



Corporate

Ignorance of health and safety law is ‘staggering’, with only 10% fully aware of the issues and consequences, according to HSE figures. Brian Tingham looks at the risks

Most plant operators now have fairly sophisticated health and safety policies in place – indeed, a whole industry having sprung up in the last 30 years to support them, both in preventing accidents and complying with the Health & Safety at Work Act 1974 (HSWA). But when it comes to how the relevant legislation affects not only directors, but also senior managers, the ignorance is staggering, according to the experience of manufacturing, pharmaceutical and construction litigation specialists Andrew Jackson and Michelle Di Gioia from Thomas Eggar LLP.

Their findings are also supported by a survey, commissioned by the HSE, which suggests that as few as 10% of directors are aware that they and/or their managers could face imprisonment, if they are found to have failed in complying with the law. Jackson and Di Gioia say this has come about, because “it’s too easy for directors to be cynical and pay lip service to health and safety”.

They concede that this situation is understandable – given the more than 50 sections under the HSWA, with numerous regulations and approved codes of practice, as well as interpretations and case law to match. That’s why, they say, most firms engage a law firm or H&S consultant to write the H&S policy. Then “the box is ticked and the job is done, without the director

having to do much more than write the lawyer’s cheque”. And to date, from a financial perspective, that has been enough: even when cases went to court and sentencing included a fine, that has invariably been paid by the company and so personal accountability has not been an issue.

Enter the Corporate Manslaughter and Corporate Homicide Act 2007, which came into force in April 2008 and makes it easier for companies to be convicted where a ‘gross failure in the way activities were managed or organised results in a person’s death’. The repercussions under this act can be severe: in addition to plant operators being convicted, there are also now increased penalties as a result of The Health and Safety Offences Act 2008, which came into force early last year.

Fines and imprisonment

Organisations can now face unlimited fines (starting at 5% of turnover) and be required to implement remedial actions and publish details of their offences. Meanwhile, for company directors and senior managers found guilty under existing H&S legislation, there is the prospect of prison sentences, as well as fines.

“You can’t delegate a prison sentence,” comments Jackson. When corporate manslaughter hit the headlines last year, Jackson and Di Gioia,

Andrew Jackson of Thomas Eggar LLP: “You can’t delegate a prison sentence”



along with many other professionals, expected the first prosecution to be brought against a large corporate. But it wasn't: instead, facing the threat of a prison sentence is the director of a small company whose member of staff was accidentally killed during a mudslide while carrying out a soil survey at a site. The trial of that case commences shortly and the result will be eagerly awaited.

But it's not only directors who are at risk: any 'senior manager' responsible for health and safety could face a fine and imprisonment. And no-one is immune – even those with highly automated plants, who, in Thomas Eggar LLP's experience, sometimes take their H&S responsibilities less seriously than their less sophisticated counterparts. "People are always surprised when we advise them of potential penalties and consequences. We give them specific examples of what has happened to other companies," comments Di Gioia.

Essentially, it is an internationally recognised standard that defines the framework for implementing an effective health and safety management system. Based on the Plan-Do-Check-Act model, it requires organisations to:

- Identify hazards and risks
- Define a policy direction for health and safety
- Set objectives and targets
- Implement operational controls to manage and minimise risks
- Monitor effectiveness of those controls
- Keep the systems up to date
- Audit the effectiveness of the systems
- Train staff and communicate the policy, procedures and systems
- Correct non conformities
- Review performance and identify trends
- Address shortfalls and identify opportunities for continual improvement.



Michelle Di Gioia of
Thomas Eggar LLP

manslaughter

"My initial scepticism about all manner of seemingly innocuous issues has been replaced with a serious consideration of potential risks," comments Jackson. He recalls one CEO, running a large utility, who, he says, got the balance right. "I was delighted to hear his remarks, when addressing an audience of senior managers, suppliers and partner companies, that he would not do business with, or allow anyone to work for his company, who put profit before safety. He made health and safety a cultural issue, as well as a procedural one: the same approach the courts adopt in prosecutions."

Courts' concerns

Make no mistake, accidents will happen. But, as Jackson says: "When a company or individual is charged, the courts will look at how the company was operating, in relation to the accident." The legislation focuses on failures of management systems and senior managers themselves – meaning those who play a significant part in managing or organising the company's activities.

The new offence considers how activities were organised and managed. That means investigators will look at: the systems and practices for carrying out work; the level of employee training; adequacy of equipment, supervision and middle management; and arrangements for risk assessment, monitoring and auditing of the processes.

BS OHSAS 18001 is recognised as a method for demonstrating compliance with the Corporate Manslaughter Act and the required duty of care.

"Having a health and safety management system in place will not only help mitigate any offence under the Corporate Manslaughter and Corporate Homicide Act 2007, and help you to demonstrate your duty of care, but may also lead to considerable benefits," says Vicki Gomersall, marketing manager health and safety, BSI Management Systems.

As a result of reducing sickness, absenteeism and the number of claims made to insurance companies, she says, plant operators might reasonably expect, at the very least, to cut employer liability premiums. "The Act is an opportunity for employers to think again about how risks are managed—and for organisations to ensure they are taking proper steps to meet current legal duties," suggests Gomersall.

Other benefits resulting from improved health and safety systems, she says, could also include: improved targeting of resources on priority plant issues; reduced costs associated with downtime and investigation of accidents; reduced legal costs and compensation payments; improved morale among staff through providing a safer work environment; and hence increased productivity. There is also the very real prospect of protecting the company's reputation for corporate responsibility among both investors and customers.

However, if that's not how you and/or your management team choose to view the act, then the consequences, should a fatality ensue, are a significantly increased vulnerability to very serious – and very personal – criminal charges. **PE**

Pointers

- Most plant operators have a good grasp of health and safety, but are ignorant of new legal requirements
- HSWA includes more than 50 sections and numerous key codes of practice
- Directors can no longer employ lawyers to delegate all H&S responsibility
- Corporate Manslaughter, which came into force in 2008, changes all that
- Organisations now face huge fines, and directors and managers imprisonment
- The courts' test is always how the company/person was operating at the time