

A photograph of a man with a beard and short hair, wearing a white t-shirt, standing in a kitchen. The background is a chalkboard filled with faint, illegible writing. The entire image is overlaid with a semi-transparent red filter. A large red curved shape is on the right side of the page.

a guide to health & safety at work

The Health and Safety at Work Act has sparked plenty of discussion around its impacts on different industries. This guide outlines the key aspects of the Act and what hospitality businesses can do to prepare for this health and safety regime.

PLEASE NOTE

Restaurant Association members are strongly advised to seek guidance from the employment team on 0800 737 827.

**thought
for food.**

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Why did we need a new workplace health & safety law?

Nobody goes to work expecting to get hurt, sick or killed. But in New Zealand, far too many people do. On average, 50 – 60 people per year die on the job, 1 in 10 is harmed and 600-900 die from work-related diseases—all coming at a cost to our economy of \$3.5 billion per year. And that's before you take into account the devastating emotional costs on the friends, family, loved ones and co-workers of those people hurt or killed on the job.

WorkSafe has been mandated by the Government to lead the country to at least a 25% reduction in deaths and serious injuries at work by 2020. The Health & Safety At Work Act 2015 was developed to assist this goal. The Health & Safety At Work Act 2015 replaced the Health & Safety In Employment Act 1992 – from 4th April, 2016.

The Act is about making everyone's responsibilities clear in keeping people healthy and safe in workplaces. It provides a more cooperative approach for effective risk management. It encourages more effective worker participation, clarifies responsibilities and accountabilities, and requires PCBUs (a person conducting a business unit or undertaking), and officers (e.g. company directors) to do what they can reasonably, practicably do to keep people safe.

What's important is that you treat health and safety as part of your day-to-day business and manage it proportionately to the level of risk at your work. This means the greater the risks you have, the more vigilant you need to be. Hospitality businesses certainly have

some inherent risks which should be identified and where possible minimized - hazards in the kitchen will be one of the main areas of focus but the dining area also has risks which should be addressed. Businesses must always consider first whether they can reasonably eliminate risks. If not, do what is reasonably achievable to minimise risks.

Health and safety is not something you have to do alone. Everyone in your business has a role to play, identifying and managing risks, and ensuring a healthy, safe and incident-free work environment.

There are some key differences between the old Act and the newer Health and Safety at Work Act, which we'll outline below.

Key concepts of the Health & Safety at Work Act

1. PCBU (persons conducting a business or undertaking)
2. Primary duty of care
3. Reasonably practicable
4. Duty to consult, co-operate, co-ordinate / Overlapping duties
5. Good governance / leadership
6. Worker engagement and participation

1. PCBU (persons conducting a business or undertaking)

What is a PCBU? A PCBU is, quite simply, a "person" conducting a business or undertaking. The concept of the PCBU is the key element within the Act from which most duties and responsibilities flow. It covers every type of workplace and is perhaps the biggest change in the new regime and the one people struggle with the most.

In particular, there's an important point about the PCBU that catches many. Despite its name, a PCBU doesn't have to be an actual person. A PCBU will usually be a business entity such as a company rather than an individual person, unless they're operating a business as a sole trader or self- employed person.

Why were PCBUs introduced? The PCBU is a broad concept that reflects modern working arrangements better than the more narrow employer/employee relationship.

Example 1: If you take the example of a building site: the construction firm is a PCBU, the principal contractor is a PCBU, right down through the layers until you might reach a self-employed bricklayer working for a sub-contractor. These are all PCBUs but the only one who is actually a 'person' is the self-employed bricklayer, and on this particular site there will be overlapping responsibilities between the various PCBUs.

Example 2: Kitchen Construction Limited (KCL) operates a small business which specialises in building and renovating kitchens. Simon is KCL's sole director. KCL employs several full-time staff and regularly contracts Jill, a self-employed electrician, to do electrical work for KCL's projects: KCL is a PCBU conducting the business of building and renovating kitchens. KCL's employees are workers of KCL (so are not PCBUs). Simon is an officer of KCL (so is not a PCBU). Jill is a PCBU conducting her electrical business. Jill is also a worker of KCL because she is engaged by KCL to complete electrical work on KCL's projects.

Who isn't a PCBU? It's probably easier to describe who isn't a PCBU than it is to list out all the ones who are.

- Workers: while a self-employed person is a PCBU, someone who works for someone else is not.
- And, while workers have their own health and safety responsibilities in the workplace, they do not hold the primary duty of care (a PCBU does).
- Officers: Directors, Board members, Chief Executives and Partners are all considered Officers and have explicit duties around workplace health and safety.
- Householders employing someone to do residential work are also not PCBUs.
- And volunteer associations are also not PCBUs.

2. The primary duty of care

A business (PCBU) must ensure, so far as is reasonably practicable, the health and safety of workers and that other people are not put at risk by its work. This is called the 'primary duty of care'.

What this primary duty of care means is ensuring, so far as is reasonably practicable:

- the health and safety of workers who work for the PCBU (eg employees or contractors, including their subcontractors or workers) while they are at work in the business or undertaking
- the health and safety of workers whose work activities are influenced or directed* by the PCBU while the workers are carrying out the work (eg a franchise company whose franchise requirements influence or direct the workers of the franchisee).
- that other persons are not put at risk by the work of the business or undertaking (eg a visitor to the workplace, customers, or members of the public who could be affected by a work activity).

** Influenced or directed is new, and broadens the scope of the duty, meaning businesses have to think more broadly about who they affect through the conduct of the business or the undertaking.*

3. Reasonably practicable

Businesses must always consider whether they can reasonably eliminate risks. If not, they must take reasonably practicable steps to minimise risks under the new health and safety laws.

So far as is reasonably practicable is also new and is a slightly different test to "all practicable steps" (in the old legislation). You're expected to do what a reasonable person would do in your situation - taking responsibility for what you can control. This means what is or was reasonably able to be done, at a particular time, to ensure health and safety, taking into account and weighing up all relevant matters. It includes weighing up the likelihood of the risk or harm occurring, the degree of harm that might result from the risk or hazard, and what is known or would be reasonably expected to be known about a risk or hazard.

It also includes assessing the extent of the risk and the available ways (so far as reasonably practicable) of eliminating or minimising the risk, and finally the cost associated with this,

including whether the cost is grossly disproportionate to the risk. But please be aware that under the new law cost is the last factor that will be considered.

At the end of the day "reasonably practicable" pretty much means what it sounds like. For sensible, cautious business owners who understand their business, there is really no need to take unreasonable risks.

So far as is reasonably practicable:

DOESN'T mean you have to:

- do everything humanly possible to prevent accidents
- buy the most expensive equipment on the market
- spend the bulk of your week on H&S training, compliance and documentation.

DOES mean you need to:

- determine what kinds of risks are caused by your work
- consider how likely those risks are
- take appropriate action that is proportionate to the injury or illness that could occur
- implement well-known and effective industry practices
- involve your staff in identifying and controlling risks.

Example: REASONABLY PRACTICABLE STEPS

While on a job, two builders have to spend a single day outside drilling. The work will cause a lot of dust and both the foreman and the workers recognise the dust is not good for either them or those nearby. Together they decide that, while they can't eliminate the problem altogether, they can keep dust levels down by using a water spray and regularly cleaning up. They can also wear masks while working. Barricades are erected to keep others away. As this is an isolated task, and because some kind of dust extraction unit would be too expensive for a one-day job, they've done what is reasonably practicable.

Example: NOT REASONABLY PRACTICABLE STEPS

Trudi works in the kitchen at a cafe where she sometimes has to climb a ladder to stock on high shelves. The ladder she's been given is wobbly and also a bit short. This means she has

to reach quite high while on an unstable ladder. She feels unsafe doing this and tells her manager she is uncomfortable with the task. In turn, the manager tells Trudi she has to keep using it because it's the only ladder the cafe has. This would be considered unreasonable due to the minimal costs associated with getting a safer ladder and the high potential for Trudi to get hurt.

What is reasonably practicable takes into account how much is commonly known about the risks involved, as well as the recognised ways of eliminating and minimising them. The availability and cost of safeguards should also be considered.

The question is not whether the business has the cash on hand to pay for the solution, but rather whether the cost is proportionate to the harm that could result. No one expects NASA-type technology where the risk is relatively low and a cost-effective and a simple solution could work just as well.

The primary duty of care is a broad overarching duty. It includes but is not limited to, so far as is reasonably practicable:

- providing and maintaining a work environment that is without risks to health and safety
- providing and maintaining safe equipment and structures
- providing and maintaining safe systems of work
- ensuring the safe use, handling and storage of equipment, structures and substances
- providing adequate facilities for the welfare at work of workers in carrying out work for the business or undertaking, including ensuring access to those facilities
- providing any information, training, instruction, or supervision that is necessary to protect all people from risks to their health and safety arising from work carried out as part of the conduct of the business
- monitoring the health of workers and the conditions at the workplace for the purpose of preventing injury or illness of workers arising from the conduct of the business or undertaking.

Businesses must also maintain any worker accommodation that is owned or managed by the business and provided because other accommodation is not reasonably available.

The accommodation must be maintained so the worker is not exposed to health and safety risks.

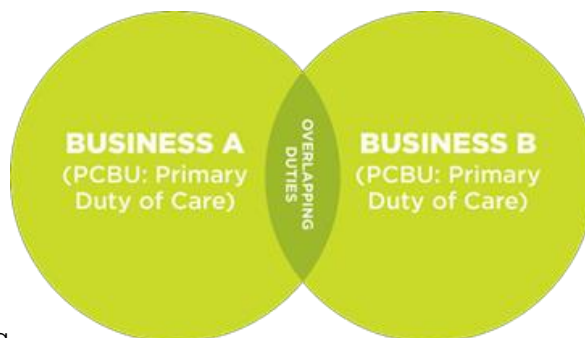
4. Duty to consult, co-operate and co-ordinate

When there are multiple businesses (PCBU's) at the same location, each business must do what they can, within their influence and control, to keep workers safe. In these situations, the most effective way to manage workplace health and safety is by working together. Ensuring that businesses work together for the health and safety of everyone in the workplace is a fundamental part of the new Health and Safety at Work Act.

In general terms, when we talk about businesses working together, we mean that all businesses must, so far as is reasonably practicable, consult, cooperate, and coordinate their activities with other businesses, particularly when there are overlapping duties in relation to workplace health and safety, so that you can all meet your joint responsibilities. Businesses do not need to duplicate each other's efforts.

Overlapping duties

Because businesses have duties to all workers and others affected by their work - not just those they directly employ or engage - they may well have overlapping duties.



For example, a construction site where a labour hire worker from one business is working for another business. In this case, all businesses in the workplace have a duty to consult, cooperate and coordinate on health and safety matters.

However, the Act recognises that businesses with shared duties have different influences over health and safety matters, so the extent of a business' duty depends on its level of influence and control. A business with a higher level of influence and control (and with the

greatest share of the responsibilities) will usually be in the best position to manage the associated risks. A business with less control or influence may fulfil their responsibilities by making arrangements with the business with the higher level of influence and control. In practice this means that the measures a business should take in relation to its own employees and contractors are likely to be different from the measures which it should take in relation to the employees and contractors of another business. This is because it will have less influence and control over the workers of another business. It is not 'all or nothing' - the degree of responsibility will be affected by the level of influence and control a business has over the situation.

Businesses should also monitor each other to ensure everyone is doing what they agreed.

5. Good governance / leadership

The legislation places a positive duty on directors – as Officers of a business (PCBU) – to exercise due diligence to ensure that the organisation complies with its health and safety duties and obligations.

The term Officers' includes those who hold positions that enable them to significantly influence the management of the organisation. This means that certain senior leaders in an organisation (such as CEOs, Board Members, Directors and Partners) are also officers and have explicit duties around workplace health and safety. Officers must actively engage in health and safety and ensure that health and safety is everyone's business (from the top down).

An officer does not have to ensure the health and safety of the workers but do have to make sure their organisation complies with its obligations. This means always having current knowledge of work health and safety matters; knowing the nature of your organisation's operations and the associated risks; and assessing the resources and processes to manage those risks. Just as your finances and resourcing are standing agenda items, health and safety should be treated as a fundamental part of running a business.

Officers v PCBUs what's the difference in the duty?

The Officers' duty is not the same as the PCBUs (business') duty. The business holds primary duty for health and safety of the workers (and others) it engages and employs – and influences or directs – in any capacity.

Officers do not have to directly ensure the health and safety of the business' workers. Rather the officer must exercise due diligence that the business is meeting its health and safety legal obligations. An Officer's due diligence complements this duty – it doesn't replace it.

A reminder, Officers are:

- Directors, Partners, or any person occupying a position comparable to Director
- Any other person occupying a position in the business that allows the person to exercise significant influence over the management of the business or undertaking (e.g CEO).
- Does not include person who merely advises or makes recommendations to officers (e.g. managers, supervisors, work H&S advisers)

What is due diligence?

Due diligence requires directors (as Officers) to take reasonable steps to understand the business' operations and health and safety risks, and to ensure that they are managed so that the organisation meets its legal obligations. Due diligence is defined in section 44(4) of HSWA as taking reasonable steps to:

- acquire and update knowledge of health and safety matters
- gain an understanding of the operations carried out by the organisation, and the hazards and risks generally associated with those operations
- ensure the PCBU has, and uses, appropriate resources and processes to eliminate or minimise those risks
- ensure the PCBU has appropriate processes for receiving and considering information about
- incidents, hazards and risks, and for responding to that information in a timely way

- ensure there are processes for complying with any duty, and that these are implemented
- verify that these resources and processes are in place and being used

6. Workers (and others) engagement and participation

Worker engagement and participation are an important part of growing a positive workplace culture. Engagement and participation are related duties. What is done to meet one duty can help meet the other. Both involve two-way communication – a conversation about health and safety.

- Engagement is how a business involves its workers in work health and safety matters and decisions.
- Participation practices are the on-going ways for workers to raise health and safety concerns, be part of making decisions which affect work health and safety, and offer suggestions for improving health and safety.

A worker is anyone who carries out work for a PCBU, such as:

- an employee
- a contractor or sub-contractor
- an employee of a contractor or sub-contractor
- an employee of a labour hire company
- a person gaining work experience
- an outworker
- a volunteer worker
- an apprentice or trainee

It is a legal requirement for all businesses (PCBUs) to have worker engagement and participation practices, regardless of their size, level of risk or the type of work they carry out. PCBUs must:

- engage with workers on matters which will or are likely to affect their health and safety
- have worker participation practices that provide workers with reasonable opportunities to participate effectively in improving health and safety.

Participation practices can be flexible – an organisation and its workers should choose a worker participation model that works for them. What is appropriate will depend on the nature of the risks, the size of the organisation and the views and needs of the workers.

Worker participation practices can be direct or through representation. Representation means that workers choose one or more people to speak or act on their behalf. Workers can then share questions, concerns and suggestions with health and safety representatives, health and safety committees, unions or other worker representatives who can raise health and safety matters with the PCBU.

Duty of workers and others

Everyone is responsible for work health and safety, however workers have different responsibilities to those of the business. Under the new law, all workers are obliged to:

- take reasonable care of their own health and safety,
- take reasonable care that what they do or don't do doesn't adversely affect the health and safety of others,
- cooperate with any reasonable policies or procedures the business or undertaking has in place on how to work in a safe and healthy way, and
- comply with any reasonable instruction given by the business or undertaking so that they can comply with HSWA and the regulations.

What we mean by worker participation

Workers and managers must work together closely to find joint solutions to common risks and problems. Stronger worker participation underlines the expectation in the Act that everyone in the workplace is responsible for workplace health and safety, and that workers are empowered to intervene when they see an unsafe situation.

The Act requires all workplaces to have effective worker participation practices that foster worker involvement so that PCBUs actively engage with workers on health and safety practices. It is not good enough to simply tick the box and have processes and systems in place; the systems must be effective in practice.

Small businesses with fewer than 20 workers in non high risk sectors are excluded from the requirement to have health and safety representatives and Health and Safety Committees when requested by workers. This change does not stop smaller non-high risk businesses from voluntarily deciding to have Health and safety representatives and committees as a way of meeting their worker participation obligations.

All other businesses, including small businesses in high-risk sectors (hospitality is not a high risk sector), will still have to initiate an election for a health and safety representative when requested.

When is engagement required?

Businesses need to engage and consult with workers ...

- When hazards are identified and assessed
- When making decisions about
 - addressing risks
 - the adequacy of staff welfare facilities
 - monitoring worker health and workplace conditions
 - providing information and training to workers
 - procedures for resolving work health or safety issues
- When determining work groups – for an H&S committee/representative
- When proposing changes which may affect the health and safety of workers
- When developing worker participation practices (i.e. ways for workers to participate in improving work health or safety on a day to day basis)

Offences and penalties

While hospitality is not considered a high risk industry under the new legislation, it is worth noting that at the extreme end of the scale, penalties have increased significantly for breaches under the new Health & Safety At Work Act. There is a three tier system to penalties following an established breach:

	Reckless Conduct in respect of Health & Safety Duty (being reckless about the risk to an individual of death or serious injury)	Failure to Comply with Health & Safety Duty, Exposing an Individual to Risk of Death or Serious Injury	Failure to comply with Health & Safety Duty (no exposure to death or serious injury/illness)
Individual (not a PCBU)	Imprisonment not exceeding 5 years; and/or fine up to \$300,000	Fine up to \$150,000	Fine up to \$50,000
Individual (PCBU)	Imprisonment not exceeding 5 years; and/or fine up to \$600,000	Fine up to \$300,000	Fine up to \$100,000
Body Corporate	Fine up to \$3 million	Fine up to \$1.5 million	Fine up to \$500,000

What to do now

Don't rush into anything at great expense. Review your organisation's health and safety practices and, if needed, revise how you manage critical risks that could cause illness, injury or even death.

Here are some first steps:

- **Identify and manage your risks.** There is a myth that an organisation, and its officers, must eliminate all risks. They can't. The nature of any work is that there will always be risks; what's important is that they can be managed and minimised. First, they must be identified. Remember to assess both health and safety risks.

- **Lead by example and make health and safety a part of your organisation's culture.**
The question is no longer "Do I have a liability?", but "How can I improve health and safety?" Get all staff thinking this way...and get them involved – not just because it's the law but because they can help you and they also have a duty to take reasonable care for their own and their colleagues' health and safety. The Act focuses our attention on how we work more than where we work and the people doing the work are best placed to identify the risks.

Consult with the Restaurant Association (0800 737 827) if you have any further queries.

The Restaurant Association also has some additional resources you may like to consider:

- **Health & Safety Update webinar recording (March 2016)**
Members can order a copy of this webinar which was held as part of the Restaurant Association's professional development calendar in March 2016. Presented by Hesketh Henry's Alison Maelzer, the webinar discusses how the new Health and Safety legislation affects your business operations and compliance. Alison runs through the obligations for business owners under the Health and Safety At Work Act. A specialist in this area, Alison breaks down and explains the implications of the Act for hospitality business owners. She explains what the changes will mean for you and focuses on what you can do to ensure your business is ready. Order your copy by emailing bookings@restaurantnz.co.nz.
- **Restaurant Association's Health and Safety package**
The Restaurant Association have collaborated with two reputable companies, Worksafe Services Ltd and Zone Health & Safety, to bring you an enhanced package of health and safety services so enable members to receive training and ongoing specialised health & safety advice. This package includes:
Health & Safety Manual/Guide including:
 - Folder / guidelines
 - Health & Safety Vision Document
 - Health & Safety Plan
 - Policy
 - Procedure
 - Hazard Register

- Forms
- Certificate of Completion

Plus, ongoing training and support:

- Ten step by step YouTube set-up video guides delivered weekly online, starting in September.
- In addition to ongoing helpline access at the Restaurant Association, a specialised health & safety adviceline every Tuesday from 9am – 12pm, available for the next 12 months.
- Ongoing support for those seeking further assistance.

Order the Health & Safety Package by emailing info@restaurantnz.co.nz.