

Get shorty?



Are small and medium-sized enterprises served a raw deal by those responsible for enforcing health and safety law? Tying up some of the major recent developments in SME compliance, **Rob Elvin** weighs up the evidence.

COMPLIANCE WITH HEALTH AND SAFETY LAW can be a challenge. Indeed, businesses are faced with meeting numerous obligations, which can be found in a vast collection of legal instruments.

The challenge can be particularly difficult for small businesses, which have limited resources in terms of both employees and money. While all businesses have to comply with the law irrespective of their size, specific guidance aimed at small businesses is available to help them comply. Enforcement bodies also claim that they take into account the size of enterprises before they make enforcement decisions.

Small focus

In 2005, Philip Hampton was charged by the Chancellor of the Exchequer to consider the scope for reducing administrative burdens by promoting a more efficient approach to regulatory inspection and enforcement. His report,¹ along with the Government's response to it,² recognised the need for a specific approach towards smaller enterprises.

Among other things, it recognised that: the HSE needs to work harder with smaller enterprises; the interests of small businesses need to be considered when regulations are designed; health and safety awareness officers should be employed to provide advice and guidance specifically for small businesses; business behaviour of small organisations need to be understood so that guidance can be targeted; and the administrative burdens faced by small businesses need to be reduced.

The HSE's most current strategy, 'The Health & Safety of Great Britain – Be Part of the Solution', includes a specific goal "to adapt and customise approaches to help the increasing number of SMEs in different sectors to comply with their health and safety obligations". The strategy acknowledges that SMEs account for a



considerable number of health and safety incidents each year, and that some SMEs conduct certain activities that carry a high level of risk.

However, it also acknowledges that SMEs find goal-based health and safety management difficult to apply. The strategy concludes that the goal of the HSE, as well as of Local Authorities, is to find new ways to help SMEs understand how to comply with the law in a manner proportionate to the risks posed by their activities.

Proportionality

This theme of proportionality runs throughout the HSE's approach. The Executive's Enforcement Policy Statement, which provides guidelines as to how enforcement authorities should carry out the powers and duties conferred on them by the HSWA 1974, covers the concept of proportionality; it states that making decisions on what is reasonably practicable to control risks involves the exercise of judgment, which should take account of the

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degree of risk, on the one hand, and the sacrifice – in money, time or trouble – involved in the measures necessary to avert the risk, on the other hand.

Duty-holders are expected to take measures and incur costs to reduce the risk, unless the risk is insignificant in relation to the cost. Therefore, it is arguable that the small size of an employer is relevant to the ‘reasonably practicable’ calculation, and SMEs may be able to justify taking fewer steps to avert a particular risk in comparison with larger companies that have greater resources available.

Specific support is available to help SMEs comply with health and safety laws. The HSE guidance document, ‘An Introduction to Health and Safety in Small Businesses’,³ summarises the key common areas of risk at work and explains to SMEs how to find out more to ensure that work is made safe. Many Local Authorities also provide similar guidance to help SMEs. The HSE, along with Business Link,⁴ provides a health and safety performance indicator, which is free and anonymous, and is intended to help SMEs measure their health and safety performance and benchmark against others. IOSH also provides a free safe start-up tool⁵ to provide SMEs with basic information on how to comply with health, safety and environmental regulations.

In October last year, the HSE published a 20-minute risk assessment for offices, aimed at cutting back the time it takes to evaluate the hazards in office environments. It also provided free advice and information for businesses at a series of open days around the country, and launched a competition with IOSH entitled ‘Innovation in Safety – Small Business Award’, with the aim of finding new ideas to improve health and safety in small businesses.

Harsher enforcement?

Clearly, a huge amount of time, effort and money is being expended to improve SME compliance with health and safety law. However, it is often argued that

enforcement against SMEs is harsher, as large companies receive disproportionately low fines.

Although the size of the organisation is not relevant to whether or not it is guilty of committing an offence, the means of the organisation are relevant to any fine and should be taken into account. Sentencing guidelines reflect the fact that the courts should be provided with information about the financial circumstances of the defendant and, although a fixed correlation between the fine and either turnover or profit is not appropriate, the fine should be one that is not beyond the defendant’s capability to pay. It may also be considered appropriate that a small-business defendant should be allowed a longer period of time to pay a fine.⁶ Accordingly, the mechanisms are available to sentencing tribunals to ensure sentencing is proportionate and fair.

Red-tape relaxation

In October last year, Lord Young published recommendations seeking to simplify and improve health and safety regulation by promoting a common sense approach in relation to non-hazardous activities.⁷ This focused on a desire to consolidate health and safety law into a single set of accessible regulations, along with clear guidance, simplified risk-assessment procedures, and reducing the number of workplace accidents that need to be reported.

While these recommendations should benefit all businesses in helping them comply with health and safety law, they will have specific benefit for SMEs, which may already struggle to comply.

The Government has now outlined its intention to review all health and safety laws, with a view to scrapping any that impose unnecessary burdens on businesses.⁸ At a recent conference in London, Safety minister Chris Grayling stated that, for the vast majority of Britain’s businesses, the current health and safety system is full of “unnecessary red tape and regulations”. This review should therefore lead to changes in

health and safety law that will help businesses, particularly SMEs, comply.

Conclusion

Health and safety laws apply to all businesses, however small they might be. Despite the assistance provided for SMEs, many organisations of modest size still find it harder to comply owing to their lack of resources, which, in turn, can mean they are simply not aware of the mechanisms available to help them.

The regulators’ approach to enforcement, and guidelines on sentencing should mean that the limited resources of SMEs are taken into account. However, this is not always the case, as can be seen by the recent prosecution of Cotswold Geotechnical (Holdings) for corporate manslaughter. ■

References

- 1 Hampton, P (2005): ‘Reducing administrative burdens: Effective inspection and enforcement’, HM Treasury – www.berr.gov.uk/files/file22988.pdf
- 2 Department for Business, Enterprise and Regulatory Reform (2008): ‘Effective Inspection and Enforcement: Implementing the Hampton vision in the Health and Safety Executive – www.bis.gov.uk/files/file45358.pdf
- 3 INDG 259 – www.hse.gov.uk/pubns/indg259.pdf
- 4 www.businesslink.gov.uk/bdotg/action/haspi
- 5 www.safestartup.org
- 6 Sentencing Council’s guidance on ‘Magistrates’ Court Sentencing Guidelines’ and ‘Corporate Manslaughter and Health and Safety Offences causing death’ – <http://sentencingcouncil.judiciary.gov.uk/guidelines-to-download.htm>
- 7 www.cabinetoffice.gov.uk/resource-library/common-sense-common-safety
- 8 Good health and safety, Good for everyone – www.dwp.gov.uk/policy/health-and-safety

Rob Elvin is European head of the Environmental, Safety and Health Group at Squire Sanders Hammonds. He will be speaking on this subject in the SHP Legal Arena at 12.30pm on Wednesday, 18 May. For more details about Rob and the Arena sessions, go to <http://content.yudu.com/A1rsin/SHPLegal2011Guide/>