Sentencing Guideline published

The long-awaited Sentencing Council's guideline for health and safety offences has now been published and will come into effect on 1 February 2016. This signals a perpetuation of the recent trend for increasing fines for health and safety failings and, as with sentencing for environmental offences, heralds the onset of a far more stringent analysis of offending behaviour and the financial position of the offender. Emphasis is placed on the risk or likelihood of harm with fines intended to have a "real economic impact". Significantly, whether "the fine will have the effect of putting the offender out of business will be relevant"; and "in some bad cases this may be an acceptable consequence".

The approach of the courts in calculating the significant fines anticipated remains to be seen but what is clear is that organisations will be required to submit detailed financial information, including turnover figures, pre-tax profit, director remuneration, pension provision, assets and debt exposure for the past three years (including, where appropriate, that of any associated organisation, which may lead to an examination of any group structure). Failure to produce the required financial information, or the production of insufficient or unreliable financial information, is likely to attract an adverse reaction. The court will form its own conclusions from the circumstances and information available, including if the offender is able to pay any fine.

It is not difficult to understand why some argue that this will inevitably lead to lengthy sentencing hearings in court as the stakes are high.

Organisations facing substantial fines for such offences may also have to report such matters in their annual accounts with inevitable reputational damage as a consequence.

Of perhaps greater personal significance for directors and senior managers is the prospect of an unlimited fine or a custodial sentence if they are found guilty of the consent, connivance or neglect in the commission of the offence by the company. The thresholds for custodial sentences for individuals would suggest a far greater likelihood of imprisonment for the most serious breaches.

The prospect of very substantial fines on conviction for health and safety offences, coupled with the potential for custodial sentences for involved officers, has led some to question the future role of corporate manslaughter prosecutions. Convictions for corporate manslaughter demand a number of evidential hurdles to be satisfied to secure a conviction. By contrast, health and safety offences are far easier to prosecute. If real impact can be achieved via prosecution, conviction and sentencing for such breaches, prosecutors may be more inclined to take that route.
Two things, in particular, are brought into sharp focus in the guideline and demand the Board’s attention now:

- the requirement for a proactive, co-ordinated and fully supported approach to health and safety is crucial. The guideline makes it clear that persistent offenders or those who adopt a cowboy approach to health and safety will face harsher fines, whilst single offenders with an otherwise exemplary record and an enthusiastic, forward-thinking and structured approach to compliance which is fully endorsed from the top down are likely to be dealt with in a more lenient manner, although the fine must still be large enough to be a punishment and deterrent.

- given the stark difference between the current and future regimes, many of those currently subject to proceedings may be well advised to enter early guilty pleas, in appropriate cases, in order to expedite their cases (the guideline will apply to sentencing after 1 February 2016, regardless of when the offence was committed). Sentencing under the current regime may be preferable.

The message is clear – regulatory authorities expect health and safety to remain a key corporate priority. Directors must ensure that it is at the top of their agenda.

Further information can be found in our bulletin.

Sentencing in Scotland

As we have reported before, the Sentencing Council’s guidelines apply only in England and Wales and have no formal legal standing in Scotland. That being said, it is generally felt that in sentencing (particularly for UK-wide offences) Scottish courts will have regard to appropriate guidelines when deciding how to deal with a convicted offender. In a recent case before the High Court in Scotland, however, Lord Carloway reminded Scottish judges that:

“Definitive Guidelines from the Sentencing Council of England and Wales often provide a useful cross check for sentences in Scotland especially where the offences are regulated, as here, by a UK statute and there are identical sentencing maxima. They should not, however, be applied in Scotland in a rigid or mechanistic fashion…”

Currently, judges in the Scottish criminal courts sentence on a case-by-case basis, although certain sentencing options and sentencing for particular offences are prescribed by parliament. As we have reported previously, a new Scottish Sentencing Council, chaired by Lord Carloway, has been set up to promote consistent and transparent sentencing practices by the Scottish courts, including through the use of sentencing guidelines. It will meet for the first time on 14 December 2015. It is too early at this stage to say with any certainty how closely Scottish courts will follow the Definitive Guideline. This is not entirely satisfactory and some clarity on this would be welcome. Watch this space.

New international health and safety standard expected in 2016 – an update

We reported last time on the new international health and safety standard expected in 2016. The project committee set up by the International Organisation for Standards with responsibility for the development of the new worldwide standard has confirmed that the ISO 45001 can now move to the Draft International Standard stage and is on course for its anticipated publication date of October 2016. The Draft International Standard will be circulated to all ISO members who will then have three months to comment. It can then proceed directly to publication or to the Final Draft International Standard stage.

ISO 45001 aims to:

- prevent injury and ill health
- cut workplace fatalities worldwide
- proactively improve occupational health and safety performance.

Occupational health risk management

The construction industry has long been seen as a high risk industry with a difficult health and safety record. Significant improvements have been made in recent years with frequent Health and Safety Executive (“HSE”) initiatives targeting the sector, aiming to raise awareness of health and safety issues and to highlight the common misunderstanding of what “occupational health” means, but there is still work to be done. HSE have now (20 November 2015) published new guidance to encourage better management of occupational health risks, urging the industry to "put an end to the hundreds of construction workers that die of occupational diseases every month".

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The guidance offers employers and others advice on:

• what “health risk management” means
• the roles in managing health risks at work
• what might need to be done to comply with the law
• when an occupational health service provider might be needed and what can be expected from them
• the benefits to businesses and their workers of a well-managed, skilled occupational health service
• what health surveillance is and when it needs to be carried out.

Much has been said about occupational health recently – and not just in relation to the construction industry. HSE is determined to improve workplace health; recent statistics produced by them show that around 1.2 million workers in the UK are currently suffering from a workplace illness with around 500,000 new cases each year. Whilst figures show a decline over the 10 years to 2011/12, there appears to have been a levelling out in this more recently, prompting the HSE to state that there can be “no room for complacency…. It goes without saying that HSE needs those with responsibility in this area to assist it in its mission to improve the health of the working population” (BMJ 17 November 2015).

The message is clear – HSE expects all involved in the workplace to take responsibility for both safety and health. Both must be uppermost in the minds of employers, in particular, and as the recent trends in sentencing (see above) show, those who adopt a cowboy approach do so at their peril.

DSHAR consultation opens

As anticipated in our last bulletin, HSE has published (on 28 October 2015) its consultation on proposals to replace the Dangerous Substances in Harbour Areas Regulations 1987 (and its associated ACOP and guidance) with new shorter regulations, which are more relevant to society today. The proposal is part of the UK government’s Red Tape Challenge to streamline and modernise regulation, whilst retaining current levels of protection.

The consultation closes on 23 December 2015.

HSE publishes consultation on EMF exposure

HSE has published (on 20 November 2015) its consultation on the implementation of the EU Directive on the minimum health and safety requirements regarding the exposure of workers to the risks arising from physical agents – electromagnetic fields (“the EMF directive”). HSE proposes to introduce the Control of Electromagnetic Fields at Work Regulations 2016 (“the 2016 regulations”) to transpose the requirements of the directive not already covered by existing legislation.

The EMF directive, which must be implemented by 1 July 2016, lays down minimum requirements for the protection of workers from risks to their health and safety arising, or likely to arise, from exposure to electromagnetic fields (“EMF”). EMF is a type of non-ionising radiation present in virtually all workplaces and which is produced whenever a piece of electrical or electronic equipment (i.e. TV, food mixer, computer, mobile phone, etc.) is used. The EMF directive covers EMFs with frequencies up to 300 gigahertz (GHz) and requires that dutyholders assess the levels of EMF to which their workers may be exposed against a set of specific thresholds. These are called Action Levels (“ALS”) and Exposure Limit Values (“ELVs”). Different frequency ranges have different ALS and ELVs.

Although all businesses will have to undertake an initial assessment of EMF levels, it is anticipated that the majority will not need to take any additional action to reduce the risk from EMF. This is because either their workplaces consist only of low level and safe sources of EMFs or because, in those workplaces where workers are exposed to higher levels of EMFs that might cause harm, EMF levels should already be assessed and robustly managed.

The 2016 regulations require all employers to:

• ensure that exposure to EMFs is below ELVs
• assess the levels of EMFs to which employees may be exposed
• assess the risks of the employees’ exposure and eliminate or minimise those risks. Employers must ensure they take workers at particular risk, such as pregnant workers and workers with active or passive implanted or body-worn medical devices, into account
• provide information and training on the particular risks (if any) posed to employees by EMFs in the workplace and details of any action the employer is taking to remove or control them. This information should also be made available to their safety representatives as appropriate
• take appropriate action when employees are exposed to EMFs in excess of the ELVs
• provide health surveillance as appropriate.

ELVs may be exceeded in certain circumstances where employees are adequately protected and the 2016 regulations allow HSE to exempt specific work activities from the ELVs where certain conditions are met.

Employers should familiarise themselves with the requirements of the 2016 regulations and start preparing for its implementation now.

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Transparency in supply chains – an update on the Modern Slavery Act

In previous editions of this update, we have reported on the transparency provisions in the Modern Slavery Act 2015. The government has now issued guidelines on this as a result of which we have produced an updated guide, which is available here.

Corporate Manslaughter Prosecutions

King Scaffolding Limited – the company was recently sentenced, having pleaded guilty to a charge of corporate manslaughter on 28 April 2015 following the death of an employee who had been working on the roof of the company’s headquarters. The company was fined £300,000, payable over 10 years.

Linley Developments Limited – the company pleaded guilty to a charge of corporate manslaughter following the death of an employee when a structurally unsound wall collapsed on him on site. In addition, Trevor Hyatt (Managing Director) and Alfred Barker (Project Manager) each pleaded guilty to breaching Regulations 28 and 31 of the Construction (Design and Management) Regulations 2007. The company was fined £200,000 plus costs of £25,000. Trevor Hyatt was given a 6-month prison sentence (suspended for two years) and fined £28,000 plus costs of £7,500. Alfred Barker was given a 6-month prison sentence (suspended for two years) and ordered to pay costs of £5,000.

Recent enforcement activity

Piotr Kowalczyk, 7 December 2015 – Mr Kowalczyk, was sentenced to six months’ imprisonment, suspended for two years and ordered to pay costs of £12,404 after pleading guilty to offences under Section 3(2) of the Health and Safety at Work etc Act 1974, after a third party contractor fell from an incorrectly fitted ladder whilst inspecting a boiler. Mr Kowalczyk, who could not speak or read English and was not conversant with current British health and safety standards, had been tasked with carrying out refurbishment and improvement works at the building, which included fitting a propriety loft ladder. Following sentencing, the HSE inspector responsible for the case said:

“I believe the sentence passed today indicates how serious the court has considered the offence, and this should send a message to all involved in this type of work, which includes property owners, letting agents and maintenance contractors that it is essential to use tradesmen competent in all tasks asked of them. Failure to do so could result in them being guilty of an offence themselves”.

Martin Paul Jacobs, MP Jacobs Limited, 3 December 2015 – Mr Jacobs was fined £5,000 and ordered to pay costs of approximately £5,000 after pleading guilty to an offence under section 37 of the Health and Safety at Work etc. Act 1974 (offence committed with the consent, connivance or attributable to the neglect of a director or similar officer), after an employee fell from a ladder whilst replacing guttering on a two storey building. He was also given a 6-month custodial sentence, suspended for 12 months.

DLP Services (Northern) Limited, 25 November 2015 – fined £14,000 with costs of £1,590 after pleading guilty to breaches of the Construction (Design and Management) Regulations and the Control of Substances Hazardous to Health Regulations. One of their workers suffered severe cement burns to his knees after kneeling on wet flooring to finish it manually. The resultant cement burns required 12 days’ hospitalisation for the employee and ongoing treatment. The HSE investigation found the company failed to adequately assess the risks and implement suitable and sufficient control measures to protect employees from contact with the wet concrete with their skin. In addition, it did not provide suitable personal protective equipment and there were no welfare facilities on site.

Ernest Doe & Sons Limited, 19 November 2015 – fined £750,000 and full costs of £9,155 after an incident which left a worker permanently blind in one eye. The worker had been working with a colleague to re-fit and re-inflate the tyres of a customers’ 4-wheel-drive agricultural vehicle. During re-inflation, one of these tyres exploded, causing him to be blown across the workshop, and to sustain severe injuries to his head and to the right side of his face. The HSE found that the company failed to ensure that adequate instruction, training and supervision were provided to its tyre technicians and that the company also failed to identify and remedy unsafe working practices that had been allowed to become the norm at its tyre depot.

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777 Environmental Limited and 777 Demolition and Haulage Co. Limited, 2 November 2015 – two associate companies have been fined after the death of a worker in London, killed when concrete joists fell on him. Electrician John Walker, who worked for 777 Environmental Limited, met his death while working on a demolition site on Walworth Road, Elephant and Castle, where the Strata Building now sits. The Health and Safety Executive (HSE) prosecuted after it found the principal contractor, 777 Demolition and Haulage Co. Limited, and subcontractor, and also sister firm, 777 Environmental, failed to properly plan, manage and monitor the demolition of the structure. 777 Environmental Limited admitted breaching Section 2(1) of the Health and Safety at Work etc., Act 1974, at an earlier hearing and was fined £90,000. 777 Demolition and Haulage Co. Limited denied the charges but was found guilty, after a trial, of breaching Section 3(1) of the Health and Safety at Work etc., Act 1974 and was fined £125,000. Costs of £167,857 were awarded to HSE.

F&S Freeman Limited, 14 October 2015 – fined after an agency worker suffered life threatening chest injuries when he fell 3.5 metres through a gap in a new floor. An HSE investigation found the airbags being used as a fall protection measure below the gap in the floor were not kept properly inflated and failed to break Mr Quinn’s fall. The company pleaded guilty to breaching Section 3(1) of the Health and Safety at Work etc., Act 1974 and was fined £5,000 and ordered to pay costs of £855.

Health and safety statistics 2014/15

HSE has published its 2014/15 health and safety statistics. Key statistics include:

• 1.2 million people who worked during the last year were suffering from an illness they believed was caused or made worse by their work, of which 0.5 million were new conditions that started during the year.

• 2,538 people died from mesothelioma in 2013 and thousands more from other work-related cancers and diseases such as COPD.

• 142 workers were killed at work. Of the main industrial sectors, construction, agriculture and waste have the highest rates of fatalities.

• 76,000 other injuries to employees were reported under RIDDOR. Of these injuries, the most common kinds of accidents were caused by slips and trips (28%), handling, lifting or carrying (23%) and being struck by moving objects (10%).

• Injuries and new cases of ill health resulting largely from current working conditions cost society an estimated £14.3 billion in 2013/14.

• Further information is available here.