

WORKPLACE SAFETY IN THE U.K.

Date: 3 February 2016

Labor, Employment and Workplace Safety Alert

By: Dylan G. Moses, Janice Harte-Lovelace, Christine Braamskamp

INTRODUCTION

Accidents do sometimes happen, even in well-run factories and construction sites.

Where there has been an accident in the U.K., companies face prosecution by the Health & Safety Executive ("HSE") in the criminal courts and should be aware that fines on conviction are likely to be very significant - considerably more than in the U.S..

DEFENDING WORKPLACE SAFETY CASES

Defending workplace safety cases in the U.K. has always been difficult. For many offences alleging breach of safety regulations there is a reverse burden of proof making defense challenging when an accident has occurred. The company has to prove that the workplace where an accident took place was safe.

With effect from 1 February 2016, the levels of fines for workplace safety offences have increased significantly making the response to any accident or incident even more important. The right response can result in avoiding prosecution altogether or, if that is not possible, a significantly lower fine than might otherwise be the case. This can be achieved by persuading the court that the culpability of the company falls in the lower end of the designated sentencing spectrum and ensuring that the court gives credit for mitigating factors and that there are no avoidable aggravating factors.

The investigation in the immediate aftermath of an incident is critical. The approach taken by the company and its management to the HSE investigators and any evidence given in person or in writing requires careful handling. Unlike in the U.S., health and safety prosecutions in the U.K. are in the criminal courts and a conviction will give rise to a criminal record.

THE NEW GUIDELINES

The new Sentencing Guidelines for Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences take effect for sentences post 1 February 2016, regardless of the date of the offence.

The guidelines introduce fines of up to and potentially over £10m for large companies (defined as having a turnover of £50 million and over) with a starting point of £4m for offences where the court finds a very high culpability. Even where the culpability is low the starting point for a fine is £300,000.

Where the turnover "very greatly" exceeds £50 million *"it may be necessary to move outside the suggested range to achieve a proportionate sentence"*.

Most prosecutions follow an accident, but health and safety offences are also concerned with failures to manage risks to health and safety and do not require proof that the offence caused any actual harm.

Accordingly companies in the U.K., their parent companies and their boards need to have workplace safety and the plan for a response to incidents high on their agendas.

Even before the introduction of the new Sentencing Guidelines, substantial fines had been imposed on large companies arising from breaches of e.g. workplace safety law (£700,000) and environmental law (£1 million) whilst a major hospitality company received a very large fine (£1.5 million) for breach of food safety law by rogue employees. Under the new guidelines those fines would have been substantially higher.

The court is required to set the fine so that it reflects the seriousness of the offence and takes into account the financial circumstances of the offender. The fine must be *"sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation"*.

The requirement that the court take into account the offender's financial circumstances will lead to very large fines being imposed on companies with large turnovers. A large contractor's fine may well be higher than, say, its sub-contractor, even if the culpability of the sub-contractor is considerably greater.

Where there is a conviction the court will take account of mitigating factors such as an early guilty plea, cooperation and acting promptly to make improvements, but will still focus to a significant extent on the financial circumstances of the defendant company.

The U.K. courts are increasingly undertaking a much more sophisticated investigation of a defendant company's accounts in order to satisfy itself that the fine imposed will directly affect the shareholders and/or directors; this level of scrutiny will always be necessary when the defendant is a large company. Indeed, in some cases, the turnover of a whole group of companies may be assessed by the sentencing courts and not just the turnover of the defendant organization. The English Court of Appeal has endorsed this approach and ruled that a court may assess the *"economic realities"* of the group of companies to which the defendant belongs.

The Guidelines can be found [here](#).

REACTING TO ACCIDENTS

The manner in which the company deals with the investigation and the prosecuting authorities can make an enormous difference to the prospects of prosecution and, if convicted, the eventual fine. The first few hours after an accident or incident are critical.

Companies should already have in place a clear incident management scheme to ensure that any incident is reported internally without delay to the right team so the appropriate internal investigation can commence.

Key staff must be trained on their responsibilities in the event of a serious accident including those relating to operational, legal and reputational issues as well as dealing with the welfare of site personnel affected by the accident itself and responding to the HSE and, in the case of a fatality, the police.

Gathering evidence and witness statements in the immediate aftermath of an incident is vital both to understand how an accident has happened and to prepare for subsequent criminal prosecutions, civil claims and, in case of a fatality, an inquest.

Frequently prosecutions are not commenced for several years after the accident so careful witness statements taken at the time of the accident will be the key evidence required to assess the prospects of successfully defending any later prosecution and in providing material for mitigation.

INSURANCE

Although, for public policy reasons, a fine arising from conviction cannot be insured, the costs incurred by a company and its employees arising directly and indirectly from a workplace safety incident, including the costs associated with attending an inquest or defending a prosecution and sometimes the HSE's investigation and prosecution costs may be recoverable from insurers. It is therefore also important to have a clear understanding of the terms of relevant insurance policies which may respond (including public liability, employers' liability and directors and officers' liability) and ensure notice is given strictly in accordance with its terms. An appropriate incident management regime can assist with the latter.

For further reading and an overview of what companies in the U.K. can do to avoid being negatively impacted, please see this [Legal Insight](#).

KEY CONTACTS



DYLAN G. MOSES
PARTNER
LONDON
+44.(0)20.7360.8154
DYLAN.MOSES@KLGATES.COM

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