

WORKPLACE LAW UPDATE

Issue 10 – January 2011

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OCCUPATIONAL HEALTH AND SAFETY UPDATE: THE MISTAKES YOU DON'T WANT TO MAKE

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As the nation moves to the adoption of the model Work Health and Safety Act, commencing 1 January 2012, senior management and directors should be starting to look closely at their responsibilities for all occupational health and safety issues.

The new legislation will broaden the primary duty of care for the provision of a safe work place and work practices from employers to all persons involved in the conduct of a business or undertaking.

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Another important reform and one of immediate significance for senior management and directors is that they will be directly responsible for failing to provide a safe working environment.

To date in Victoria, senior management and directors have been personally exposed to liability where they have failed to take reasonable care to prevent a contravention by their company of occupational health and safety obligations where they have had knowledge of and ability to have taken the required action but failed to prevent or minimise that risk from occurring.

About CCI Lawyers

CCI Lawyers is a boutique workplace relations practice.

CCI Lawyers operates as an independently managed legal practice, providing legal services that are charged at competitive rates to employers across Australia.

CCI Lawyers is associated with the Victorian Employers' Chamber of Commerce and Industry ([VECCI](#)). Your business does not need to be a VECCI member to engage our services.

The rationale for this change flags the move away from senior management and directors potentially being able to avoid liability by showing that they have done all that was within their control to prevent or reduce a risk to health and safety.

The new duty will place a positive obligation on senior management and directors to exercise due diligence so as to ensure that their company complies with its various obligations.

Due diligence will include taking reasonable steps in the circumstances to:

- a) acquire and keep up to date with knowledge of work health and safety matters.

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- b) gain an understanding of the nature of the operations of the business and the hazards and risks associated with those operations.
- c) ensure the business has appropriate resources available to eliminate or minimise risk to health and safety.
- d) ensure that the business has access to appropriate information regarding hazards and risks and that it responds in a timely way to that information.
- e) ensure that the business has in place processes for compliance with legislative obligations. This includes consulting with workers and the provision of training and instruction.
- f) verify the provision and use of the resources referred to above.

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So what does it mean for the busy CEO on any day where he/she is dealing with shareholders, board members, financiers, suppliers, distributors, customers and the demands of a multi-divisional business?

The CEO might be comforted in the knowledge that the business has a health and safety system which:

- is managed nationally by the group OHS manager;
- delivers information on work health and safety issues as part of monthly reports from divisional heads to the executive management committee;
- is subject to external audits that confirm that the health and safety system is compliant with Australian and International standards and benchmarks.
- is producing low and stable loss time through injury statistics.

However, the CEO has noted but not taken any action to investigate:

- a report from HR of a recent spike in the level of sick leave being taken.
- that there have been a number of resignations.

While aware from media reports that bullying and harassment claims are on the increase in the community, the CEO does not believe it is an issue within the business.

Then comes the day when HR advises that a young female employee has made allegations of sexual harassment and bullying & harassment by her manager. A WorkCover claim for stress has been lodged. The initial investigation of the allegations reveals that

they appear to have followed the manager raising performance issues with the employee.

The CEO starts to ask questions of HR about the circumstances. The responses provided are not encouraging. The recent resignations were by employees from within the area managed by the relevant manager and they appear to have been due to employees feeling uncomfortable with his style of management and the amount of work allocated. Further while there was a policy on sexual harassment there was not a policy that specifically addressed bullying & harassment. The complaints of the young female employee concerned are appearing consistent with the managers conduct over an extended period. The CEO is wondering about the prospects of the employee going to lawyers and the media.

Under both the new legislation and existing occupational health and safety legislation in Victoria, employers are required to consult with employees about the identification of hazards or risks to health and safety in a work place and the measures that might be taken to address such risks.

Amongst all the issues the CEO will have to deal with in this matter he learns that there has neither been any consultation with the workforce nor any training or awareness program conducted about the issue of bullying and harassment. A WorkSafe Inspector knocks on his door.

The above highlights the underlying policy direction of the new legislative provisions dealing with the liability of senior managers and directors. Along with the ever increasing focus on the need for business to implement measures to support workplace health and to address issues related to an ageing and diminishing workforce, Senior management and directors will need to show leadership in ensuring that a safe work environment is established and maintained.

Senior managers and directors will focus their attention on their exposure to a substantially increased penalties of up to \$600,000 and/or 5 years imprisonment for serious contraventions of the Work Health and Safety Act. However that attention should not be diverted from also acting to prevent less obvious contraventions of legislative obligations to consult with a workforce on health and safety issues such as bullying and harassment.

It will no longer be sufficient to ensure occupational health and safety systems are compliant with international and Australian Standards and best practice. Having the documentation in place and ticking all the right boxes during safety audits will not by

themselves satisfy a senior manager or directors obligation to act proactively under the Work Health and Safety Act.

Leading up to the implementation of the new laws senior managers and directors need to ask themselves ;

1. Are we fully aware of the new laws?
2. Do we have resources and systems in place that would satisfy the due diligence test?
3. Do we have an emergency strategy in place that would establish the best possible defence for officers if an unfortunate event occurs?
4. Under what circumstances would the organisation assist or not assist a senior manager or director under investigation or subject to prosecution?
5. Where an organisation will assist, what assistance would be made available to the manager or director?

It is becoming harder to attract good directors to boards because of personal liability issues. Having good systems in place which protect all employees and the organisation will provide a level of assurance to those potential board members.

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