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Legislative requirements for the SA Construction Industry - Principal and Subcontractors

The Occupational Health and Safety Act section 37(2) - Mandatary Agreement

As mentioned in a previous article regarding *the legislative requirements in the South African construction industry*, section 37(2) of the Occupational Health and Safety Act 85 of 1993 (OHSA) makes reference to a written contractual agreement entered into between a **client or principal contractor** and a *(sub)contractor* in terms of work and/or services to be rendered, subject to the terms and conditions of the mandatary agreement. In this blog we will focus on the purpose of a mandatary agreement and the legal obligations associated with such an agreement.

What is a Mandatary Agreement?

- Mandatary, **not *mandatory*,** refers to a person or organisation with whom an agreement is concluded.
- The definition in the OHS Act includes the wording "including an agent, a contractor or a subcontractor for work, but without derogating from their status as employers in their own right".
- Vicarious liability is a form of secondary or imposed liability, where someone is held responsible for the acts or omissions of another person.

What is the purpose of a Mandatary Agreement?

- The mandatary agreement is signed by the two parties, and states that the client has put in place certain health and safety rules and regulations in order to ensure compliance on a specific site. It is the prerogative of the client to expect all contractors to adhere to these rules and regulations. The mandatary agreement is signed by both parties and kept on file as record.
- Section 37(1) of the OHS Act places full responsibility and liability on the employer in respect of compliance, unless a Mandatary Agreement has been signed between the client and contractor, imposing instructions from the client on the contractor to prohibit certain acts or conditions that would be in contravention of the OHS Act. Only when the agreement has been signed, can full liability and responsibility be transferred to the contractor for acts performed by the contractor contrary to the Act.
- The Mandatary Agreement between the client and contractor ensures that both parties involved accept responsibility and liability for health and safety compliance on site.

What are the legal obligations for a Principal Contractor?

The Mandatary Agreement, by definition, is an agreement stating that a (sub)contractor complies with all relevant legislation as specified by the client or principal contractor. Should the client or principal contractor be in contravention of the law, it may directly affect the compliance of the (sub)contractor as well. The onus is thus on the (sub)contractor to ensure that they are familiar with legislative requirements, and that they adhere to these requirements.

Section 37 of the OHS Act presumes that an employer may "escape" legal liability if the employer/client or principal contractor can prove the following three points:

- Firstly, that the (sub)contractor did or did not conduct work, and/or acted *without permission* from the client or principal contractor, which resulted in the (sub)contractor acting in contravention of the law;
- Secondly, that the (sub)contractor operated outside the scope of work agreed upon, outside their authority, and that the actions of the (sub)contractor were not a condition agreed upon by the parties;
- Further, that the employer or principal contractor took reasonable steps to prevent the conduct of the (sub)contractor. This does not include explicit instructions which prevent unlawful actions, and will not be regarded as sufficient reasonable steps. However, a written agreement between the client or principal contractor and the (sub)contractor will be regarded as reasonable, and must be signed by both parties to be legally binding.

Understanding the legal protection of a Mandatary Agreement

The Mandatary Agreement provides an employer/client or principal contractor the means of legal protection should the (sub)contractor wilfully and knowingly act in contravention to the law. This, specifically, places the responsibility on the (sub)contractor and not on the employer/client or principal contractor.

It is important to note, however, that an employer or client / principal contractor can never waive their responsibility or legal obligation to comply, regardless of the agreements signed. Section 41 of the OHS Act states that an employer who allows an employee to work in an unsafe work environment or allows an employee to work in contravention of legislative requirements, will still be held liable even if the employee has indemnified the employer in writing. The only two instances in which employers can indemnify themselves are in terms of sections 10(4) and 37(2) of the OHS Act.

Should non-conformance on the part of the (sub)contractor be reported to the Department of Labour, the employer/client or principal contractor will be placed under scrutiny to determine whether they too are in contravention. The Mandatary Agreement is essentially an agreement between the two parties to encourage good OHS practice; however, it should not be regarded an indemnity or “get-out-of-jail-free card” for either party, but rather a mutual agreement to comply with the provisions of the OHS Act.

What does vicarious liability mean for employers?

Employers must understand that by becoming an employer, they become responsible for the actions and omissions of their employees. The employer employs people to work “through” him/her. This means that the actions, or omission of actions, will reflect on the employer as well as on the employee.

It is the responsibility of the employer to ensure that the employee conforms to certain requirements of legislation, in order to remain within the bounds of law. A duty of reasonable care lies with the employer to ensure that all matters in terms of law are adhered to; if not, it is the duty of the employer to rectify such non-adherence.

For further information, refer to the Occupational Health and Safety Act and relevant Regulations. Regulations that form an important part of the construction industry are the Construction Regulations, Environmental Regulations for Workplaces, General Safety Regulations and Administrative Regulations.

In conclusion

Businesses especially in the Construction Industry are encouraged and advised to familiarise themselves with the applicable legislation, regulations and by-laws, which will assist employers to understand the demands of the industry better. Key legislation to consider includes the OHSA, Construction Regulations 2014, General Safety Regulations and General Administrative Regulations.

SERR Synergy assists business owners with a comprehensive OHS service which creates and continuously develops a health and safety culture and system aligned with the internal policies and goals of the business. We have a dedicated and qualified team that implements health and safety legislation, and assists with small- to large-scale OHS projects, concerns or aspects.

Our OHS services include the development, implementation and maintenance of a health and safety compliance programme for Principal Contractors and Agents (Construction and Mining sites), Sub-contractors (Construction, Transport, Chemical and Petroleum industries) and General Industries such as farms, agricultural schools, retail stores, hotels, warehouses, restaurants, etc.

About the Author: Inge-Marie joined our team in August 2018 and currently holds the title 'Occupational Health and Safety Officer'. She is registered with SACPCMP as Candidate Construction Health and Safety Officer and holds a SAMTRAC certificate and B.Com Business degree from UNISA. She has more than eight years' experience in the construction and health and safety industry, specialising in roof work, telecommunication and working at heights. She is currently responsible for various industry-specific clients, including construction, manufacturing, chemicals and oil, as well as wireless internet service providers. She compiles OHS files, risk assessments and fall protection, emergency and evacuation plans and conducts regular internal audits for clients.