

Health & Safety Bulletin

Spring 2010



Welcome to the latest edition of our Health & Safety Bulletin.

In this issue we lead with the news that the Sentencing Advisory Panel (SAP) has back-tracked on previous proposals to link fines with turnover under the Corporate Manslaughter and Corporate Homicide Act 2007. The view from SAP was that their original proposal could not be adopted uniformly across public and private sector companies.

With statistics showing that over 2 million employees in the UK are exposed to levels of noise that maybe harmful, we also take a look at what employers can be doing to protect themselves.

We also look at the potential consequences of a visit by an HSE Inspector.

If you would like advice on any aspect of health and safety please contact Andrew Jackson or Michelle Di Gioia

You can find contact details for the team on the back page.

Sentencing guidelines for Corporate Manslaughter cases

We have previously reported that the Sentencing Advisory Panel ('SAP') was proposing that companies charged under the Corporate Manslaughter and Corporate Homicide Act 2007 should be fined as much as 10% of their annual turnover.

This could have potentially led to fines topping hundreds of millions of pounds. However, the SAP has now stepped back from linking fines with turnover.

The Sentencing Guidelines Council ('SGC') has just published its guidance for the sentencing of defendants under the Corporate Manslaughter Act and corporate defendants whose breach of the Health & Safety at Work etc Act 1974 was a significant cause of death.

The reason given for stepping back from linking fines to turnover is that it is not appropriate in view of the different financial structures and circumstances of organisations within the private and public sectors.

The guidelines recommend that the appropriate fine in the case of a conviction for corporate manslaughter is to be 'measured in millions of pounds and should seldom be below £500,000'.

In the case of a conviction for causing death under the Health and Safety at Work etc Act 1974, the appropriate fine 'will seldom be less than £100,000 and may be measured in hundreds of thousands of pounds or more'.

The SGC explain what factors should be taken into account when determining the seriousness of the offence. For example, how foreseeable the serious injury was, how far short of the applicable standard did the defendant fall, how common the kind of breach of care is and how far up the organisation responsibility goes.

Other factors that aggravate the offence and which may justify a higher fine would include the number of deaths and serious

injury caused, failure to heed warnings or advice, cost cutting at the expense of safety or deliberate failure to obtain or comply with relevant licences, assessment or observation by independent authorities with a safety responsibility.

The guidelines also set out mitigating factors which judges should take into consideration, for example, a prompt acceptance of responsibility, co-operation with the investigation, genuine efforts to remedy the defect, a good safety record and a responsible attitude to safety.

The SGC also says that in addition judges should make publicity orders, requiring organisations to issue public statements including statements on their websites about their convictions, so that shareholders, customers and the local community would be made aware of the offence.

Furthermore, the SGC reiterate the need for the Court to consider making Remedial Orders if the necessary steps are identifiable with sufficient precision to render the Order enforceable.

These guidelines will apply to all sentences after 15 February 2010 and have arrived just in time for the first corporate manslaughter case commencing trial this February.

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“...personal injury payments typically range from £3,000 - £20,000.”

Deaf to the consequences

According to the Health and Safety Executive (HSE), over 2 million employees in the UK are exposed to levels of noise at work which may be harmful. Exposure to excessive noise over a prolonged period can permanently damage a person's hearing, possibly entitling them to claim thousands of pounds in damages from their employer.

The year was 1963, 'I had a dream'

The year of 1963 will be best remembered for Dr Martin Luther King's speech, but it was also the year in which the government published a guidance booklet regarding the dangers of noise exposure at work. As a consequence, generally speaking, all employers, from 1963 onwards, are to be taken as being aware of the dangers of noise exposure. However, most employers took little notice of such guidance, giving rise to hundreds of thousands of personal injury claims made by those suffering damage to their hearing as a consequence of being exposed to excessive levels of noise. This has cost employers and their insurers millions if not billions of pounds. The duty to protect against noise is nowadays more strict and more onerous. A prudent employer, therefore, wishing to avoid being confronted with such personal injury claims, needs to be aware of the present legislation and be taking steps to protect their workforce, and balance sheets, from harm.

The Noise at Work Regulations 1989 and the fall of the Berlin Wall

The Berlin Wall was not the only thing falling in 1989, so too were the noise levels considered to be 'lawful' by the government. The 1989 Regulations introduced rules governing permissible noise exposure levels, imposing duties upon employers in relation to noise levels lower than those the common law had previously determined as being safe. These Regulations recognised the potential for noise levels below 90dB(A) but above 85dB(A) to be potentially harmful and thereby encompassing many more employers and their workforces and increasing the potential for claims. Again, history and experience tells us that many, if not most, employers were slow to react

to these new rules and are now facing claims for noise induced hearing loss from past and present employees.

The Control of Noise at Work Regulations 2005 and 'shock and awe'

'Shock and awe' was not the headline in 2005 which greeted the new statutory Regulations governing noise exposure levels, but, nonetheless, new legal limits were introduced more than halving the daily permissible noise dose. A similar regime of duties were retained under the 2005 Regulations to those introduced by the 1989 Regulations, but the action levels were reduced from 85dB(A) to 80dB(A) (the First Action Level) and from 90dB(A) to 85dB(A) (the Second Action Level). The affect was to encompass even more workplaces and workforces, giving rise to the potential for more personal injury claims.

Wake up and hear the noise

The lesson to be learned from the past 46 years is that noise, whilst invisible, is dangerous at certain levels, can cause damage to hearing and can give rise to personal injury claims, not just from sole individuals but perhaps from whole workforces. It is important therefore to take heed of the legislation currently in force, to ensure compliance with the same, not only to protect the health of employees but also to avoid further claims.

The not so quiet factory/industry

The more commonly encountered noisy workplace would include shipbuilding; motor vehicle manufacturing, coal mining and road breaking. However, nowadays, more untypical workplaces have the potential of being too noisy and damaging to the health of its employees, such as pubs, clubs and orchestras.



The governing Regulations are not concerned solely with the noise levels, but also the duration of the exposure, in order to determine an individual's daily exposure. Also, noise levels are measured in decibels on a logarithmic scale so that 93dB(A) is in fact twice as loud as 90dB(A). What this means is that different noise levels are safe for different periods of time, the higher the noise the shorter the permissible duration of exposure.

There are duties imposed upon employers where the First Action Level is likely to be exceeded, there are more onerous duties where the Second Action Level is likely to be exceeded.

The cost

The cost to the sufferer is damage to their hearing, as noise can permanently damage hair cells in the inner ear responsible for transmitting impulses to the brain. Suffers, whilst not profoundly deaf, will struggle to hear in group environments such as meetings and weddings, where background noise is present. This can give rise to embarrassment for all those involved when incorrect or inappropriate responses are given in conversation. Another possible consequence is that the sufferer can develop Tinnitus (commonly in the form of a hissing or ringing noise) which can range from the mildly annoying to the suicidal. Clinically,



nothing can be done or prescribed to remedy these problems, although devices such as hearing aids and maskers can sometimes provide assistance. These problems all add up so that personal injury payments typically range from £3,000 - £20,000. Of course, the knock on cost to the employer is in the form of increased employer liability premiums and any applicable insurance excess on each claim. Not to mention the loss of goodwill between the employer and affected employees.

Being proactive, taking advice

Many employers in the past have been guilty of failing to take heed of the dangers of noise and have ended up having to react to claims made against them. The best course is to be proactive, to heed the Regulations, to take advice and to ensure appropriate policies and safeguards regarding noise are in place. If the latter course is favoured, then both employers and employees benefit.

Thomas Eggar boasts personnel with many years of experience in relation to advising on noise induced hearing loss claims and are therefore best placed to provide the advice which many have failed in the past to do and who are now quite literally paying the price.

Should you wish to discuss this matter further then please contact Steven Eldred (023 8083 1237) steven.eldred@thomaseggar.com

Enforcement notices

The Health and Safety Executive ('HSE') and local authority inspectors are entitled to enter any workplace with or without giving notice to the employer. They can inspect all aspects of work processes and associated records, take photographs and samples and talk to workers and their representatives.

Inspectors have wide ranging powers, particularly following a workplace incident or during a routine visit, and may issue an improvement or prohibition notice if they believe that you are breaking health and safety law or your work activities give rise to a risk of serious personal injury.

Improvement notices

Section 21 of the Health and Safety at Work etc Act 1974 (HSWA) gives an inspector the power to issue an improvement notice where they are of the opinion that a person is contravening health and safety law or has done so in the past and is likely to do so again.

The notice will specify what the breach is, say what needs to be done and why and will give you a time period for rectifying the situation ranging from a few weeks to a few months, depending on the situation in question and how long it may take to rectify. The minimum time given is 21 days.

Prohibitions notices

Section 22 HSWA allows an inspector to issue a prohibition notice where they consider that there is a risk of serious personal injury arising from work activities.

There are two types of prohibition notices: Immediate and Deferred. An immediate prohibition notice means that work must cease immediately until matters have been rectified accordingly. A deferred prohibition notice will state that work activity must stop after a set time period.

The prohibition notice will explain why the inspector thinks there is a risk of serious personal injury and may state whether a law is being breached and what you need to do to reduce or control that risk.

Appeals

Such notices could impact on the day to day running of your business and could result in lost business if you have to stop

work and contractual obligations cannot be met as a result.

The consequences of receiving such notices are that they are registered on the HSE's website for 5 years. This is a public database and often these notices have to be declared when tendering for new contracts.

It is for all of these reasons that more and more companies when receiving either notice consider an appeal.

If you appeal against an improvement notice, then the notice will be suspended until the appeal has been heard by the Employment Tribunal. If the appeal is against a prohibition notice, it stays in force until after the appeal is heard, unless you apply to the tribunal to have it lifted pending the appeal.

At the appeal the tribunal will either uphold the notice, vary the terms or quash it.

Statistics

In 2008/2009 the HSE issued 3,196 prohibition notices and 4,816 improvement notices. Local authorities issued 1,370 prohibition notices and 4,930 improvement notices. That is a total of some 14,312 notices and those figures do not include notices which the Office of Rail Regulation has the power to issue. That is more notices than were issued in the preceding year.

Conclusion

For those companies receiving either improvement or prohibition notices, it is important to ensure that the notice is appropriate, accurate and that you can meet its demands, if not, then notices can be appealed, and bearing in mind the long lasting consequences, appeals should always be considered.

Should you wish to discuss this matter further then please contact Michelle Di Gioia (01635 571083) michelle.digioia@thomaseggar.com

Health and Safety (Company Director Liability) Bill 2009-10

New legislation is being proposed to amend the Health and Safety at Work etc Act 1974 in respect of the liability of company directors.

On 19 January 2010, the House of Commons was asked, under the Ten Minute Rule motion to give leave for this Bill to be introduced. Backbench Labour MP, Frank Doran, who is sponsoring this Bill, was allowed ten minutes to support the Bill. Other MPs were allowed ten minutes to comment. The House agreed and the Bill was read for the first time.

At this stage, the detail of this proposed Bill is not fully known other than to place a positive duty on all company directors to take all reasonable steps to ensure health and safety in all aspects of the company's activities.

Private Members' Bills are often not printed until close to a second reading debate. The provisional date for the second reading of this Bill is 23 April 2010.

It seems in the last few years this area has been quite popular with attempts to amend legislation. However, just because this new Bill has had its first reading does not mean that it will become introduced as law as there are a number of hurdles to get over before a Bill receives royal assent and formally becomes law. Watch this space.



Introducing the team



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