

Duty to Consult Under the Occupational Health and Safety Act 2004 (VIC)

Since the commencement of the Occupational Health and Safety Act 2004 (Vic) ("the Act"), many employers have worked hard to ensure that their systems of work and safety procedures have met the requirements of the new legislation. While the majority of provisions of the Act commenced operation on 1 July 2005, employers should note that section 35 of the Act, which imposes a duty on employers to consult with employees when undertaking certain activities, came into effect on 1 January 2006.

The obligation in section 35 seeks to ensure a dialogue between employers and employees about occupational health and safety issues which affect employees and others working at the workplace.

In order to discharge the duty under section 35, employers must (as far as reasonably practicable) formally discuss health and safety issues with employees who are or are likely to be directly affected by a relevant activity. Relevant activities include:

- Identifying hazards and assessing risks in the workplace.
- Deciding on measures to control risks to health and safety.
- Making decisions about the adequacy of facilities for the welfare of the employees.
- Reviewing and instigating procedures to resolve health and safety issues, to monitor health or to provide information to employees on health and safety.
- Determining the membership of the OHS committee.
- proposing changes that may affect the health and safety of employees.

This list is not fixed as regulations may provide for additional activities which will require consultation.

Consultation with independent contractors and their employees in relation to matters over which the employer has control, the duty to consult extends to independent contractors and also employees of independent contractors. This is the case even if there is an agreement between the employer and an independent contractor which purports to limit or remove the employer's control. Employers should therefore consider their relationship with contractors in order to clarify the extent of these obligations.

How must consultation be conducted?

Consultation is achieved by:

- Sharing with the employees information about the matter on which the employer is required to consult.
- Giving the employees a reasonable opportunity to express their views about the matter.
- Taking those views into account.

Where the employees have a health and safety representative, that representative must also be consulted.

Failure to carry out consultation when required is an offence, punishable by a fine of up to 900 penalty units (\$94,329.00) for a corporation and up to 180 penalty units (\$18,865.80) for an individual.

What should you do?

We recommend employers consider the following questions:

- Do you have a written OH&S consultation procedure and a written OH&S issue resolution procedure?
- If you do not have a designated work group or health and safety committee, how will you consult with employees?
- Is your management representative competent in OH&S resolution procedures?
- How will you demonstrate that you are complying with the duty to consult?
- Can you demonstrate that the views of the employees are taken into account?

We are able to assist you to draft policies and train your managers about their obligations should you require this.

For further information, please contact:

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