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Company directors and officers may face personal liability for OHS breaches in 2012

Currently in Victoria if a company breaches the Occupational Health and Safety Act, and that breach is attributable to a failure by the company's officer to take reasonable care, the officer maybe prosecuted for the same breach as the company.

This potential liability will be widened when the new model Workplace Health and Safety Act (WHS Act) commences. This is expected for 1 January 2012, although its commencement may be delayed by 12 months.

Section 27 of the WHS Act will impose a new positive duty on officers of a "person conducting a business or undertaking" to exercise "due diligence" to ensure that the business or undertaking complies with duties under the WHS Act.

An officer may include a director, chief executive officer, managing director or general manager of the company or firm.

If you are an officer, you must exercise "due diligence" to ensure compliance by your business with its health and safety obligations.

Due diligence requires an officer to take reasonable steps to do the following:

1. acquire and keep up-to-date knowledge of work health and safety matters

(for example, to know what the law requires and the strategies and processes for elimination or minimisation of hazards and risks so far as is reasonably practicable);

2. to gain an understanding of the nature of the operations of the business or undertaking and generally of the hazards and risks associated with those operations
3. to ensure that the business 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

(this requires an understanding of what is needed for health and safety, making decisions about procedures and resources and ensuring that they are used);

4. to ensure that the business has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responding in a timely way to that information

(this should include the reporting of incidents and emerging hazards and risks, identifying if any further action is required to eliminate or minimise the hazards or risks so far as is reasonably practicable and ensuring steps are taken by the business to take reasonably practicable steps);

5. to ensure that the business has, and implements, processes for complying with its statutory OHS obligations, including:
 - reporting notifiable incidents;
 - consulting with workers;
 - ensuring compliance with notices issued under the WHS Act;
 - ensuring the provision of training and instruction to workers about work health and safety; and
 - ensuring that health and safety representatives receive their entitlements to training
 - licensing and registration obligations; and
 - union right of entry requirements and the duty to consult, co-operate and co-ordinate activities with other duty-holders;
6. to verify the provision and use of the resources and processes referred to above (through inspection or auditing processes).

Remember:

- An officer will only be required to take reasonable steps to do the above. What is reasonable will depend on the particular circumstances, including the role and influence able to be exercised by the individual officer.
- Officers can rely on information from an expert, and direct a specialist to undertake safety risk minimisation, but they must be able to demonstrate that the expert or specialist is suitably qualified and actually doing what is required.

Due diligence – an officer's checklist

- My business has in place appropriate systems to manage health and safety in work. I actively monitor those systems.
- I take an active and inquisitive role in the planning and actioning of health and safety initiatives.
- When I am not involved directly in implementation of these initiatives, I make the decisions that allow for the appropriate measures to be taken by the business. I take reasonable steps to ensure that these measures are taken.
- I know who has health and safety obligations in my business, and I know the nature of those obligations. I ensure that those people have the authority and accountability to meet those obligations. I know enough to be able to make decisions and ensure that resources are available and processes are in place to enable those persons to meet those obligations.
- My business has processes in place to collect and report relevant health and safety information to enable me to make proper decisions.
- My business has processes in place that operate to enable my staff to be consulted about health and safety matters and to provide input to management about hazards and risks, obligations and performance of OHS management.
- When I rely on my managers, experts and supervisors to collect, analyse and communicate safety information, I ensure that the information is logical and credible and that the person giving the information is suitably qualified.