

NEW SENTENCING GUIDELINES PROPOSE JAIL TERMS OF UP TO 18 YEARS FOR GROSS NEGLIGENCE MANSLAUGHTER, WITH HEALTH AND SAFETY CASES SINGLED OUT FOR INCREASES

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The proposed new sentencing guidelines covering gross negligence manslaughter are set to increase jail terms for the worst workplace safety breaches causing death. There is a new maximum jail term of 18 years; and whilst the highest sentences are intended to 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 that there was a risk of death.

The Sentencing Council published its draft guidance on 4 July 2017 covering proposed sentences for individuals who commit manslaughter. This includes a step-by-step guide that judges must follow in determining sentences for **gross negligence manslaughter**, which is the most serious offence that can be committed by an individual for a health and safety breach. The draft is open for consultation until 10 October 2017 and is expected to come into force for sentences imposed from December 2018.

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The message for the boardroom is to sit up and take note, because these guidelines apply to current acts and omissions - they will be retrospective in that someone who commits an offence in 2017 can expect the guidelines to be in force by the time he or she comes up for sentencing after a delay of 18 months or more.

How does this relate to the 2016 sentencing guidelines for health & safety?

We are just getting used to the impact of the sentencing guidelines introduced in February 2016 for health and safety offences and **corporate** manslaughter. These have led to a steady rise in fines for companies and a reduced threshold for individuals to be sent to jail under the 2 year maximum term for health and safety offences.

Gross negligence manslaughter is committed by an individual whose gross breach of a duty of care causes or materially contributes to a death. This offence was excluded in 2016 and we can now see that it is the Sentencing Council's intention that, for workplace cases, it will also be punished much more severely than now.

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How are the proposed new sentences calculated?

There are 4 levels of culpability, from 'low' to 'very high', each of which leads to a different starting point jail term. The starting points are 12 years, 8 years, 4 years and 2 years for culpabilities of 'very high', 'high', 'medium' and 'low', respectively. Other factors can then be taken into account to move you down a little or up a lot within a specified range around each starting point. For example, the 'very high' range is 10 to 18 years and you move up the range if more than one person was put at risk or if you wrongly seek to blame others (which might well be necessary as part of defending at trial).

A number of factors are listed to enable the judge to determine the right culpability category. In a typical case arising in the workplace, these factors point strongly against falling within the 'low' category and make it much more likely the 'high' or 'very high' categories will be chosen. In particular, if the offender was aware that a breach could cause death, then this points towards 'high'. Similarly, if the breach persisted for weeks or months.

The impact of this for workplace cases is enormous. These typically involve a breach lasting at least some weeks and it would be unusual for the offender not to be aware that getting safety wrong could cause a death. In these cases, the presumption looks set to be that culpability will at least be 'high'. Another feature of 'high' is where the conduct was motivated by financial gain or avoidance of cost.

More worrying still, you can be taken into the 'very high' category if more than one feature of 'high' is evidenced. So, if you are aware of the risk of death (one feature of 'high') and the breach lasted weeks (another feature of 'high'), then this can take you into the 'very high' category (starting point 12 years in jail and range 10 to 18 years). And if there is also evidence of cost cutting at the expense of safety (another feature of 'high'), 'very high' seems almost inevitable.

What happens next?

If this seems extreme for workplace cases, then you may want to respond to the consultation, which is on the Sentencing Council's website; I will be collating a response for the Health and Safety Lawyers Association. I should caution, however, that the consultation document specifically uses a workplace scenario as an example, and makes clear that the Sentencing Council regards serious workplace cases as deserving increased sentences.

What should we do?

This means the most fruitful approach is to continue efforts to improve workplace behaviour and, for my part, to explain how the law expects directors and senior executives to act in order to stay out of jail.

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