

## Legal update - Responding to a workplace accident

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No health and safety system is infallible. Although the Health and Safety at Work Act 2015 (HSWA) requires persons conducting a business or undertaking (PCBUs) to take reasonably practicable steps to ensure workers are not harmed, the reality is 'accidents happen'. When they do there are a number of steps that PCBUs can take to minimise the risk of both further incidents and prosecution by WorkSafe.

### Immediate actions

When an accident or incident occurs, the safety of those involved in the incident must be addressed as a priority. Before first aid is administered the site should be made safe so that no further injuries occur. For example, if the incident involves machinery, the machinery should be turned off (if it is safe to do so) and any other hazard should be removed or isolated so that further injury to the victim, or to those assisting the victim, does not occur.

Once the site is safe, first aid should be given to any victims and emergency services called if required (this may have occurred concurrently with making the site safe). Having first aid trained staff on site, and appropriate first aid equipment for the particular workplace available, makes all the difference in the initial response to the incident.

### Preserve the incident site

Once the immediate threat to health and safety has been addressed and treatment for the victims has been arranged, the incident site must be preserved. The HSWA requires a PCBU that manages or controls a workplace where a 'notifiable incident' has occurred to take all reasonable steps to ensure the incident site is not disturbed until authorised by an inspector. However, the duty to preserve the incident site does not prevent assisting someone who has been injured, or doing anything to make the site safe.

A notifiable incident is an unplanned or uncontrolled incident at a workplace that exposes any person to a serious risk to health or safety arising out of a specified event. The events include gas leaks, electric shocks and falls, amongst others. WorkSafe have a tool that helps determine whether an event is notifiable or not which is located at [worksafe.govt.nz/worksafe/notifications-forms/notifiable-events/](https://www.worksafe.govt.nz/worksafe/notifications-forms/notifiable-events/). If you are unsure about whether the incident is notifiable or not, you should seek legal advice.

The incident site should be preserved to prevent it from being disturbed until authorised by a WorkSafe inspector. Failing to preserve an incident or accident site is an offence under the HSWA that carries a fine of up to \$50,000.

### Advise WorkSafe

WorkSafe must be notified by the PCBU of a 'notifiable event' as soon as possible after the PCBU becomes aware of the event. A 'notifiable event' is defined in the HSWA as meaning the death of a person, a notifiable injury or illness, or a notifiable incident arising from work.

'Notifiable injury or illness' is defined in the HSWA to include specified injuries or illnesses. Generally, if the person requires immediate medical attention (other than first aid) or treatment within 48 hours of exposure to a substance, then the injury or illness will be notifiable.

The duty to notify WorkSafe must be fulfilled by the fastest means possible in the circumstances which is usually by telephone. WorkSafe must be given the details it requests about the incident and it may require the PCBU to provide a written notice of the incident within 48 hours of the telephone call. If a written notice is not required, then WorkSafe must give the PCBU an acknowledgement of having received the notice (or the details if the information it has received).

WorkSafe inspectors may issue the PCBU with an improvement notice, a prohibition notice, or a non-disturbance notice. If any of these notices are issued by an inspector they must be displayed in a prominent place at the place of work the notice relates to, and the notice must be adhered to.

### Seek advice

Once WorkSafe has been notified it can be helpful to seek initial specialist advice from a lawyer or health and safety expert about instigating an internal investigation. Obtaining ongoing advice throughout the investigation phase will mean the PCBU is aware of its legal obligations and it is better placed to defend any charges filed in relation to the incident.

If WorkSafe decides to investigate the incident it will usually conduct interviews with the PCBU. The PCBU may want its advisors present during any interview to ensure the PCBU's rights are properly recognised, the interview is fair, and the interviewer only covers relevant material. They can also assist the PCBU in identifying which documents the PCBU has to give WorkSafe.

## **Undertake an investigation**

Although there is no longer a specific statutory duty for a PCBU to carry out its own internal investigation into an incident arguably it will need to complete an investigation to meet its other duties under the HSWA, such as the duty to maintain a safe workplace, and to address risks. If the resources are available this investigation could be carried out by the PCBU's own workers, or alternatively, by engaging a specialist investigator.

At the outset of the investigation a decision should be made as to whether the investigator is instructed alongside a lawyer so that the report is prepared for the purpose of obtaining legal advice (and likely covered by legal privilege). Being privileged means that the material does not have to be disclosed to third parties such as the Police or WorkSafe. Even if this occurs the PCBU should have a report that can be used internally for staff education and that can be provided to WorkSafe to assist in its investigation. The investigator should investigate the facts of the incident (what happened, how did it happen, who was involved etc) but should avoid reaching legal conclusions. For example it would be premature for an investigator to reach a conclusion that "the PCBU was in breach of the HSWA" without taking legal advice.

## **Implement changes (if necessary)**

The investigation report may identify deficiencies in the PCBU's health and safety policies, procedures, or resources. If appropriate these deficiencies should be addressed as soon as possible to avoid or mitigate future occurrences of the same incident. Should a second incident occur similar to the first, a prosecution is more likely to follow and the penalty is likely to be more severe, particularly if there has been an injury or fatality. WorkSafe will investigate what the PCBU knew about the risk prior to the accident and what steps it took to remove or isolate that risk. The PCBU's culpability will be higher in circumstances where the PCBU knew of the risk and proceeded regardless of that risk and with insufficient steps to remove or isolate the known risk.

The changes that need to be implemented following an incident may include additional training, improvements to workplace procedures, improvements to workplace structures or guarding, or the introduction of new personal protective equipment.

## **Maintain records**

It is mandatory for PCBUs to keep a record of each notifiable event for at least five years from the date on which notice of the event was given to WorkSafe.

## **Other actions to consider**

As far as possible, a PCBU should maintain contact with victims after the accident particularly if he or she is off work for an extended period of time to recover. The PCBU should stay in touch with the victim during this time and should try to identify ways it can assist during his or her recovery. Not only is providing such assistance good people management, it is taken into consideration for any sentence passed down to the PCBU if it is successfully prosecuted for the accident. Assisting victims after an incident does not mean the PCBU is accepting it caused the accident or was in any way at fault. Regardless of where blame ultimately lies, rehabilitation and the victim's return to work is in all parties' best interests.

Depending on the severity of the incident, the PCBU may also want to consider offering counselling or EAP services to people who witnessed the incident as well as those who were directly involved in it.

The age old saying "accidents happen" will continue to apply. However the actions that a PCBU takes to prepare for any such event, and the PCBU's immediate response when accidents occur, will lessen the consequences, both for the victim and for the business.

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