

Health and Safety Newsletter

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Briefing note

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Welcome to the second edition of our Health and Safety newsletter. Once again, we aim to bring you up-to-date with developments relating to health and safety in the workplace.

The issues of stress and sickness absence have attracted considerable attention recently following initiatives from the HSE, the government's consultation on "fit notes" and the important House of Lords decision in *Stringer* on long term sickness and statutory holiday entitlement. To add to this, the impending impact of swine flu means employers cannot afford to ignore their health and safety obligations not least because of the increased penalties for breaches which came into force in January this year.

In this newsletter, we focus on two pieces of health and safety-related legislation. As reported in our May Employment Update the first prosecution has been brought for the criminal offence of corporate manslaughter. The Corporate Manslaughter and Corporate Homicide Act 2007 came into force just over a year ago and we take this opportunity to review what it says and set out practical steps employers can and should take to protect the health and safety of their employees. Secondly, as the smoking ban is now two years old we consider the impact this has had in the workplace.

Finally we take a look at the practical implications for employers of recent cases.

Health and Safety news

HSE Strategy

On 3 June 2009, the HSE published a new health and safety strategy: The Health and Safety of Great Britain: Be part of the Solution. The Strategy states that Great Britain has one of the best health and safety records in the world. However, it also highlights that the figures for 2007/08 show little improvement in reducing injury and ill health caused by work in the last five years.

The key objectives of the Strategy

The Strategy aims to bring together the regulators (the HSE and local authorities), employers and workers to:

- Reduce the number of work-related deaths, injuries and illnesses;
- Gain widespread commitment to what "real health and safety is about";
- Motivate those in the health and safety system to maximise their contribution; and
- Hold those who fail in their health and safety duties to account.

The strategy also sets out the goals aimed at achieving those objectives which include:

- To investigate work-related accidents and ill health and to take enforcement action

to prevent harm and secure justice when appropriate;

- To encourage strong leadership in championing the importance of health and safety. This focus should be on "real" health and safety issues and be distanced from a "jobsworth" approach where health and safety is used as an excuse to prevent certain activities;
- To encourage better training in health and safety issues throughout organisations;
- To reinforce the promotion of worker involvement and consultation in health and safety matters;
- To focus on key issues that will deliver the highest reduction in deaths, accidents and illnesses;
- To adapt approaches to help small and medium-sized enterprises (SMEs) comply with their health and safety obligations;
- To reduce the likelihood of low frequency, high impact catastrophic incidents; and
- To take account of wider issues that impact on health and safety.

The HSE has also confirmed that from September 2009 many of its publications will be published freely on its website which will include its full range of guidance and approved codes of practice.

HSE website launched to prevent work-related stress

Since our last newsletter the HSE has launched a [new website](#) aimed at helping employers prevent work-related stress. The site, which includes content such as advice, guidance and case studies for businesses to follow, comes as result of the growing problem of stress in the workplace. 13.5 million working days were lost in Britain alone last year due to work-related stress, having an effect on the performance of businesses and the health of their employees.

HSE considers that the site also comes at a time where effective management of stress levels could mean significant savings for businesses in the current economic climate.

New Guidance on managing workplace stress

The CIPD, HSE and Investors in People have joined forces to launch [new guidance](#) on the management of workplace stress. The guidance: "Line Management Behaviour and Stress at Work" comes following predictions that the recession will result in a sharp increase in stress. The guidance highlights four main management competencies which aim to help employers save on both human and business costs.

"Fit notes"

The Government has launched a consultation on 28 May on the new so-called "fit notes"

which are set to replace the existing sick notes in spring 2010. The emphasis will be changed so that doctors will be able to indicate whether someone may be fit for some work and what they might be able to do which could include a phased return to work. It will be up to employers to consider all the circumstances in order to decide if they accept that their employee is not capable of work. The consultation closes on 19 August 2009.

Swine Flu

The full impact of swine flu has yet to be felt in the UK, although the WHO has now raised the alert level to pandemic, with many anticipating that the autumn will bring an increased number of cases.

In our May Employment Update we attached a [business continuity checklist](#) which outlined issues employers need to consider and put in place now in order to deal with the potential impact should the worse case scenario take place. We have attached the link for ease of reference and would urge employers to consider the implications and put in place strategies to deal with this. Employers are responsible for the health and safety of their employees. If they fail to put measures in place to help reduce or prevent the spread of swine flu in the workplace they could potentially be liable under the health and safety legislation.

Working Time Directive

Negotiations on amendments to the European Working Time Directive came to an end in April without any agreement being reached between the European Parliament and the European Council of Ministers. This means that, for the foreseeable future, the UK will retain the ability to “opt out” of the 48 hour working week.

Focus - corporate manslaughter

As we reported in our [May Employment Update](#), the CPS authorised the first ever prosecution under the Corporate Manslaughter and Corporate Homicide Act 2007 (“the Act”) when Cotswold Geotechnical Holdings was charged with corporate manslaughter following the death of one of its geologists when a pit collapsed on him. As a timely reminder of employers’ health and safety responsibilities we review what the Act says and what practical steps employers can put in place to ensure that they comply with their health and safety obligations to employees. This is particularly topical in view of the need for businesses to plan for the event of a swine flu pandemic.

The Act came into force on 6 April 2008 and created a new criminal offence of corporate manslaughter. This offence only applies to organisations not to individuals who will continue to be liable under the common law of manslaughter and existing health and safety legislation.

What is corporate manslaughter?

An organisation will be guilty of corporate manslaughter if the way in which its activities are managed or organised: *causes the person's death; and amounts to a gross breach of a relevant duty of care owed to that person.*

An organisation cannot be convicted of the new offence unless the prosecution can prove

that a substantial element of the breach lies in the way the organisation's senior management managed or organised its activities. "Senior management" is defined as those persons who play a significant role in the management of the whole or a substantial part of the organisation's activities.

This is a change from the previous regime whereby in order for a company to be found guilty of the common law offence of manslaughter by gross negligence, the prosecution had to prove that the "directing or controlling mind" of the company (i.e. a senior individual who could be said to embody the company in his actions and decisions) was also guilty of the offence.

What is a "gross breach"?

A "gross breach" is conduct which falls far below what can reasonably be expected of the organisation in the circumstances. There are certain factors which a jury must take into account when deciding whether an organisation is guilty of the new offence, namely:

- whether the organisation was in breach of health and safety legislation;
- how serious the management failure was;
- how much of a risk there was of death occurring.

The Act sets out a non-exhaustive list of factors which a jury may take into account, including whether there were any attitudes, policies, systems or accepted practices in the organisation that were likely to have encouraged a management failure.

What is a "relevant duty of care"?

A relevant duty of care include a duty owed by an organisation to employees or other persons working for the organisation, a duty owed as an occupier of premises and a duty owed in connection with:

- the supply of goods or services;
- carrying out of any construction or maintenance operation;
- carrying out any other activity on a commercial basis.

Whilst the new offence deals essentially with health and safety issues, it is not strictly limited to breaches of health and safety legislation. It is phrased in terms of a breach of duty of care under the law of negligence.

Who does the offence apply to?

The offence applies to all organisations operating in the UK including companies, partnerships, trade unions and employers associations. It does not apply to individuals, such as company directors or managers. However, the common law offence of

manslaughter by gross negligence continues to apply to individuals. If a company is prosecuted the company (and/or its company directors and managers) could still be prosecuted for any breaches of health and safety or other laws.

What are the penalties?

The new offence involves a trial by jury. If convicted, the maximum penalty is an unlimited fine. As it can only be committed by an organisation, imprisonment is not an appropriate penalty.

In addition to imposing a fine, the Crown Court may also make a:

- “Remedial order” requiring the organisation to take steps to remedy the management failure, including any deficiencies in health and safety policies, systems or practices;
- “Publicity order” requiring the organisation to publicise the conviction.

The offence is not retrospective and therefore does not apply to anything done or not done prior to 6 April 2008 and therefore the common law offence of manslaughter by gross negligence will still apply to companies for conduct and events which occurred before this date.

Practical steps

Key practical steps that organisations can take to reduce the risk of health and safety incidents and prosecution under the Act include the following:

- Ensure that health and safety leadership within the organisation meets the standards set out in the joint guidance issued by the Institute of Directors and the Health and Safety Commission;
- Consider whether safety management systems have been successful to date, and whether improvements can be made;
- Consider carrying out an independent audit of health and safety management systems and health and safety compliance;
- Develop an incident response plan. Be prepared to initiate an immediate internal investigation following an incident, and to ensure that documentary and physical evidence is preserved;
- Review the organisation's liability insurance to check that recoverable legal costs incurred under the Act would be covered; and
- Consider ways to strengthen the health and safety culture within the organisation, so that everyone takes responsibility for improving health and safety.

Focus - the smoking ban - two years on

On 1 July 2007, the Health Act 2006 brought into effect a smoking ban in England making it a criminal offence to smoke in a smoke-free place. Similar legislation already existed in Wales, Scotland and Northern Ireland. Two years on, we consider below whether the ban has been a success and what employers need do to ensure that they are continuing to comply with the legislation.

A reminder of the legislation

The smoking ban makes it a criminal offence to smoke on premises which are enclosed or substantially enclosed. There are some exemptions, for example private dwellings, designated smoking bedrooms in hotels and guesthouses and specialist tobacconist shops.

The legislation created the following offences:

- **Smoking in a smoke free place** which carries a fixed penalty of £50 payable within 29 days (discounted to £30 if paid within 15 days) or a fine of up to £200 on conviction by a Magistrates Court.
- **Failure to prevent smoking in a smoke free place** which carries a penalty of up to £2,500 on conviction in a Magistrates Court.
- **Failure to display the required no smoking signs** which carries a fixed penalty of £200 payable within 29 days (discounted to £150 if paid within 15 days) or a fine of up to £1,000 on conviction by a Magistrates Court.

The reasons behind the proposal and the public reaction

At the time of its introduction, the Government emphasised that the rationale behind the introduction of the smoke free law was to protect employees and the public from the harmful effects of second hand smoke. There were many, however, who expressed and continue to express opposition to the smoking ban, in particular the pub industry which feared that the smoking ban would have a serious financial impact on their trade. Organisations such as the "Save the Shisha Campaign" have been campaigning for an exemption for England's 650 shisha bars.

Despite initial and continued opposition, a report released by the Office for National Statistics one year after the smoking ban was introduced suggested that most people supported it. 80% of respondents taking part in their survey agreed with the legislation banning smoking. The survey also suggested that the concerns advanced by the pub industry proved not to be as serious as had been feared, with almost three quarters of people stating that they visited the pub as often as they did before the smoking ban and 16% reporting that they now go more often.

Compliance in the workplace?

In the workplace, 93% of respondents said that smoking had been banned in the building where they worked and 31% reported that no smoking was allowed on the premises or

the grounds where they worked. This suggests that a large number of employers have extended their no smoking policy not only to their buildings but are imposing an entire site ban.

In a report issued by the Department of Health entitled “Smoke free England – one year on”, a number of interesting key findings were presented. These findings demonstrated that:

- 98% of all premises and vehicles inspected between July 2007 and March 2008 were smoke free, complying with the requirements of the law;
- 80% of all premises and vehicles were displaying the correct no smoking signage;
- 80% of businesses said implementation of the law had gone well or very well.

The statistics also show relatively few prosecutions. During the nine months between July 2007 and March 2008, there were:

- 49 fixed penalty notices issued and 8 court hearings for signage offences;
- 477 fixed penalty notices issued and 8 court hearings for the offence of an individual smoking in a smoke free premises or vehicle; and
- 19 court hearings for the offence of failing to prevent smoking a smoke free premises or vehicle.

The Government anticipated that to a large extent, the success of the smoke free legislation would be dependent on self enforcement. Although there are those who have publicly voiced their opposition and their intention to flout the ban, with general awareness of the smoke free legislation being reported at 96% in the Department of Health’s report and with 76% of the respondents supporting the smoke free law, it appears that the Government’s hopes have proved to be achievable.

But what about the smokers themselves? Has the introduction of the smoke free law helped to reduce the number of smokers in this country? The figures in the Department of Health’s report suggest so as they report a 22% increase in the number of successful quitters through local NHS stop smoking services between April and December 2007 compared to the same period in 2006/2007.

A Checklist for Employers

The Government has heralded the smoke free law as a triumph for health and safety and the surveys commissioned into the effects of the smoke free law suggest that it has been a success. It appears, therefore that the smoking ban is here to stay. The introduction of the smoking ban in England was, of course, part of a growing global trend and since its introduction in England, smoking bans have subsequently been introduced in Belgium, Croatia, Denmark, Germany, Hungary, India, Monaco and the Netherlands. Employers

will, by now, be well versed in their obligations to ensure compliance with the smoke free law, however it may be helpful to provide a brief reminder of the key points:

- Review no smoking policies. Two years on, it may be time to assess whether the no smoking policies are working and whether any adjustments are necessary to ensure compliance with the law but also to adopt policies that are realistic and practical. If you don't yet have a no smoking policy, consider drafting one!
- Train staff to understand the law and their responsibilities, ideally this should be included as part of health and safety and induction stage training.
- Ensure that the appropriate signage is displayed where required (including in Company vehicles)
- Give consideration to staff who do smoke and may wish to smoke during the working day, for example are they allowed smoking breaks and do you provide smoking shelters or designated spaces for smoking?
- Update other relevant policies, for example disciplinary procedures and codes of conduct. It should be made clear to staff that any breach on their part of the no smoking policy will be treated as an act of misconduct.
- Finally, as part of a responsible employer's commitment to corporate social responsibility, consider offering counselling and support to employees who smoke in order to assist them to quit.

Cases

Workers entitled to holiday pay while off sick

The long-awaited House of Lords decision in *Stringer and others v HMRC* was handed down this month and has not been good news for employers with employees on long term sickness absence. Their Lordships in overturning the Court of Appeal decision unanimously held that claims for unpaid statutory holiday could be brought under the Employment Rights Act 1996 as an unlawful deduction from wages as holiday pay fell within the definition of "wages". The Court of Appeal had previously held it was only possible to bring this type of claim under the Working Time Regulations which meant it was not possible to claim for previous holiday years. However a claim made on the basis of a series of unlawful deductions can go back several years provided the claim is brought within 3 months of the last deduction.

The House of Lords decision focuses entirely on this issue and the other significant issue appealed from the Court of Appeal, which concerned whether it is possible to accrue and take statutory annual leave during a period of long-term sickness is not specifically addressed. This is because the parties agreed that in the light of the ECJ's decision following referral from the House of Lords, the EAT decision on this point should be reinstated. The ECJ held that a worker was entitled to accrue, take and be paid for

statutory annual leave while on sick leave or alternatively, if they were not permitted to do so, they must be entitled to carry forward the accrued and untaken leave and either be permitted to take it on return to work or be paid in lieu on termination of employment. This means workers on long term sick leave are entitled to take their statutory annual leave during the holiday year and be paid in full for it even if they have exhausted all their contractual and statutory sick pay. This is not good news for employers who will need to revisit their policies on dealing with those on long term sickness absence and may, in some cases, face claims covering several years.

As the Lords did not need to consider the implications of these aspects of the appeal, unfortunately there are a number of issues which are not clear. For example, whether the worker needs to have requested annual leave in order to bring a claim as two decisions of the EAT conflict on this point. It is also not clear how the ECJ decision about carrying over holiday entitlement would be interpreted for example, if the worker was refused a request to take leave, as the Working Time Regulations do not permit this. This is going to undoubtedly result in further litigation until these issues are resolved by the Court of Appeal or the House of Lords.

Defective work equipment

However, another decision of the House of Lords concerning strict liability for defective equipment was better news for employers. In ***Smith v Northamptonshire County Council*** the House of Lords considered the provisions which impose strict liability on employers to ensure work equipment is maintained, in efficient working order and in good repair under the Provision and Use of Work Equipment Regulations 1998 (“the Regulations”).

Ms Smith who worked as a carer and driver for the Council was injured while wheeling a client down a defective wheelchair ramp which had been installed at the client’s home by the NHS. The Council was aware of the ramp and had inspected it but did not own it. She brought a claim against the Council under the Regulations and the key question was whether the Council was liable.

In a majority decision, the House of Lords held that the Council could not be strictly liable for equipment which it did not provide, own, possess or have any responsibility or right to repair. The dissenting judge considered that the ramp came within the definition of “work equipment” and therefore as the claimant was using at work the Council was liable.

This decision means that employers will not necessarily be liable for equipment which is not within the employer’s control and not on their premises. However, it does not mean that employers will never be liable for events which take place on sites outside their control. Employers still have a duty under the Management of Health and Safety at Work Regulations 1999 to assess the risks to health and safety of their employees. In this case the Council had inspected the ramp - if it had not carried out a satisfactory inspection or had identified a defect but not taken any action, it would have faced claims for negligence and under the 1999 regulations. Conversely, the fact that the Council had carried out an inspection of the equipment did not mean it automatically became liable for

its maintenance.

Stress – Head Teacher wins claim

As mentioned above, stress in the workplace continues to be a significant issue for employers. The HSE's launch of a new website and its recent guidance emphasises how important it is for employers to be aware of how to deal with this issue in the current economic climate which is anticipated to cause more cases of stress.

The High Court's decision in *Connor v Surrey County Council* serves as a reminder that employers literally cannot afford to ignore this issue. Here, the Court upheld a head teacher's claim for negligence and awarded her £387,778 in damages, not including interest and past loss.

Mrs Connor worked as a deputy head in 1994 at New Monument Primary School, was promoted to headteacher in 1998 until September 2005 when she ceased work due to ill health. The School was multi-cultural but most of the pupils were Muslim. In 2003 several new members joined the school's governing body, including Mr Martin and Mr Saleem. They sought to monopolise meetings with a view to imposing their own agenda to introduce an increased role for the Muslim religion in school, made offensive verbal attacks and made various informal and formal complaints of racism and "Islamaphobia" and sought to stir up disaffection in the local community by circulating a petition against Mrs Connor.

She brought various claims against the Council including for negligence. The High Court held that from June 2004 the Council ought to have considered that Mrs Connor was at risk of psychiatric injury from stress and it was their duty to put a stop to this. The Council had the power where there is a serious breakdown in the way a school is governed to appoint additional governors and replace the existing governing body with an interim board. These powers could have been used but the Council had not intervened and had disregarded the health and welfare of Mrs Connor and her staff.

We hope that you have found this edition interesting and informative. Any feedback you have on the format and/or topics or health and safety services generally would be greatly appreciated.

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