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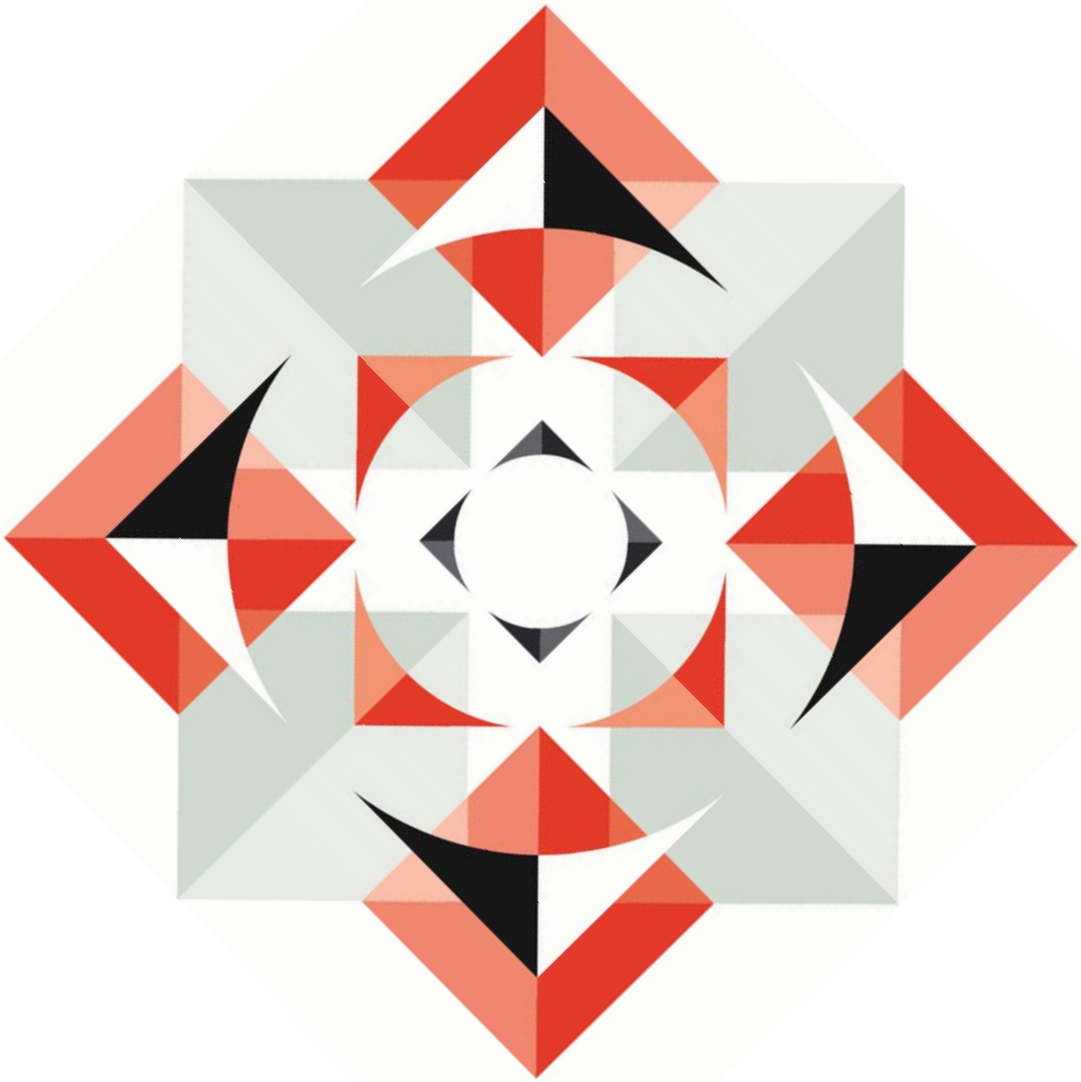
Health and safety in the workplace



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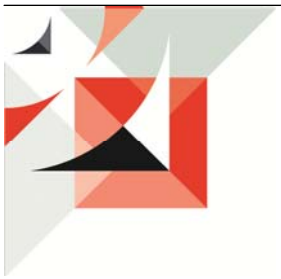

Introduction

With the number of health and safety ("H&S") prosecutions steadily increasing and significant reforms in sentencing for H&S offences and deaths at work, the need for employers to be aware of their H&S obligations couldn't be more important. This Inbrief sets out the key H&S obligations facing employers and the consequences of non-compliance.

Overview

Non-compliance with H&S laws can have a significant impact on an employer's business whether because of detrimental publicity and 'naming and shaming' or the severe sanctions that can be imposed.

The legislation governing H&S in Great Britain is extensive. The bedrock of the law is the Health and Safety at Work etc Act 1974 ('the Act'), which is supported by extensive regulations. Under the Act, employers have an overarching obligation to ensure, as far as is reasonably practicable, the health, safety and welfare at work of their employees and visitors to their premises.

In addition, under common law, employers have a general duty of care to their employees to safeguard their health, safety and wellbeing. This duty of care is often described as an obligation to provide a safe place of work, safe plant and equipment, competent employees and a safe system of work (although this is not an exhaustive list of the duty's components).

A failure to comply with these obligations can result in fines, and in some instances imprisonment, for employers, their employees, managers and directors.

What's the legal framework?

In addition to the Act and the common law 'duty of care', H&S obligations can be found in:

- Regulations made under the Act to expand on and reinforce its provisions, and give effect to European H&S Directives, including:
- the Management of Health and Safety at Work Regulations 1999 ('Management of H&S Regulations')
- Manual Handling Operations Regulations 1992
- Workplace (Health Safety and Welfare) Regulations 1992
- Personnel Protective Equipment Regulations 1992
- Health and Safety (Display Screen Equipment) Regulations 1992, and
- Provision and use of Work Equipment Regulations 1998
- Approved Codes of Practice ('ACOPs')

ACOPs & guidance

Compliance with the relevant ACOP is deemed compliance with the relevant H&S requirements. A failure to comply with the ACOP, though, can be used as evidence of non-compliance with H&S requirements and it will then be for the employer to prove that it is satisfying the requirements in an alternative manner.

The HSE also publishes guidance and circulars concerning H&S matters. These don't have the same legal status as ACOPs but may be referred to as indicators of good practice and compliance with H&S law.

What duties do employers face?

The Act

The Act imposes duties on employers towards their employees, members of the public and others who are affected by their activities. Employers have a duty to safeguard employees' health, safety and welfare at work, as far as is reasonably practicable, including:

- ensuring employees are provided with training, information, instructions and supervision which allows them to work safely
- keeping any place of work under the employer's control well maintained to ensure it is safe to work in and has safe routes for access and exit
- providing a safe working environment with adequate facilities for welfare at work;
- providing and maintaining safe plant and systems of work, and
- ensuring that articles and substances are safely used, handled, stored and transported

Employers with five or more employees are also obliged to:

- prepare and regularly revise a written H&S policy, and inform employees of its existence and of any changes to it, and
- not charge their employees for anything

done or provided for the purposes of complying with H&S law

Management of H&S Regulations

The Management of H&S Regulations require employers to carry out risk assessments to identify H&S risks their employees face while at work (and, if the employer engages five or more employees, to record the findings). Once identified, the employer must then take steps to remove or minimise the risks. It is vital that risk assessments are up to date and fit for purpose; one size certainly won't fit all.

The Management of H&S Regulations also require employers to:

> provide employees with information on the identified risks, the preventive/protective measures taken, and procedures in the event of an imminent danger to those at work and who is responsible for implementing them

> train their employees in H&S matters on joining and whenever the employees are exposed to new or increased risks, and

> appoint an officer responsible for assisting with compliance with H&S. This person need not be an employee, but must be competent to perform these duties, properly informed and resourced.

What powers do the regulators have?

The main regulator is the Health and Safety Executive ('HSE') but individual local authorities (i.e. county, district or borough council) also have responsibilities to enforce H&S law within their jurisdictions, as do certain other governmental bodies ('Regulator'). The Regulator appoints inspectors to implement H&S law, use enforcement powers and bring prosecutions. These inspectors have a wide range of powers, including, the right to:

> inspect workplaces to detect non-compliance and offer guidance

> direct that premises or anything on them be left undisturbed for so long as is reasonably necessary for the purpose of the investigation

> take measurements, photographs, recordings and samples

> conduct interviews

> require the production and inspection of any documents and take copies, and

> seize and render harmless items which they reasonably believe give rise to an imminent risk of serious personal injury

In practice, the Regulator is most likely to investigate serious workplace accidents, organisations with a poor track record and organisations working in particularly dangerous sectors. The police are also involved in fatality cases.

Methods of enforcement

Informal action

Less serious breaches of H&S law are often dealt with by the Regulator informally. This may be through the offer of advice, verbal warnings, letters of advice and recommendations.

Statutory notices

If the Regulator believes that an organisation's breach (or potential breach) is more serious, it can issue a statutory notice and publish its name on a public register (www.hse.gov.uk/enforce/prosecutions.htm). The statutory notices are:

'Improvement notices' - issued to those thought to be in breach, or likely to be in breach, of H&S law, which requires them to take steps to rectify the breach within a specific timeframe.

'Prohibition notices' - issued where the inspector believes the recipient is engaged in an activity which involves a risk of serious personal injury or imminent danger, and requiring the recipient to stop the activity immediately and not resume it until the inspector confirms it is safe to do so.

These notices can be appealed within 21 days of service. However, refusal to comply with their requirements risks criminal prosecution, a fine, and/or imprisonment.

Fee for intervention scheme

The HSE is able to recover the costs of its regulatory functions from those found to be in a 'material breach' of H&S law which results in the service of a statutory notice (including an improvement notice or prohibition notice).

The fee is based on the amount of time that an inspector has spent identifying the material breach, helping to put it right, investigating and taking enforcement action. The hourly rate for the fee is £124. The latest review showed the average charges to be around £500.

What are the penalties for breach of H&S law?

Criminal liability under H&S law

A breach of the Act is a criminal offence. Most breaches are 'strict liability' offences (i.e. there is no need to prove that the offender intended the act to happen or even to show negligence. It is sufficient that the offender caused the act to happen). In some circumstances the accused has to prove that they did meet the required standard.

Prosecution of H&S breaches

The penalty for a breach of H&S law depends on whether the offence is dealt with in the magistrates court or in the Crown Court. In particular:

Magistrates court - maximum term of imprisonment: six months (although legislation has been enacted which, if brought into force, would increase this to twelve months). Fines: maximum £20,000 for offences committed before 12 March 2015. Unlimited fine for offences committed after 12 March 2015.

Crown Court - maximum term of imprisonment: two years. Fines: unlimited in amount.

The courts also have a range of other remedies open to them, such as ordering compensation up to £5,000, disqualifying the offender from holding directorships, a prosecution costs order and a remedial order

In 2013/14 (latest figures available) there were 881 convictions for H&S offences in Great Britain, with an average fine of £18,944. Over recent years custodial sentences have become increasingly frequent and fines have increased.

Corporate manslaughter

An organisation is guilty of an offence if the way in which its activities are managed or organised:

> causes a person's death

- amounts to gross breach of the duty of care owed by the organisation to the deceased; and
- activity of senior management was a substantial element in the breach.

The offence is punishable by an unlimited fine. There have only been a small number of corporate manslaughter convictions, but prosecutions have become more frequent.

Employees, managers and directors

Employees have duties under the Act to take reasonable care for the health and safety of themselves and others who may be affected by their acts/omissions as well as to cooperate with their employer to enable the employer to comply with its duties.

In addition, company officers or managers will be criminally liable if an H&S offence:

- arose due to their 'consent' or 'connivance', or
- was attributable to their 'neglect'

Consent: knowledge and awareness of the circumstances and the risks which caused the failure.

Connivance: knowing and not doing anything about the risks.

Neglect: unreasonable breaching of a duty of care.

Liability is aimed at those in a position of real authority i.e. the decision-makers within the company who have both the power and responsibility to decide company policy and strategy. A director convicted of a breach can be disqualified from being a director for up to 15 years.

Increased fines

New sentencing guidelines for H&S offences, corporate manslaughter and food safety and hygiene offences came into force in England and Wales on 1 February 2016. The guidelines encourage courts to set fines at a level which will cause 'real economic impact' so that both shareholders and boards understand the importance of providing a safe working environment. The guidelines provide sentencing ranges which are linked to the different levels of culpability and harm that can result from such offences, as well as the turnover of the offender. As a result, there is likely to be a significant increase in fines, with the upper end of the range of fines for 'large organisations' (organisations which have a turnover of £50 million or more) being £10 million for H&S offences and £20 million for corporate manslaughter.

What's the risk of a civil claim?

Personal injury claims

Employees who have suffered injury or damage to health may bring personal injury claims against employers. The claimant will need to show that:

- the employer breached the duty of care owed to them
- this breach caused them injury, and
- the injury was a reasonably foreseeable result of the breach

Note that an employer's duty of care extends to the employee's mental well-being. For example, where an employee suffers mental illness or psychiatric injury as a result of stress at work (e.g. because of high workload, or bullying) the employee may have a personal injury claim against the employer. These can be difficult claims for employees to pursue as they have to establish a genuine psychiatric injury, rather than mere anxiety or distress; and in addition the injury must be a reasonably foreseeable consequence of their employer's actions (or omissions).

Vicarious liability

An employer will generally be vicariously liable for the wrongful acts of its employees if committed in the course of their employment. This means that those who suffer injury or damage as a result of the negligence of an employee can bring their claim against the employer and the employee in question.

Vicarious liability potentially extends not only to wrongful acts in the workplace, but also while employees are attending work-related activities – for example, after-work drinks or away days.

Other civil actions

Other H&S-related claims that may be brought against employers include:

- claims for dismissal or detrimental treatment resulting from certain H&S activities (including refusing to work in situations of serious and imminent danger) and 'whistleblowing' on H&S issues;
- claims for disability discrimination (for example, an employer has failed to make 'reasonable adjustments'); and
- claims for 'constructive dismissal', where an employee resigns as a result of a fundamental breach of the employer's duty of care.

Reporting

There are strict rules on record keeping and reporting of accidents and dangerous occurrences which are beyond the scope of this Inbrief.

For further information on this subject please contact:

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