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What changes in HSWA mean for small businesses? – an update.

Most small businesses have no idea changes in the Health and Safety at Work Act 2015 currently before parliament mean for them. Assuming there is no significant change from the Bill, there are two aspects in particular that small business needs to be concerned about – critical risk, officer responsibilities and approved codes of practice (ACOPs). If you don't know what these are, keep reading or contact us.

Focus on “critical risks”

The concept of focusing on events that have a realistic potential for fatality or serious harm as a consequence, aligns with the risk-based structure already embedded in the existing legislative framework.

The Act already requires a PCBU (Person Conducting a Business or Undertaking) to eliminate or minimise risks so far as is reasonably practicable. That tests for what is “reasonably practicable” already lead to priority for higher-consequence hazards (critical risks).

However, two points to note:

- It is not in itself an offence not to have identified critical risks. However, no business is going to ignore risks that will harm their people.
- Everyone will require a risk management process: identify hazards, assess risk, and control them proportionately. They don't need to be complex, but there will be a need to demonstrate you have one.

So the policy change being discussed in Parliament is more about messaging and guidance for small businesses, but it is not a fundamental shift.

For small business it is actually pretty simple. There are four basic steps:

1. Identify the critical risks
2. Effectively control the critical risks
3. Be able to demonstrate you have done 1 & 2.
4. Review controls are in place and working through some formal process

In practical terms, we see the changes in the legislation having no significant effect day to day, but the regulatory tone and enforcement priorities could mean prosecutions are less likely.

Approved codes of practice (ACOPs)

Following an ACOP has been and will continue to be evidence of compliance. However, they are non-binding and you can still demonstrate compliance through other means. But the “other means” need to be assessed relative to the ACOP thus we expect ACOP to become more prominent as the accepted means of compliance. As a result, even small businesses will need to become familiar with and follow them.

We were concerned ACOP may become prescriptive and this initial view has been reinforced by the following advice from Worksafe.

“ As you may know, the Minister for Workplace Relations and Safety, the Hon Brooke van Velden, has introduced the Health and Safety at Work Amendment Bill (the Amendment Bill). This would change the legal status of approved codes of practice (ACOPs) to provide a type of legal protection referred to as ‘safe harbour’. This means that if a business follows what an ACOP sets out, they would be treated as having complied with the relevant legal duty.

These ACOPs are being drafted under these proposed provisions. This means ACOPs must use precise and directive language, setting out one or more clearly defined, objectively verifiable ways to comply with each duty. In effect, if the Amendment Bill is passed, ACOPs must operate as a code, specifying what to do and how to do it, rather than guidance that leaves a business to determine the appropriate actions themselves.”

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Whilst the ACOP will be the appropriate means of compliance in most cases, it is going to be the approach that carried lowest risk and highest cost. The potential for over-engineering the solution is huge, as is the cost impact.