ENVIRONMENTAL FINES

Enforcement actions completed by the U.S. Environmental Protection Agency (EPA) during the 2011 year resulted in agreements by alleged environmental violators to implement $19 billion in pollution control measures. The fines resulted in levies of $168 million in civil penalties. Here in NZ the situation is on a much reduced scale but the impact is non the less just as severe. There have been hundreds of cases particularly in the matter of dairy farm effluent. So much so, that we are of a mind to assist dairy farm owners. We understand that a typical fine has been not less than $45,000.

ENVIRONMENTAL SOLUTION CONCEPT

What we propose to research is the practicability of providing dairy farm owners a low cost, or if possible a cost-neutral solution for their effluent problems. At present nearly all farmers endeavour to control the nitrogen levels of fertiliser so that they do not cause undue stress on local waterways. At the same time, they use spreading of effluent onto pasture land or draining it into large cess pits. It is our opinion that these measures whilst better than nothing are just not fixing the problem. It would be much better to have physical controls in place to prevent contamination of land near waterways and to prevent or minimise admittance to waterways by proper drainage systems using buffer fencing with low risk or reduced grazing patterns. In fact, we believe that Government subsidies could be or are readily available to make this “a no brainer.”

BEWARE LARGE FINE FOR SACKING

All Clients are warned to take extra care when dismissing staff. It costs you a dollar or two and a few minutes of your time to telephone us for advice and clarification. In simple language you must not dismiss a worker unless s/he has been given an opportunity to explain and a fair hearing with written warning. Your employment rules must be robust and not a 4 page document that you have paid some lawyer or employment agency or consultant $1250 for.

Two recent cases in Christchurch need to be considered. A cannabis smoker was awarded $13k compensation for wrongful dismissal when the employer did not follow correct procedures. In another case a firm was ordered to pay $24k for unfair sacking. You should note that wrongful dismissal is very likely to result in the worker getting about 6 months wages.

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SUMMIT SYSTEMS LIMITED

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The Degree of Control – Occupational Health & Safety Act

This article is open to debate as at least one Judge in NZ does not agree with the concept of degree of control. Refer to DoL vs Eban Norman case where the judge required us to strike out all references to the degree of control yet at the same time agreed to allow the Dept of Labour to call a member of its Head Office staff as an expert witness to enforce a prosecution which will go down in the annals of history as a disgraceful event with less than zero community benefit. In plain language it is generally accepted by most Health and Safety Practitioners that in a workplace “the more you do, the less liable you are and the less you do, the more liable you are.”

The Degree of Control is different to the Duty of Care that we discuss in another issue. But it also invokes responsibilities for all parties on a site. As stated previously, the Act makes it clear that ignorance cannot be used as an excuse and that managers, owners, supervisors and all in charge of work at a worksite are obligated to prevent serious harm (injury). The Act therefore enforces strict liability. In plain language this means that it does not matter if you did not know, did not want to know, or otherwise did not have the ability to know the safety laws. Furthermore, proof of intention is not required. In plain language an inspector does not have to prove anything relating to your intentions in the matter of laying information (bringing a prosecution).

Let me try to discuss Degree of Control and spell out in simple and plain language what this means. Imagine you are the manager of a large industrial site or supermarket or similar and there is a huge open space for parking vehicles. Provided all ordinary vehicles can come and go with ease and without limitation on access then it is deemed to be a public space. In our view it is unlikely that the Dept of Labour would try to bring a prosecution on the owner of the site in the event of an injury to a person parking on the site provided that the owner had made correct and adequate provision for parking spaces, entry, egress, exit etc.

The moment that you put a security fence around the parking area you are assuming full responsibility for the area and must identify all risks, problems and hazards. You are obligated to assess them, then eliminate, isolate, minimise, mitigate or control - without fail. Now, all of that may sound harsh and nonsensical to the average person brought up under benevolent socialistic laws that prevail in NZ. Nevertheless, it is based on International laws, (HSE laws are somewhat similar to Old Testament laws). The best way to reduce your liability is to have formal contract documents with other parties signed off to make them fully responsible for their work and staff. This should leave you free to carry on with your business without fear of huge fines.

ARE YOU YET RESPONSIBLE FOR THE TRESPASSER?

The former legislation provided Accident Compensation for the Burglar or Criminal that happened to sustain an injury doing his or her criminal work. This has been changed so that the burglar or criminal cannot get ACC if s/he gets an injury in his or her criminal activity. But the trespasser can possibly still make you liable for an injury on a site that is not a large farm. But be careful and think long and hard. If you are a farmer with a large site that the burglar or trespasser can easily get onto then you now have much less liability under the recent amendment legislation. But the same may NOT be true for a commercial or industrial site where you have considerably more potential to control public access.

OSH / DOL INSPECTORS HAVE REGARD FOR PROPER REPORTING

We have tried to tell clients many times that they should hand over the reporting process to us in the event of a serious harm or suspected serious harm. It costs you and us almost nothing to get an informed yet anonymous opinion from an inspector as to the views of the Department. The Inspector will do research and respond with a reliable indication as to the potential culpability (wrongness or guilt) within hours. Whilst the initial indication is not an official ruling, it is usually helpful so that we do not waste time in doing a lengthy report which a lesser one will probably suffice.

Let us say yet again that a high quality management system with reporting procedures and proof of annual auditing has much to commend to the Department. In a recent case we were given the facts relating to an injury or harm and made the initial report on landline 0800 20 90 20. We made it clear at the time we were not sure if there was a serious harm (we were awaiting a clinical opinion) and that a full report would be given within 7 days. The victim had his hand jammed under a concrete slab in the red zone at Christchurch during building demolition work. One of our senior staff then completed a full investigation and report within 2 days. Within just 3 more days, the client received a letter from DoL saying that no further action by the Department would be taken.

This is the best way to avoid a long and stressful wait. Please let us help you. We urge clients not to try and be clever on their own. We can cite cases where clients have tried and failed. A few of course, have succeeded on their own.

DELIVERY OF GOODS TO YOUR SITE

If you are getting a courier van arriving then it is very much different to a truck with a hiab or forkhoist to unload at a building site. If you fail to have a formal agreement in place for such work, you could easily be liable in the event of an accident. The agreement should specifically state that the delivery firm accepts full responsibility for the delivery vehicle plus the unloading process and any lifting machinery.

FALL PREVENTION BLITZ

We are informed that the Dept of Labour staff will be having a blitz on all work where workers could be or are working at heights. We further understand that a very large construction company has issued warnings to all staff that any work of 900 mm or more above ground level must be protected to prevent a fall. This is in spite of the fact that the Building Act 1991 specifies a height of 1.2 metres for a barrier or protection. Height training should be given to NZQA 15757 or equivalent appropriate unit standards.

FURTHER BLITZ ON FARM BIKES AND PROTECTIVE GEAR

We are also informed that the Dept of Labour will be visiting farms to check on farm bikes. Please make sure that all staff are issued with a proper helmet that complies with the AS/NZS standard for compliant helmets. New Zealand recognises three international standards for motorcycle helmets: US Snell (M 2000), European (ECE 22.05) and Australian (AS 1698). Where possible see that 4 wheelers have a roll over protective structure (ROPS) and a seat belt. Staff must be trained in how to drive bikes on steep land and in particular, how to avoid capsize. For further information on proper standards for adequate personal protective gear we suggest that you go to www.rideforever.co.nz/gear/safety-approved-gear/

THE OLD GUY WHO IS IMPACTING YOUR EXPERIENCE RATING

We are informed that several large clients are being badly affected by experience rating due to old hands suffering joint injury or degeneration due to age, football injuries of the past, or an accumulation of injuries plus arthritis / rheumatism. There is no easy answer to this problem but the result is that the client can easily be loaded with $100,000 of experience rating penalty for a person off work for several months duration. The best way to avoid getting into this predicament is to make sure that you obtain a copy of the applicant's ACC record before you hire a new worker. Simply get the applicant to phone ACC on 0800 222 776 to ask for a copy of his or her ACC record to be faxed to your fax number, before you finalise the appointment. Do not take this matter lightly!

If you already have the worker on deck and have failed to do the above then you have two other options. One is to put the worker onto rehab light duties where this is possible. The second option is to have a meeting with the worker (you must follow HR protocols very carefully). The objective will be to get the worker to agree to move out of your company to a new job doing work that is more suitable. Remember to contact us and do not try to do this on your own. It is possible to get a relocation grant from WINZ in some cases and we have worked through this issue with several clients in the past.