Fenwick Elliott
The construction & energy law specialists
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Welcome to the May edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue find out about health and safety law

Insight

Health and safety reform - a storm in a teacup?

There has been much discussion and concern lately in relation to proposals by the Health and Safety Executive (i) to cull various health and safety measures resulting in a fifty percent reduction in health and safety regulation by April 2015 and (ii) introduce by October 2012 a charging scheme in order to recover costs incurred by the Health and Safety Executive in investigating breaches of health and safety law.

In this issue of *Insight* we examine what effect this health and safety reform might have on the construction industry.

Placing the reform in context

According to Health and Safety Executive ("HSE") statistics, 50 construction workers were killed as a result of workplace accidents in 2010 / 2011 with the refurbishment sector carrying the most risks. This is an increase on 2009 / 2010 when 41 workers were killed. The construction industry sees more deaths than any other industrial sector and barely a week passes without a new death being reported.

The increase in deaths on site came around the same time as the government announced its 'red tape challenge' through which it has committed to examine unnecessary regulation in the health and safety sector, a sector governed by no less than 17 Acts of Parliament and over 200 regulations. The aim of the reforms is to reduce the burden on business by freeing it from unnecessary bureaucratic health and safety burdens and for a common sense approach to be restored.

Against this backdrop of a bad safety record in the construction industry in particular, some might ask why is health and safety law being reformed at all?

The changes

The Legislative Consultation

The HSE is consulting on proposals to axe 14 safety measures, including the tower crane register (which requires contractors to notify the HSE whenever a tower crane is erected and confirm it has been examined) and also regulations relating to construction workers wearing head protection on site. This all comes in the midst of the HSE's 'working at height' safety drive: work carried out at height is the cause of the majority of fatal accidents on site for obvious reasons. The consultation is set to close on 4 July 2012.

The good news is that the forthcoming legislative consultation is expected to have very little impact on the construction industry. This is because the regulations which are under threat are those which the HSE argues has no direct health and safety benefits because they are either unnecessary, or there are other regulations currently in force which provide adequate protection to construction workers and third parties, including the general public.

The affected regulations are The Construction (Head Protection) Regulations 1989 ("the 1989 Regulations") and the Notification of Conventional Tower Cranes Regulations 2010 ("the 2010 Regulations").

The former largely replicates the Personal Protective Equipment at Work Regulations 1992 which can also be relied upon to regulate the use of head protection on site and the HSE is therefore correct in saying the 1989 Regulations are unnecessary as head protection is covered elsewhere.

As for the latter, the 2010 Regulations' intention (namely raising safety standards or providing reassurance to members of the public) has not been achieved. The HSE has not stated why the 2010 Regulations failed to achieve their stated purpose; it simply says that non-regulatory methods should be explored and that the regulations were 'unnecessary'.

There has been an angry response from health and safety proponents and those families who bear the scars of health and safety failures on site to the proposal to remove the 1989 and 2010 Regulations. Most recently, the Ford family lost a husband and father following demolition work that was carried out without the use of head protection.

Over-regulation in relation to work at height in particular might actually serve to re-assure the public that the government takes safety failures on site seriously. The HSE's stance that the 1989 Regulations do not provide assurances as to health and safety is somewhat difficult to understand.

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The Charging Scheme

Whilst the health and safety legislative reform will probably not have much of an impact on the construction industry, the same cannot be said of the new Fees for Intervention (FFI) scheme ("the Charging Scheme") the HSE intends to implement by October 2012. The government's approach to the construction industry in particular is set to change with the focus switching to higher risk areas and serious breaches of health and safety regulations as opposed to businesses who generally try and do the right thing.

The Charging Scheme is a real sign of the times in that it has been implemented in the face of a 35% cut to the HSE's budget and the burden for funding health and safety investigations now falls upon those who are suspected of flaunting the law, as opposed to the state. Schemes of this sort are already common place in other 'major hazard' industries such as nuclear sites, and the Charging Scheme is therefore by no means novel.

The Charging Scheme will impact those who are found to be in (i) material breach of health and safety law and where (ii) the written intervention of the HSE has been necessary. This intervention might be in the form of an enforcement notice, email or letter and the fees the HSE might recover could be as high as £24,000 if the breach is sufficiently serious. This intervention cost approach is in complete contrast to the previous position whereby the HSE's ability to recover its investigation costs was limited to 'just and reasonable' costs incurred following a successful prosecution in line with the usual position on the recovery of court costs.

As a result of the Charging Scheme, the HSE will be able to charge for its services the minute it puts pen to paper. This may result in increased enforcement activity by the HSE as any previous financial barriers to enforcement will cease to exist.

The government also intends the HSE's intervention cost recovery to be mandatory which means the HSE will be legally required to recover its costs from those in breach. Smaller contractors would be placed at a considerable disadvantage as no allowance would be made for the resources of the organisation when imposing the HSE's charges.

What does health and safety reform mean for you?

The legislative reform will probably not be a big concern, but the Charging Scheme may have a financial impact if you are found to be in material breach of health and safety law and the HSE decides to investigate. The costs you might have to bear would be further increased if any investigation was followed by a successful prosecution.

It goes without saying that the key to avoiding falling within the Charging Scheme is to comply with the law. If you are caught out, you should put right any breaches immediately to limit your financial exposure to the HSE's investigation fees. The HSE charges by the hour and fees may be as high as £124 per hour in some areas.

If you do not have health and safety advisers in-house, you should be sure to familiarise yourself with the online tools that have been made available by the government (see http://www.hse.gov.uk/revitalising/tools.htm) to assist businesses to comply with the myriad of health and safety law, which often leads to confusion and uncertainty.

Conclusion

The streamlining of health and safety law will probably have little practical effect on the construction industry as the regulations which are to be abolished are either covered by other regulations or are else (according to HSE evidence) ineffective.

As for the Charging Scheme, this will most likely affect smaller contractors, sub-contractors and consultants. Many of the larger UK contractors have stringent zero tolerance health and safety policies in place which are in turn passed onto the supply chain. This has done a lot to keep health and safety at the forefront of people's minds but this does not solve the problem. Invariably, it is the smaller contractors and smaller projects that pose the greatest health and safety risks as they account for 60-70% of the fatalities.

It is possible that the Charging Scheme may ultimately backfire on itself. This is because under-reporting of injuries and dangerous occurrences pursuant to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 is already a problem. The introduction of the Charging Scheme may actually do the HSE more harm than good as any report may result in investigation fees being levied by the HSE which may discourage reporting in the first place. Since accident reporting informs HSE strategy this may create more problems than it solves

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