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# Health and Safety Toolkit



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MinterEllisonRuddWatts

# Clearing the way for safer workplace practices

2013 saw the start of a series of legislative and policy developments that have culminated in the most comprehensive reform of New Zealand's health and safety system for over 20 years. The overhaul impacted all New Zealand workplaces, organisations and individuals. While many aspects of the new regime are already in force, others will be introduced on a staged basis. The 2015 Health and Safety at Work Act – and key associated regulations – came into force on 4 April 2016. Other regulations will be phased in as they are developed.

We have compiled this toolkit to help workplaces and individuals navigate the reforms and to highlight the main steps that need to be taken to ensure compliance with the current regime and with the upcoming changes. Should you have any questions about your health and safety obligations, our team has experience across a broad range of health and safety matters and we would be delighted to assist you.



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# The changing landscape for health and safety in New Zealand

New Zealand's health and safety system has been overhauled. How might the changes affect you?



## The legislation

The Health and Safety at Work Act 2015 has been enacted and replaces the previous health and safety legislation. The Bill had been introduced to Parliament in March 2014. The Select Committee reported back to Parliament in July 2015. After progressing through Parliament, the Act passed its third reading in August 2015. The Health and Safety at Work Act 2015 came into force on 4 April 2016.

### Key features of the Act include:

- It is based on the Australian Model Work Health and Safety Act.
- It increases the penalties for non-compliance and creates a three-tiered hierarchy of offences.
- It imposes a duty to take "reasonably practicable steps."
- It replaces the duties owed by employers and principals with a broader duty owed by "persons conducting a business or undertaking".
- It includes a new object of securing workers' health and safety.
- It promotes continual improvement and good practice, benchmarked on international standards.
- It implements a presumption in favour of the highest level of protecting workers from harm.
- It imposes a due diligence obligation on directors and officers.
- It creates specific obligations for those designing, manufacturing, installing, supplying or importing plant, substances or structures

Each year, around **1 in 10 workers** in New Zealand is harmed at work.

### If you are a director or an officer



As a director, managing your organisation's health and safety risk is just as important as managing financial and reputational risk and it should receive the same focus

- "Officers" include individuals who hold positions that allow them to exercise significant influence over the management of the business.
- Under the legislation, directors and officers are required to exercise due diligence to ensure compliance.
- The legislation and the Good Governance for Directors Guide detail steps directors and officers should take, including:
  - Acquire and maintain current knowledge of health and safety matters, the organisation's operations and the hazards and risks arising from those operations.
  - Verify that the organisation has sufficient resources available to manage health and safety risks, and that the organisation is utilising those resources.
  - Ensure the organisation complies with its health and safety duties.
- The legislation contains increased penalties for non-compliance and an increased focus on enforcement. Directors and officers will be personally liable if they fail to exercise due diligence.
- Insurance against fines imposed for breaching health and safety obligations is invalid and has no effect.

### If you are a Person Conducting a Business or Undertaking (PCBU)



(includes employers, principals, self-employed, partnerships etc)

- The legislation imposes:
  - An enhanced primary obligation on PCBUs to take "reasonably practicable" steps to ensure the health and safety of workers.
  - Specific duties on PCBUs that manage or control workplaces or fittings or plant at workplaces, and designers, importers, manufacturers and installers of plant, substances or structures to be used in a workplace.
  - Increased obligations to support worker participation, to consult with workers and, if requested, to train health and safety representatives.
  - Increased penalties for non-compliance and an increased focus on enforcement.
- Insurance against fines imposed for breaching health and safety obligations is invalid and has no effect.

### If you are a worker or involved in the workplace in another role



(includes employees, apprentices, contractors, students, etc)

- The Health and Safety at Work Act 2015 contains the following relevant features for workers:
  - Workers and others will be subject to a legislative obligation to take reasonable care for their own health and safety and not to affect the health and safety of others.
  - Increasing the previous framework for worker participation and consultation with PCBUs.
  - A system for workers to request the election of health and safety representatives and to form work groups.
  - Increased penalties for non-compliance and an increased focus on enforcement.
- Regulations also contain further detail about worker participation.

The economic and social costs of workplace injuries and diseases for New Zealand are estimated to be about **\$3.5 billion** annually - around 2% of GDP.



## The regulations

The Ministry of Business, Innovation and Employment (MBIE) has prepared regulations to underpin the legislation.

The regulations are based on Australian Model Regulations and primarily provide specific guidance on five areas of workplace health and safety:

- General risk and workplace management;
- Worker participation, engagement and representation;
- Asbestos; and
- Major hazard facilities.

MBIE is preparing further regulations for work involving hazardous substances

Compliance with the regulations is mandatory. The regulations took effect at the same time as the legislation, with the exception of hazardous substances regulations, which have yet to be finalised.

# Current status of the Health and Safety at Work Act 2015

## What has happened so far?



Pike River Mine explosion  
November 2010



### Reports and Recommendations

- Royal Commission on the Pike River Coal Tragedy findings issued - October 2012
- Independent Taskforce on Workplace Health and Safety recommendations issued - April 2013
- MBIE and Institute of Directors in New Zealand issued "Good Governance Practices Guideline for Managing Health and Safety Risks" - May 2013 (revised version issued March 2016)
- New Zealand Government issued "Working Safer: A blueprint for health & safety at work" - August 2013



WorkSafe New Zealand established  
December 2013



### Health and Safety Reform Bill

- Health and Safety Reform Bill introduced and referred to the Transport and Industrial Relations Committee - March 2014
- Bill reported back on 24 July 2015 (report initially due back September 2014, then 29 May 2015 - deadline later extended to 24 July 2015).
- Amendments made to the Bill as it progressed through the Parliamentary process by way of Supplementary Order Papers - August 2015



### Health and Safety at Work Act 2015

- Health and Safety at Work Act enacted - August 2015
- Most provisions of the Act came into force on 4 April 2016



### Health and Safety Regulations

- The majority of the first phase of regulations have been finalised and came into force with the Act on 4 April 2016.
- The regulations for work involving hazardous substances continue to be finalised.

## What is still to come?

### WorkSafe guidance

WorkSafe has issued guidance on the Health and Safety at Work Act and regulations (for more information see separate box on WorkSafe's guidance so far). Further guidance and codes of practice are expected.

### WorkSafe's guidance so far

WorkSafe has provided guidance on key aspects of the Health and Safety at Work Act 2015 and regulations.

- **Introduction to the Health and Safety at Work Act 2015:** This is a special guide that provides a plain English explanation of key requirements under the Act and the role of WorkSafe.
- **Worker Engagement, Participation and Representation Good Practice Guidelines:** These guidelines describe what WorkSafe considers good practice in relation to worker engagement, participation and representation.
- **Good Governance for Directors:** This guide provides information on the health and safety responsibilities of directors.
- **Reasonably practicable fact sheet:** This fact sheet is for small to medium businesses, explaining what 'reasonably practicable' means in the workplace.
- **WorkSafe position on occupational (work-related) health:** This position sets out the expectations of duty holders in following the occupational health requirements in the Act and regulations.

WorkSafe has also prepared some FAQs and mythbusting to provide answers to questions and dispel myths about the Act in respect of the following areas:

- General Principles
- PCBUs
- Worker Engagement and Participation
- Officers
- Workers
- Health and Safety representatives and committees
- Volunteers
- Schools
- Property management



# What does this mean for businesses?

## What is a PCBU?

Under the Act, a PCBU is any **person conducting a business or undertaking**, whether that person conducts a business or undertaking alone, or with others, and whether or not the business or undertaking is conducted for profit or gain.

PCBUs include employers, principals, self-employed, partnerships, and people who manage or control a workplace.

Workers, officers and volunteer associations that have no employees are not PCBUs under the Act.

A worker is a person who carries out work for a PCBU, including as an employee, contractor, subcontractor, employee of a contractor or subcontractor, apprentice or trainee, or volunteer worker. Workers owe their own duties to take reasonable care with their own health and safety, and that of others.



Directors and officers

Due diligence

PCBUs

Workers

Others in the workplace

## Practical steps for PCBUs

We have distilled these steps from the recommendations contained in the reports and guidance material currently available.

If you are a PCBU, you should:

- Track health and safety performance through lead and lag indicators and monitor other information that may reflect latent health and safety issues (such as rates of sick leave absence, exposure to risks that are potentially harmful and reports of non-compliance).
- Investigate incidents (including near-misses) and conduct root cause analyses.
- Review incident reports and statistics to identify trends and implement appropriate responses.
- Monitor contractors' health and safety performance and ensure contractors have robust processes in place that are consistent with the company's expectations.
- Ensure inductions and training provided to employees and contractors is consistent and comprehensive.
- Implement and update the health and safety management system.
- Conduct and finalise risk assessments, implement the controls identified in those assessments and update risk assessments where risks or controls may have changed.
- Support a 'no-blame' culture where health and safety is supported and promoted through enabling worker participation, ensuring adequate resources are allocated to health and safety initiatives and providing training and information about specific health and safety risks.
- Check whether your contractual terms with suppliers/customers are appropriate for the Act and, if necessary, amend.



## What is a Workplace?

Under the Bill, the definition of "workplace" originally proposed was "a place where work is carried out" for a business, including any place a worker goes, or is likely to be, while at work.

In the Act, this was changed to refer to a place where work "is being" carried out or is "customarily carried out".

There have also been changes specifically relating to farms to clarify, for example, that the duty of a PCBU with management or control of a workplace does not apply to the main dwelling house or, except when work is being carried out, to areas of the farm other than farm buildings or structures.



## What duties does a PCBU have?

Every PCBU has a responsibility to take "reasonably practicable" steps to ensure the health and safety of workers and other persons.

This includes taking reasonably practicable steps to ensure:

- the work environment does not pose risks to health and safety;
- safe plant, structures and systems of work are maintained;
- there are adequate facilities for workers' welfare while at work;
- all people receive the appropriate information, training, instructions and/or supervision necessary to protect them from health and safety risks; and
- the health of workers and the conditions at the workplace are monitored so as to prevent workers' injury or illness.

# What does this mean for directors and officers?

## Who is an officer under the Act?

An officer is a director, a partner (or a general partner in a limited partnership), or a person occupying a position in a body corporate or an unincorporated body that is comparable to that of a director.

Originally the definition of officer in the Bill also included any person who makes decisions that affect the whole, or a substantial part, of the business or undertaking of the PCBU. This last branch of the definition of an officer was later changed to instead include any person who holds a position that allows them to exercise significant influence over the management of the PCBU. This includes for example, the CHIEF EXECUTIVE, and others in governance roles. Whether someone is an officer will be a factual question. One relevant factor is whether the person has enough authority to make governance decisions that have a significant influence on the business.

### Previously

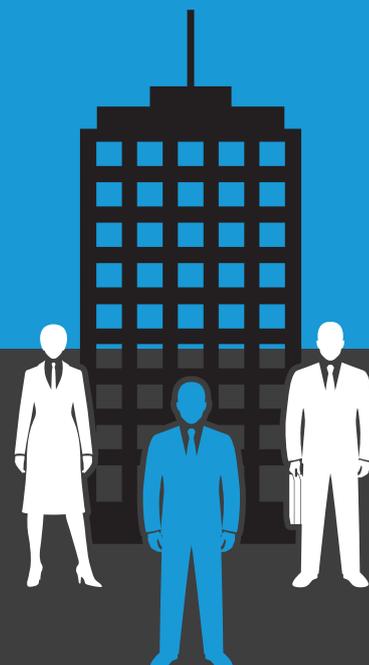
Liability secondary to company's breach

Acquiesce, direct, assent, authorise or participate in company's breach

### Current

Primary liability

Exercise due diligence to ensure compliance



## Practical steps for directors and officers

We have distilled these practical steps from the findings contained in the reports and guidance material currently available.

If you are a director or officer you should:

- Prepare a Board charter that outlines the Board's commitment to health and safety and update the charter periodically.
- Understand the company's operations, the hazards and risks associated with the operations and the controls in place to manage those hazards and risks.
- Hold senior management to account for health and safety by developing specific targets, implementing stringent reporting requirements and including health and safety targets in KPIs.
- Receive and review comprehensive updates on health and safety incidents, near misses, illnesses, contractors' health and safety performance, progress with implementing formal plans, risk assessments and findings from internal and external audits.
- Monitor the company's health and safety performance and understand its processes by reviewing audits, management plans, risk assessments, risk registers and incident investigations.
- Ensure the company allocates adequate resources and engages appropriate expertise to implement, develop and maintain the health and safety management system.
- Obtain independent expert advice as required.
- Arrange periodic formal reviews of the company's health and safety performance, and ensure appropriate steps are implemented to address any recommendations from reviews.
- Form a Board subcommittee to monitor health and safety performance in greater detail and provide periodic reports to the entire Board.

The [Institute of Directors' and WorkSafe's Health and Safety Guidance: Good Governance for Directors](#) is a useful reference tool.

For officers who are not directors, not all of these steps will be relevant/possible. However, it is prudent to take as many of these steps as is practicable.

## What obligations do officers have?

The obligations of directors and officers under the Act are not to ensure the health and safety of workers and others, but rather to exercise due diligence to ensure the PCBU complies with that duty. Due diligence includes taking reasonable steps to:

- acquire and keep up-to-date knowledge of health and safety matters for the PCBU;
- understand the nature of the PCBU's operations and of the associated hazards and risks;
- ensure the PCBU has appropriate resources and processes to eliminate or minimise risks to health and safety;
- ensure that the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards, and risks and for responding in a timely way to that information;
- ensure that the PCBU has, and implements, processes for complying with any duty or obligation; and
- verify the provision and use of the above resources and processes through reviews and audits.

When determining the extent of the due diligence that an officer is required to undertake the nature of the business or undertaking, the position of officer, and the nature of the responsibilities undertaken by the officer will be taken into account.

# The changing expectations for internal health and safety investigations

The health and safety regulator has introduced a requirement for employers, principals and people in control of places of work (“duty-holders”) to conduct internal health and safety investigations and, in some circumstances, to provide the findings of those investigations to a health and safety inspector. Here is what that means.



## Previous legislative position

- Under previous health and safety legislation, employers were required to investigate certain workplace accidents and incidents, including:
  - Any accident that harmed or might have harmed any employee or person in a place of work controlled by the employer;
  - Every occurrence of “serious harm” to an employee at work; and
  - Every occurrence of “serious harm” to an employee as a result of any hazard to which the employee was exposed at work.
- The Health and Safety in Employment Act did not impose a specific obligation on principals or persons in control of a place of work to investigate accidents and incidents of “serious harm”. Depending on the circumstances (including the terms of any contractual arrangements), principals and persons in control of places of work may choose to conduct their own internal investigations.
- Employers, principals and self-employed people were required by the Health and Safety in Employment Act to notify the health and safety regulator of accidents and incidents of serious harm.



## The Duty-Holder Review

- The regulator, WorkSafe New Zealand, sometimes requires organisations to carry out a “duty-holder review”. There is no statutory basis that provides for this review. The duty-holder review is an internal investigation of a health and safety incident conducted by a PCBU or duty-holder at the request of a health and safety inspector.
- The purpose of the duty-holder review is to “address everything that contributed to an accident to make sure it won’t happen again”.
- Health and safety inspectors will request a duty-holder review when an incident occurs at the workplace and the inspector determines that the duty-holder should examine the incident themselves and provide the Ministry with a report of the investigation.
- Health and safety inspectors will review the duty-holder’s report to “check that improvements described in the report have been completed or are under way.”
- Health and safety inspectors will also liaise with any victims of the incident to keep them informed of the progress of the report.
- The Ministry has developed a template for the duty-holder’s investigation report, which is available from this [link](#).



## What are the implications for my organisation?

- Internal health and safety investigations play an important part in all organisations’ health and safety management systems.
- The Health and Safety Guide: Good Governance for Directors recommends that directors review serious incidents and satisfy themselves that management have taken adequate steps to respond to such incidents. Managers can therefore expect directors to take greater interest in the conduct and findings of internal health and safety investigations.
- Duty-holders can use different strategies in conducting and reporting internal investigations. Depending on the circumstances and the findings of the investigation, duty-holders may wish to consider using legal privilege to protect certain parts of the investigation.

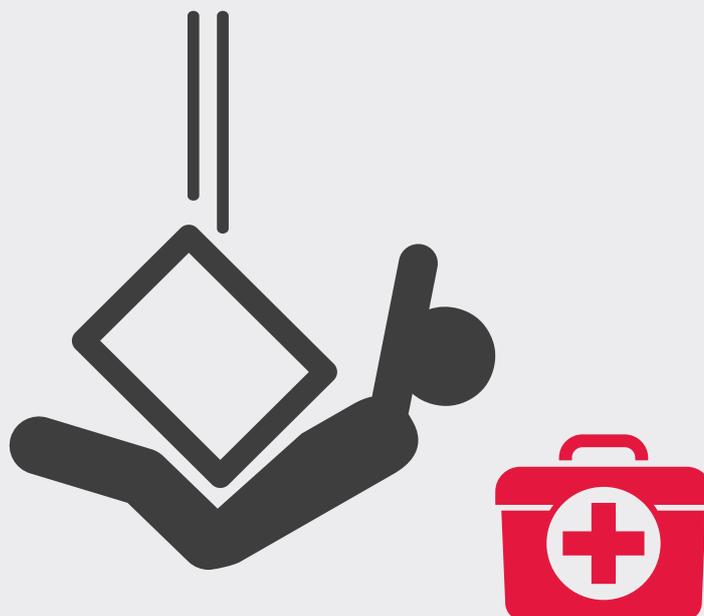


# The changing approach to recording and notifying workplace accidents and serious harm

Among the changes contained in the Health & Safety at Work Act 2015 are changes to the recording and notifying of workplace accidents and serious harm. The changes are outlined here.

## What is an **accident**?

Any event that causes any person to be harmed or, in different circumstances, might have caused any person to be harmed.



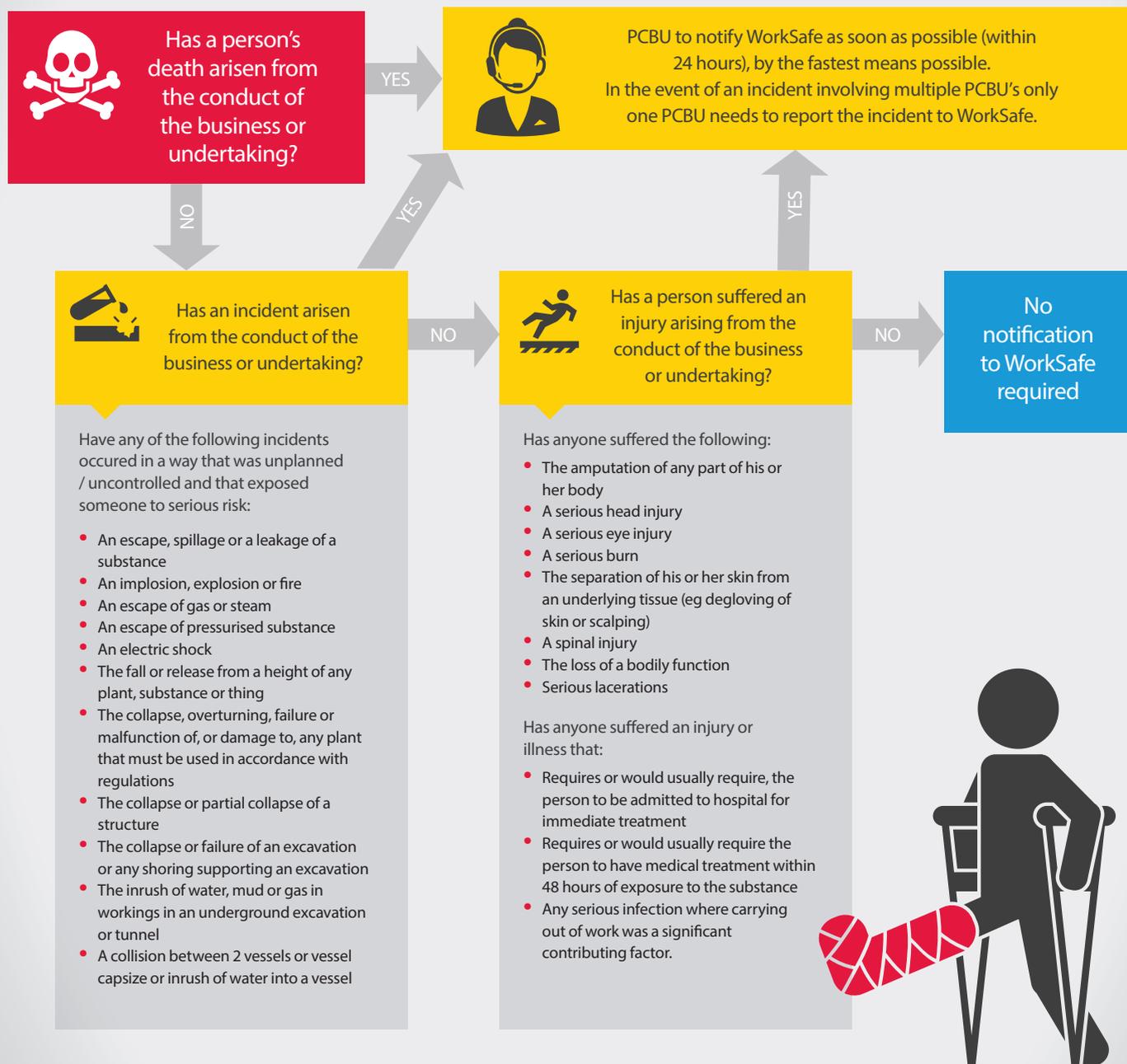
## What is serious harm?

Any one or more of the following conditions:

- Death.
- Any of the following conditions that results in permanent or temporary severe loss of bodily function:
  - respiratory disease
  - noise-induced hearing loss
  - neurological disease
  - cancer
  - dermatological disease
  - communicable disease
  - musculoskeletal disease
  - decompression sickness
  - vision impairment
  - poisoning illness caused by exposure to infected material
  - chemical or hot-metal burn of eye
  - penetrating wound of eye
  - bone fracture
  - laceration
  - crushing
- Amputation of a body part.
- Burns requiring referral to a specialist medical practitioner or specialist outpatient clinic.
- Loss of consciousness from lack of oxygen.
- Loss of consciousness, or acute illness requiring treatment by a medical practitioner, from absorption, inhalation, or ingestion, of any substance.
- Any harm where the person is hospitalised for 48 hours or more within seven days of the occurrence of the harm.

# The changing approach to recording and notifying workplace accidents and serious harm

Among the changes contained in the Health and Safety at Work Act 2015 are changes to the recording and notifying of workplace accidents and serious harm. The requirements, and steps to follow in deciding whether WorkSafe must be notified, are outlined here.



## Notification requirements



Under the Health and Safety at Work Act, if you're a person conducting a business or undertaking (PCBU), you will be required to:

- Keep a record of every notifiable event for at least 5 years.
- Ensure that WorkSafe is notified as soon as possible after you become aware of a notifiable event occurring at the business or undertaking.
- Notification can be by telephone or in writing (including by email). If you notify WorkSafe by telephone then you must, if required by WorkSafe, provide written notice of the notifiable incident within 48 hours of being requested to do so.

# MinterEllisonRuddWatts

## Health and Safety team



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A partner at MinterEllisonRuddWatts, Stacey has almost 20 years experience successfully representing financial institutions, other companies, public sector entities and directors & officers in significant litigation and regulatory matters. Stacey returned to the firm in 2010 after spending 11 years as a Wall Street litigator in New York. She has been recognised by independent research as a leading lawyer in New Zealand by Chambers International Law Directory, The Legal 500, Legal Media Group and NZ Lawyer. Stacey regularly provides public and private sector organisations with strategic and immediate advice on health and safety issues and crisis management. Following the explosion at Pike River's coal mine in November 2010 Stacey was engaged to respond to investigations by NZ Police, the Chief Coroner and the Department of Labour. She was lead counsel for certain company directors and officers including Pike's former CEO and board chairman, before the Royal Commission into the Pike Tragedy and at the Coronial Inquest. Stacey also defended Pike's former CEO in his prosecution for alleged health and safety violations. She also maintains an active pro bono practice. Stacey won the Community and Not-For-Profit Award at the 2015 Westpac/Fairfax Women of Influence Awards. Stacey was named the Law Fuel Lawyer of the Year in 2015 for New Zealand. Stacey has also co-authored a book, published in 2016, which was written for everyone working in New Zealand, Health and Safety at Work in New Zealand: Know the Law.



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Gillian is an internationally recognised legal expert. She regularly represents clients at all levels of the court system and brings significant experience to the firm's national Employment and Health and Safety team.

Gillian helps boards of directors manage health and safety risks by providing proactive compliance advice and practical solutions to comply with New Zealand's health and safety regime. This interacts with other aspects of her clients' businesses such as drug and alcohol testing in the workplace, worker participation systems and interactions with unions. Gillian also provides emergency strategic advice during high profile and sensitive situations. She has experience with Coronial Inquests, WorkSafe investigations, subsequent prosecutions and communicating with all stakeholders and media as necessary.

Health and safety, industrial relations, human rights and privacy are focus areas of Gillian's practice. She advises clients on all aspects of risk management and represents them through official processes.



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Megan is recognised as both an employment law and public law specialist including in the Chambers Global international law directory. Megan's practice traverses strategic, litigious and time-critical day-to-day advice on all aspects of public and employment-related law including health and safety matters. Megan is working with numerous boards of directors to assist them, and their organisations in complying with the Health and Safety at Work Act 2015.

- Megan also carries out a wide range of work in health and safety related matters including advising on:
  - medical incapacity and medical retirement terminations;
  - workplace accidents (including WorkSafe New Zealand investigations and prosecutions);
  - managing risks in the education sector;
  - managing issues arising from earthquake prone buildings;
  - health and safety policies (including bullying and harassment, and drug and alcohol policies);
  - conducting disciplinary investigations in the event of health and safety breaches, and providing in-house training;

compliance with health and safety obligations and audit checks. Megan also provided employment and health and safety advice, as part of a specialist team of advisors, to Directors and Officers of Pike River following the explosion at Pike River's coal mine.



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Aaron assists clients with risk management and problem solving in the areas of employment law, public law, white collar/ regulatory matters, and in the sports industry.

Aaron helps clients to assess health and safety risks in their businesses, implement comprehensive policies and programmes, conduct internal audits and investigations into incidents, and represents clients in investigations and prosecutions.

Aaron was part of the Pike River team dealing with the Department of Labour inspectors, and at the Coronial Inquest. Aaron also defended the pilot of the Tug Vessel Kuratau in a prosecution by the Maritime Safety Authority. Aaron has experience advising clients on investigations by the Transport Air Accident Investigation Commission. He is currently advising a major international airline on implementing new training protocols and procedures for aircrew.

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Jane is partner in our corporate and commercial team. She specialises in commercial contracting and commercial law across a range of sectors and industries.

The right engagement and contracting approach can help clients achieve their preferred health and safety outcomes. Jane helps clients manage their contractual and compliance issues regarding health and safety throughout the procurement planning, supplier selection, supplier engagement and supplier management stages. Having advised extensively on clients' health and safety contracting and related issues, Jane can get to nub of the issue quickly and generate practical and pragmatic health and safety options and documentation appropriate for the context. She regularly provides strategic advice and detail for health and safety policies, contract reviews and negotiations, template clauses and checklists, and assists clients to roll out the engagement and contracting approach within the client's organisation.



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Oliver advises on all aspects of workplace health and safety. This includes providing risk management strategies and advice on regulatory compliance as well as giving prompt and pragmatic advice on the steps to take immediately following a significant health and safety incident. Oliver regularly advises on the conduct of internal investigations and acts for corporate entities and senior managers during WorkSafe investigations and prosecutions and in coronial inquests. Oliver is currently advising leading companies in the engineering, energy and transport maintenance sectors in respect of WorkSafe investigations and prosecutions.



### Emma Warden

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Emma is a Special Counsel in our Wellington disputes resolution team. She specialises in employment law, health and safety, public law and education law. Emma provides advice on and assistance with matters under health and safety legislation, both generally and in relation to specific situations or incidents – whether contentious or non-contentious. She also assists with reviewing and amending clients' health and safety policies and procedures, regularly conducts training on health and safety matters, including work-related stress, and advises employers on accident compensation issues, the management of sick or injured employees, and investigations into potential health and safety breaches.



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With a background in employment law and commercial litigation, Chris has experience advising clients in the workplace health and safety space. He helps clients respond to health and safety incidents and accidents, and provides ongoing support in respect of any subsequent investigations or prosecutions brought by the regulator, WorkSafe New Zealand. Chris assists clients in assessing health and safety risks in their businesses, implementing comprehensive policies and programmes, conducting internal audits and investigations, training staff, building health and safety obligations into commercial and employment contracts, managing employment law issues in the health and safety context, and complying with statutory obligations.



### June Hardacre

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June has broad experience in all aspects of both New Zealand and English employment law. June regularly advises clients across a range of sectors in respect of their obligations under health and safety laws. This is in respect of duties and obligations of directors and officers, the primary responsibilities of PCBUs, and contractor duties. In addition, June has particular experience in advising clients in the agriculture sector and implementing compliance based training. June recently returned to New Zealand, having practiced at a magic circle firm in London for several years, and at another top tier New Zealand law firm prior to that. June has presented at a number of workshops for clients on the implementation of the Health and Safety at Work Act.



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Matthew is in our Dispute Resolution team and works for both private and public sector clients. He has assisted with Companies Act and insolvency litigation; claims for interference with privacy; high profile prosecutions brought by the Serious Fraud Office and Inland Revenue Department; regulatory matters, enforcement action under, for example, financial markets, health and safety and resource management legislation; and a range of professional disciplinary proceedings.



### Duncan MacKenzie

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Duncan is a member of our Dispute Resolution team. He advises clients about their health and safety obligations (having been heavily involved in the Pike River Royal Commission of Inquiry) and he acts for clients in the medico legal area. Duncan appears for clients in court and in private arbitration and mediation. Duncan appeared before the Pike River Royal Commission of Inquiry and has also appealed in the Coroner's Court.

# Want to learn more?

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