

LK GOVERNANCE UPDATE

MARCH 2023



MAKING PSYCHOSOCIAL SAFETY A PRIORITY

CLAIRE CLUTTERHAM

Physical safety in the workplace has been at the forefront of employers' minds for decades. The consequences of physical safety failures are obvious and range from a loss of productivity or difficulty retaining and recruiting staff to death and serious injury. It is unequivocally accepted that employees who arrive at work in good physical condition are entitled to go home in the exact same way.

Whilst safeguarding physical wellbeing in Australian workplaces rightly remains critical, in recent years the conversation has shifted toward understanding wellbeing and mindfulness in the workplace, with both public and private sector employers (and employees) cognisant of the role psychosocial safety plays with respect to both employee wellbeing and productivity. To state the obvious: employers are likely to achieve greater levels of productivity if they have a workforce that is engaged and feels valued.

Building a psychologically safe workplace takes time and effort and is about much more than offering discounted gym memberships, a lunch-time yoga class or a bowl of apples in the kitchen. In fact, legislation requires employers to actively identify psychosocial risks and hazards in their workplaces and implement effective controls and measures to eliminate or minimise them.

A CHRISTMAS GIFT: THE WORK, HEALTH AND SAFETY (PSYCHOSOCIAL RISKS) AMENDMENT REGULATIONS

In late December 2023, the *Work, Health and Safety (Psychosocial Risks) Amendment Regulations (Psychosocial Regulations)* came into force. The Psychosocial Regulations do not make it more complicated to do business. Rather, they focus employers' attention on **how** to do business.

What is a psychosocial risk or hazard?

Regulation 55A of the Psychosocial Regulations sets out a reasonably broad definition of a psychosocial hazard as one that arises from or relates to the design or management of work, a work environment, plant at a workplace or workplace interactions or behaviours, and which may cause psychological harm (physical harm may also arise).

Psychosocial risks are covered in Regulation 55B. They are risks to the health or safety of a worker or other person arising from a hazard. The Psychosocial Regulations impose a duty to eliminate or minimise the hazard and the risk of that hazard. This is consistent with existing legislative duties with respect to physical safety, but it is arguably more complicated to implement given that psychosocial hazards, risks and consequences are harder to identify, measure and manage.

The Regulations and the *Work, Health and Safety Act (2012)* provide a useful framework pursuant to which employers can develop management strategies. The relevant questions are:

1. What duties are owed?
2. Who owes them?
3. What is reasonably practicable?
4. What is meant by control measures?
5. What needs to be done?

What duties are owed? Who owes them?

The three relevant categories of duty holders are:

- persons conducting a business or undertaking
- workers
- officers

Businesses and organisations, *being persons conducting a business or undertaking*, owe duties to employees, contractors and other persons in attendance at the workplace to eliminate or minimise hazards and risks to safety by taking reasonably practicable steps.

Workers (including employees, contractors, subcontractors, apprentices, work experience students and volunteers), through acts or omissions, must take reasonable care of their own safety and that of others, and comply with the reasonable instructions, policies and procedures that the person conducting a business or undertaking sets in relation to health and safety.

The duties owed by **officers** are higher. Depending on the type of role they hold, people may qualify as an officer all the time or some of the time. Section 9AD of the Corporations Act sets out who may be regarded as an officer. In addition to a director or secretary of the corporation, an officer is someone who makes or participates in making decisions that affect the whole, or a substantial part, of the business of the corporation, or who has the capacity to affect significantly the corporation's financial standing, or in accordance with the instructions or wishes of the directors of the corporation are accustomed to act.

This construction is important when considering delegated authority. For example, if the company secretary takes annual leave and delegates his or her responsibility to someone else for the duration of that period of leave, then the delegate will be an officer during that period and required to understand and act in accordance with the higher duties imposed by the law.

It is important to understand that in the context WHS, officers are not safety representatives or safety officers. They are those directly prescribed as such by the corporation.

Officers must be proactive about psychological safety. They need to conduct due diligence with respect to safe systems and methods of work to understand the psychological hazards and risks facing the business and take active steps to control them and measure the effectiveness of those controls.

For example, officers should:

- understand the requirements of WHS legislation and their own duties
- ensure that the business is appropriately resourced to manage risks
- ensure that those resources are being used
- ensure the business has effective reporting processes for incidents and hazards and that staff are familiar with these processes and how to engage with them
- continually monitor the effectiveness of those processes.

“... employees who go to work in good physical condition are entitled to go home in the exact same way.”

What does ‘reasonably practicable’ mean?

Human beings are all different. We react in different ways to different problems, to different people and to different situations. Eliminating (or even minimising) every single unique psychosocial hazard or risk that every single unique person may experience is a complex task and probably unachievable. The legislation requires those who owe a duty to do what is reasonably practicable.

What is reasonably practicable involves an assessment of something that is or was at a particular time reasonably able to be done in relation to ensuring health and safety, taking into account and weighing up all the relevant matters.

Those relevant matters include:

- the likelihood of the hazard or risk concerned occurring
- the degree of harm that might result from the hazard or the risk
- what is known or ought reasonably to be known about the hazard or risk and how it might be eliminated
- the availability and suitability of ways to eliminate or minimise the risk
- the cost associated with available ways of eliminating or minimising the risk, including whether the cost is grossly disproportionate to the risks.

What is a control measure?

Control measures are steps that are taken in connection with eliminating, reducing or minimising the hazard, or eliminating the likelihood that the risk will be realised.

Regulation 55D of the Psychosocial Regulations sets out a series of factors that must be considered prior to determining the most appropriate control measures to implement to eliminate or minimise the hazard.

These include but are not limited to:

- the duration, frequency and severity of the exposure of workers and other persons to the psychosocial hazards
- how the psychosocial hazards may interact or combine
- the design of work, including job demands and tasks
- the systems of work, including how work is managed, organised and supported
- workplace interactions or behaviours
- the information, training, instruction and supervision provided to workers.

A psychosocial hazard might include long working hours around mandated deadlines. Where the need to work long hours over a period are largely beyond the control of the organisation, risks may be mitigated (for example in the case of long hours, the risk of burnout, fatigue, depression) by doing some of the following:

- hiring more resources (possibly temporary resources)
- awarding additional days of leave after the completion of the project
- having an ongoing dialogue with employees to ensure a work life balance is achieved as much as possible

While 'peak periods' of high intensity work are anticipated in some industries (e.g. year-end reporting, audit season, harvest), for those organisations where there is always high pressure and demand, consideration should be given to what adjustments can be made to ensure they remain in compliance with the Psychosocial Regulations.

What to do next?

If your organisation doesn't already have one, a risk register is a critical tool which can be used in this context to identify:

- Potential hazards (e.g. long working hours)
- Frequency of exposure
- Typical length of exposure
- Severity of exposure
- Presence of other hazards
- Effectiveness of current controls
- What further controls are necessary
- Responsibility for actioning further controls
- Timing of controls
- How and when effectiveness of controls will be measured

WHS policies should also be reviewed. How accessible are they, and do staff understand them? Is more training required? If there was a recent incident, was the effectiveness of the policies also reviewed? Reviewing, testing, measuring and improving policies should be done frequently, but this process takes on greater importance in the aftermath of an incident.

“While peak periods of high intensity work are anticipated ... adjustments can be made to ensure compliance with the Psychosocial Regulations.”

The Psychosocial Regulations are in their infancy. Despite that, because of the breadth of their application it is expected that they will be tested in the courts before very long. Key questions surrounding the concept of reasonably practicable when it comes to risks you cannot necessarily see, how and when workplace interactions and behaviours may create psychosocial hazards and risks and what qualifies as an effective control in this context will hopefully be answered, providing important clarity to employers in relation to this continually emerging workplace issue.

Key Contacts:

Claire Clutterham
E: cclutterham@lk.law
T: +61 8 8239 4640

Madeleine Harland
E: mharland@lk.law
T: +61 8 8239 4657