

December 2015 – health and safety sentencing guidelines published



In my blog in September 2015, the Sentencing Council’s consultation on proposed changes to the sentencing guidelines for health and safety, corporate manslaughter and food safety offences was discussed. Following the consultation period which closed in February of this year, the guidelines were published in November with implementation commencing on 1st February 2016.

The aim of the guidelines is to promote a consistent approach for health and safety, corporate manslaughter and food safety offences and to ensure all sentences are proportionate to the offence and in relation to other offences.

The new guidelines apply to organisations and individuals and introduce the following principles:

Culpability – 4 categories ranging from ‘very high’ (deliberate or flagrant breach) to ‘low’ (did not fall short of the appropriate standard; evidence that failings were minor and not systemic’)

Harm (note this is the level of harm risked, not the actual harm) – 4 categories based upon seriousness and likelihood. The table below summarises these categories:

Seriousness of harm risked			
	Level A <ul style="list-style-type: none"> Death Physical or mental impairment resulting in lifelong dependency on third party care for basic needs Significantly reduced life expectancy 	Level B <ul style="list-style-type: none"> Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer’s ability to carry out normal day-to-day activities or on their ability to return to work A progressive, permanent or irreversible condition 	Level C <ul style="list-style-type: none"> All other cases not falling within Level A or Level B
High likelihood of harm	Harm category 1	Harm category 2	Harm category 3
Medium likelihood of harm	Harm category 2	Harm category 3	Harm category 4
Low likelihood of harm	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

There are two factors to be taken into consideration that may inflate the level of harm:

- The number of people exposed to the harm
- Whether the offence was a significant cause of actual harm

Having determined the offence category, the court must ensure the fine is proportionate by reference to the organisation’s annual turnover and any other relevant financial information.

The guidelines provide a starting point for fines and ranges of the level of fines expected which are based upon the turnover of the organisation. These have been substantially increased and the court has scope to increase these further if aggravating factors exist.

Businesses and individuals need to be proactive when managing health and safety. The basic building blocks must be in-place and positive assurance of compliance with them delivered on a consistent basis:

- visible leadership by senior executives to understand the importance of ‘setting the right tone’:
 - Refer to IoD / HSE guidance (Leading H&S at Work)
 - S37 HaSaWA neglect ie not as proactive as they ought to have been)
 - Senior management failing leading to the offence of Corporate Manslaughter
 - Review of H&S Policy and procedures to ensure clarity around roles and responsibilities and incident management
- a safety management system
- competent people with suitable skills, knowledge and experience
- great communication and cooperation

Other mitigation to understand and implement includes:

- Avoid aggravating or culpability factors:
 - Failure to learn from near misses
 - Cost-cutting
 - Failure to act upon previous advice (from HSE or others)
 - Failure to listen to employees
 - Deliberate, repeated or long-standing breach
- Challenge inappropriate enforcement notices
 - Acceptance of a notice from the HSE could be a strong indicator of acceptance of the relevant material breach
 - Payment of any Fee for Intervention (FFI) fines could also be a strong indicator of acceptance of the relevant material breach
- Obtain legal privilege over the incident investigation report

More than ever before, organisations need to ensure access to competent health and safety advice with relevant training in health and safety law for senior executives so that they understand what the law requires each of them to do and the criticality of leadership in health and safety to lead by example and set consistent high standards.

To evidence this compliance, appropriate records should be kept of procedural compliance, training, etc as well as levels of supervision, monitoring, audit and the close-out of actions arising from these processes.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Brian Cable is a Director of elnet consulting ltd