

## Keep calm and carry on - safely

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31 August 2014

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### What impact will the proposed health and safety reforms have on workplace stress?

Everyone experiences stress at different times during their career. While a bit of pressure may lead many of us to perform well, ongoing and overbearing workplace stress can be harmful not only to the employee, but to the wider business.

The current health and safety reforms will result in a better resourced regulator and personal liability for directors and senior managers. This, combined with the rapidly evolving workplaces that we see today, will mean that employers will need to keep an especially vigilant eye on their workers' wellbeing with a resulting positive impact on workplace stress.

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### What is stress in the workplace?

The effects of stress are recognised in two ways. Stress may occur as a result of hazards in the workplace, and stress itself may cause hazards. A number of factors can cause stress, including negative work relationships (internally or with external parties, such as clients), difficult timing (such as long hours or shift work), pressures of the role or issues with tasks (including limited training or feedback and lack of variety or control).

WorkSafe NZ suggests that symptoms of a stressful workplace include low morale, high staff absenteeism or turnover, customer complaints, loss of business and low productivity. Individual reactions to stress vary but common complaints include headaches, raised blood pressure, anxiety, irritability and difficulty concentrating.

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### Current regime

Where an employee considers that he/she has suffered from workplace stress, a number of legal options have long been available. The most common fall under the Employment Relations Act 2000 and include personal grievances for unjustified disadvantage, breach of contract and constructive dismissal. Other civil claims exist for breach of common law and statutory duties to provide a safe system of work.

An employee may also pursue a private prosecution against their employer under the Health and Safety in Employment Act 1992 (HSEA), or the employer may be prosecuted by WorkSafe NZ. Since 2003, the HSEA has defined "harm" as including "physical or mental harm caused by work-related stress". One of the objects of the Act is to comprehensively define hazards as potential causes of harm so that all are covered, including harm caused by work-related stress.

However, many employers have not given work related stress the attention it deserves. That will need to change once the proposed health and safety reforms come into law.

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### Health and safety reform

The much anticipated Health and Safety at Work Act is expected to come into force in April 2015. Key changes include expanded responsibilities for workplace health and safety, with increasing personal responsibility and liability for directors and senior management, increasing worker participation and increased penalties for breaches. The "performance based" principles underlying the HSEA remain unchanged but they are intended to be implemented more effectively.

In regards to workplace stress, the Health and Safety Reform Bill (Bill) includes a new definition of "hazard" to mean "a situation or thing that has the potential to cause death, injury, or illness to a person". A person's behaviour will also be a hazard where it has the potential to cause death, injury or illness to a person (whether or not that behaviour results from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition). The Bill also includes a definition of "health" as including "mental health". Therefore, while the term "workplace stress" is not explicitly provided for, it is included in the wider definition of hazard and will remain important under the new Act.

## Duties

A duty holder will be a "person conducting a business or undertaking" (PCBU). The primary duty of care will be to ensure, so far as is "reasonably practicable", the health and safety of workers and others affected by the work. If a PCBU has a duty or an obligation under the proposed Act, an "officer" of the PCBU must exercise "due diligence" to ensure that the PCBU complies with that duty or obligation. Directors/partners and the CEO will be "officers", together with, most likely, other senior managers as the definition currently includes "any other person who makes decisions that affect the whole, or a substantial part, of the business of the PCBU".

The due diligence obligation is wide-ranging and, in essence, will mean that directors/partners and senior managers must be personally satisfied that the PCBU is meeting its health and safety obligations, including personal knowledge of the hazards and risks facing the business and that appropriate resources and processes for eliminating or minimising them are in place. A failure to meet the obligation will expose the officer to a risk of being personally convicted of a criminal offence, which carries significant potential penalties (see further below).

While personal liability is intended to motivate Boards and senior managers to more comprehensively address workplace safety, the flipside will likely be a significant positive impact on the early identification and management of workplace stress.

## Offences

A tiered penalty regime is proposed, which significantly increases maximum liability levels. The regime categories are reckless conduct, a duty failure exposing serious risk, and a failure to comply with a duty.

The most serious (reckless conduct) has a maximum penalty of \$3,000,000 for a body corporate, and \$600,000 or five years imprisonment (or both) for individuals including officers. The officer must have had conscious foresight of a dangerous consequence, and an intention to continue the course of conduct regardless of the risk. Therefore, officers may be personally liable for the maximum penalty if they are alerted to, but choose to ignore, someone suffering extreme stress attributable to the workplace.

## Worker engagement, participation and representation

Workers will continue to be obliged to take reasonable care of their own and others' safety while at work but employers will need to more actively engage with them on health and safety decisions, including on decisions regarding stress in the workplace.

Worker participation practices will be mandatory (under the HSEA, they are only required for workplaces with 30 or more employees or where requested by a worker or union). In addition, health and safety representative(s) must be elected at the request of a worker or if the PCBU initiates it, and a health and safety committee must be established if requested by a health and safety representative, five or more workers, or if initiated by the PCBU.

Workers will also be able to take action if managers do not address reported workplace stress. The Bill allows health and safety representatives to issue provisional improvement notices where they reasonably believe that there is or is likely to be a contravention of the Bill or regulations. Further, workers are able to cease unsafe work, and health and safety representatives will be able to direct them to do so.

Officers should be alive to these issues and the increased transparency under the Bill, as judges will be able to issue adverse publicity orders that will allow the "naming and shaming" of those who do not comply with their duties.

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## Recommended actions

To ensure compliance with the proposed new legislation and to foster a healthy workplace free from undue stress, employers should:

- Ensure there is a health and safety charter or strategy and policies in place, which include workplace stress issues.
- Ensure that those primarily responsible for health and safety in the organisation are well-trained and up to date on the latest thinking on workplace stress.
- Include workplace stress as an agenda item on health and safety committee meetings and meaningfully discuss the issue. Discuss health and safety at Board meetings.
- Set up and implement an appropriate health and safety system, which includes the early identification of workplace stress and proactive management of it. Guidance on what one looks like can be found in the *Good Governance Practices Guideline for Managing Health and Safety Risks* and on the WorkSafe NZ website.
- Implement a "safe" culture, where employees are encouraged to report if they are feeling stressed, without fear of

retribution or inadequacy. This should be part of the health and safety system, and communication can be directly with the employer, a worker representative or through any union. Seek comment from employees and take reports of stress at face value. Ensure that concerns are documented and acted upon. Often, an employee will report stress to a manager but no further action is taken. Encourage employees to speak up if they are feeling stressed. They are under an obligation to communicate this to their employer.

- Include workplace stress on the hazard register. Consider and communicate options to help minimise it, such as decreasing workload, transferring roles, altering task allocation or changing reporting lines.
- Look for signs of workplace stress in reports to the Board and keep an eye on and monitor stress "indicators". Stress may be able to be identified through employment related claims against the employer, ACC claims, sick leave, medical reports, anecdotes, interviews with staff or culture surveys. Other indicators include measures of employee hours or calls to EAP services. For instance, if certain employees are working long or unusual hours, be sure to acknowledge this and offer them support.
- Provide training on stress and techniques for dealing with it to employees and managers. This could be through an external provider, EAP services or using the resources on the WorkSafe NZ website.
- Know the business. Both employers and employees should appreciate the stressful circumstances in which it may operate. The key to the proposed changes is that officers must be personally satisfied with the workplace's approach to health and safety. If they are, then it is likely that they will be meeting their obligations under the proposed Act.

*This article was written by Sherridan Cook for the ISN Magazine (July/August 2014 Issue).*

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