

IS YOUR BOARD PREPARED FOR THE SURPRISING BITE OF THE NEW HEALTH & SAFETY ENFORCEMENT REGIME?

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The new sentencing guidelines for health & safety offences are in force from 1 February 2016. They were intended to increase the level of fines, particularly for larger organisations. However, unintended consequences of the way punishments are now calculated mean that Judges will be forced to hand out very much greater fines than expected and send many more directors, managers and junior employees to jail for breaching health & safety laws.

The 4 Inflations

For most health & safety breaches, the criminal law laid down by Parliament does not set an upper limit to the size of the fine, so it is left to judges and magistrates in Court to decide how the fine should 'fit the crime'. To help the Court set a fair, transparent and consistent tariff, the eminent judges and lawyers on the Sentencing Council have created a set of guidelines now coming into force.

Close inspection of the new sentencing guidelines shows that 4 inflationary factors are going to increase radically the level of fines, yet only 1 of these factors was intended. Similarly, the threshold for imprisonment will be reached very much more easily than before. Let's look briefly at the 4 inflationary factors:

1st Inflation

The sentencing guidelines introduce a structured approach that the Court must follow. This involves plugging 'culpability', 'likelihood' and 'harm' factors into a series of tables to reach recommended starting point fines, as well as ranges of fines above and below the starting points. Similarly for imprisonment of individuals, the tables stipulate ranges of prison sentences above and below various starting points.

These tables were calculated by reviewing past sentences and then, particularly for larger companies, increasing the levels of fines. This 1st inflation was intended. It was designed to accommodate the Court of Appeal's repeated view that health & safety fines have generally been too low and need to be increased sufficiently to send a message to directors and shareholders. Indeed, the Court of Appeal envisages fines exceeding £100million for the worst health & safety breaches by the largest companies.

But the Court of Appeal has not recommended massive increases across the board, even for less serious offences by smaller companies and by individuals. Yet this will be the effect of the next 3 inflations.

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2nd Inflation

The sentencing guidelines switch from a mainly outcome based approach (what was the seriousness of the injury) to a risk based approach (how serious was the harm that was risked). There are justifiable reasons for this switch but its inflationary effect on sentences was not factored into the calculations. How does this 2nd inflation work?

Suppose an object falls from a crane and crushes someone's toes. Traditionally, that would be prosecuted and sentenced very much more leniently than if the same object had hit someone's head and caused a fatality. Under the new risk based approach, the toe injury is seen as having involved a high risk of death or disability and is plugged into the computation at the level calculated for a fatality.

The majority of non-fatal incidents could have been more serious, so these will be inflated up to the level of fine corresponding to that more serious injury.

3rd Inflation

If the offence exposed not just one but a number of people to the risk of harm, the Court is directed to ramp the punishment up to the next level. As a seasoned health & safety defence lawyer, I struggle to think of a case where the breach only exposed one person to a risk of harm. For example, if other people could have been hit by the object falling from the crane, this 3rd inflation will apply.

4th Inflation

Finally, if there was actual harm (unless more minor than could be expected), the Court is also directed to ramp the punishment up to the next level. Since most prosecutions arise after someone has been injured, this 4th inflation will almost always apply.

In summary, the combined effect of these last 3 unintended inflations will mean that criminal sentences will tend to converge at the higher end of a scale that has already been substantially increased by the 1st intended inflation. The Court is given some discretion but not enough to depart materially from the stipulated calculations.

For example, it is going to be difficult for an individual convicted offender to escape a jail sentence if he or she was aware of a risk of being in breach, nobody suffered an injury but several people were exposed to a 'medium' likelihood of death or disability. This is a very significant reduction in the threshold for imprisonment for health & safety offences.

It has never been more important to bring the importance of health & safety to the attention of board members and senior executives and, for my part, to explain how the law expects them to act in order to stay out of jail.

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