

Article Information

Author: Chris Hartigan

Service: Employment & Labour, Work Health & Safety

Updated OHS framework for labour hire workers and hosts in Victoria

In March 2022, new amendments to the *Occupational Health and Safety Act 2004 (Vic)* (OHS Act) expanded the health and safety framework for labour hire workers and their hosts in Victoria.

In September 2022, a second set of amendments will take effect in the OHS Act, making it a criminal offence to enter into a contract or insurance arrangement covering an OHS Act penalty, or to seek or accept the benefit of such an arrangement.

The *Occupational Health and Safety and Other Legislation Amendment Act 2021 (Vic)* (**Amending Act**) amended the OHS Act to expand the scope of the occupational health and safety (OHS) obligations on organisations when they use labour hire workers in Victoria. Although host organisations already owed OHS duties to labour hire workers, a key practical implication of the Amending Act is the new express obligation requiring consultation and cooperation between host employers and labour hire suppliers in relation to OHS issues.

Deemed employees for the purpose of OHS obligations

From 22 March 2022, the Amending Act added a new deeming provision to the OHS Act. That deeming provision stated that, for the purposes of the OHS Act, a person is taken to be an employer of a worker including if a labour hire services provider supplies the worker, recruits the worker, or places the worker, to perform work for the first person. The result is that the express obligations of employers in relation to employees now apply in relation to hosts and labour hire workers.

The OHS Act, at section 22(b) and 23(1), already included obligations on employers which would have applied in relation to the health and safety of labour hire workers. For example, section 22(b) established an obligation on employers to “*so far as is reasonably practicable...monitor conditions at any workplace under the employer’s management and control...*” That obligation covered conditions at the workplace generally, regardless of whether it related to direct employees or also related to labour hire workers. Similarly, section 23(1) already imposed an obligation on employers to ensure “*so far as is reasonably practicable, that persons other than employees of the employer are not exposed to risks to their health or safety arising from the conduct of the undertaking of the employer*”.

However, the expanded definition of “employee” for the purposes of the OHS Act means that broader obligations under the OHS Act expressly apply in relation to labour hire workers. For example, section 21 states that an employer must “*so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health*”. The result of the amendments in March 2022 is that section 21 now applies in relation to both an organisation’s own employees and any labour hire workers.

Other obligations under the OHS Act, previously only applying in relation to direct employees, also now apply in relation to labour hire workers. For example, section 35 of the OHS Act will now be read as requiring employers to consult with both their direct employees and any labour hire workers in certain circumstances (such as when identifying or assessing hazards or risks to health or safety at a workplace under the organisation’s management and control or arising from the conduct of the undertaking). This is separate from the new obligation for labour hire providers and clients to consult, co-operate and co-ordinate with the labour hire service provider (see below).

Consultation and co-operation between labour hire providers and clients/hosts

The first set of amendments in 2022 mean that labour hire providers and their clients both need to be able to demonstrate that they have taken all reasonable steps to consult, co-operate and co-ordinate in relation to OHS matters on a site. The circumstances of each industry and workplace will affect the kinds of issues that labour hire service providers and hosts must coordinate together in relation to the duties that they both owe to the labour hire workers.

The introduction of this new obligation in the OHS Act is broadly reflective of the requirement for duty holders to “consult, co-operate and co-ordinate” under the Model WHS Act as implemented in multiple other Australian jurisdictions. For example, under the *Work Health and Safety Act 2011 (NSW)* (**NSW WHS Act**), section 46 applies where multiple persons owe duties in relation to the same matter under the NSW WHS Act. In those circumstances, the two duty holders are each liable in relation to their duties, and also have a individual obligation to “consult, co-operate and co-ordinate” with each other.

Insurance arrangements and new criminal offence

The first set of 2022 amendments included amendments rendering void any provision of an insurance contract or arrangement to the extent it provided an indemnity from liability for a pecuniary penalty imposed under the OHS Act. That amendment, to render void such terms, took effect from 22 March 2022. However, the second step, slated to come into effect from 22 September 2022, will make it a criminal offence to enter into a contract or insurance arrangement indemnifying an employer from an OHS Act penalty, or to seek or accept the benefit of such an arrangement.

There is a risk of potentially being prosecuted for this new offence, including where a contract is entered into or renewed including such an insurance “arrangement” (with a formal insurer or labour hire customer/supplier).

For many organisations, the imminent introduction of this new criminal offence results in an urgent need to review the terms of any insurance or contractual arrangements prior to renewing them. This amendment, combined with the other amendments taking effect from March 2022, will result in many organisations needing to reassess their financial risk exposure in relation to OHS issues and the engagement of labour hire workers.

Conclusion

The expanded legislative framework for labour hire providers and hosts, including the duty for labour hire service providers and hosts to consult, co-ordinate and co-operate in relation to OHS matters, came into effect from 22 March 2022.

As part of step one in these amendments, organisations can no longer rely upon contracts or agreements for insurance or indemnities in relation to pecuniary penalties imposed under the OHS Act. However, related criminal offences are slated to come into effect on 22 September 2022.

In light of these changes, it is critical for organisations to review their practices relating to communication and coordination with labour hire service providers concerning OHS compliance. Furthermore, organisations should review their insurance contracts, and contracts with labour hire service providers, to determine if they have entered into a contract which provides an indemnity or insurance arrangement in respect of penalties imposed under the OHS Act.