

September 2019

## Enforceable undertakings frequently asked questions

QUESTION	ANSWER
1. What is an enforceable undertaking?	<p>Enforceable undertakings are an alternative to prosecution when a duty holder has breached (including an alleged breach) the <i>Health and Safety at Work Act 2015</i>.</p> <p>It is a way for a duty holder to voluntarily make a binding agreement with us to take action for the breach they have made.</p> <p>This agreement outlines the actions the duty holder will take to address the breach.</p>
2. Why does WorkSafe accept enforceable undertakings?	<p>We accept enforceable undertakings in certain circumstances because they allow a duty holder to make improvements for workers, the industry or sector and the community, as well as make amends to any victim(s).</p>
3. Who can apply for an enforceable undertaking?	<p>Any duty holder who has breached the <i>Health and Safety at Work Act 2015</i> can apply for an enforceable undertaking. This includes PCBUs, workers, officers etc.</p> <p>It is a voluntary application. We will not force an enforceable undertaking on you.</p> <p>Information about how to apply can be found in <i>Enforceable Undertakings Practice Guide</i>. You can find this on the enforceable undertaking page on the WorkSafe website.</p>
4. What needs to be in an application?	<p>The key part of the application is letting us know the actions you intend to take to address the breach.</p> <p>We will consider whether these actions will have an acceptable outcome for everyone involved. We will then decide whether to accept or reject the proposed enforceable undertaking based on this.</p> <p>Information about what needs to be in an application can be found in the <i>Enforceable Undertakings Practice Guide</i>.</p>
5. What does the question 1.7 in the application form mean?	<p>Question 1.7 in the application form asks duty holders to:</p> <p><i>'detail the injury sustained or illness suffered by victim(s) or other(s) as a consequence of the contravention or, (as applicable) the potential for fatal injury or future fatal illness'.</i></p> <p>You only need to respond to the second part of this question if there was no immediate injury or illness, but the magnitude of the alleged contravention was such that it had the potential to have fatal health and safety consequences.</p>
6. What are the benefits of an enforceable undertaking?	<p>The benefits of an enforceable undertaking include:</p> <ul style="list-style-type: none"> <li>- addressing the issues that lead to the breach</li> <li>- making changes to benefit workers or the workplace</li> <li>- making amends to victim(s)</li> <li>- promoting high standards of workplace health and safety in your industry or sector, and</li> <li>- avoiding prosecution.</li> </ul>

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7. Is applying for an enforceable undertaking the same as admitting guilt?	<p>No, applying for an enforceable undertaking does not mean that you are admitting guilt for the breach.</p> <p>However, as part of an enforceable undertaking, you must acknowledge the issues that lead to the breach. This must include details of the relevant steps/measures that should have been taken.</p> <p>In addition, if the enforceable undertaking is agreed to, you will be expected to agree to a joint public statement should we consider one necessary.</p>
8. What happens to the charges that have been filed against me by WorkSafe if I apply for an enforceable undertaking?	<p>We will continue to follow the prosecution process until the application for an enforceable undertaking is complete.</p> <p>If we accept the enforceable undertaking application, the prosecution process will stop. However, if the application is declined, the prosecution will continue.</p> <p>When there is a genuine interest in pursuing an enforceable undertaking, we will take all reasonable steps to delay any court proceedings until the enforceable undertaking process is complete.</p> <p>Please also refer to Question 9.</p>
9. What happens if I express an interest in/apply for an enforceable undertaking before charges are filed?	<p>Irrespective of having received a registration of interest or an application, WorkSafe will continue with its investigation, the enforcement decision-making process, and /or any legal proceedings as an independent but parallel process.</p> <p>This means that we will try to determine an application for an enforceable undertaking before the 12 month timeframe for filing charges, but if this is not possible we may proceed with filing charges.</p> <p>Any decision to withdraw charges will be made when a decision is made on the enforceable undertaking application.</p> <p>Please also refer to Question 8.</p>
10. What is a 'Section 47' offence?	<p>A 'Section 47' offence refers to Section 47 of the <i>Health and Safety at Work Act 2015</i>. Section 47 describes behaviour that is considered reckless and may expose any individual to a risk of:</p> <ul style="list-style-type: none"> <li>- death</li> <li>- serious injury, or</li> <li>- serious illness.</li> </ul> <p>If we believe that the breach is a Section 47 offence, we cannot accept an enforceable undertaking.</p>
11. What is the 'suitability assessment'?	<p>The suitability assessment helps to decide whether an enforceable undertaking is the right type of enforcement outcome for the breach, under the specific circumstances. We use it at the start of the process after you have expressed an interest in an enforceable undertaking, but before you submit a formal application.</p> <p>We have several measures we use to assess suitability. If two or more of these apply to the breach, we are unlikely to accept an application for an enforceable undertaking.</p> <p>We will let you know the outcome of the assessment once it is done. You are still able to submit an application for an enforceable undertaking, regardless of the suitability assessment outcome.</p> <p>More information about the suitability assessment can be found in <i>Enforceable Undertakings Practice Guide</i>.</p>
12. What does WorkSafe look for in an enforceable undertaking?	<p>An enforceable undertaking agreement should include commitments to promote good health and safety practices for:</p> <ul style="list-style-type: none"> <li>- the workers and/or workplace</li> <li>- the wider industry or sector</li> <li>- the community.</li> </ul> <p>Further information about what an application must contain, and what we will take into account when considering an application can be found in the <i>Enforceable Undertakings Practice Guide</i>.</p>

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<p><b>13. Can an enforceable undertaking be altered?</b></p>	<p>Yes, an enforceable undertaking can be altered after it is accepted. This is called a variation. We must agree to any variations before they are made.</p> <p>A request to vary an enforceable undertaking must be given to us in writing. We will only consider variations:</p> <ul style="list-style-type: none"> <li>- that do not alter the spirit of the original undertaking</li> <li>- where there has been a material change in your circumstances and/or</li> <li>- if complying with the terms of the undertaking is later found to be impractical.</li> </ul> <p>Information about varying an enforceable undertaking can be found in <i>Enforceable Undertakings Practice Guide</i>.</p>
<p><b>14. How long does an enforceable undertaking last?</b></p>	<p>An enforceable undertaking will continue until all terms in the agreement have been fully completed.</p> <p>Specific agreed timeframes will vary from case-to-case. Enforceable undertakings will generally last as long as it takes for you to complete the terms. We will help you to set a timeframe for completion, taking into account:</p> <ul style="list-style-type: none"> <li>- the health and safety matters involved</li> <li>- the duty holder, and</li> <li>- the commitments made in the undertaking.</li> </ul>
<p><b>15. How will you know if I am complying with an enforceable undertaking?</b></p>	<p>When an enforceable undertaking is agreed, we will set up a monitoring schedule. We will use this, and our own inspections and oversight, to ensure an enforceable undertaking is meeting its objectives.</p> <p>You are responsible for providing all reports and evidence on time as detailed in the schedule.</p>
<p><b>16. What if I breach the terms of an enforceable undertaking?</b></p>	<p>Failing to comply with an enforceable undertaking is an offence under section 126 of the <i>Health and Safety at Work Act 2015</i> (the Act).</p> <p>If we believe that you have not complied with any aspect of an enforceable undertaking, we may take enforcement action. We may also bring proceedings for the breach of the Act.</p> <p>If the Court believes the terms of an enforceable undertaking have been breached, there are several actions that can be taken. These are detailed in Section 127 of the Act.</p>
<p><b>17. Does WorkSafe take victims' views into account?</b></p>	<p>Yes, if we receive an enforceable undertaking application, we will contact the victim(s) to confirm any information the enforceable undertaking applicant has provided about their views.</p> <p>If the victim has not provided any information, we will contact them to seek their views on the proposed undertaking.</p> <p>The views of the victim(s) are important and will be actively considered as part of our decision making process.</p>
<p><b>18. Why are enforceable undertakings public?</b></p>	<p>We are required by the <i>Health and Safety at Work Act 2015</i> to make the outcomes of enforceable undertakings publicly available on our website. This includes when we accept an enforceable undertaking and our reasons for accepting it.</p>
<p><b>19. Can personal or business details be withheld from the public record of an enforceable undertaking, on request?</b></p>	<p>We are bound by <i>The Privacy Act 1993</i> and <i>The Official Information Act 1982</i> to remove personal information as required. This includes redacting information to protect the victim(s) of the breach.</p> <p>Unlike the courts, we do not grant name suppression. This means that WorkSafe will not generally withhold business details – the expectation is that the enforceable undertaking will be published in full.</p>
<p><b>20. I don't think I did anything wrong, but can I apply for an enforceable undertaking?</b></p>	<p>We will not accept an enforceable undertaking where a duty holder denies responsibility for the breach or is unwilling to make a joint public statement on the matter.</p> <p>While an enforceable undertaking is not an admission of guilt for the breach of the Health and Safety at Work Act 2015, we require a duty holder to acknowledge the behaviours or faults that lead to the breach happening.</p> <p>Please also refer to Question 7.</p>

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21. Should I wait until the investigation is concluded before starting work on an enforceable undertaking?	<p>No, we encourage you to start thinking about enforceable undertaking activities early.</p> <p>Any positive actions undertaken (over and above compliance with the law) after the alleged contravention has occurred, but before an enforceable undertaking is accepted, can be included in the undertaking application and will be given positive consideration.</p> <p>However, this does not guarantee acceptance of the enforceable undertaking.</p>
22. Is acceptance of an enforceable undertaking guaranteed?	<p>No, applications for enforceable undertakings will be considered on a case to case basis. It will depend on the circumstances around the breach and how you intend to address these.</p>
23. Who makes the decision to accept a proposed enforceable undertaking?	<p>The Head of Specialist Interventions is the enforceable undertakings decision-maker. However, they can nominate that a decision is made by WorkSafe's Senior Leadership Team (or a sub-set of that team).</p>
24. My enforceable undertaking application was declined – can I get more information on this?	<p>We will give you written notice of our decision on your application, including the reason for the decision.</p> <p>If you have further questions regarding a declined application, you can contact our Enforceable Undertakings Team: <a href="mailto:EnforceableUndertakings@worksafe.govt.nz">EnforceableUndertakings@worksafe.govt.nz</a></p>
25. Where can I get more information on enforceable undertakings?	<p>Guidance information about enforceable undertakings, including the list of approved undertakings and our enforceable undertaking policy, can be found on the enforceable undertaking page on our website.</p>
26. How long does the enforceable undertaking application process take?	<p>Time-frames will vary depending on the individual circumstances of the breach and at what stage of the process you have expressed interest.</p> <p>An application will not be considered until the investigation into the breach has finished, and the Section 47 review and suitability assessment are complete. This could take some time.</p> <p>We will let you know when we are ready to consider an application. Once an application is received, the process of considering it is relatively quick.</p>
27. Do I need a lawyer to draft a proposed enforceable undertaking and submit an application to WorkSafe?	<p>There is no requirement to do this. However, an enforceable undertaking is legally binding and has serious consequences if breached, so we do recommend seeking legal advice if you have any concerns.</p>