# OVERVIEW

## Coronavirus Commercial/Health & Safety 14.04.20

## COVID-19

This guidance is to allow ECA Members to consider their broad range of responsibilities under relevant health & safety law.

## 1. Sites opening

The guidance on businesses which have been ordered to close can be found here

https://www.gov.uk/Government/publications/further-businesses-and-premises-to-close

The Government position (as of 24.03.20) is that construction (along with FM/maintenance) can continue, subject to meeting essential conditions*.

*The current view of the Construction Leadership Council is that work should only continue if:

- it can be carried out under the latest guidance issued by Public Health England https://www.gov.uk/guidance/social-distancing-in-the-workplace-during-coronavirus-covid-19-sector-guidance#construction - For advice for business in other nations of the UK please see guidance set by the Northern Ireland Executive, the Scottish Government and the Welsh Government.
- it can be undertaken without compromising on health and safety protection;
- it is done in accordance with the latest Site Operating Procedure (SOP) (http://www.constructionleadershipcouncil.co.uk/news/site-operating-procedures-during-covid-19/);

  Currently version 3: a version 2 was released for 3 hours on 2nd April and subsequently withdrawn – contractors taking actions based on version 2 during the intervening period should seek legal advice.
- workers can travel safely and responsibly to sites.

Note: HSE has been allocated enforcement responsibility for meeting the PHE guidelines on-site.

Where there is genuine concern about health and safety which cannot be resolved onsite then the route given is either their local authority or the HSE (e.g. construction sites) at: www.hse.gov.uk/contact/concerns.htm.

## 2. CDM Regulations

The Construction (Design and Management) Regulations 2015 (CDM) and accompanying guidance issued by the Health and Safety Executive, as amended from time to time (and together referred to as 'CDM'), contain most of the key requirements concerning health, safety and welfare matters on construction sites (though CDM 2015 does not apply to all maintenance work, which is nevertheless covered by the HSW Act 1974 and other health and safety legislation).

CDM 2015 places an overarching duty on the Principal Contractor to take reasonably practicable steps to manage the works to avoid harm to those involved in site activity.

The Principal Contractor (usually the main contractor) is obliged to manage the overall health and safety risk through the construction phase plan (CPP) – including welfare facilities – hence the CPP should address site compliance with the SOP.

If evidence of non-compliance with the Site Operating Procedures can be adduced, such evidence will support any allegation that the site may not be compliant with CDM.

For guidance on an employer who cannot ensure the workplace is safe see the Health & Safety at Work Act.

## 3. Health & Safety at Work etc. Act 1974

A summary of the Act is that it includes the following:

- Applies to all construction sites, and more widely.
- Includes duties to ensure *welfare*, in addition to health and safety.
- Sets out general duties of employers, self-employed persons, persons in control of premises, employees, manufacturers and suppliers to safeguard the health and safety of employees and public who may be affected by their work.
- S.2 gives employers a duty to ensure the health and safety of employees as far as is reasonably practicable.
- S.3 imposes a duty to ensure people who are not employees are not exposed to health and safety risks.
- S.4 imposes a duty to ensure premises are safe and from risks to health.
- S.7 and 8 give employees a duty to take reasonable care.
- S.37 provides that directors and managers can be liable personally for neglect or consent that leads to an offence under the Act.
- Failure to comply with the requirements of the Act is a criminal offence which can result in a prison sentence of up to 2 years prison and an unlimited fine.
- Most health and safety regulations fall under the 1974 Act.

s.3 therefore places a duty on businesses to take reasonably practical measures to avoid harm to people in other organisations when carrying out their own activities.

Directors can also be prosecuted for workplace deaths under the Health & Safety at Work etc. Act 1974.

The Act says individual directors or senior managers may be liable where a company fails to meet its health and safety obligations and the failing is due to the director's "consent or connivance" or where their neglect permitted the safety failure. Consent or connivance means the director was aware of the circumstances leading to the death and that they consented or allowed things to continue. The offence can also be committed through mere neglect.

A manslaughter charge is certainly dramatic, but directors should, if anything, be more aware of offending under the Act instead of a manslaughter charge for three reasons:

- liability under the Act is much easier to prove than gross negligence manslaughter
- while the company's lawbreaking must be established it need not be "gross"
- under the Health & Safety (Offences) Act 2008 a custodial sentence of up to 2 years may be given.

The 2008 Act has given the Act more teeth and closed the gap on the penalty for gross negligence manslaughter.

The 2016 Health & Safety Offences Definitive Guidelines include guidelines for sentencing individuals where there's a breach of a health and safety duty and a death results. Judges follow a number of steps including assessing the:

- "culpability" or degree of fault - which can be deliberate, reckless, negligent or low
- category of harm.

In view of the above, failure to comply with current Site Operating Procedures may result in breaches of CDM 2015 and/or the HSW Act 1974 and employers should be sure to document and evidence compliance.

## 4. Corporate Manslaughter & Corporate Manslaughter Act 2007 & Corporate Manslaughter (common law)

While there is a wide spectrum of possible health effects arising from to COVID 19 infection, the potential for fatality makes the following relevant.

Corporate manslaughter under the CHCM is where the employer is grossly negligent. An organisation can be convicted of someone's manslaughter if its mismanagement amounts to a "gross" breach of a duty of care.

The CMCH Act states; an organisation will be guilty if the way in which its activities are managed or organised:

- causes someone's death
- amounts to a gross breach of a duty of care owed by the organisation to the deceased.

An organisation will be guilty if the way its activities are managed or organised by senior management is a "substantial element" in the breach. The focus is therefore on general corporate procedures and processes rather than individual action and decision-making.

Individual directors at fault for work-related deaths may be prosecuted under the common law offence of gross negligence manslaughter. Indeed, prosecutors still continue to charge individual directors particularly if their company is being prosecuted for corporate manslaughter.

Where a director is accused of causing a workplace death, they may be prosecuted for being grossly negligent. To be negligent:

- the director must owe the deceased a duty of care (such as in circumstances of employment)
- the director must have breached that duty
- the breach must have caused the death.

But mere negligence is not enough. The duty of care failure must be "gross". In other words, so extreme that the action or inaction of the director can be considered criminal i.e. conduct falling far below what's reasonably expected. This final element makes the offence very difficult to establish.

Even in high profile corporate failures such as the Hatfield train crash, no individual directors were actually convicted.

The position of director does not in itself create a duty of care to every employee. Rather, what "measure of control and responsibility" directors or senior managers exercise over activities is key.

Only by first asking what control and responsibility a director had can the duty be established. If directors don't have direct control or responsibility, then there may be no duty and no manslaughter liability.

Establishing control and responsibility is much easier in small organisations.

Fully documenting and evidencing policies, procedures and monitoring/enforcement of the aforementioned will be key to ensuring the business is not 'grossly' negligent.

## 5. RIDDOR

In relation to COVID19, employers are required to report under RIDDOR (Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 2013) when:

- an unintended incident at work has led to someone's possible or actual exposure to coronavirus. This must be reported as a 'dangerous occurrence'; or
- a worker has been diagnosed as having COVID 19 and there is *reasonable evidence* that it was caused by exposure at work. This must be reported as a case of 'occupational disease'.

While RIDDOR applies to virtually all workplace activity, the two requirements above (notably the first bullet) are designed primarily (though not exclusively) to cover health and social care settings. However, employers should beware any potential for retrospective extension of these elements to all other continuing activity during the COVID19 outbreak which, if not carried out safely, could result in the contraction of COVID19.

## 6. Risk Assessments & Method Statements

It is a legal requirement (*R.*3 of the Management of Health and Safety at Work Regulations 1999) *for every employer to assess* the health and safety risks arising from their work activity. This legislation applies in *any work setting*. The purpose of the assessment is to identify what needs to be done to control/manage health and safety risks.

Though a method statement is not explicitly required under health and safety law, it enables evidence of compliance with goal setting and specific duties and responsibilities under health and safety law, and in relation to site welfare.

A method statement describes how work is to be carried out in a safe manner and without risks to health. It should include all the significant risks identified in the risk assessment and the measures needed to control those risks. Method statements are particularly helpful for:

- providing information to employees and others about how work should be done, and the precautions to be taken
- providing the Principal Contractor with information to develop the health and safety plan for the construction phase (the CPP).

A risk assessment and method statement addressing COVID19 issues will form a central plank in an employer's evidential arsenal to rebut any potential claim under other areas of health & safety legislation.

## 7. PPE

Personal protective equipment (which includes respiratory protective equipment) should always aim to ensure sufficient health and safety protection from workplace hazards. Sites should follow the Site Operational Procedure guidelines on PPE.

The additional use of PPE in specific workplace situations, in relation to COVID 19, for example where essential site activity requires close proximity working, may be referred to in industry sector guidance.

Evidencing required use of PPE – as referred to above – in relevant policies, procedures, risk assessments and method statements will underpin your evidence of compliance with health & safety legislation in these key areas.

## 8. Employer's liability insurance

Employers' liability insurance (EL) is compulsory for all employers under the Employers' Liability (Compulsory Insurance) Act. All firms who employ staff are legally required to hold employer's liability Insurance.

EL insurance will help pay compensation if an employee is injured or becomes ill because of the work they do for the employer.

To hedge the risk of injury to employees, all employers must get employers' liability insurance as soon as they become an employer. The policy must cover them for at least £5 million and come from an authorised insurer. Employers can check to see if their insurer is authorised by looking at the Financial Conduct Authority register or by contacting the Financial Conduct Authority.

Employers may not need EL insurance if they only employ a family member or someone who is based abroad.

Employers can be fined £2,500 every day they are not properly insured. Employers can also be fined £1,000 if they do not display their EL certificate or refuse to make it available to inspectors when they ask.

Contractors will want to ensure they are complying with all applicable health & safety law so as not to void or invalidate their insurance cover. It may therefore be prudent to ask your insurers what, if any. guidance they have during the COVID19 outbreak with respect to your works in order to ensure you stay within your policy cover – at least asking the question will help establish and document your proactive approach in this area.

## 9. Evidence

Ordinarily the issue of proof and evidence is separate to the theory of liability/culpability. This is the principle of the employer being innocent until proven guilty and how do you prove guilt when it comes to COVID19.

Time will tell however, if COVID19 is interpreted by the judiciary as so extraordinary - as was asbestos/mesothelioma – that unusually (as with asbestos), under the rationale that industry was better placed to ensure the risk and take steps to mitigate - that the courts ruled that the employers are assumed to be guilty, until proven innocent. In effect, the mere fact that an employee worked for the employer during a period of their employment and was exposed was proof enough, without the need to prove/disprove that the employee actually caught the illness at a particular site whilst under a particular employer.

HSE cites the need for *reasonable evidence* when requiring the legal reporting of COVID 19 spread.

While such evidence may be generally difficult to identify, identification becomes easier if anyone has demonstrably not followed the relevant legislation or the requirements of relevant guidance.

For example, acts or omissions that clearly led to a breach of relevant legislation or the SOP could provide reasonable evidence that COVID 19 spread was more likely than in wider society, during site activity.

Conversely, *demonstrable* adherence to the legislation and guidance would provide reasonable evidence that COVID 19 was *not* more likely to be spread during site activity, compared to wider society.

Evidence will be key to defending your business from any claim and ensuring you remain within the confines of your insurance cover.


ECA, Rotherwick House, 3 Thomas More Street, St. Katharine's & Wapping, London E1W 1YZ
**Tel**: 020 7313 4800 **Email**: info@eca.co.uk **www.eca.co.uk**