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Update

Fees for intervention: Guidance released 29 June 2012

Are you ready and will your business be caught?

1 October 2012 will herald a new era in the relationship between the Health and Safety Executive ("HSE") and those it regulates with an extension to the regulator's cost recovery regime. Known as the "Fee for Intervention" scheme (the "Scheme") and introduced by the Health and Safety (Fees) Regulations 2012, this development may add a new financial pressure to businesses. In the most serious and complicated cases, companies may be required to pay fees running to thousands of pounds.

The policy

"The policy of the Government and the HSE board is to place a duty on the HSE to recover costs where duty holders are found to be in material breach of health and safety law" (Costs Recovery Consultation Document).

The background

Committed to the Coalition's "*deregulation agenda*", on 21 March 2011 the Department for Work and Pensions published its policy document *"Good Health and Safety, Good for Everyone"*. This included a commitment by the HSE to reduce the level of proactive inspections by one third, equating to 11,000 fewer inspections every year. The HSE is tasked with achieving this target, *"through better use of intelligence to target inspections towards higher risk industries and duty holders where there is information indicating they may be in breach of health and safety law"*. Coupled with a 35% reduction in its budget courtesy of the 2010 Spending Review, this targeted approach includes the extension of the HSE's ability to recover its costs from those it regulates.

The concept

The Scheme will impose a duty upon the HSE to recover the costs of any intervention that leads to the identification of a contravention of health and safety law by a duty holder.

Polluter pays for the safety arena?

The documents proposing the Scheme talk of non-compliant businesses being, *"those who create"* the need for regulatory work analogous to the "polluter pays" principle well established in environmental law. Simply put, a business that breaches legislation must pay the cost of correcting that breach. With the linkage having been made between wrongdoing and liability for funding the HSE's work, the clear policy of the Government in these times of austerity is that the tax payer should not be required to finance the continued contravention of health and safety law by errant duty holders.

Does the Scheme apply to my business?

The Scheme applies, in theory at least to all HSE enforced businesses. However, three categories of industry have been identified with a view to concentrating regulatory inspection efforts on high risk premises:

- Comparatively high risk areas: construction, waste and recycling and high risk manufacturing. In these sectors, proactive inspections will continue and indeed should increase as HSE resources are diverted away from the lower risk industries
- Areas of concern but where proactive inspection is unlikely to be effective and is not proposed: agriculture, quarries and health and social care. In these areas, the HSE will continue to intervene proactively but will do so through alternative means such as joint initiatives with industry, educational events etc
- Lower risk areas: low risk manufacturing, transport, local authority educational provision and post/courier services. There will be no proactive inspection in these areas

The Scheme does not apply to those in sectors enforced by other regulators (e.g. local authorities), nor does it apply to the self-employed who only put themselves at risk or to individual employees.

What is a material breach?

The Scheme will be engaged when, *"in the opinion of the… inspector, there is or has been a contravention of health and safety law that requires them to issue notice in writing of that opinion to the duty holder"*. The Guidance provides some detailed examples, which identify the enforcement response in each case.

Start the clock

Costs will be recoverable from *"the point of entry at the site to the point of leaving"* even if the material breach is not immediately identified. The HSE view is that, in order to make *"appropriate judgments"* about required enforcement action, the Inspector needs that time to assess the duty holder's ability to effectively manage the risks and achieve compliance.

How will decisions be made?

The current method of making enforcement decisions will be maintained. As such, the HSE will make its determinations based on the Enforcement Policy Statement and Enforcement Management Model. The promise, therefore, is for a targeted and proportionate approach.

What will the HSE charge for?

The Scheme will cover writing letters and reports, preparing and serving enforcement notices and all investigation and follow up work until a prosecution is commenced. This means that even if the material breach is rectified immediately, once the Scheme is engaged, the duty holder will receive invoices for all work done by the inspector in relation to the notified material breach, rather than having to pay these costs only if convicted following prosecution.

The HSE will refund sums paid under the Scheme where an enforcement notice is successfully appealed or where a company is prosecuted but not convicted.

How much will it cost?

Costs will be charged at a blended hourly rate of £124, which is based upon not just the gross salaries of the Inspectors, but also the HSE's corporate services and overheads, capital charges and general administrative expenditure.

Specialist input (such as from the Health and Safety Laboratory) will be charged at the actual cost to the HSE. Where several material breaches are identified, several experts may be required.

The HSE expects to make a cost recovery of £43.6m per annum, framed in the proposals as being a *"direct benefit to the tax payer"*.

Worryingly, whilst the Scheme will not be used to recover for the cost of training new inspectors, the charge to a duty holder could be impacted upon by an *"inspector's level of experience"*. This suggests that cases investigated by a junior inspector where a material breach is found may result in higher fees than an identical case inspected more efficiently by an experienced inspector.

What should I do?

Duty holders need to be familiar with the Scheme and how it will operate, as any HSE inspection (whether following an accident or not) has the potential to result in substantial costs.

Companies should consider how they will deal with an intervention under the Scheme and what provisions will be required in order to minimise possible costs exposure.

A sting in the tail?

In these difficult economic times, is there a possibility that businesses investigated by the HSE could be driven under due to the application of the Scheme, without the HSE's contention that there has been a material breach ever having been proven in Court?

October 2012 may also see the introduction of the Legal Aid Sentencing and Punishment of Offenders Act 2012. This Act contains provisions preventing companies from recovering their defence costs in health and safety cases where they are not convicted. Whilst invoices paid under the Scheme would be refunded to the company in those cases, the cost of successfully defending the charges will no longer be recoverable. This could leave businesses in the unenviable position of funding a HSE investigation for several years before having to find additional sums, unless they have cover under an insurance policy, to defend the prosecution.

The Scheme, subject to Parliamentary approval and already postponed once, is due for implementation on 1 October 2012.

Further information

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Further advice should be taken before relying on the contents of this summary.