

Sentencing Council's new guidelines for health & safety offences: Organisations

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The Sentencing Council's new guidelines for health & safety offences, corporate manslaughter and food safety and hygiene offences have arrived and will apply to all cases sentenced on or after 1 February 2016.

The guidelines represent a watershed moment with serious consequences for businesses. The most significant change is the direct link between the level of fine and a defendant's turnover. Their aim is to introduce consistency in sentencing and that fines must be substantial to have a real economic impact.

Hefy fines

The maximum fine for corporate manslaughter will be around £20m.

The starting point for the fines is linked to the organisation's annual turnover, not profits. In exceptional cases, the court will be allowed to take into account the turnover of the parent company, which is not itself a defendant. In real terms, this will lead to a three or fourfold increase in expected penalties.

The most serious breach leading to a fatality (not corporate manslaughter) attracts a starting point of £4m, with a range from £2.6m to £10m, for a large company (turnover in excess of £50m). For a micro company (turnover under £2m) it will lead to a starting point of £250,000 with a range from £150,000 to £450,000. For a very large company, or in an exceptional case, a judge can impose punishments outside the recommended range.

Sentencing structure

The basic structure is the same as that used for environmental offences since July 2014.

The court will first consider the harm and culpability factors in order to identify the seriousness of the offence. For example, it will ask whether the defendant has complied with the industry standards or made changes following any prior incidents.

The court will then identify a starting point and range for the appropriate level of fine (this is based on turnover), and will consider the aggravating and mitigating factors to make adjustments within that range. Relevant recent convictions are likely to result in a substantial upward adjustment. A good health & safety history, full cooperation and effective health & safety procedures will be mitigating factors.

There then follows consideration of whether the suggested fine is proportionate to the defendant's means; any wider impact the fine may have on innocent third parties (e.g. employees and service users); and factors such as an early guilty plea.

What this means for you

High-turnover low-margin companies, such as those in construction, agriculture and manufacturing, will be the ones most affected by the changes. Significantly, whether the fine will have the effect of putting the offender out of business will be relevant; in the worst of cases this may be an acceptable consequence.

Companies can expect increased scrutiny of their accounts, particularly where a group structure is involved. The company must be prepared to provide comprehensive accounts for the last three years. Newton (fact-finding) hearings are likely to become more frequent, as the parties argue over the degree of harm and culpability as well as the turnover band the corporate defendant fits into.

Steps to take:

- Review your existing health & safety policies and procedures ensuring the systems are robust.
- Ensure a prominent profile for health & safety risks in the corporate risk registers.
- Boards must satisfy themselves that health & safety is embedded in the organisation and is not just a function of the health & safety team.

- Audits must be fit for purpose and not a tick box exercise.
- Investigations of incidents must be thorough with consideration given to invoking litigation privilege.

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