



# Leadership and engagement

## The importance of getting it right from a legal perspective

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# overview:

1. Why safety matters
2. Legal duties of employers and individuals
3. Recent fines and the Sentencing Guidelines
4. What's new?
5. Compliance



# HEALTH & SAFETY MANAGEMENT

- A legal necessity
- A stakeholder requirement
- A moral duty
- A financial benefit
- A protection from personal criminal liability



# A STAKEHOLDER REQUIREMENTS

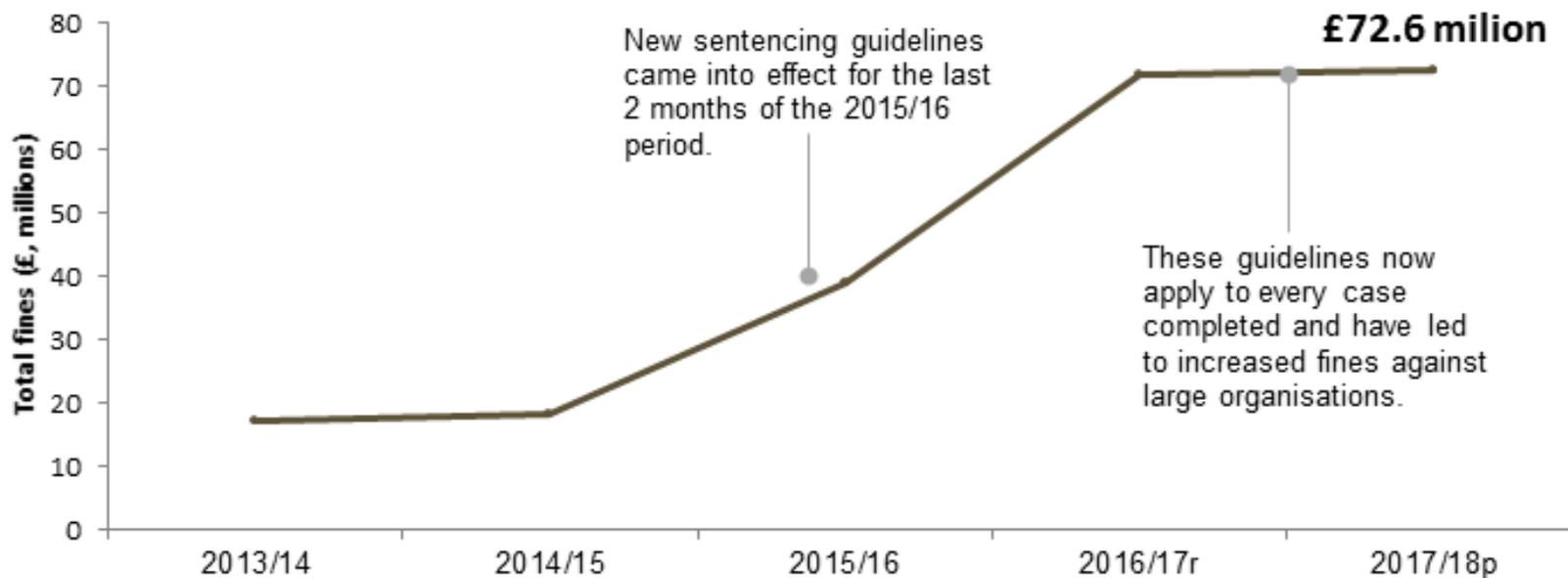


- Management
- Employees
- Self Employed
- Suppliers/Contractors
- The Board
- Financial Backers
- Insurers
- The Community

# HSE STATISTICS – 2017/18

- **144** workers killed at work
- **71,062** injuries to employees reported under RIDDOR
- **517** cases prosecuted by the HSE in 2017/18 with a conviction rate of 95%
- **11,522** enforcement notices issued by HSE and L
- Duty holders found guilty of health and safety offences in 2017/18 received fines totalling **£72.6 million**, an average penalty of around **£147,000** per case resulting in conviction, which is more than double the average fine in 2015/16

# HSE PROSECUTION: FINES



# FINES:

1. Humber Refinery 2005 - £800k
2. Buncefield 2010 - £1.4 million
3. Biolab 2010 - £66k
4. Lindsey Oil Refinery 2015 - £1.4 million
5. Valero/Chevron 2019 - £?
6. Grenfell - £?

# LEGAL DUTIES OF EMPLOYERS



# Health & safety at work act

To whom do employers have a duty of care?

- Employees – Section 2
- People who may be affected by your work activities – Section 3
- As a result of being in control of premises – Section 4
- COMAH Regulations 2015 – reg 5

# REVERSE BURDEN OF PROOF

- Unlike other criminal offences those in health & safety are often due to an omission rather than a deliberate act
- Once a health & safety breach is established then it is for the defendant to prove that they did all that was reasonably practicable to avoid that breach



# Corporate Manslaughter – THE LAW

- An organisation is guilty of an offence if the way in which its activities are managed or organised:
  - (a) causes a person's death, and
  - (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased
- An organisation is guilty of an offence only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach



# Corporate Manslaughter – KEY ELEMENTS

- Is there a gross breach of a duty of care?
- Jury to consider:
  1. failure to comply with H & S legislation
  2. the seriousness of that failure
  3. how much of a risk of death was posed by it
  4. the extent to which there were attitudes, policies, systems or accepted practices in place that were likely to have encouraged the failure or produced a tolerance of it

# CORPORATE MANSLAUGHTER – EFFECTS

- Greater focus on individuals who are senior management - more interviews of management
- Focus on Policy making & implementation
- Prolonged Police investigations
- No personal prosecution for corporate manslaughter but HSWA more likely and common law gross negligence remains
- “Culture” crucial

# Corporate Manslaughter

- Start – CPS have opened **150+** corporate manslaughter investigations since 2009
- There have now been **23** convictions and **3** acquittals
- More companies are awaiting trial
- Some **40** cases are currently being investigated by CPS
- More charges will follow as investigations are complex and can take a very long time before coming to trial

# LEGAL DUTIES OF INDIVIDUALS



# Personal liability

## **H.S.E. ENFORCEMENT POLICY:**

*One of the “principles of enforcement” requires inspectors to consider the management chain and role played by individual directors and managers and prosecute them where appropriate*



# General duty of employee

Every employee to take reasonable care for himself and others and to co-operate with his employer and training provided – Section 7

- “Horseplay”
- Supervisors
- Safety equipment

# PERSONAL CRIMINAL LIABILITY

H&SWA - Section 37

Who can be liable?

- A director, manager, secretary or similar officer of the company or
- A person purporting to act in such a capacity

# PERSONAL CRIMINAL LIABILITY

What makes you liable under H&SWA?

- A breach of regulations plus:
  - Consent
  - Connivance
  - Attributable to any neglect



# Personal liability (1)

Individuals prosecuted:

- 2015 – **15**
- 2016 – **46** (**34** were convicted, **12** were given prison sentences with the longest prison sentence imposed at two years. **1** person was found not guilty and in **11** instances the charges were withdrawn or the HSE offered no evidence).

## Personal liability (2)

- 2017 – **40** directors were successfully prosecuted: **7** faced a fine at an average of £8,022, **17** directors had a suspended prison sentence and **17** received an immediate custodial sentence for an average of 21 months). **4** directors were convicted of manslaughter (**3** received an immediate custodial sentence and **1** faced a fine).

# Recent FINES UNDER THE NEW GUIDELINES



# THE NEW APPROACH (1)

The guidelines require a step by step assessment of:

- Culpability
- Harm
- Turnover
- Aggravating and mitigating factors
- Proportionality



# THE NEW APPROACH (2)

- Other factors
- Reduction for guilty plea
- Compensation and ancillary orders
- Totality principle



# Step 1: Organisations - determining the offence category (1)

## Based on two stages:

- **Culpability** – 4 categories
  - a) Very high – deliberate or flagrant breach
  - b) High – fell far short of the standard e.g. below industry standards, ignoring concerns raised, failing to respond to prior incidents, breaches subsisting over long period
  - c) Medium – e.g. systems in place but not sufficiently adhered to or implemented
  - d) Low – e.g. significant efforts made to address risk but inadequate on this occasion

# Step 1: Organisations - determining the offence category (2)



Seriousness of harm risked			
	<b>Level A</b> <ul style="list-style-type: none"> <li>• Death</li> <li>• Physical or mental impairment resulting in lifelong dependency on third party care for basic needs</li> <li>• Significantly reduced life expectancy</li> </ul>	<b>Level B</b> <ul style="list-style-type: none"> <li>• 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</li> <li>• A progressive, permanent or irreversible condition</li> </ul>	<b>Level C</b> <ul style="list-style-type: none"> <li>• All other cases not falling within Level A or Level B</li> </ul>
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)

# Step 2 - starting point and category range

<b>Large</b> Turnover or equivalent: £50 million and over		
	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
<b>High culpability</b>		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
<b>Medium culpability</b>		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
<b>Low culpability</b>		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

# The outcome of the new reality (1)

- Since February 2016, there have been 58 fines in excess of £1m
- 2015 saw just three fines in excess of £1m and 2014 none
- In 2016/17 period the largest fine was £5 million and a total of 38 cases received fines over £500,000



# The outcome of the new reality (2)

- This is in contrast to the 2014/15 period, which was the last full year without these guidelines, where the single largest fine was £750,000 and 5 cases were at or above £500,000
- The average level of fine increased moving from £29,000 per conviction in 2014/15 to £58,000 in 2015/16, £126,000 per conviction in 2016/17, and £147,000 for 2017/18

WHAT'S NEW?



# HM Inspector of Health and Safety (Appellant) V Chevron North Sea Limited

- On Thursday 8 February 2018, the Supreme Court handed down a judgment defining the scope of an appeal under section 24 of the Health and Safety at Work etc Act 1974 ("HSWA")
- Appeal of a prohibition notice served on an offshore oil installation. Chevron obtained an expert report which confirmed that there was no risk of injury at the time the notice was served. However, this was 11 months after the initial inspection
- It was held that, if expert evidence proves that there was no risk to safety at the time of service of a notice, the Court should be allowed to take this evidence into account in on appeal





# Reduction in sentence for early guilty plea

- Applies from 1 June 2017
- Encouraged to plead guilty early
- Maximum =  $\frac{1}{3}$  reduction
- 1<sup>st</sup> stage of proceedings =  $\frac{1}{4}$  reduction
- First day of trial =  $\frac{1}{10}$  reduction
- During the course of trial = no reduction

# new sentencing guidelines for Gross Negligence Manslaughter

- **New sentencing guidelines** confirm jail terms of up to 18 years for gross negligence manslaughter
- In force since 1 Nov 2018
- *“While the highest sentences apply to individuals whose disregard of safety was motivated by cost cutting, sentences are also set to increase to an 8 year starting point in mainstream cases, where the failing persisted for weeks or the offender was aware there was a risk of death.”*
- Excluded from the 2016 guideline

# COMPLIANCE



# Planning, engagement and delivery

- Management of Change is your domain
- In hazardous industries, it is often easy to assume that everyone understands what is happening, why and the nature of the risks involved
- Psychology rather than law
- Boards (know) delegate to Project leaders (know) who delegate to those responsible for actual/physical change; those at risk
- Front line workers know what?





# What do front line workers know?

- There's a job to be done
- Company procedure?
- Why it is important to adhere to the procedure?
- How to do what's required?
- The actual risks?
- Why they're doing to job?
- How they will be judged?
- Short cuts?
- Their line manager's approach to delay?

# CHECKLIST – HOW EXPOSED ARE YOU TO A PROSECUTION?

- Out of date policies and procedures
- Are existing policies well communicated?
- Inappropriate policies and procedures
- Insufficient resources allocated
- Decision based solely on financial considerations



# CHECKLIST – HOW EXPOSED ARE YOU TO A PROSECUTION?

- Is there a lack of top level commitment?
- A perception that health and safety is down to employees / health & safety department?
- Is health and safety seen as an integral part of what you do
- Clear policies and procedures that are well communicated and understood?
- An irresponsible approach to health and safety?
- A laissez-faire, complacent culture?

# Bed time reading for directors

- Institute of Directors and HSC joint publication – ‘Leading health and safety at work – Leadership actions for Directors and Board Members’.
- Essential principles:
  - Strong and active leadership from the top
  - Worker involvement
  - Assessment and review

# PLAN, DO, CHECK, ACT

## **Plan –**

**Policy**

**Planning**

## **Do –**

**Risk Profiling**

**Organise**

**Implement Plans**

**Audit!**

## **Check –**

**Investigate Accidents/Incidents/**

**Near misses**

**Measure Performance – Audit!**

## **Act –**

**Take required steps**

**Reinforce procedures**

**Educate/Reassure/Retrain**



# LEADERSHIP IMPACT

*The lowest standard **leaders** exhibit is the highest standard the organisation can expect*

# QUESTIONS FOR MANAGEMENT (1)

- What is the relevant health and safety guidance, international standard or those used by peer organisations?
- Do we meet and exceed them? If not, why not?
- What have we learned from similar incidents or near misses?
- Do we really know or are we delusional?
- How can we improve?

## QUESTIONS FOR MANAGEMENT (2)

- Discipline, rigour, intolerance?
- Honesty, integrity, leadership
- Is the senior management competent?
- What is our culture and do we live and breathe it?
- What remedial action has been taken so that it cannot happen again?
- Are our audits actually effective?

final thoughts....

Integrity is doing the right thing, even when no one is watching



Any questions?





# Get in Touch

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