

Employers to be held more accountable for asbestos exposure

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Asbestos is one of New Zealand's biggest work place killers, accounting for more fatalities annually than workplace accidents.

The Ministry of Business, Innovation and Employment statistics show that in 2010 170 people died from asbestos-related diseases. In the same year, there were 77 workplace deaths resulting from accidents. Despite these high asbestos fatality figures, there have been relatively few prosecutions of employers for exposing their employees to asbestos or asbestos containing materials (ACMs). This situation is set to change if the draft Health and Safety at Work (Asbestos) Regulations ("the draft Regulations") are brought into force in their current form.

The draft Regulations are part of the wider health and safety in work reforms which seek to address New Zealand's poor work safety record. The draft Regulations impose additional duties over and above the duties in the Health and Safety at Work Act 2015 (not yet in force) for work that involves, or may involve, exposure to asbestos.

The draft Regulations adopt the language of the new Act, and generally, the duties apply to "Persons Conducting a Business or Undertaking" (PCBU). A PCBU is a broader concept than "employer" and encompasses a wide range of modern working arrangements, such as companies, contractors, government departments, partnerships, and landlords.

Identifying the hazard

The draft Regulations require PCBUs who manage or control a workplace to identify (so far as reasonably practicable) all asbestos or ACMs at the workplace. This obligation will be wide reaching because it will apply to employers who occupy or lease commercial buildings that may contain asbestos, as well as trade staff who undertake work on existing buildings (such as electricians, plumbers, and builders).

PCBUs will have an obligation to positively identify whether their buildings contain asbestos or ACMs, and will need to keep a register of any asbestos or ACM which is, or may be, in the building. Continuity of information about buildings is provided through PCBUs having to transfer an asbestos register to any person who assumes management or control of the workplace.

Demolition or refurbishment of buildings or plant pre-dating 1990

If work is to be done on structures or plant pre-dating 1990, or in which asbestos has been identified, or is likely to be present, the duty to identify asbestos is more rigorous. PCBUs that carry out this type of work will have a positive duty to have the structure or plant to be demolished or refurbished tested by a competent person before any demolition or refurbishment can take place. If that competent person is uncertain whether asbestos is in the structure or plant, an assumption is to be made that asbestos is in that structure or plant. An asbestos management plan must then be compiled, and any identified asbestos or ACM must be removed prior to the refurbishment or demolition commencing.

These duties will mean any trade staff wanting to start work on buildings constructed prior to 1990 must have testing performed before any work commences. Given the extensive use of asbestos in New Zealand buildings the testing will need to be comprehensive. Testing of a single part of the building, such as one ceiling in a house that is to be demolished, is unlikely to satisfy the legal testing requirements in the draft Regulations. Specialist advice will need to be sought to identify what aspects of the building, structure or plant to be refurbished or demolished could potentially contain asbestos and should, therefore, be tested. Full records of testing and professional assessments should be kept by PCBUs as evidence of compliance.

Removal of asbestos will need to be carried out by a licenced removalist. The draft Regulations create a tiered licencing system (from Class A removalist to Class C removalist). For removal of larger quantities of asbestos, or any friable asbestos, a Class A

licenced removalist will be required. The legal onus is on the PCBU who commissions the removal to ensure the removalist holds the appropriate licence.

Training and monitoring

PCBUs will have a duty to train their workers who may be involved in asbestos-related work. The training will need to cover the identification, safe handling, and suitable control measures for asbestos. The PCBU will need to keep each worker's asbestos training record for a minimum of five years after the worker ceases working for the PCBU. The PCBU will also have to provide health monitoring for its workers who conduct asbestos removal work.

Compliance costs

Over time compliance with the draft Regulations should reduce the number of New Zealander's who die as a result of asbestos exposure. However, there will be a corresponding financial cost for industries working with asbestos. Time delays resulting from having asbestos assessments and testing completed before commencing work should be anticipated. There will also be the cost of developing an asbestos management plan and removing the asbestos where it is found to be present.

Because the draft Regulations require a higher level of qualification for asbestos removal, businesses that regularly deal with asbestos will face an increase in the time and expense associated with training their employees to the specified level and maintaining ongoing health-related monitoring. All of these additional costs will need to be factored into the cost of work.

Consequences of non-compliance

In addition to potential serious health consequences for workers, failing to comply with the draft Regulations may result in prosecution under the draft Regulations and/or the new Act.

A successful prosecution will result in a criminal conviction and penalties possibly extending to the directors or officers of a company. The level of fine the PCBU may face for breaching the draft Regulations is yet to be determined. However, the draft Regulations draw heavily from chapter 8 of the Australian Work Health and Safety Regulations 2011, which prescribes fines ranging from A\$6,000 if an individual breaches a Regulation, to A\$30,000 if a body corporate (ie a company) breaches. In addition, WorkSafe could prosecute PCBUs under the new Act, which will have significantly higher penalties for directors, officers, and PCBUs (including imprisonment for some offences).

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