

New commitments for worker involvement

1 October 2015

The long-awaited Health and Safety at Work Act 2015 will come into force on 4 April 2016, and it includes a series of obligations concerning worker engagement, participation and representation. Although these matters are currently provided for in the Health and Safety in Employment Act 1992, the Act is more prescriptive in this area and will establish new obligations.

The primary duty-holder under the Act will be a 'person conducting a business or undertaking' (PCBU). This article aims to assist PCBUs by summarising these new obligations and suggesting what they might look like in practice so that PCBUs are prepared when the provisions come into force next year.

PCBUs in the mining sector should also be aware that the Act will establish further obligations for that sector (see Schedule 3 to the Act).

Worker engagement and participation

Under the Act, a PCBU will have a duty to:

...so far as is reasonably practicable, engage with workers –

(a) who carry out work for the business or undertaking; and

(b) who are, or are likely to be, directly affected by a matter relating to work health or safety.

The circumstances in which a PCBU will be required to engage with workers on health and safety matters are broadly defined. They include when a PCBU is identifying hazards and assessing risks in relation to its work, in developing health and safety procedures and worker participation practices (referred to below), and in determining work groups (also discussed below).

Note that the Act's definition of 'worker' is not limited to employees, and includes contractors, subcontractors, employees of a labour hire company, apprentices and trainees.

A PCBU's duty of engagement will involve:

- Sharing relevant information with workers
- Giving workers a reasonable opportunity to express their views, raise issues, and contribute to decision-making processes on health and safety matters
- Taking workers' views on health and safety into account in decision-making
- Informing workers of the outcomes of work engagement in a timely manner (ie after consulting with workers on a particular health and safety matter, advising them what the decision is and the reasons for it).

In addition, PCBUs will be obliged to 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...on an ongoing basis*" ('worker participation practices'). In designing these, PCBUs must comply with any industry-specific requirements, and take into account any relevant codes of practice.

Such practices could include establishing or maintaining a health and safety committee and consulting with workers through that committee. Managers could also make health and safety a regular item for meetings, and workers could be given the opportunity to provide their views about health and safety issues through a designated email address or intranet space.

It will be an offence not to comply with the duties summarised above. A maximum fine of \$100,000 (or \$20,000 where the PCBU is an individual) may be imposed for a failure to comply.

Health and safety representatives and work groups

The Act provides a series of functions and powers for health and safety representatives. These include representing workers in relation to health and safety, investigating complaints, monitoring health and safety measures, inquiring into potential risks, making recommendations, providing feedback to their PCBU and promoting the interests of workers.

The Act will not require every workplace to have a representative. However, if a worker notifies a PCBU that they would like a representative to be elected, the PCBU will have to respond to their request following the process set out in the Act (discussed below).

Generally speaking, representatives will only represent workers in their own 'work group'. Where a worker requests the election of a representative, the relevant PCBU will have to determine the work groups that make up the business or undertaking (and engage with workers in doing so).

Determination of work groups

The default position provided for in the Act is that a work group is made up of all of the workers of a business or undertaking. However, a PCBU will be able to determine alternative work groups if it considers that the default position "*would be inappropriate having regard to the structure of the business or undertaking.*" This might be the case where, for example, various different types of work are carried out in the PCBU and health and safety issues could better be addressed by having a work group for each type of work, or where work is carried out at different locations and this makes it impracticable to have one work group for the PCBU.

If a PCBU decides to determine an alternative work group or groups, it will have to ensure that the alternative arrangement groups workers in way that "*most effectively enables the health and safety interests of the workers to be represented*". A PCBU will also have to take into account the need for representatives to be accessible to the workers they represent.

Two or more PCBUs may also be able to agree to a 'multiple PCBU work group arrangement'. Where such an arrangement exists, individuals carrying out work for different PCBUs may be part of the same work group. This type of arrangement may be suitable where more than one PCBU has duties for the same work or workers (eg a construction project involving employees, contractors and subcontractors from various PCBUs working together).

Obligation to initiate an election

How a PCBU must respond to a worker requesting the election of a representative will depend on:

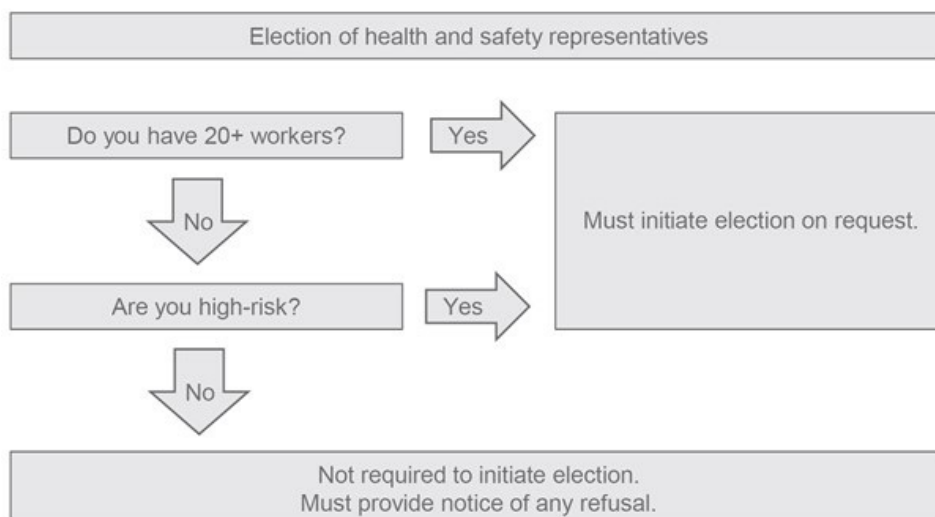
- How many people are carrying out work for the business or undertaking
- Whether the work carried out falls within the scope of any 'high-risk sector or industry'.

High-risk sectors or industries will be listed in regulations. Draft regulations are expected in a few weeks.

If a PCBU's work is carried out by fewer than 20 workers *and* falls outside the 'high-risk' categories, the PCBU will be able to (but does not have to) refuse a request to initiate an election for a health and safety representative. In this event, the PCBU will have to provide written notice to the worker who made the request within a reasonable time.

If the work of a PCBU's business or undertaking is carried out by 20 workers or more, or is 'high-risk', a PCBU who receives notification from a worker will be *required* to initiate an election for a representative. Time limits and other requirements for elections will be set down in regulations.

If a PCBU fails to comply with any of these obligations, it will be liable for a fine of up to \$25,000 (or \$5,000 if the PCBU is an individual).



Health and safety committees

Health and safety committees are another form of worker representation found in the Act. Their functions will include facilitating cooperation in relation to health and safety matters, helping to develop health and safety "*standards, rules, policies, or procedures*" for the relevant workplace, and making health and safety recommendations.

Where a committee has been established in a PCBU, that PCBU will be required amongst other matters to consult with the committee about health and safety (so far as is reasonably practicable), to provide the committee with the information it requires to carry out its functions, and to adopt health and safety recommendations made by the committee or explain in writing why a recommendation will not be adopted.

Establishing a committee

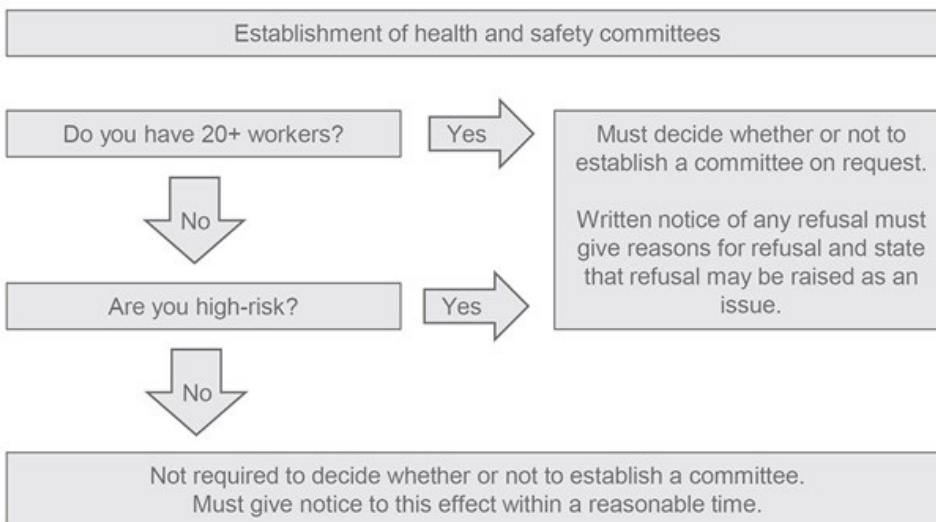
As with representatives, the Act will not require every workplace to have a committee. A PCBU may however be requested to establish a committee either by a representative, or by five or more workers at the workplace.

Where the work of the business or undertaking is carried out by fewer than 20 workers and is not within a 'high-risk' sector or industry, the relevant PCBU will not be required to decide whether to establish a committee. Where a request to establish a committee is not considered by a PCBU for this reason, the persons who made the request must be given written notice to this effect within a reasonable time.

If work is carried out by 20 workers or more, or is 'high-risk', a PCBU will have two months to decide whether it will establish a committee for all or part of the business or undertaking. Written notice of the PCBU's decision will need to be made "*as soon as practicable*" to workers with an interest in the decision.

A PCBU will be able to decide not to establish a committee where it is satisfied that the worker participation practices it has in place already provide workers with reasonable opportunities to "*participate effectively in improving work health and safety in the business or undertaking on an ongoing basis*". A PCBU will need to give written notice of a decision not to establish a committee, together with the reasons for the decision and advice that the refusal may be raised as an issue under the conflict resolution provisions of the Act (see Subpart 6 of Part 3).

Again, not meeting these obligations will be an offence, and will give rise to liability for a fine of up to \$25,000 (or \$5,000 if the PCBU is an individual).



This article was written by Joss Opie and Ella McLean for the ISN Magazine (September/October 2015).

Auckland

188 Quay Street
Auckland 1010

PO Box 1433
Auckland 1140
New Zealand

P: +64 9 358 2555

F: +64 9 358 2055

Wellington

Aon Centre
1 Willis Street
Wellington 6011

PO Box 2694
Wellington 6140
New Zealand

P: +64 4 499 4242

F: +64 4 499 4141

Christchurch

83 Victoria Street
Christchurch 8013

PO Box 322
Christchurch 8140
New Zealand

P: +64 3 379 1747

F: +64 3 379 5659