ii. The use of the substance for a purpose for which it was designed of manufactured, or the proper handling, storage, or disposal of the substance
  - iii. The assembly or use of the structure for a purpose for which it was designed or manufactured, or the proper demolition or disposal of the structure.

It also applies to persons who are at or in the vicinity of a workplace and who are exposed to the plant, substance, or structure at the workplace or whose health or safety may be affected by a use or an activity referred to above.

### **Duty of PCBU who supplies plant, substances, or structures**

The Act applies to a PCBU (a supplier) who conducts a business or undertaking that supplies: plant, substances or structures that are to be used, or that could reasonably be expected to be used, at a workplace.

This means the supplier must, so far as is reasonably practicable, ensure that the plant, substance, or structure is without risks to the health and safety of persons:

- who, at a workplace, use the plant, substance, or structure for a purpose for which it was designed or manufactured
- who handle the substance at a workplace
- who store the plant or substance at a workplace
- who construct the structure at a workplace
- who carry out any reasonably foreseeable activity (such as inspection, cleaning, maintenance, or repair) at a workplace in relation to:
  - i. The assembly or use of the plant for a purpose for which it was designed or manufactured, or the proper storage, decommissioning, dismantling, or disposal of the plant
  - ii. The use of the substance for a purpose for which it was designed or manufactured, or the proper handling, storage, or disposal of the substance
  - iii. The assembly or use of the structure for a purpose for which it was designed or manufactured, or the proper demolition or disposal of the structure.

It also applies to persons who are at or in the vicinity of a workplace and who are exposed to the plant, substance, or structure at the workplace or whose health or safety may be affected by a use or an activity referred to above.

#### **Further duties of designers, manufacturers, importers and suppliers**

A designer, a manufacturer, an importer and a supplier must also carry out, or arrange the carrying out of, any calculations, analysis, testing, or examination that may be necessary for the performance of their duties under the Act. Importers and suppliers may also have to ensure that the calculation, analysis and testing have been carried out. A designer, a manufacturer, an importer or a supplier must give to each person whom a designer provided a design, or a manufacturer, importer or supplier who provided or supplied any plant, substance, or structure, adequate information concerning:

- a. Each purpose for which the plant, substance, or structure was designed
- b. The results of any calculations, analysis, testing, or examination, including, in relation to a substance, any hazardous properties of the substance identified by the testing
- c. Any conditions necessary to ensure that the plant, substance, or structure is without risks to health and safety when used for a purpose for which it was designed or when carrying out any activity referred to above.

Finally, a designer, manufacturer, importer or supplier must, on request, make reasonable efforts to give current relevant information on the matters set out in (a) – (c) to a person who carries out, or is to carry out, any of the activities prescribed under the Act. However, the obligations prescribed under this section of the Act do not apply to suppliers in the sale of plant, whether or not in trade, if the plant is second-hand and sold as is. To avoid doubt, the term “as is” means that the plant is sold without any representations or warranties about its quality, durability, or fitness, and with the entire risk in those respects borne by the buyer.



### **Duty of PCBU who installs, constructs, or commissions plant or structures**

The Act applies to a PCBU who installs, constructs, or commissions plant or a structure that is to be used, or could reasonably be expected to be used, as or at a workplace. This means that the PCBU must, so far as reasonably practicable, ensure that the way in which the plant or structure is installed, constructed, or commissioned ensures that the plant or structure is without risk to the health and safety of persons:

- who, install or construct the plant or structure at a workplace
- who use the plant or structure at a workplace for a purpose for which it was installed, constructed, or commissioned
- who carry out any reasonably foreseeable activity at a workplace in relation to the proper use, decommissioning, or dismantling of the plant or demolition, or disposal of the structure
- who are in the vicinity of a workplace and whose health and safety may be affected by a use or an activity set out above.

## **Duties of officers, workers and other persons – Due diligence**

### **Duty of officers (due diligence)**

If a PCBU has a duty or an obligation under the Act, an officer of the PCBU must exercise due diligence to ensure that the PCBU complies with that duty or obligation. This means that an officer of a PCBU must exercise the care, diligence, and skill that a reasonable officer would exercise in the same circumstances, taking into account (but without limitation) the nature of the business or undertaking and the position of the officer and the nature of responsibilities undertaken by the officer.

Under the Act due diligence includes:

- taking reasonable steps, to acquire, and keep up to date, knowledge of work health and safety matters
- to gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the hazards and risks associated with those operations
- ensure that the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking
- ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information
- ensure that the PCBU has, implements, processes for complying with any duty or obligation of the PCBU under the Act
- to verify the provision and use of the resources and processes set out above.

### **Offence of reckless conduct in respect of duty**

A person commits an offence against the Act where that person holds a duty under the Act and without reasonable excuse, engages in conduct that exposes any individual to whom that duty is owed to risk of death or serious injury or serious illness, and is reckless as to the risk to an individual of death or serious injury or serious illness.

A person who commits an offence under this section of the Act is liable on conviction:

- For an individual who is not a PCBU or an officer of a PCBU, to a term of imprisonment not exceeding 5 years or a fine not exceeding \$300,000, or both:
- For an individual who is a PCBU or an officer of a PCBU, to a term of imprisonment not exceeding 5 years or a fine not exceeding \$600,000, or both:
- For any other person, to a fine not exceeding \$3 million.

### **Offence of failing to comply with duty that exposes individual to risk of death or serious injury or serious illness**

A person commits an offence against the Act where that person holds a duty under the Act and the person fails to comply with that duty; and that failure exposes any individual to a risk of death or serious injury or serious illness.

A person who commits an offence under this section of the Act is liable on conviction:

- For an individual who is not a PCBU or an officer of a PCBU, to a fine not exceeding \$150,000:
- For an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding \$300,000:
- For any other person, to a fine not exceeding \$1.5 million.

### **Offence of failing to comply with duty**

A person commits an offence against the Act where that person holds a duty under the Act and the person fails to comply with that duty.

A person who commits an offence under this section of the Act is liable on conviction:

- For an individual who is not a PCBU or an officer of a PCBU, to fine not exceeding \$50,000:
- For an individual who is a PCBU or an officer of a PCBU, to a fine not exceeding \$100,000:
- For any other person, to a fine not exceeding \$500,000.

An officer of a PCBU may be convicted or found guilty of an offence for failing to exercise due diligence under the Act whether or not the PCBU has been convicted or found guilty of an offence under the Act.

## Duties to preserve sites and notify notifiable events (accidents)

### Duty to preserve sites

A PCBU who manages or controls a workplace at which a notifiable event has occurred must take all reasonable steps to ensure that the site (includes any plant, substance, structure or thing associated with the notifiable event) where the event occurred is not disturbed until authorised by an inspector.

However, the duty to preserve sites does not prevent action to: assist an injured person, to remove a deceased person, or that is essential to make the site safe or to minimise the risk of a further notifiable event, or for which an inspector or the regulator has given permission. Additionally, this duty does not apply if the notifiable event is being investigated under the Armed Forces Discipline Act 1971 or the Transport Accident Investigation Commission Act 1990.

A person who contravenes this section of the Act commits an offence and is liable on conviction:

- For an individual, to a fine not exceeding \$10,000:
- For any other person, to a fine not exceeding \$50,000.

### Duty to notify notifiable event

A PCBU must, as soon as possible after becoming aware that a notifiable event arising out of the conduct of the business or undertaking has occurred, ensure that the regulator is notified after the event.

A notification under this section of the Act may be given by telephone or in writing (including by email, or other electronic means), and must be given by the fastest possible means in the circumstances.

Where a person is giving notice by telephone the person must give the details of the incident requested by the regulator, and if required by the regulator, give written notice of the incident with 48 hours of being informed of the requirement. Such notice must be provided in a form, or contain the details, approved by the regulator.

If the regulator receives notice by telephone and a written notice is not required, the regulator must give the PCBU details of the information received, or an acknowledgement of having received the notice.

A person who contravenes this section of the Act commits an offence and is liable on conviction:

- For an individual, to a fine not exceeding \$10,000:
- For any other person, to a fine not exceeding \$50,000.

### Requirement to keep records

A PCBU must keep a record of each notifiable event for at least 5 years from the date on which notice of the event is given to the regulator. Such a record must contain the particulars prescribed by the regulations (if any).

A person who contravenes this section of the Act commits an offence and is liable on conviction:

- For an individual, to a fine not exceeding \$5,000
- For any other person, to a fine not exceeding \$25,000.

## **Worker engagement, participation, and representation**

### **Duty to engage workers**

A PCBU must, so far as is reasonably practicable, engage with workers who carry out work for the PCBU, and who are, or are likely to be, directly affected by a matter relating to work health and safety.

If the PCBU and the workers have agreed to procedures for engagement, the engagement must be in accordance with those procedures.

A person who contravenes this section of the Act commits an offence and is liable on conviction:

- For an individual, to a fine not exceeding \$20,000:
- For any other person, to a fine not exceeding \$100,000.

### **Nature of engagement**

Engagement with workers under the Act requires the following:

- That relevant information about the matter be shared with workers in a timely way;
- That workers be given a reasonable opportunity –
  - to express their views and to raise work health or safety issues in relation to the matter; and
  - to contribute to the decision-making process relating to the matter;
- That the views of workers be taken into account by the PCBU; and
- That the workers be advised of the outcome of the engagement in a timely manner.

If the workers are represented by a health and safety representative, the engagement must involve that representative.

### **When engagement is required**

Engagement with workers under the Act is required in relation to work health and safety matters in the following circumstances:

- Identifying hazards and assessing risks regarding the work to be carried out,
- When making decisions about eliminating or minimising those risks,
- When making decision regarding facilities for the welfare of workers,
- When making decisions about procedures for,

- engaging with workers, or
- monitoring the health of workers, or
- monitoring the conditions of the workplace under the PCBU management, or
- providing information regarding training for workers.
- When making decisions regarding procedures (if any) for resolving work health and safety issues at the workplace
- When developing worker participation practices, including when determining work groups, or
- When carrying out any other activity prescribed by regulations.

### **Duty to have worker participation practices**

A PCBU must have practices that provide reasonable opportunities for workers who carry out work for the business or undertaking to participate effectively in improving work health and safety in the business or undertaking on an on-going basis. This means the PCBU must comply with prescribed requirements relating to worker participation, including requirements relating to a particular industry, sector, or kind of workplace and if applicable take into account any type of approved code of practice.

In this context the term reasonable opportunities means:

- The number of workers in the business or undertaking
- The number of different workplaces, the distance between them
- The likely risks to health and safety
- The nature of the work performed
- The nature of the employment arrangements or contracts arrangements, temporary workers
- The willingness of workers and their representative to participate
- The duty to act in good faith as required by section 4 of the Employment Relations Act 2000.

A person who contravenes this section of the Act commits an offence and is liable on conviction:

- For an individual, to a fine not exceeding \$20,000:
- For any other person, to a fine not exceeding \$100,000.

### **Election of health and safety representatives**

A worker who carries out work for a business or undertaking may notify the PCBU that the worker wishes one or more health and safety representatives to be elected to represent workers who carry out work for that business or undertaking. If a PCBU receives notification in these circumstances the PCBU must initiate the election within the time prescribed by the regulations. A PCBU may, on the PCBU's own initiative, initiate the election of health and safety representatives.

Despite the requirements set out above a PCBU is not required to initiate the election of health and safety representatives, if the work of the business or undertaking is carried out by fewer than 20 workers, and is not within the scope of any high-risk sector or industry. A PCBU who seeks to rely on these grounds to refuse a worker's request must give notice to that effect within a reasonable time to that worker.

Despite the requirements set out above a PCBU is not required to initiate the election of health and safety representatives, if the work of the business or undertaking is carried out by fewer than 20 workers, and is not within the scope of any high-risk sector or industry. A PCBU who seeks to rely on these grounds to refuse a worker's request must give notice to that effect within a reasonable time to that worker.

A person who contravenes this section of the Act commits an offence and is liable on conviction:

- For an individual, to a fine not exceeding \$5,000:
- For any other person, to a fine not exceeding \$25,000.

### **Requirements for conducting elections**

An election for health and safety representatives (whether following the request of a worker or on the initiative of the PCBU) must comply with any prescribed requirements specified in the regulations.

### **Determination of work groups**

If a worker makes a request or the PCBU initiates the election of a health and safety representative, the PCBU must determine one or more work groups, in accordance with the following:

- Unless a PCBU determines otherwise, a work group comprising of all the workers in the business or undertaking; or
- A PCBU may determine one or more work groups if the PCBU considers that the work group comprised of all the workers in the business or undertaking would be inappropriate having regard to the structure of the business or undertaking.

If the PCBU determines more than one work group on the a basis of the information specified above then the PCBU must ensure that the workers are grouped in a way that most effectively enables the health and safety interests of the workers to be represented, and takes account of the need for a health and safety representative to be accessible to the workers that he or she represents, and has regard to any prescribed requirements.

To avoid doubt, two or more PCBUs may, by agreement, determine one or more work groups that comprise workers who carry out work for any PCBU who is party to the agreement for example, a multiple PCBU work arrangement provided the PCBU determine the work group in a way that enables workers to be represented and takes account for the need for health and safety representatives to be accessible to the workers they represent.

A PCBU must determine the number of health and safety representatives who may be elected for that work group in accordance with the prescribed minimum ratio of health and safety representatives to workers.

Note: the prescribed minimum ratio will be set in the regulations.

## Health and safety committees

The following persons may request that the PCBU at a workplace establish a health and safety committee for the business or undertaking or part of the business or undertaking

- A health and safety representative for a work group of workers carrying out work at that workplace; or
- Five or more workers at that workplace.

The PCBU must decide within two months of receiving the request whether to establish a health and safety committee. However, a PCBU is not required to decide whether to establish a health and safety committee if the work of the business or undertaking is carried out by fewer than 20 workers and is not within the scope of any high-risk sector or industry prescribed by the regulations. If a PCBU decides it's not required to establish a health and safety committee for these reasons then written notice to that effect must be provided within a reasonable time by the PCBU to the person (or persons) who made the request.

Separately, a PCBU may refuse a request made for the establishment of a health and safety committee if the PCBU is satisfied that existing worker participation practices at the workplace sufficiently meet the requirements relating to the duty of a PCBU to have worker participation practices under the Act. In this situation the PCBU must give written notice of its decision as soon as practicable to workers who the PCBU considers have an interest in the decision and no later than any prescribed time. In addition such notice must include reasons for the decision and a statement that workers may raise the refusal as an issue under subpart 6 of the relevant part of the Act which provides for the resolution of work health and safety issues.

To avoid doubt, a PCBU at a workplace may establish a health and safety committee for the workplace or part of the workplace on the PCBU's own initiative.

## Provisional improvement notices

A health and safety representative may issue a provisional improvement notice requiring the person to: remedy the contravention, prevent a likely contravention from occurring, or remedy the things or activities causing the contravention or likely to cause a contravention. However, a health and safety representative must not issue a provisional improvement notice in relation to a matter unless he or she has first consulted the person.

A health and safety representation must not issue a provisional improvement notice in relation to a matter if an inspector has already issued an improvement notice in relation to the same matter.

If a health and safety representative issues a provisional improvement notice, he or she must provide a copy of that notice to the PCBU of the work group that the health and safety representative represents, as soon as practicable.

A health and safety representative must not issue a provisional improvement notice unless the representative has: completed training prescribed by or under the regulations, or previously completed that training when acting as a health and safety representative for another work group.

## Requirements relating to provisional improvement notices

A provisional improvement notice must be in writing and must state:

- that the health and safety representative believes the person is contravening, or is likely to contravene, a provision of the Act or regulations
- the provision the representative believes is being, or is likely to be, contravened
- how the provision is being, or likely to be, contravened and the day, at least 8 days after the notice is issued, by which the person is required to remedy the contravention or likely contravention.

A provisional improvement notice may include recommendations relating to the measures to be taken to remedy the contravention or prevent the likely contravention, or things or activities causing the contravention, or likely to cause a contravention, to which the notice relates. Such recommendation may refer to an approved code of practice or offer the person to whom it is issued a choice of ways in which to remedy the contravention or prevent the likely contravention.

A person to whom a provisional improvement notice is issued must, as soon as practicable, display a copy of the notice in a prominent place at or near the workplace, or part of the workplace, at which work is being carried out that is affected by the notice. A person must not intentionally remove, destroy, damage, or deface a notice displayed during the period that the notice is in force.

To avoid doubt, provisional improvement notices may be altered by a health and safety representative to clarify, correct or reflect changes of address and any irregularities or defects in such notice does not make it invalid. A person must comply with a provisional improvement notice within the time specified in the notice by remedying the contravention or avoiding any likely contravention. A person may comply with such notice in a different way from that directed by the health and safety representative provided the person substantially complies with the requirement to remedy the contravention or avoid any likely contravention.

A person who does not comply with a provisional improvement notice within the specified time period commits an offence and is liable on conviction

- For an individual, to a fine not exceeding \$50,000:
- For any other person, to a fine not exceeding \$250,000.

### Review of provisional improvement notice

A person to whom a provisional improvement notice has been issued under the Act may, within 7 days after a provisional improvement notice is issued to the person, ask the regulator to appoint an inspector to review the notice. If a request for such a review is made then the notice is stayed until the inspector makes a decision on the review.

The regulator must ensure that an inspector does review the provisional improvement notice as soon as practicable and make inquiries as to the circumstances of such notice. After reviewing the notice the regulator must confirm the notice, or confirm with changes, or cancel the notice.



## Right to cease or direct cessation of unsafe work

A worker may cease, or refuse to carry out, work if the worker believes that carrying out the work would expose the worker, or any other person, to a serious risk to health or safety arising from an immediate or imminent exposure to a hazard.

A worker may continue to refuse to carry out the work if:

- The worker attempts to resolve the matter with the PCBU as soon as practicable after first refusing to do the work; and
- The matter is not resolved; and
- The worker believes on reasonable grounds (having been advised by a health and safety representative) that carrying out the work would expose the worker or any person to a serious risk to the worker's or other person's health and safety arising from an immediate or imminent exposure to a hazard.

A worker who exercises their right under the Act to cease work must, as soon as practicable, notify the PCBU that the worker has stopped. The right to cease work under the Act does not authorise a worker to refuse to do work that, because of its nature, inherently or usually carries an understood risk to the worker's health and safety, unless that risk has materially increased beyond the understood risk.

A worker who exercises their right under the Act to cease work must, as soon as practicable, notify the PCBU that the worker has stopped. The right to cease work under the Act does not authorise a worker to refuse to do work that, because of its nature, inherently or usually carries an understood risk to the worker's health and safety, unless that risk has materially increased beyond the understood risk.

If a worker ceases work, the PCBU may direct the worker to carry out alternative work at the same or another workplace if that work is safe and appropriate for the worker to carry out until the worker can resume normal duties. A worker must remain available to carry out alternative work as directed by the PCBU. Alternative work means:

- For a worker who is an employee, work that is within the scope of their employment agreement
- For a worker that is not an employee, work within the scope of the worker's contract.

In addition, a worker may agree (but cannot be directed) to do other work that is safe and appropriate for the worker. Separately, the Regulator may assist as soon as practicable in resolving issues around the cessation of work.

## Prohibition of adverse, coercive, or misleading conduct

The Act provides for significant penalties where a person engages in adverse conduct against a worker that causes a worker any detriment or disadvantage for their involvement in health and safety matters prescribed under the Act, for example – for being a health and safety representative or member of a health and safety committee or ceasing work under the Act.

### **Prohibition on adverse conduct**

A person must not engage in adverse conduct for a prohibited health and safety reason. A person who contravenes this section of the Act commits an offence and is liable on conviction:

- For an individual, to a fine not exceeding \$100,000:
- For any other person, to a fine not exceeding \$500,000.

### **Prohibition on coercion and inducement**

- A person must not request, instruct, induce other persons to engage in adverse conduct.
- A person must not organise, threaten or organise to take actions against another person (to engage in adverse conduct)
- A person must not knowingly or recklessly make false or misleading comments regarding obligations / participation and making complaints under the Act.

A person who contravenes these sections of the Act commits an offence and is liable on conviction:

- For an individual, to a fine not exceeding \$100,000:
- For any other person, to a fine not exceeding \$500,000.

Note: the Act provides for exceptions under the rules on coercion and inducement, for example constables and emergency services who give reasonable directions where the circumstances may require.

## **Enforcement and other matters**

Under the Act notice means any of the following:

- An improvement notice
- A prohibition notice
- A non-disturbance notice
- A suspension notice.

### **Improvement notices**

If an inspector reasonably believes a person is contravening a provision of the Act or regulations, or is likely to contravene the Act or regulations, then the inspector may issue an improvement notice requiring the person to:

- Remedy the contravention
- Prevent a likely contravention from occurring;
- Remedy the things or activities causing the contravention or likely to cause a contravention.

An improvement notice must state the reason for the contravention, the provisions of the Act that are being breached, a reasonable time period within which the person is required to remedy the contravention and may include recommendations. Extensions of time can be issued by an inspector.

A person must comply with the improvement notice within the period specified in the notice. A person who contravenes this section of the Act commits an offence and is liable upon conviction:

- For an individual, to a fine not exceeding \$50,000:
- For any other person, to a fine not exceeding \$250,000.

### **Prohibition notices**

If an inspector reasonably believes (a) that an activity at a workplace that involves or will involve a serious risk to the health or safety of a person arising from an immediate or imminent exposure to a hazard or that such an activity may occur at a workplace, or (b) substance, or work that is required to be authorised under subpart 2 of Part 5 or a mining operation, an inspector:

- Believes there is a serious risk to any person because of a failure to comply with the Act or regulation
- Believes on reasonable grounds that it is likely that a person will fail to comply with this Act or regulations, and that failure would be likely to cause a serious risk to the health and safety of any person.

The inspector may give a person who is in control over the matter a direction prohibiting to carry on the activity until the matter is resolved to the satisfaction of the inspector. Such direction may be given orally, but must be confirmed by written notice (a prohibition notice issued to the person as soon as practicable.

A prohibition notice must state that the inspector believes that grounds for the issue of the prohibition notice exist and the basis for that belief, and describe briefly the matter or activity that the inspector believes gives rise or will give rise to the risk, and specify the provisions of the Act or regulations that the inspector believes is being, or is likely to be, contravened by that matter or activity. A prohibition notice may include recommendations on the measures that could be taken to remedy the risk, activities, or matters to which the notice relates, or the contravention or likely contravention. A prohibition notice issued under the Act which prohibits the carrying on of an activity in a specified way may do so by specifying one or more of the following:

- A workplace or part of a workplace, at which the activity is not to be carried out
- Anything that is not to be used in connection with the activity
- Any procedure that is not to be followed in connection with the activity.

A person to whom a prohibition notice is issued must comply with the direction or notice. A person who contravenes this section commits an offence and is liable upon conviction:

- For an individual, to a fine not exceeding \$100,000:
- For any other person, to a fine not exceeding \$500,000.

## Enforcement tools and new penalties

The Act gives the courts the power to require offenders to publish adverse publicity orders, meaning an offender may be have to publish the offence, the consequence and the penalty imposed related to the matter in a public forum.

The Act also creates new types of court orders, for example: improvement, project, restoration and training orders and carries over the ability of third parties to bring private prosecutions.

Finally, the Act provides for graduated categories of offences which impose substantially higher penalties than those under the Health and Safety in Employment Act 1992. The maximum penalties under the new regime for both individuals and corporate entities held liable for reckless conduct that results in the death of a worker can be up to \$3 million and/or up to 5 years imprisonment for individuals.

## The Regulations

The key Regulations which support the Act are as follows:

- Health and Safety at Work (General Risk and Workplace Management) Regulations 2015
- Health and Safety at Work (Worker Engagement, Participation, and Representation) Regulations 2016
- Health and Safety at Work (Infringement Offences and Fees) Regulations 2015
- Health and Safety at Work (Asbestos) Regulations 2015
- Health and Safety at Work (Adventure Activities) Regulations 2015
- Health and Safety at Work (Major Hazard Facilities) Regulations 2015
- Health and Safety at Work (Mining Operations and Quarrying Operations) Regulations 2015
- Health and Safety at Work (Petroleum Exploration and Extraction) Regulations 2015
- Health and Safety at Work (Hazardous Substances) Regulations 2016

The full versions of the each of the Regulations specified above can be found on the following link: <http://www.legislation.govt.nz/>

## Further assistance

Business Central has a team of highly qualified and experienced health and safety consultants, advisors and lawyers available to assist your business in implementing practices, policies and procedures to ensure that your business is compliant with the new Act.

Business Central also offers an extensive range of health and safety training options for business owners, managers and staff.

For further information or assistance please contact the AdviceLine.

**Published: August 2017**