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Key WHS reforms accelerated in NSW

Yesterday we reported on the introduction of two bills, by the NSW Government, both implementing work health and safety reforms. Principally, the Work Health and Safety Bill 2010 (WHS Bill) introduced the model laws proposed by Safe Work Australia (as part of the harmonisation process). Further to this, the Occupational Health and Safety Amendment Bill (OHS Act) was introduced to accelerate some key aspects of the WHS Bill before 1 January 2012.

The OHS Act reforms some of the most contentious and defining provisions of the current Occupational Health and Safety Act 2000 (NSW) (OHS Act) and Occupational Health and Safety Regulation 2001 (NSW) (OHS Regulations). There are a number of reforms that take place as soon as the OHS Act receives assent.

So what key changes can we expect to see very soon in NSW?

General Duties - 'so far as is reasonably practicable'

The general duties of employers, controllers and designers/manufacturers/suppliers throughout the OHS Act have been amended so that such duties are no longer expressed in unqualified terms. That is, the duties are qualified by "so far as is reasonably practicable".

A definition of "reasonably practicable" will be incorporated into the amendments.

The duties of employees are also amended so that the duty to co-operate as necessary with health, safety and welfare requirements at work, will be a duty to co-operate so far as is "reasonably" necessary to enable compliance.

No More Reverse Onus of Proof

As a result of the amendments to the general duties, the prosecution, in order to establish an offence has been committed, will now need to prove what was "reasonably practicable" in the circumstances. This removes the reverse onus of proof and means the defendant will not be required to prove it was not "reasonably practicable" to comply with the duty.

Consequently, the defence provisions of the OHS Act will be removed as they are no longer necessary.

Directors / Managers no longer deemed liable for contraventions

The provision of the OHS Act deeming directors and persons concerned in the management of a corporation liable for contraventions of the corporation has been removed.

In its place, the OHS Act will incorporate a positive duty for officers to exercise all due diligence to ensure the corporation complies with health, safety and welfare duties. A definition of "due diligence" will be incorporated into the amendments.

Union right to prosecute removed

The right of unions to prosecute offences under the OHS Act has been removed. Union prosecutions currently on foot will be permitted to continue. However, union prosecutions commenced after the introduction of the OHSA Bill into Parliament (i.e. after 4 May 2011) and before the OHSA Bill commencement will be terminated.

This means that if the WHS Bill is passed, as of 4 May 2011, unions will not longer be able to prosecute offences under the OHS Act.

These are significant changes to the work health and safety legislation in NSW and will alter the way in which the OHS Act and OHS Regulations are applied and offences prosecuted in NSW.

Once again, stay tuned for further updates and if you have any questions, please do not hesitate to contact us.

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