

Occupational Health and Safety Act

LEGAL LIABILITY

The Roles of the CEO 16(1) and the 16(2)s in the Workplace



Most CEO's and managers have at some time opened their Occupational Health and Safety Act and read Section 16 and then perhaps not given it another thought? In order to prevent unfortunate incidents which may lead to criminal or civil liability, let's unpack what the Act says to really understand.

1.0 **SECTION 16 of the OHS ACT**

Section 16 of the OHS Act states the following:

- 16. Chief Executive Officer charged with certain duties
 - 16.1. Every chief executive officer shall as far as is reasonably practicable ensure that the duties of his employer as contemplated in this Act are properly discharged.
 - 16.2. Without derogating from his responsibility or liability in terms of subsection (1), a chief executive officer may assign any duty contemplated in the said subsection, to any person under his control, which person shall act subject to the control and directions of the chief executive officer.
 - 16.3. The provisions of subsection (1) shall not, subject to the provisions of Section 37, relieve an employer of any responsibility or liability under this Act.
 - 16.4. For the purpose of subsection (1), the head of department of any department of State shall be deemed to be the chief executive officer of that department."

Safety issues in our workplaces are governed by South African legislation which must be complied with. So what if we have a board of directors, or if we have a body corporate? Who will be responsible for the health and safety in the workplace and might have to face the "long arm" of the law should an unfortunate incident occur?

Section 16(1) defines the CEO as the person who is responsible for the overall management and control of the business; this appointment is referred to as the 16(1) Appointment.

Therefore, if a company has a board of directors, the board must decide who will be the person with the most authority. The OHS Act will consider this person to be the 16(1) or the CEO as defined in Act.

According to the Act:

- Every chief executive officer shall as far as is reasonably practicable ensure that the duties of his employer as contemplated in this Act are properly discharged.
- Without derogating from his responsibility or liability, a chief executive officer may assign any duty contemplated in the said subsection, to any person under his control, which person shall act subject to the control and directions of the chief executive officer.
 - This allows for the Appointment of a 16(2).
- The provisions of this section shall not, subject to the provisions of Section 37, relieve an employer of any responsibility or liability under this Act.
 - Section 37 of the Act stipulates that whenever an employee does or omits to do any act, which would be an offence for the employer of such employee to do or omit to do, the CEO would be seen the accountable person. Refer to 2.0 below.
- For the purpose of this section, the head of department of any department of State shall be deemed to be the chief executive officer of that department.

Although there is only one CEO, the Act allows this person to appoint another person or persons as a 16(2). Therefore, the 16(2) shall act subject to the control and directions of the chief executive officer. After appointment they will be legally bound to help and assist the CEO (Section 16(1)) with safety management over these designated areas. The appointment as a 16(2) simply means as per the Act that the CEO has appointed a senior staff member in the company / branch to ensure the OHS act is complied with and meets all legal requirements.

The responsibility and liability remains with the CEO who must ensure, that the duties imposed by this Act on the employer, are properly discharged. The legislator clearly wants to ensure that these health and safety duties are properly delegated by the CEO.

The CEO can delegate responsibilities to the 16(2) but cannot delegate accountability.

The intention of the legislator is to enforce an official legal structure within the organisation. These prescribed structures largely assist with the proper delegation of health and safety responsibilities within the business environment.

To facilitate effective safety management within the business or organisation, the roles and responsibilities of the above mentioned persons should be clearly defined, documented and communicated. In order to meet this responsibility, Section 16(1) and 16(2) appointees should familiarize themselves with all statutory requirements stipulated by the Occupational Health and Safety Act and regulations.

It is therefore, advisable to introduce a 37(2) contract if you have contractors on your site and that your employees fully understand the scope of their duties and that everything reasonably practicable has been done to ensure the health and safety of the workers.

2.0

SECTION 37 of the OHS ACT

Section 16(3) makes provision for the CEO to be relieved of his or her responsibility and liability under certain circumstances as stipulated in Section 37. Section 37 basically regulates who is liable in the case where an employee or mandatory (including contractors) does not comply with the requirements of the Act.

According to the Act:

Section 37(1)(c) of the OHS Act in summary states that if an employee commits a contravention of the Occupational Health and Safety Act, the employer shall be presumed to have done or omitted to do that act, and the fact that he issued instructions forbidding any act or omission shall not in itself be accepted as sufficient proof that he took all reasonable steps to prevent this conduct.

This effectively means that the employer will be held responsible and liable, unless:

- the employee was acting without the permission of the employer; or
- it was not within the scope of the authority of the employee; or
- all reasonable steps were taken by the employer or any such user to prevent any act or omission of the kind in question

This is also applicable to a contractor, referred to as a mandatory, that is appointed to work for the employer where the employer will be held responsible and liable, unless the parties have agreed in writing to the arrangements and procedures between them to ensure compliance by the mandatory to the requirements of the Act, hence the need for the Section 37(2) Agreement between the parties.

3.0

SECTION 9 of the OHS ACT

Section 9 places a duty on employers to ensure that all persons who are not in their employment (such as contractors) are not exposed to health and safety hazards.

It therefore goes without saying that organisations are still responsible to ensure that contractors

are not exposed to hazards whilst conducting work on their behalf, even if they have entered into a Section 37(2) agreement.

Further, the Construction Regulations also place duties on clients (the employer organisation) to manage, audit and supervise contractors on their sites.

It is quite clear therefore that it was never the intention of the legislator that an organisation escapes liability in respect of the health and safety of its contractors by signing the agreement but rather that it only limits the employers' liability in the cases where the contractor contravenes the Act. The employer is still ultimately responsible to ensure that all parties on his site are not exposed to hazards, and could face penalties if this duty is not fulfilled.