

Consultation

Minimum requirements for complying with the employer duty

Summary

This document outlines what employers need to do as a minimum to achieve compliance with the duty to consult. It supplements guidance provided in WorkSafe's publication *Consultation on health and safety – A handbook for workplaces*, *WorkSafe's HSR Policy* in relation to consultation and *An overview of how inspectors deal with specific issues* containing information on enforcement of the employer duty to consult.

Who must be consulted

- **Employees** - employers must consult on the matters listed below so far as is reasonably practicable¹ with employees who are (or are likely to be) directly affected.
- **Health and safety representatives (HSRs), if elected** – HSRs must always be involved in any consultation on matters affecting, or likely to affect, the health and safety of members of their designated work group (DWG), with or without the direct involvement of the DWG. This can be achieved either by:
 - consulting directly with employees and HSRs together
 - consulting directly with employees and HSRs separately
 - consulting with employees via HSRs without the involvement of employees directly, provided this has been agreed in a procedure for consultation in the workplace²

Where there is no HSR, consultation must be undertaken directly with employees.

- **Independent contractors and their employees and employees of labour hire companies** - in relation to matters over which the principal employer has control³. The independent contractor, sub-contractor or labour hire firm, as direct employers, also have a duty to consult with their employees.
- **Volunteers** - as volunteers are not employees or independent contractors, the duty to consult does not apply. However, the employer must ensure so far as is

reasonably practicable that volunteers are not exposed to risks to their health and safety. Consultation with volunteers can assist the employer to meet this duty.

How to consult

Consultation must involve:

- sharing information with employees about the matter
- giving employees a reasonable opportunity to express views about the matter, and
- taking those views into account.

Where employees are represented by an HSR, the consultation must involve the HSR. Employers must provide HSRs with all relevant information about the matter and, if reasonably practicable, a reasonable time before it is provided to employees. Consultation must proceed with the employer:

- inviting the HSR to meet or meeting with the HSR at their request, and
- giving the HSR a reasonable opportunity to express their views on the matter and taking those views into account

Opportunities need to be made available (eg providing a meeting room and time) for affected employees and their HSR(s) to come together to consider the information that has been provided, to discuss the issues and form their views.

What matters must be consulted about?

- identifying or assessing hazards or risks
- making decisions on how to control risks
- making decisions about the adequacy of facilities for employee welfare
- making decisions about procedures to:
 - resolve health and safety issues
 - consult with employees on health and safety
 - monitor employees' health and workplace conditions
 - provide information and training

¹ This means that employers must consult with employees to the extent that is reasonable in the circumstances, and will depend on factors such as the size and structure of the business, the nature of the work that is carried out etc.

² Refer to *Consultation on health and safety – A handbook for workplaces* for further information on agreed procedures for consulting about health and safety.

³ Or would have control if not for an agreement to the contrary

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- determining the membership of any Health and Safety Committee (HSC) in the organisation
- proposing changes that may affect employees' health or safety to any of the following:
 - the workplace
 - plant, substances or other things used in the workplace, or
 - the work performed at the workplace
- doing any other thing prescribed by the *Occupational Health and Safety Regulations 2007*

While employers, HSRs and employees should aim to reach agreement as a result of consultation, agreement is not a required outcome of the *Occupational Health and Safety Act 2004* (OHS Act). An employer is still ultimately responsible for making decisions about health and safety, and controlling risk so far as is reasonably practicable.

Mechanisms for consulting with affected employees

Workplace meetings present an ideal avenue for consultation. These may include team meetings, branch meetings, divisional meetings, production meetings or tool box talks. For example, in setting the agenda for a meeting, the employer can:

- include items relating to any of the matters an employer is required to consult about
- encourage employees and HSRs to contribute to the agenda before the meeting, and
- provide employees and HSRs with an opportunity to add items or prepare for the meeting by distributing the agenda and relevant OHS information prior to the meeting. If it is reasonably practicable, the information must be provided to the HSRs a reasonable time before it is provided to the employees.

In larger workplaces this may be done via email.

A number of meetings may be required, depending on the OHS matter under consideration, and may be requested by the HSR. In meetings:

- employees and HSRs should be encouraged to ask questions, raise concerns, propose options, make recommendations and be part of the problem-solving process.
- Additional meetings may be required eg at the request of the HSRs.

For meaningful consultation to occur, face to face meetings may be the best option; however, there may be circumstances where this is not possible or preferable. For

example, if one HSR cannot attend a meeting with other HSRs and management, or where the OHS Manager is based in Melbourne but the Manager and HSRs of an affected DWG are in a regional workplace, a phone conference may be required.

When a course of action is decided, the employer should document the action, who is responsible for implementing the action and the anticipated completion date.

If the employer's final decision differs from the views of the employees and HSRs (ie agreement has not been possible), the employer should provide feedback and explain the reasons for the decision.

OHS matters that must be consulted about which affect the whole workplace, such as the development of procedures (see above), should be brought to the attention of the health and safety committee (HSC), if established. A function of the HSC is to formulate and review health and safety standards, rules and procedures that are to be carried out or complied with at the workplace, and making them known to employees (in other languages, where appropriate).

Agreed procedures for consultation

Procedures for consultation must be followed if agreed with a majority of employees. Any agreed procedures must:

- be consistent with the OHS Act
- be the subject of consultation with employees (and HSRs, if elected) before they are implemented
- be agreed ie there has to be genuine consultation and agreement about the procedures between the employer, the HSRs and employees, and it has not been imposed by one party or the other, or arisen out of a flawed process for reaching agreement, such as reaching agreement through an unrepresentative process.

Example procedures for consultation on health and safety can be found in *Consultation on health and safety – A handbook for workplaces*

Further information

For further information contact the WorkSafe Victoria Advisory Service on **1800 136 089** or go to **worksafe.vic.gov.au**