

**Contract
Relationship
Management**

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Introduction

Most work activities are covered by the Health and Safety in Employment (HSE) Act 1992. Various work situations exist. The guidance in this document is focused on 'self-employed' people who are engaged to work on a contract basis.

In this guide, "contractor" refers to a person who works as a sole trader, corporate entity, or on some basis other than as an employee.

If the person that is engaged to do work is described as 'self-employed' for tax or other purposes, the person engaging will have duties as a principal under the Act.

Section 18 of the Health and Safety in Employment Act 1992 creates a duty for principals to contracts that apply to these situations, and this brief guidance has been prepared to inform and help principals and contractors to meet their respective duties for contractor safety.

Who is a principal? Who is a contractor?

A "principal" in terms of the Health and Safety in Employment Act 1992 is an individual or a corporate entity who *engages* any person (other than an employee) to do any work **for gain or reward**.

This usually requires a contractual relationship in which the principal pays for the work of the person engaged. The duty under section 18 is then placed on the person able to ensure relevant obligations are performed through that contractual relationship.

It follows that a person engaged by a principal **for gain or reward** is a contractor. The major exception to the definition of a "principal" is when a householder engages someone to do work on his or her home. As an example, if you hire a plumber to fix a blocked drain in your home, you are not liable under the Act for the safety and health of the plumber while the work is carried out.

"For gain or reward"

The contractor must be engaged "for gain or reward" in order for section 18 to apply. Case law has found the "gain or reward" must move directly from the principal to the person or company engaged through the contract.

The contract need not be written, and all terms do not need to be explicit, but there must be contract formation in the normal legal sense of an offer, an acceptance of the offer, and a mutual transfer of value (the "gain or reward").

"Gain or reward" need not be financial. It could be payment in kind, an exchange of labour or services, or (as mentioned above) the benefit gained from a service or warranty agreement.

The association between the principal and the contractor must be clear and direct.

What is the duty?

A principal has a duty to a contractor, a sub-contractor and their employees. The diagram in Appendix 3, Figure 1: Typical principal / contractor relationships, sets these out. Section 18 of the Act creates the duty requiring principals to a contract to take "all practicable steps" to ensure contractors, subcontractors and their employees are not harmed while undertaking work under the contract.

As the legal requirement is that all practicable steps be taken, a failure to take only one practicable step may be a breach of the Act, and may result in enforcement action.

The legal nature of the relationship between you and any person working for you or on your behalf should be clarified and included in the terms of the contract.

It is important to note the principal cannot contract out of obligations owed under section 18 by purporting to pass the duties on to contractors or subcontractors. Contractual clauses that attempt to do this will not be accepted by the courts.

If you are considering any attempt to limit your responsibility for the health and safety of others, you should if necessary, seek legal advice.

Contractor or Employee?

Section 18 applies where there is a contractual relationship between principals and self-employed people or business units such as companies and partnerships; generally called "independent contractors".

The duties owed under section 18 extend to the employees of any such self-employed person, or business unit.

Where a company or other similar business unit is engaged to do work, there is a clear distinction between engaging such a business and hiring an employee. However, where an individual person is engaged, the distinction may be less clear. Questions might arise on whether the duty is owed as a principal under section 18, or as an employer under different provisions in the Act.

Where there is a contract between a principal and a self-employed person, the duties of a principal under section 18 apply. Where there is an employer/ employee relationship in existence, then the duties of an employer/employee relationship apply.

It may not always be clear whether a person is an employee or a self-employed contractor.

Nor is it always of particular significance to the parties concerned, as long as their respective needs are being met. However, in the event of a dispute, or an investigation after an accident, a court may have to determine the nature of the relationship.

Indications of being an employee

The key question courts ask is whether the person performing the work is in business on their own account. This involves a variety of legal tests and the courts look to the reality of the working relationship, as opposed to the contractual "label" parties have attached to it.

A work relationship is likely to be an employment relationship between employer and employee if the:

- intention of the employer and the person performing the work is to form an employer/employee relationship, as shown in any written agreement or correspondence and/or by the behaviour of the parties to it
- employer or their agent controls the hours worked (how and when the job is done)
- payment is made by the hour, week, etc, as opposed to a lump sum
- employer or their agent has the power to hire and fire
- employer makes the profit or loss from the enterprise
- employer deducts ACC premiums and PAYE tax on behalf of the employee
- employer supplies materials for the work
- person performing the work cannot make a profit or loss from the way in which the work is carried out (for example, they are not paid on a "per job" basis)
- employer owns or leases the equipment needed
- person performing the work is bound to one employer at a time and is expected not to compete with or offer his or her skills to competitors of the employer.

Indications of being a self-employed contractor

It is more likely to be a contract where the person performing the work is classified as an independent contractor (with the duties of a self-employed person) if all or most of the following features are present in a work relationship:

- the intention of the parties to the contract is not to form an employer/employee relationship, and this is reflected in the contract and/or the behaviour of the parties

- payment is made in a lump sum at the end of the job, or in instalments as the job progresses and the contractor:
- controls how and when the job is done
- can choose who does the job and hire other people without specific approval from the other party
- pays any tax, ACC or insurance themselves
- can make a profit, or suffer a loss directly
- supplies equipment and materials
- is free to accept similar work and materials from a number of sources at the same time.

The duty to record and notify accidents and incidents and actively deal with identified hazards

Section 25 of the Act requires employers, self-employed persons and principals to maintain a register of accidents and serious harm in a prescribed form. They must record in it the details of every accident or incident that harmed, or might have harmed a self-employed person while at work and contracted to the principal, or as a result of any hazard to which the person was exposed while at work and contracted to the principal. All incidents of serious harm to a self-employed person while at work and contracted to the principal must be notified and reported to the regulator: this may be Worksafe NZ or CAA. Note that this duty applies to both contractors AND principals.

Reporting accidents, incidents and hazards to the principal

The principal should ensure they are advised by contractors of all accidents and incidents, whether or not these arise from hazards or potential hazards over which the contractors exercise control and that there is a clear method for reporting.

Additionally there will often be situations where a contractor is dependent on the principal's control of hazards, or on their provision of hazard information. For effective hazard management, there needs to be efficient transfer of information between the parties.

This can only be achieved with any certainty through clearly designated reporting lines and the establishment of procedures to deal with situations that are reported on.

Contractors or principals who are also employers are required to follow the formal hazard management processes of sections 7-10 of the HSE Act.

Although these steps are not directly applied to the duties of principals under the Act, the courts have held they are relevant when considering the scope of the principal's duty to take "all practicable steps".

Information-sharing between principal and contractor

Information sharing between principals and contractors will be closely related to the monitoring of contractor performance. What is appropriate will vary according to the circumstances.

In a situation where the contractor is engaged for their particular expertise and the principal has little effective control over the place of work, the principal might not be expected to take detailed operational steps in relation to the contractor's specialised functions. This may reduce the need for monitoring or information sharing in the context of selection, induction and monitoring.

As an example, a principal that had subcontracted building work was held not to be liable for failing to ensure on-site supervision was provided. The principal was found to have taken all practicable steps in relation to contractor selection, having an adequate induction process and providing safety information prior to work commencing that identified the specific hazards.

In another case, a principal who had carefully stipulated appropriate requirements for confined space entry in advance, made extensive contractual provision for health and safety, and checked its contractor's safety procedures, was held not to be liable when

members of the contractor's specialised confined entry team were involved in an accident arising from defects they had noticed on site.

Every contract should be considered for its own unique circumstances: where there are site specific rules, a practicable step that principals should not overlook is to be engaged in actively monitoring safety performance and compliance of the contractor while doing the work they were engaged for.

Information to be given by the principal about the workplace or procedures

The section 18 duty means there is a duty to inform of any **foreseeable hazards**, even when the principal is not an employer. Information to be given by the principal may be summarised as including the following:

- hazards that are known to exist, or the principal ought reasonably to know about, in the place of work and may affect the contractor or their employees
- restricted areas
- any work permit procedures, e.g. hot-work permits
- any company rules that the contractor will be required to comply with during the contract
- emergency procedures that exist and first-aid facilities available,
- procedures for reporting and recording of accidents/incidents and hazards, and
- specific job instructions and work methods.

The practicable steps are unlikely to include instruction on any specialised work for which the contractor has been employed.

This means that, for example, having taken sufficient care to engage a competent diving contractor to inspect the piles of an estuary bridge, and that the work is notified to the regulator, a principal would not usually be expected to provide instructions on diving practices or equipment.

However, the principal would be expected to advise on such matters as traffic volumes over the bridge, the likelihood of flash flooding, or peculiarities in the method of construction that may create hazards for divers.

Information to be given by contractor about the workplace or procedures

Information to be given by the contractor will usually be contained in a health and safety plan. For any significant contract the contractor should submit a plan of how they intend to manage health and safety in relation to the proposed work, before the contract is formed.

What is a significant contract will depend on the circumstances. For example, in the forestry industry a contract to fell and remove several trees from an isolated farm paddock would probably not require a formal plan. However, clearing a similar stand of trees from beside a busy highway or extracting a woodlot by a cable-logging operation would each require a detailed plan.

Similarly, in the construction industry, the building of a single office partition might require elementary health and safety considerations, but for the refitting of an entire floor of an office building or the construction of a new building, the courts would likely require a detailed plan.

For any project, it should as a minimum contain the following details:

- hazards identified and control measures to be taken
- emergency procedures
- training, experience and qualifications of employees (including certificates of competency where required)
- procedures for reporting and recording of accidents/incidents and hazards.

The health and safety plan needs to be adequate and appropriate to the hazards and circumstances of the particular contract. As mentioned above, this means a standard plan intended to apply to all contracts is unlikely to be appropriate. The plan should

describe the lines of accountability and responsibilities for supervision.

The plan should contain the following information on hazard management, in addition to any other topics required by the principal:

- information on hazards that the contractor is bringing onto or may be creating (e.g. hazardous substances, noise, dust, electrical hazards, etc)
- safety provisions for other people who may be affected by the work, including people in the vicinity and the public
- safety equipment that may be necessary, including standards which apply, and
- restricted areas, security and control of access to the work area.

The contractor will need to provide regular updates on progress with the health and safety plan.

Pre-start briefings

Where appropriate, contractors and their employees should be given induction training regarding the workplace or site, and the opportunity to ask about hazards and risks. The nature of induction training will vary according to the types of hazards and associated risks.

In some cases, basic induction training will be sufficient, where in others training will need to be more rigorous.

To help identify risks and to plan the work safely, the principal and/or contractor may use job registration forms, or checklists specific to the project, for example, a farm map detailing overhead wires, fences, and other hazards associated with flying.

This helps to assess the risks associated with the activity and define control measures and precautions required (e.g. safe systems of work, method statements, use of specific equipment).

The number and type of questions will depend on the work complexity and hazards involved.

The following was provided by Garth Gallaway on 4th October 2015:

1. The farmer has an obligation to ensure that no contractor (the pilot/ag company) comes to harm while engaged by him. If there is a hazard that the farmer ought to have been aware of (for example, a wire) then there is a duty on the farmer to (at the very least) make the pilot aware of the hazard. But if the hazard (the wire) can be eliminated then it should be. If not then it should be isolated (by making sure the pilot does not have to fly in that area and warning the pilot). If it cannot be eliminated or isolated, then it needs to be minimised (I suggest by making it visible and/or warning the pilot).

2. The company of the pilot (assuming he/she is an employee) have obligations to ensure that the pilot does not come to harm; which involves discussion with the farmer about hazards on the property; putting in place a system where the farmer is required to identify those hazards and ensuring that they are communicated to the pilot. And making sure that the pilot can identify hazards appropriately.

Appendices:

Appendix 1	Farmer (principal) and contractor agreement
Appendix 2	Access, storage and airstrip checklist
Appendix 3	Contract Management Summary

Appendix 1 Farmer (principal) and contractor agreement

The purpose of this agreement is to ensure that contractors and farmers clarify, and give regard to, their respective responsibilities under the Health and Safety in Employment Act 1992.

For the purpose of this agreement, "farmer" means "farmer or his/her agent".

1. The farmer affirms:

That the farmer has advised the contractor of any significant hazards in the workplace that he/she controls.

That should the farmer become aware of any significant workplace hazard or unsafe practice undertaken by the contractor, the farmer shall take appropriate actions before work begins or continues.

This applies to the area in which the contractor or the contractor's employees are working, whether relating to the workplace that the farmer controls or to that under the control of the contractor.

The checklist for Aerial Application (attached) has been used for recording actions taken by the principal in identifying hazards and informing the contractor of these.

2. The contractor affirms:

That the contractor and the contractor's employees are trained and competent to carry out the work assigned in a safe manner.

All plant, machinery, tools and safety equipment that may be used by the contractor and/ or the contractor's employees are in good repair, are suitable, available and used at all times when necessary to do so.

That the contractor has developed adequate emergency procedures suitable for the foreseeable emergencies that might arise.

That the contractor has been advised by the farmer of any significant hazards in the work place that the farmer controls, that might cause serious harm to the contractor or the contractor’s employees/assistants.

If the contractor or the contractor’s employees/assistants identify any hazards on the farmer’s property which are likely to cause them serious harm, access to the farmer’s land and/or work on it shall not proceed until appropriate control actions are taken.

Besides taking their own control actions, the contractor or the contractor’s employees/assistants shall, where necessary, request the farmer who controls any such hazards to take appropriate actions before access or work begins.

Contractor Signed

Farmer Signed

Date:

Appendix 2

Access, storage and airstrip checklist

Access and storage

All access ways to the storage bin are clear, graded as necessary, and are free from long grass and in such condition that they will afford sufficient traction for vehicles to operate safely.

There is sufficient room for the truck to turn without damaging the aircraft operating area.

The storage area or bin is dry and has a waterproof cover or roof.

The farmer or an agent will be on hand to ensure the fertiliser is covered after delivery.

Airstrip

The airstrip surface has been checked for branches, wire, potholes, damage from stock, cowpats and other surface irregularity.

The grass is short, either cut or grazed by sheep.

Stock has been removed.

The strip has been checked by driving over it at 80 km/h.

Flight paths

The flight path is clear of fences, wires and trees etc.

Contractor airstrip checks

Strip length:	Strip slope:
Altitude:	Equivalent strip length:
Weather satisfactory	Wind indicator satisfactory
Runway surface satisfactory	Runway width satisfactory
Runway approach/take-off paths safe	
Fences/obstacles/wire clearance satisfactory	
Braking action satisfactory	
Job hazard briefs	
Runway hazard brief received from owner	
Job hazard brief received from principal	

A 'No' answer requires attention before the airstrip is used.

Farmer sign-off (Can be received electronically)

Airstrip owner sign-off(Can be received electronically)

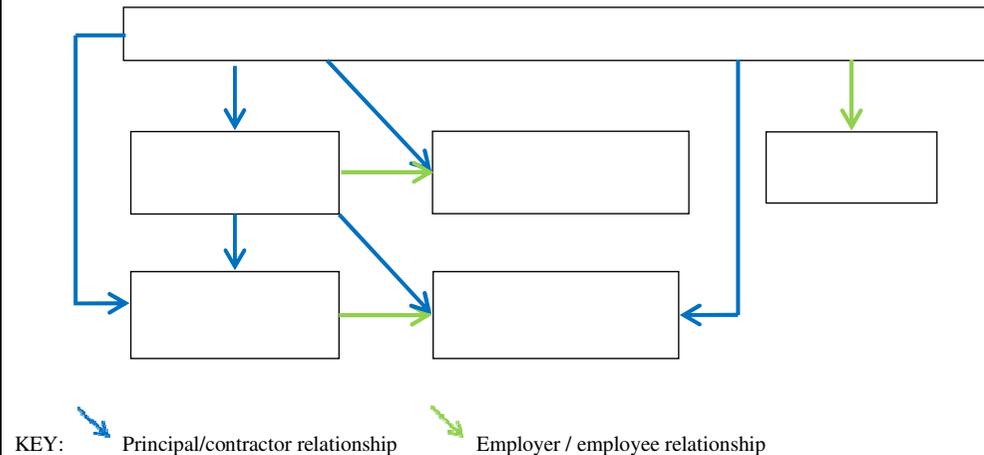
Appendix 3

Contract Management Summary

Duties of principals and contractors:

If you out source or contract work out 'for gain or reward' you have duties under Section 18 as a principal.

Figure 1: Typical principal / contractor relationships



See above on next page

A principal has overall control and coordination of a contract and cannot distance themselves from what is occurring in a place of work simply because the employer is more directly related to and responsible for the employees or subcontractors carrying out the work. The principal should implement policies and procedures that ensure the HSE duties, responsibilities and safety standards that are identified are adhered to.

The principal and contractor should implement the following processes prior to selecting or tendering out a work contract:

1. Scoping the Work

Determine what work is being contracted out and consider the pre-tender implications. Pre-tender activity includes; assessing the HSE hazards, risks and controls to prevent harm, and the contractor competencies necessary.

2. Pre-qualifying the Contractor

Pre-assessment of potential contractors is essential prior to engaging their services. A pre-tender questionnaire will provide assessment of the contractors HSE policies and plans, personnel, sub-contractors, equipment, qualifications, HSE performance (accident rates, enforcement actions, and safety audits), insurances, and compliance to industry standards. An approved preferred contractor list can be constructed from this information.

3. Contractor evaluation, selection and negotiation of terms

The principal must judge the competencies of the contractor by reviewing and evaluating the contractor's pre-tender documentation and management systems information. This period provides time to adjust the requirements of the contract and the overall contract HSE plans if necessary.

4. Awarding the contract

The final contract agreement includes; the final HSE plan incorporated in to the contract, a nominated contact person, joint safety meetings, hazard reporting, accident reporting, notifiable works reporting, permits to work, exchange of information concerning hazards, emergency procedures, training inductions, visitor controls, HSE milestones, confirmation and applicability of CAA rule part requirements and final signing and dating of the contract document.

5. Contract compliance

The principal must monitor/check the on-going compliance of the work being carried out by the contractor. Regular meetings should be held to review and audit safety performance. The principal must inform the contractor of any newly identified hazards, unsafe practices, accident reports or changes in the works programmed.

6. Post-contract reviews

On completion, the principal should review the quality of work against the job specifications and terms of the contract and provide feedback and learning to the contractor on their safety performance. Information should also be fed back into the preferred contractor process for possible future selection of that contractor for similar work.

I: Typical principal / contractor relationships

