

Health and safety briefing

Workplace health and safety: new law gets tough on offenders

A new Act comes into force on 16 January 2009 which will have significant implications for anyone with responsibility for health and safety matters within their organisation - especially those in the construction sector.

Business impact

- *Significant implications for anyone with responsibility for health and safety matters; particular relevance to the construction sector.*
- *Main changes to sanctions:*
 - *real possibility of imprisonment: prison sentences of up to two years for most health and safety offences; and*
 - *maximum fine in the Magistrates' Courts raised from £5,000 to £20,000.*
- *We recommend that organisations:*
 - *increase health and safety training for senior management;*
 - *ensure there is board scrutiny of health and safety compliance; and*
 - *regularly review internal policies and procedures to ensure compliance with existing health and safety laws.*
- *Firms with good health and safety systems in place remain unlikely to be prosecuted.*

The Health & Safety (Offences) Act 2008 (new Act) applies in England, Wales, Scotland and Northern Ireland and changes the mode of trial and the maximum penalties applicable to a wide range of health and safety offences under the Health and Safety at Work, etc. Act 1974 (HSWA), the primary piece of legislation governing occupational health and safety in the United Kingdom. These offences relate to everyone who is "at work", as well as the general public who may be affected by work-related activities. The new Act is not retrospective – i.e. it does not apply to any offences committed before 16 January 2009. The legislation covers a wide range of health

and safety offences, from failing to undertake a risk assessment by way of a construction phase plan as required by the Construction (Design and Management) Regulations 2007, to failing to leave a site undisturbed following an accident.

The impact of the new Act is threefold.

- Firstly, it gives the courts the option of imposing a prison sentence of up to two years for most health and safety offences: previously a custodial sentence was only available for the most serious offences.
- Secondly, it makes certain offences which can currently only go to trial in the Magistrates' Courts triable in either the Magistrates' Court or the Crown Court. The Crown Court can impose higher fines and custodial sentences.
- Thirdly, it raises the maximum fine which may be imposed by the Magistrates' Courts for a breach of the HSWA, or any Regulations made under the HSWA, from £5,000 to £20,000.

The new Act amends section 33 of the HSWA, which sets out the various categories of offences which apply in England, Scotland and Wales under the HSWA¹. The table in the Annex details each category of offence



The construction industry accounted for one third of all fatal accidents at work in the UK in 2006/7

under the HSWA, and sets out the revised mode of trial, and the maximum penalties (in terms of fines and custodial sentences) which may be imposed for each one.

Background to the new Act

The new Act has come about by way of a private member's bill introduced by Keith Hill, Labour MP for Streatham and a former Labour housing minister. Private members' bills rarely make it onto the statute books and, indeed, the Bill which has been enacted has had a chequered past, with five previous manifestations since 2000. However, cross-party backing in the House of Commons has meant that the Health and Safety (Offences) Bill has now, finally, become law.

During its second reading² in the Commons, Keith Hill explained why the Bill was being presented:

"There are three main reasons: tougher, more commensurate, punishment, more effective deterrence and greater efficiency in the dispensation of justice".

As long ago as 1998, the Court of Appeal judged that health and safety fines being imposed by the courts were too low. On the option of imprisonment, there had been a history, going back to the mid-1990s, of judges expressing discontent at being unable to impose jail sentences for particular health and safety offences. The third reason was the need for greater efficiency in the court system. Magistrates' Courts often referred more serious cases to the Crown Court, which they would otherwise have been competent to hear and judge, because they felt that they did not have adequate sentencing powers. By extending the £20,000

maximum fine in the lower courts and making imprisonment an option, the effect of the new Act is likely to be that more cases will be resolved in the lower courts.

Implications of the new Act

Whereas, previously, the majority of offences under the HSWA were punishable by fines, there is now a real possibility of imprisonment. For example, under the old law, an employee who had failed to take reasonable care could be liable to a fine of up to £2,500. Under the new law, the same employee could face the threat of a two-year prison term.

The previous legislation allowed Magistrates' Courts to impose fines of up to £20,000 only in respect of breaches of the general duties to safeguard people's health and safety (as set out in sections 2 to 6 of the HSWA), whereas the maximum penalty they could impose for breaches of any health and safety Regulations made under the HSWA (which could be just as serious as breaches of the general duties) was £5,000.

Breaches which now attract the maximum penalty of £20,000 in the Magistrates' Court include a failure to undertake a risk assessment and breaches of the various asbestos regulations. In addition, the £20,000 maximum penalty has been extended to include offences which undermine the ability of enforcers to regulate health and safety, to prevent harm or to investigate what may be a serious health and safety offence.

Under the previous legislation, imprisonment was only an option in the Magistrates' Courts for failure to comply with an improvement or prohibition notice or with a court remedy order, and for offshore offences. In the higher courts, imprisonment was an option only for failure to comply with licensing requirements or explosive provisions, or disclosures in breach of the HSWA. The custodial sentence option has been extended in order to cover cases such as those where judges had indicated that they would have jailed a particular offender but for the lack of imprisonment as a sentencing option. Furthermore, the offences under section 20 of the HSWA (i.e. contravening any requirement imposed by an inspector or preventing another person from appearing before an inspector or from answering his or her questions) are now categorised as "either way" offences rather than, as was previously the case, only being triable in the lower courts. This means that, in future, they may attract the tougher penalties available in the higher courts.

The increase in the level of fines is certainly significant, but what will be of particular interest to anyone with responsibility for health and safety matters within their organisation is the significantly increased possibility of a custodial sentence for any infringement of either the HSWA or of any Regulations made under that Act. This means, for example, that an infringement of the Construction (Design and Management) Regulations 2007 could potentially result in a prison sentence of up to two years. In addition, a false entry made in any register book or other relevant statutory document, which is made with an intent to deceive will also, potentially, attract a sentence of up to two years.

£20,000

New maximum fine which can be imposed in the Magistrates' Court

228

Total workplace accident fatalities in the UK for the year 2006/7

Comparison with the Corporate Manslaughter and Corporate Homicide Act

Another recent Act relating to health and safety issues is the Corporate Manslaughter and Corporate Homicide Act 2007 (CMCHA). It is interesting to note that, when the CMCHA was enacted, the Government ultimately decided against the imposition of prison sentences and only applied the CMCHA to corporations, and not to individuals.³ Under the CMCHA, which came into force on 6 April 2008, an offence is committed if there is a gross breach by a corporation of a duty of care which causes a person's death. Offences under the CMCHA only apply to the corporation – not to its directors or other senior managers – despite the requirement that it is their management or organisation of the corporation's activities which caused the death. Under the CMCHA, firms are liable to the imposition of an unlimited fine or publicity orders – "naming and shaming" – but not for the imprisonment of directors.⁴

The new Act therefore represents a considerable departure from the powers previously available to judges, and widens significantly the scope for directors, or other senior managers with particular health and safety responsibilities, being sentenced to prison for up to two years, for a wide range of health and safety offences. However, it should also be borne in mind that the Health and Safety Executive (HSE), the body responsible for prosecuting health and safety offences in the United Kingdom, operates strict guidelines⁵ in deciding whether to prosecute health and safety offences, and prosecutions of individuals are not undertaken lightly.

Conclusion

The new Act will have particular resonance in the construction sector, where work-related instances of death and serious injury are particularly high. Figures issued by the HSE for the year 2006/2007 reveal that a total of 228 workers lost their lives as a result of accidents or incidents at work, of which 72 were in the construction sector. Responding to these figures HSE Chair, Judith Hackitt, said "*we want to see employers taking more ownership and leadership to embed health and safety in their organisational culture and boardrooms*". She also added that "*the high levels of fatalities in the agriculture and construction sectors continue to be of particular concern to us and will be a major focus of HSE's work priorities over the coming year*".

While recognising that legal sanctions constitute only a part of the full spectrum of health and safety activity in the United Kingdom, it is to be hoped that the introduction of the new Act will have the desired effect of reducing the number of deaths and serious injuries occurring in UK workplaces.

There are a number of things which a company or organisation can do in light of the new Act. One recommendation would be to increase health and safety training for senior management, and ensure that there is board scrutiny of health and safety compliance. In addition, the company or organisation should regularly review internal policies and procedures to ensure compliance with existing health and safety laws. Firms with good health and safety systems in place remain unlikely to be prosecuted. Ensuring that people are properly and regularly trained in health and safety, and undertaking periodic reviews of policies and procedures to ensure compliance with the law, will reduce the likelihood of a company or organisation, or one of its directors or senior managers, ending up in court.

HSE: "We want to see employers taking more ownership and leadership to embed health and safety in their organisational culture and boardrooms"

Notes:

- 1 For Northern Ireland, the new Act amends Article 31 of the Health and Safety at Work (Northern Ireland) Order 1978 (SI 1978/1039).
- 2 See <http://www.publications.parliament.uk/pa/cm200708/cmhansrd/cm080201/debtext/80201-0009.htm#08020152000003>.
- 3 For further information, see Ashurst's client briefing on the Corporate Manslaughter and Corporate Homicide Act 2007, available at http://www.ashurst.com/page.aspx?id_Content=3137.
- 4 The CMCHA makes it clear that an individual, although potentially liable for the common law offence of gross negligent manslaughter, cannot be guilty of secondary liability under the CMCHA for aiding and abetting, or procuring the offence.
- 5 See the HSE Enforcement Policy Statement available at <http://www.hse.gov.uk/pubns/hse41.pdf>.

Contact



Catherine Clarke
Professional development lawyer
T: +44 (0)20 7859 2461
E: catherine.clarke@ashurst.com

Annex

Mode of trial and maximum penalties applicable to offences committed under the Health and Safety at Work, etc. Act 1974 (HSWA) on or after 16 January 2009

Offence under HSWA	Mode of trial	Maximum penalty in Magistrates' Court	Maximum penalty in Crown Court
<p>Contravention of section 2 of HSWA (<i>General duties of employers to their employees</i>)</p> <p>(section 33(1)(a))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>
<p>Contravention of section 3 of HSWA (<i>General duty of employers and self-employed to persons other than their employees</i>)</p> <p>(section 33(1)(a))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>
<p>Contravention of section 4 of HSWA (<i>General duties of persons concerned with premises to persons other than their employees</i>)</p> <p>(section 33(1)(a))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>
<p>Contravention of section 6 of HSWA (<i>General duties of manufacturers, etc., as regards articles and substances for use at work</i>)</p> <p>(section 33(1)(a))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>
<p>Contravention of section 7 of HSWA (<i>General duties of employees at work</i>)</p> <p>(section 33(1)(a))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: Statutory maximum (currently £5,000)</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>
<p>Contravention of section 8 of HSWA (<i>Duty not to interfere with or misuse things provided pursuant to certain provisions</i>)</p> <p>(section 33(1)(b))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>

Offence under HSWA	Mode of trial	Maximum penalty in Magistrates' Court	Maximum penalty in Crown Court
<p>Contravention of section 9 of HSWA (<i>Duty not to charge employees for things done or provided pursuant to certain specific requirements</i>)</p> <p>(section 33(1)(b))</p>	Magistrates' Court or Crown Court	Fine: £20,000	Fine: Unlimited
<p>Contravention of any Health and Safety Regulations (e.g. Construction (Design and Management) Regulations 2007; Management of Health and Safety at Work (Amendment) Regulations 2006, etc.)</p> <p>(section 33(1)(c))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p>(or both)</p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p>(or both)</p>
<p>Contravention of section 14 of HSWA (<i>Power of the Commission to direct investigations and inquiries (or obstruction of any person in exercise of his powers under section 14)</i>)</p> <p>(section 33(1)(d))</p>	Magistrates' Court only	Fine: Level 5 on standard scale (currently £5,000)	N/A
<p>Contravention of section 20 of HSWA (<i>Powers of Inspectors</i>)</p> <p>(section 33(1)(e))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p>(or both)</p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p>(or both)</p>
<p>Contravention of section 25 of HSWA (<i>Power to deal with cause of imminent danger</i>)</p> <p>(section 33(1)(e))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p>(or both)</p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p>(or both)</p>
<p>Prevention or attempted prevention of any person from appearing before an inspector or answering a question of an inspector under section 20 (<i>Powers of Inspectors</i>)</p> <p>(section 33(1)(f))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p>(or both)</p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p>(or both)</p>

Offence under HSWA	Mode of trial	Maximum penalty in Magistrates' Court	Maximum penalty in Crown Court
<p>Contravention of any requirement or prohibition imposed by an improvement notice or a prohibition notice</p> <p>(section 33(1)(g))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: £20,000</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>
<p>Intentionally to obstruct an inspector in the exercise or performance of his powers</p> <p>(section 33(1)(h))</p>	Magistrates' Court only	<p>Imprisonment: England & Wales: 51 weeks Scotland: 12 months*</p> <p>Fine: Level 5 on standard scale (currently £5,000)</p> <p><i>(or both)</i></p>	N/A
<p>Contravention of any requirement imposed by a notice under section 27(1)</p> <p>(section 33(1)(i))</p>	Magistrates' Court or Crown Court	Fine: Statutory maximum (currently £5,000)	Fine: Unlimited
<p>Use or disclosure of information in contravention of section 27(4) or section 28 <i>(Restrictions on disclosure of information)</i></p> <p>(section 33(1)(j))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: Statutory maximum (currently £5,000)</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>
<p>Making a knowingly false statement or being reckless in doing so</p> <p>(section 33(1)(k))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: Statutory maximum (currently £5,000)</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>
<p>Making a false entry in any register, book, notice or other document with intent to deceive or making use of an entry known to be false</p> <p>(section 33(1)(l))</p>	Magistrates' Court or Crown Court	<p>Imprisonment: 12 months*</p> <p>Fine: Statutory maximum (currently £5,000)</p> <p><i>(or both)</i></p>	<p>Imprisonment: 2 years</p> <p>Fine: Unlimited</p> <p><i>(or both)</i></p>

Offence under HSWA	Mode of trial	Maximum penalty in Magistrates' Court	Maximum penalty in Crown Court
With intent to deceive, using a document issued under any relevant statutory provisions (section 33(1)(m))	Magistrates' Court or Crown Court	Imprisonment: 12 months* Fine: Statutory maximum (currently £5,000) <i>(or both)</i>	Imprisonment: 2 years Fine: Unlimited <i>(or both)</i>
Falsely to pretend to be an inspector (section 33(1)(n))	Magistrates' Court only	Fine: Level 5 on the standard scale (currently £5,000)	N/A
Failure to comply with an order made by the court under section 42 (section 33(1)(o))	Magistrates' Court or Crown Court	Imprisonment: 12 months* Fine: £20,000 <i>(or both)</i>	Imprisonment: 2 years Fine: Unlimited <i>(or both)</i>
An offence under the existing statutory provisions for which no other penalty is specified	Magistrates' Court or Crown Court	Imprisonment: 12 months* Fine: £20,000 <i>(or both)</i>	Imprisonment: 2 years Fine: Unlimited <i>(or both)</i>

Note:

* This is subject to the bringing into force of section 154(1) of the Criminal Justice Act 2003. Until section 154 is brought into force, the maximum sentence available in the Magistrates' Court will be 6 months. The maximum term of imprisonment in Northern Ireland under the new Act is 6 months.

Abu Dhabi

Suite 101, Tower C2
Al Bateen Towers
Bainunah (34th) Street
Al Bateen
PO Box 93529
Abu Dhabi
United Arab Emirates
T: +971 (0)2 406 7200
F: +971 (0)2 406 7250

Brussels

Avenue Louise 489
1050 Brussels
Belgium
T: +32 (0)2 626 1900
F: +32 (0)2 626 1901

Dubai

Level 5, Gate Precinct Building 3
Dubai International Financial Centre
PO Box 119974
Dubai
United Arab Emirates
T: +971 (0)4 365 2000
F: +971 (0)4 365 2050

Frankfurt

Oberlindau 54-56
60323 Frankfurt am Main
Germany
T: +49 (0)69 97 11 26
F: +49 (0)69 97 20 52 20

Hong Kong

11th Floor Kailey Tower
16 Stanley Street
Central
Hong Kong
T: +852 2846 8989
F: +852 2868 0989

London

Broadwalk House
5 Appold Street
London EC2A 2HA
UK
T: +44 (0)20 7638 1111
F: +44 (0)20 7638 1112

Madrid

Alcalá, 44
28014 Madrid
Spain
T: +34 91 364 9800
F: +34 91 364 9801/02

Milan

Via Sant'Orsola, 3
20123 Milan
Italy
T: +39 02 85 42 31
F: +39 02 85 42 34 44

Munich

Prinzregentenstraße 18
80538 Munich
Germany
T: +49 (0)89 24 44 21 100
F: +49 (0)89 24 44 21 101

New Delhi Liaison Office

6 Aurangzeb Road, D-1
New Delhi 110011
India
T: +91 11 2301 4054
F: +91 11 2301 4089

New York

156 West 56th Street
New York, NY 10019
USA
T: +1 212 245 4540
F: +1 212 245 4335

Paris

18, square Edouard VII
75009 Paris
France
T: +33 (0)1 53 53 53 53
F: +33 (0)1 53 53 53 54

Singapore

55 Market Street
#07-01
Singapore 048941
T: +65 6221 2214
F: +65 6221 5484

Stockholm

Birger Jarlsgatan 6B
Box 55564
102 04 Stockholm
Sweden
T: +46 (0)8 407 24 00
F: +46 (0)8 407 24 40

Tokyo

Shiroyama Trust Tower, 30th Floor
4-3-1 Toranomom, Minato-Ku
Tokyo 105-6030
Japan
T: +81 3 5405 6200
F: +81 3 5405 6222

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