



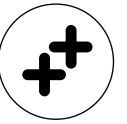
Keeping Work Safe

THE DEPARTMENT OF LABOUR'S POLICY ON ENFORCING
THE HEALTH AND SAFETY IN EMPLOYMENT ACT 1992

APRIL 2009







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Foreword

I am proud to be part of a government that supports business growth and expanded job opportunities for New Zealanders. This growth ought not to come at the expense of human life or serious harm. It is important our regulatory activities and policies for growth support productivity as well as protect people from harm.

A previous National government replaced a raft of complex, prescriptive and inefficient workplace laws with a single, results-oriented law—the Health and Safety in Employment Act 1992. The strength of this legislation is that it gives New Zealand businesses a high degree of freedom to work out for themselves how best to manage their workplace health and safety. However, along with this flexibility comes a potential for uncertainty about how businesses might actually develop, implement and maintain good health and safety systems.

Over recent years, business representatives signalled their concerns that uncertainty about complying with the law might actually compromise health and safety. I am pleased the Department of Labour is responding to this message and is now working to improve business access to high-quality health and safety information and guidance.

Businesses have also signalled uncertainty about how the Department of Labour enforces the Health and Safety in Employment Act. This enforcement uncertainty means some businesses wanting to understand or comply with the legislation may be reluctant to ask the Department for help or guidance.

To address this specific uncertainty, the Department has worked closely with business and employee representatives to develop this statement about how it enforces the Health and Safety in Employment Act.

By being more open and transparent about its approach to enforcement, I anticipate businesses wanting to comply with the law will be more open to seeking the Department's help before someone is harmed.

This policy also makes it clear to those few businesses willing to risk health and safety for a short-term gain, what the likely enforcement actions will be.

There is a more work to be done to improve business access to support and guidance, but this statement represents a positive first step on that journey.

I hope the good-will and collaboration shown during the development of this document continues between business, employee representatives and the Department to help grow New Zealand businesses and expand job opportunities, whilst ensuring people are kept safe from workplace harms.



Hon Kate Wilkinson, Minister of Labour

Introduction

I am pleased to provide these introductory comments on behalf of the Department of Labour. This policy statement is for anyone who may have an interest in how the Health and Safety in Employment Act 1992 is enforced in New Zealand workplaces.

The Department of Labour has developed this policy statement in response to consultation through the Government's 2006-07 Quality Regulation Review. The review asked businesses about how they saw regulation affecting their business. Its findings highlighted concerns and uncertainty about the sorts of responses they could expect from health and safety inspectors if there was an inspection, workplace injury, complaint or other health and safety-related incident in their places of work. The review also told us that businesses and workers value consistency and transparency highly when it comes to all aspects of enforcement and that a lack of information about enforcement creates uncertainty and makes it harder to both anticipate and respond to interactions with the Department. This policy statement is intended to fill that gap.

New Zealand's workplaces are many and varied, and this policy statement does not attempt to describe every enforcement situation or response by the Department of Labour. Instead, it sets out key principles and processes for enforcing the Act and describes what "duty-holders" (i.e. those people with duties under the Health and Safety in Employment Act 1992 – which includes employers, workers, suppliers and a range of other people involved in workplaces) can expect in response to a range of situations. The principles described within this policy statement apply to all health and safety related engagements, including those concerning the management of hazardous substances in a place of work. Detailed explanation regarding the application of specific enforcement tools prescribed by the Hazardous Substances and New Organisms Act 1996 is to be provided in a separate policy statement.

This policy statement results from a review of our policies and procedures - not only in enforcement, but in the ways that the Department works with businesses, workers and others to improve workplace health and safety. We will be consulting on further policies and procedures as the review continues. The next scheduled review date for this policy statement is 31 December 2010.

The object of the Health and Safety in Employment Act is not to achieve enforcement or prosecutions, but to promote excellent health and safety management in New Zealand places of work. Being clearer about how we undertake our enforcement role is crucial in creating an atmosphere of understanding, trust and collaboration. This policy statement is one of the ways we are meeting the changing needs of New Zealand's workplaces now and into the future.



Craig Armitage
Deputy Secretary, Workplace

The purpose of this statement

This policy statement outlines how and why the Department of Labour responds to non-compliance with the duties and other requirements set out in the Health and Safety in Employment Act 1992 (“the HSE Act”).

It is important for people and corporate entities with “duties” under the HSE Act to understand how and why we choose to respond to non-compliance. It is also important to outline our overall approach to enforcement in order to guide the development of more detailed internal operating systems and procedures.

This policy statement is supported by a range of internal operational procedures and complements our broader range of information and support services to duty-holders.

A glossary of technical terms is provided at the back of this policy.

The Department of Labour’s enforcement objective

The HSE Act promotes the prevention of harm to all persons at work and other persons in, or in the vicinity of, a place of work.

It also sets out the following means of achieving this objective:

- promoting excellence in health and safety management systems;
- defining hazards and harm in a comprehensive way so that all hazards and harm are covered, including harm caused by work-related stress and hazardous behaviour caused by certain temporary conditions;
- imposing duties to ensure people are not harmed as a result of work activities;
- setting requirements that relate to the taking of all practicable steps to ensure health and safety in places of work;
- encouraging employee participation in the improvement of health and safety and encouraging good faith co-operation in places of work; and
- providing a range of enforcement methods in response to failure to comply with the Act.

Effective enforcement of workplace health and safety reduces work-related injury and disease and fosters the growth of high-quality, productive places of work. It is also an important contributor to the government’s *Workplace Health and Safety Strategy for New Zealand to 2015* and the *New Zealand Injury Prevention Strategy*.

According to figures released by the National Occupational Health and Safety Advisory Committee, each year, up to 1000 people die prematurely as a result of a work-related disease and nearly 100 people die as a result of a work-related injury. There are also tens of thousands of new cases of occupational disease every year, thousands of which are severe. The annual financial and social cost to New Zealand of work-related injury and disease has been estimated at over \$20 billion with employers bearing a significant proportion of the financial cost¹.

Our main enforcement objective is to ensure workplace health and safety is managed effectively and those who fail to take all practicable steps to ensure health and safety are held to account appropriately. We do this to motivate sustained compliance with the HSE Act and, ultimately, to improve New Zealanders' working lives and New Zealand's economic and social well-being.

¹ Driscoll T, Mannetje A, Dryson E, Feyer A-M, Gander P, McCracken S, Pearce N, Wagstaffe M. *The burden of occupational disease and injury in New Zealand: Technical Report*, NOHSAC: Wellington, 2004

The Department of Labour's enforcement role

New Zealand's health and safety regulatory environment is performance-based. This means that duty-holders must take all practicable steps to protect people from harm in places of work. However, the Department of Labour plays a leadership role in promoting, influencing, motivating, educating and informing those involved in workplace health and safety. Effective enforcement contributes directly to this leadership role.

Our enforcement role begins when we have reasonable grounds to believe non-compliance with the HSE Act may have occurred or may be occurring, and where informal discussions have failed to resolve the non-compliance or are inappropriate because of the gravity of the situation (e.g. where serious harm has happened or is likely to happen). Where non-compliance requires an enforcement response, we will make choices about the most appropriate way to respond.

We have a number of enforcement tools for responding to non-compliance. These range in severity from written warnings through to the imposition of penalties and prosecution. Department of Labour inspectors have significant powers to enter places of work, require certain information, take samples from the workplace and prohibit any activity or thing likely to cause harm until such time as we are satisfied the hazard has been eliminated or minimised.

Our response to non-compliance is shaped by this policy statement and other policies and procedures, as well as being informed by our inspectors' judgement about the best way of obtaining compliance and improving health and safety performance. That judgement will be based on the particular circumstances of the case and by how the duty-holders respond. Our response may be aimed at influencing the duty-holders within a workplace environment or organisation to become compliant with the law and to make their place of work less hazardous. We will also use enforcement to make an example of a non-compliant behaviour in order to influence others.

In some cases, a matter being investigated may fall within the jurisdiction of other government agencies such as the New Zealand Police, Civil Aviation Authority and Maritime New Zealand². In such cases, the Department liaises with the relevant agencies to determine which agency is the most appropriate to conduct the investigation. However, there will be cases where a number of agencies conduct an investigation concurrently according to their legislative responsibilities. In many such situations, the Department has agreements in place with the relevant agencies that help clarify the role of each agency.

² Both the Civil Aviation Authority and Maritime New Zealand are designated agencies under Section 28B of the Health and Safety in Employment Act 1992. This means these agencies have been designated to take responsibility respectively for administering the Health and Safety in Employment Act 1992 for aircraft in operation and ships. Police Officers working in the Commercial Vehicle Investigation Unit are appointed as HSE Inspectors by the Secretary of Labour.

The Department of Labour's enforcement principles

Department of Labour staff perform their enforcement role with professionalism, integrity and impartiality. Our inspectors are guided by a code of conduct and are fully trained and resourced to do their job thoroughly to the highest standard.

The approach is to be firm but fair and to motivate sustained compliance with the HSE Act. When considering an enforcement response, we make judgements and choices about which enforcement option to use, who the focus of enforcement might be, and the intensity of the enforcement response.

In making judgements and choices about enforcement options, we are guided by a framework of policies, procedures and the following principles:

Consistency

Consistency of approach does not mean uniformity. It means taking a similar approach in similar circumstances to achieve similar ends. We will respond consistently when dealing with similar cases – but our approach will also reflect the specific circumstances of each case.

A proportionate focus on potential for harm

The HSE Act's primary objective is the prevention of harm in the workplace. Our enforcement response will be proportionate to the seriousness and extent of any harm, but especially the potential for harm in a given situation. This means our enforcement response may be more severe in situations involving the potential for fatalities or very serious harm. Similarly, we are likely to be tougher in cases where non-compliance potentially harms several people compared to a similar case where only one person is potentially affected.

Public accountability

In certain cases the public's expectation of accountability through formal processes is heightened. Where death or serious injury results from contravention of the HSE Act, prosecution action is highly likely.

Fairness

Our enforcement responses will be fair, impartial and undertaken with the highest integrity. In practice, this means we will ensure any person directly affected by our decision-making will have an adequate opportunity for representations to be made and considered before we make a final decision. We will also ensure our decision-making is reasonable (given the case's circumstances), unbiased, conforms to the principles of natural justice and is consistent with any previous representation(s) or in accordance with the way in which other, similar cases have been handled.

Prioritisation

We may target our enforcement activities to focus attention on particular hazards or other risks associated with types of work, work practices or employers causing health and safety concerns.

Open and accountable

We will ensure our expectations of duty-holders are made clear. We will also assist duty-holders to understand our approach to enforcement and provide an opportunity at every stage to ask questions and to seek review.

We will periodically review and audit enforcement decisions to ensure they are consistent with this guide and any other relevant policies and procedures.

We will maintain internal systems designed to learn from our enforcement activities.

Enforcement activity can generate considerable public interest and this may result in people and organisations outside of the Department requesting details of inspections, investigations and prosecutions. We will manage any such requests in accordance with the Official Information Act 1982 and, where relevant, the Privacy Act 1993.

The Department of Labour's approach to enforcement decision-making

The Department has a number of options and tools for ensuring compliance with the HSE Act. However, given our enforcement role is primarily aimed at promoting excellent health and safety practices in the workplace, we will generally use the minimum enforcement necessary to obtain compliance with the HSE Act.

Our initial response to non-compliance might not involve the use of one of our statutory enforcement tools. For example, if non-compliance is of a minor nature and it does not immediately endanger any person, we might agree with the relevant duty-holder on ways for them to become compliant without having to use an enforcement tool.

If non-compliance is of a serious nature, or it represents a likelihood of serious harm to any person, we are more likely to use an infringement notice or prosecution.

Aside from the seriousness of the non-compliance, we will generally be supportive of duty-holders who demonstrate a genuine willingness to comply with the HSE Act. In some circumstances, for example, it may be appropriate for a duty-holder and inspector to negotiate an agreement on specific remedial actions and timeframes required to bring about compliance with the HSE Act. However, where we believe a duty-holder is disingenuous, obstructive or has a previous record of similar non-compliance, we are likely to move quickly to stronger enforcement options.

Case Study One - What happens after a serious incident: an example of our enforcement response

Alistair, a forestry health and safety inspector, was phoned at work by the police to advise that they had received a 111 call from a logging operation in a plantation in the ranges nearby. Alistair, having determined that it was a workplace health and safety incident, said he would be there within the hour and reminded the police that the scene was not to be disturbed. He arranged for another inspector, Rex, to meet him there and left for the scene immediately.

The incident scene

Alistair arrived at the site office in the forest and was directed to the injury scene along a bush track. He arrived to find the body of a middle-aged logger, Lester, covered by a sheet in the cab of an excavator he had been operating. Police and ambulance personnel were still present.

After introductions, Alistair photographed the scene. He also recorded the names and roles of all those present, the owners of the plant, and the names of the businesses involved in the workplace. Alistair established that the site was being operated by logging contractors, EZ Logging Ltd. The site was, as were most of EZ Logging Ltd sites, contracted to the forestry company Radiata Corporation. The excavator involved in the incident was on long-term hire to EZ Logging Ltd from Bush-Quip Hire Ltd, a local heavy equipment hire company.

Alistair then gave permission for the removal of Lester's body, but asked that the scene remain otherwise undisturbed. Following this, Alistair and Rex recorded detail and drew diagrams of the incident scene.

Alistair took an initial statement from the owner (director)/operator of EZ Logging Ltd, Rawiri, and Paul – a fellow employee of Lester's and eyewitness to the incident.

Investigation

It was clear from the scene, and from Paul's account, that Lester was killed after a tree branch smashed through the side window of the excavator and impaled him. He had been using the excavator to move felled logs when he dislodged a "cut-up" tree that fell on, and into, the cab.

The excavator had a rollover protective structure and cabin intrusion bars fitted to the front of the machine, but it did not have side intrusion bars fitted.

Although EZ Logging Ltd was a well-established logging firm, Rawiri, as a director, claimed he was unaware side intrusion protection was required for the safe operation of this particular vehicle. This was despite it being a widely accepted practice among forestry companies using this type of machinery.

Alistair's investigation involved interviewing and taking statements from all participants in the incident that led to Lester's death and gathering background information from technical experts.

This investigation found that six months prior to the incident Radiata Corporation audited its contractor's health and safety performance, and through this became aware of the hired excavator. Radiata Corporation made it known to Rawiri they were unhappy about the excavator's safety; however, Radiata Corporation's senior managers decided to turn a blind eye to the potential safety issue because EZ Logging Ltd was a preferred and reliable contractor.

Response

Alistair's investigation concluded that fitting intrusion bars to the sides of the excavator was a practicable and reasonable step and that EZ Logging Ltd should have known of this safety solution. The investigation also showed that in Rawiri's case, as a director, he was aware of this safety solution and did not act on it.

The investigation also concluded that Radiata Corporation should have invoked contractual requirements for their contractor to operate in a safe manner.

Accordingly, the Department of Labour took the following enforcement response:

- Issued a Prohibition Notice to stop the use of the excavator for forestry operations (while issuing an alert to the industry as a reminder of the need to fit side intrusion protection);
- Prosecuted EZ Logging Ltd and Radiata Corporation;
- Prosecuted Rawiri, as a director of EZ Logging Ltd, because of his involvement in the decision not to fit the intrusion bars;
- Prosecuted Bush-Quip Hire Ltd for failing to ensure the plant it hired out was safe for its intended purpose.

The Department of Labour's enforcement tools

The Department has a number of tools available to enforce compliance with the HSE Act. We use our professional judgement and the details of each situation to determine which option is appropriate.

Written warnings

Written warnings are issued where there is non-compliance with the HSE Act identified by an inspector *and* where the non-compliance is put right to the satisfaction of the inspector **before** they leave the place of work. Written warnings are non-statutory notices but serve an evidential purpose as "prior warning" for issuing an infringement notice at a later date.

Improvement notices

Improvement notices are issued where an inspector has identified non-compliance but where the non-compliance is not remedied prior to the inspector leaving the place of work.

As with written warnings, inspectors will discuss with the relevant duty-holder(s) how they intend to remedy the non-compliance and the amount of time it will take to become compliant. The inspector will use this information to complete the improvement notice. As with written warnings, an improvement notice serves as "prior warning" for subsequently issuing an infringement notice. It is important to note that the inspector does not need the duty-holder's agreement to the specified timeframes in the notice.

Improvement notices may contain advice on possible remedial actions but it is entirely over to the duty-holder to decide how they will become compliant. For example, an improvement notice may refer to the need for a guard to be placed on a machine. However, the firm may simply cease using the machine altogether. This eliminates the non-compliance but is different to the suggested remedial action.

Inspectors will follow up **all** improvement notices to ensure compliance is achieved within the specified timeframes. Unless there are extenuating circumstances explaining why compliance has not occurred within the specified timeframes, more serious enforcement action **must** be applied.

Prohibition notices

An inspector **will** issue a prohibition notice if they believe that a failure to comply with a provision of the HSE Act is **likely** to cause serious harm to any person.

A prohibition notice must specify the specific hazard to which it relates and the inspector's reasons for believing it is likely to cause serious harm. A prohibition notice may specify steps that could be taken to eliminate the hazard concerned or minimise the likelihood that the hazard will be a source of harm.

Prohibition notices can be issued in addition to other enforcement actions in order to ensure serious harm does not occur in the meantime (e.g. while a prosecution is being undertaken).

A prohibition notice may serve as "prior warning" for later issuing an infringement notice.

Infringement notices

An inspector **may** issue an infringement notice where they have reasonable grounds to believe the duty-holder is committing, or has committed, an infringement offence **and** the person has had prior warning of the infringement offence **and** an enforcement action has not been taken against the same defendant in respect of the same matter by the inspector or any other person.

The infringement notice must specify an infringement fee which, for most offences, is no less than \$100 and up to a maximum of \$3,000.

The kinds of factors the inspector will take into account when setting an appropriate fee are:

- whether or not harm resulted from the offence; and
- if harm resulted from the offence, the extent of the harm; and
- what potential harm could have resulted from the offence; and
- in the case of an employer, principal, or contractor, the size of the business of the employer, principal, or contractor; and
- the financial circumstances of the duty-holder; and
- the safety record of the duty-holder (which includes but is not limited to "prior warning" notices).

There is a specific infringement fee of no less than \$800 up to a maximum of \$4,000 for employers who fail to have systems for identifying hazards and systems for regularly assessing hazards to determine whether they are or are not significant hazards.

In setting an infringement fee for this type of infringement offence, the inspector must consider:

- the size of the business of the employer; and
- the financial circumstances of the employer; and
- the safety record of the employer (which includes but is not limited to the prior warnings).

Infringement notices are inappropriate where there has been an incident involving a fatality and will generally not be used where there has been serious harm or multiple serious instances of non-compliance with the HSE Act. In these situations, prosecution is more likely to be the appropriate enforcement response.

Revoking certificates of competence

We issue a range of certificates of competence and other regulatory permissions. We will revoke certificates of competence where we believe it is no longer safe for the certificate to remain in place.

We may suspend or cancel a certificate where:

- the holder of the certificate has been sufficiently negligent to endanger life or is otherwise unfit to continue to hold a certificate; or
- we believe a certificate holder misled us when applying for the certification or does not meet the necessary requirements.

Prosecution

Prosecutions will be taken in the most serious situations. That is, where the most serious instances of non-compliance have occurred or where non-compliance is flagrant or wilful, or the harm or potential harm is severe.

However, the decision to prosecute is also influenced by factors such as whether there is sufficient evidence to provide a realistic prospect of conviction and/or there is a significant public interest in prosecution.

We provide guidance to judges on sentencing. We will structure our advice on sentencing based on our own assessments of the case and will be strongly influenced by our enforcement principles and our objective of motivating sustained compliance.

Private prosecutions

Any interested person other than an inspector may commence a prosecution where:

- an inspector or another person has not taken enforcement action against any possible defendant in respect of the same matter; and
- an enforcement authority has not taken prosecution action under any other Act against any possible defendant in respect of the same incident, situation, or set of circumstances (unless the person has leave of the Court); and
- the interested person has registered an interest with the Secretary of Labour (the Chief Executive of the Department of Labour) and has subsequently received notification from the Secretary that an inspector has not and will not take enforcement action against any possible defendant in respect of the same matter.

Publicising prosecutions

We believe publicising details of cases can strongly influence duty-holders. Accordingly, where we have laid charges or where an outcome of a prosecution is known, we will consider whether there is a benefit in proactively releasing details of cases. We will take care to avoid prejudicing court processes.

Case Study Two - How we use enforcement to improve workplace practices: an example of our enforcement response

After nearly 20 years of Fergus working as a motor-body repairer for a large business in the city, Fergus and Janet had been working hard to establish Hot Paints Ltd, their panel beating and spray-painting business in a thriving regional centre. With minimal capital and a couple of years' hard work, they had managed to establish enough work to keep themselves, and employees Angus and Seamus busy.

Although Fergus had extensive experience as a panel beater, his experience as a spray-painter was limited, and he had employed Angus to carry out this part of the business, while Seamus helped both Angus and Fergus. Janet worked in the office.

Hot Paints Ltd were contacted by Dave, a health and safety inspector based in the nearby city. Dave advised that a team of inspectors would be visiting businesses in the town in the following week and suggested a time when he and another inspector could visit and inspect Hot Paints' premises. He asked Fergus and Janet to have any appropriate information available to review during the visit.

On the day, Dave arrived with another inspector, Marie, who specialised in occupational health and hazardous substance issues. They met with Fergus and Janet in the office and discussed the health and safety issues of the business and the systems in place to manage them. Dave and Marie then inspected the workshop space and reviewed health and safety equipment and work processes with Angus and Seamus.

The inspection highlighted a range of issues, mainly to do with the quality of the air for Fergus and his employees in the workshop. There were some issues with dust in the panel beating area, which could be fixed with a combination of improved cleaning, the use of vacuum dust collection on finishing tools and some changes to personal protective equipment, which Marie was able to advise Fergus on. He was enthusiastic about these solutions and could see not only improvements in health and comfort, but also in the systems of work, because excessive dust was causing problems in all areas of the workshop. To demonstrate his willingness to implement these solutions Fergus telephoned his supplier while the inspectors were present.

The second atmospheric problem was in the spray-painting area where Fergus and Janet had not yet invested in a purpose-built spray-booth and had instead improvised with a curtaining arrangement to create a dust-free environment. This had inadequate ventilation. There was also insufficient personal protective equipment, particularly in connection with isocyanate-based automobile paints, which were used continually.

It was agreed that these hazard controls would be more expensive to fix, and there was a discussion of the extent of the health hazard presented to those painting, and in the wider workshop area. The most appropriate controls were discussed and a plan was developed that would see the worst practices end immediately and improved equipment introduced progressively over a six-month period. The agreement included suspending the use of isocyanate-based products until a purpose built spray booth was installed.

Dave recorded the result of their discussions during the site visit. While at the site he issued an "improvement notice" under section 39 of the HSE Act with respect to the hazard presented by spray painting. When he returned to his office he prepared a letter to Hot Paints Ltd setting out what the Department understood would happen in the workplace. He advised that he and Marie could give further advice on suitable controls if required, or that Fergus and Janet could contact their industry association.

The letter also formed a "written warning" in relation to the dust hazard. The letter set out that failure to control either of these hazards could result in further enforcement action.

Dave had advised Fergus and Janet there was likely to be a subsequent workplace visit and inspection, and that this may not necessarily involve notice.

Hot Paints Ltd subsequently installed the required equipment and were able to invite Dave and Marie along to see it within the six-month period.

Hot Paints Ltd report that the steps taken have improved the quality and quantity of their work, and added value to their business by improving the health and outlook of all members of the company. Fergus describes the purchase of the spray-booth as a watershed for the business, as it moved from a stage of "just getting by" to "being ahead of the game" with respect to their own and their employees' wellbeing.

Additional guidance

The following provides specific guidance relating to enforcement.

Working with health and safety representatives

We believe employee participation in health and safety is an effective means of driving compliance with the HSE Act and making places of work safer and healthier.

Accordingly, we will make it a priority for our inspections to ensure employers have given their employees reasonable opportunities to participate in their workplace's health and safety or have employee participation systems in place. Where we encounter an unwilling party, we will use an appropriate enforcement option to enforce compliance such as an improvement notice. If necessary, we will obtain a compliance order from the Employment Relations Authority.

Our inspectors will also work closely with trained health and safety representatives in places of work. This includes obtaining information on the management of health and safety in places of work.

Trained health and safety representatives may issue hazard notices to employers where the representative has reasonable grounds for believing the employer is not properly managing identified hazards in the workplace.

Non-compliance where incident has not yet occurred

We will take appropriate enforcement action against all identified non-compliance with the HSE Act, regardless of whether the non-compliance has resulted in an incident or in injury. Our objective is to prevent non-compliance from creating harm and to ensure duty-holders do not gain an unfair competitive advantage by not complying with the law.

Lack of systems for managing health and safety

We regard the lack of systems for identifying and/or not regularly reassessing hazards in places of work as being serious non-compliance with the health and safety legislation. Therefore we may take a more severe enforcement response in cases where failures arise due to a lack of systems. We may also take enforcement action against duty-holders who fail to have or fail to properly maintain systems for managing health and safety - regardless of whether or not an incident has yet to occur because of a lack of effective systems. This seriousness is reflected in the legislation where the minimum infringement fine for these particular provisions of the legislation is higher than other offences and the maximum infringement fee is applicable only to these specific areas of non-compliance with the HSE Act.

Training and supervision

Given the importance of training and supervision as an effective way of promoting workplace health and safety, we will treat non-compliance with the HSE Act involving a lack of training or supervision as being very serious and are likely to prosecute employers or other relevant duty-holders (e.g. directors or agents).

Obstruction of health and safety inspectors

Our inspectors must be able to conduct their activities without obstruction. Accordingly, we may prosecute anyone who displays obstructive behaviour – this includes abusing, threatening or deliberately deceiving our staff. Depending on the seriousness of the incident, we may refer cases to the New Zealand Police for prosecution.

Choice of defendant

In most cases, there is likely to be a number of duty-holders involved in non-compliance who might potentially be the focus of our enforcement response (e.g. who might be defendants or recipients of notices). We use our judgement about the most appropriate duty-holder or duty-holders to focus our enforcement response on, based on the most effective way of motivating sustained compliance. In the case of corporate duty-holders, we will assess which persons' actions or omissions are to be attributed to the body corporate for the purposes of meeting the duty.

Charges against employees

Employees (which includes managers and supervisors) are not immune from prosecution under the health and safety legislation. As duty-holders, employees must comply with the HSE Act. For example, we may prosecute an employee where it is clear the employee:

- disobeyed clear instructions; or
- acted recklessly; or
- was grossly negligent; or
- was involved in sky-larking behaviour; or
- wilfully ignored obvious hazards.

We will not prosecute employees where it is clear the employer did not provide the employee with the opportunity and resources to perform at the required safe level.

Charges against volunteers

Certain types of volunteers are deemed to be employees for the purposes of the HSE Act. If we prosecute volunteers, it will be done in a way that is consistent with the way we might approach employee prosecutions.

Charges against Officers, Directors and Agents

We may prosecute any officer, director or agent of a company, society or other body corporate (including Crown organisations) where it is clear the person(s) directed, authorised, assented to, acquiesced in or participated in the failure primarily where the person(s) in question had clear knowledge that the situation in question was unsafe or otherwise contrary to the health and safety legislation.

Charges against others

We may also prosecute a range of others such as employers, principals to contracts, self-employed workers, people in control of a place of work and people who sell or supply plant to a place of work.

Cultural appropriateness

A significant proportion of the New Zealand workforce is made up of people from non-English speaking backgrounds. As such, levels of English may vary widely and other cultural issues may need to be considered as part of the enforcement process. We will endeavour to recognise and respond to the differing needs of people from Māori, Pacific peoples, other ethnic groups and new migrants.

Where the police are investigating a crime

The New Zealand Police is usually advised first of fatal or other workplace incidents in breach of the criminal law. We investigate such incidents and liaise with the NZ Police on cases where there is (or is likely to be) a separate criminal investigation. In general, we will suspend enforcement action only where the NZ Police have laid a criminal charge. We will consider whether to re-open the investigation and/or enforcement action following the hearing of the criminal charges.

Accessing the Legislation and other information

You can find copies of the Health and Safety in Employment Act 1992 in most public libraries. It is also available for sale from Legislation Direct (<http://www.legislationdirect.co.nz>) or from selected bookshops.

One of the easiest ways to access up-to-date versions of the legislation and regulations is online at <http://www.legislation.govt.nz>. This site is searchable and material can be printed.

The Department of Labour's website, <http://www.dol.govt.nz>, also has a range of guidance material including plain English guides to the law and other helpful material. You can also use the Department's website to notify us of health and safety incidents and serious harm, occupational diseases, hazardous work, exposure to asbestos and to register an interest in enforcement action.

You can also obtain information from the Department by contacting the Workplace Contact Centre on freephone **0800 20 90 20** during business hours.

Glossary

The following technical terms are used in this paper:

Term	Definition
All practicable steps	as outlined in section 2(A) of the HSE Act
Compliance	the continuous process of acting in accordance with the duties imposed by the HSE Act
Compliance order	means an order made under section 137 of the Employment Relations Act 2000
Contractor	means a person engaged by any person (otherwise than as an employee) to do any work for gain or reward
Duty-holder	a person upon whom a duty is imposed by the HSE Act and includes, for example, employers, employees, directors, officers and other agents of corporate entities as well as suppliers of plant and machinery
Duty	A legal obligation the breach of which can result in a liability and, in the case of the HSE Act, duties relating to health and safety in employment can be found in Part 2 of the Act
Employee	means any person of any age employed by an employer to do work (other than residential work) for hire or reward under a contract of service and, in relation to any employer, means an employee of the employer (subject to sections 3C to 3F of the HSE Act)
Employer	means a person who or that employs any other person to do any work for hire or reward; and, in relation to any employee, means an employer of the employee; and includes, in relation to any person employed by the chief executive or other employee of a Crown organisation to do any work for the Crown organisation for hire or reward, that Crown organisation (subject to sections 3C to 3F of the HSE Act)

Employment Relations Authority	The authority established under section 156 of the Employment Relations Act 2000
Enforcement activities	activities that aim to reduce work-related and workplace death, injuries and disease by deterring non-compliance with the HSE Act – including inspection activities and the use of remedial measures
Enforcement Authority	Agencies with responsibilities for enforcing aspects of the HSE Act and includes Maritime New Zealand, Civil Aviation Authority, the NZ Police, and the Department of Labour
Harm	means illness, injury, or both and includes physical or mental harm caused by work-related stress
Hazard	means an activity, arrangement, circumstance, event, occurrence, phenomenon, process, situation, or substance (whether arising or caused within or outside a place of work) that is an actual or potential cause or source of harm; and includes– <ul style="list-style-type: none"> (i) a situation where a person’s behaviour may be an actual or potential cause or source of harm to the person or another person; and (ii) without limitation, a situation described in sub-paragraph (i) resulting from physical or mental fatigue, drugs, alcohol, traumatic shock, or another temporary condition that affects a person’s behaviour
HSE Act	Health and Safety in Employment Act 1992
HSNO Act	Hazardous Substances and New Organisms Act 1996
Inspector	a health and safety inspector for the time being appointed under section 29(1) of the HSE Act
Non-compliance	failure to comply with the HSE Act
Person	Includes natural persons as well as corporations and Crown organisations.

Place of work	<p>a place (whether or not within or forming part of a building, structure, or vehicle) where any person is to work, is working, for the time being works, or customarily works, for gain or reward; and, in relation to an employee, includes a place, or part of a place, under the control of the employer (not being domestic accommodation provided for the employee),–</p> <p>a) where the employee comes or may come to eat, rest, or get first-aid or pay; or</p> <p>b) where the employee comes or may come as part of the employee’s duties to report in or out, get instructions, or deliver goods or vehicles; or</p> <p>c) through which the employee may or must pass to reach a place of work</p>
Principal	a person who or that engages any person (otherwise than as an employee) to do any work for gain or reward
Prior warning	where a person has previously received one or more of the following on the same or similar matter: a written warning from the inspector, improvement notice, prohibition notice, conviction, a hazard notice, a compliance order or an infringement notice.
Secretary	the Chief Executive of the Department of Labour
Statutory enforcement tools	the enforcement tools set out in the HSE Act
Workplace	means “place of work” as defined in the HSE Act (see section 2, HSE Act).





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VISIT WWW.DOL.GOV.T.NZ

