

the **HRDIRECTOR**

THE ONLY **INDEPENDENT HR STRATEGIC** PUBLICATION IN THE UK

MARCH 08 **ISSUE 45**

the **HRDIRECTOR INTERVIEW:**

**Andrew Newall – Group HR director,
United Biscuits**

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Pictured: Andrew Newall -
Group HR director, United Biscuits

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CORPORATE MANSLAUGHTER AND THE IMPLICATIONS FOR HR DIRECTORS

HR PROFESSIONALS AND THEIR COMPANIES HAVE ONLY A FEW MONTHS LEFT TO INCORPORATE NEW HEALTH AND SAFETY LEGISLATION INTO THEIR SYSTEMS AND PROCEDURES BEFORE THE CORPORATE MANSLAUGHTER AND HOMICIDE ACT 2007 COMES INTO EFFECT ON 6 APRIL 2008. CHRIS GREEN, PARTNER AT LAW FIRM WEIGHTMANS, REVIEWS THE ACT AND ITS IMPLICATIONS FOR ORGANISATIONS.

EXECUTIVE SUMMARY

The Act will mean that failure to review structures and policies now could mean the implications for companies of a fatal incident will leave them liable to potential fines of up to 10% of their annual turnover. In addition, there will be a real threat of more offences of personal liability for gross negligence manslaughter or other offences, which could even lead to individuals facing fines or imprisonment in certain circumstances.

THE ACT

The new Act is not retrospective and so will not apply to any incidents prior to this date. The Act does not create any new duties and so companies who currently comply with existing safety obligations apparently have little to worry about.

THE OFFENCE

Although the offence is concerned with corporate liability and does not alter the legal position of individuals, personal liability of directors, senior managers or other individuals remains possible for gross negligence manslaughter, and under s.37 of the Health & Safety at Work Act, for any offence even if the injuries are not fatal.

THE NEW TEST

- a) The way in which an organisation's activities are managed by its senior managers
- b) causes a death and,
- c) amounts to a gross breach of a duty of care to the deceased.

A substantial part of the failure within the organisation must have been at a 'senior level' – i.e. the people who make significant decisions about the organisation or substantial parts of it. For example, this includes those carrying out strategic functions such as central finance, senior operational management roles or other managerial roles and those with central responsibility for health and safety. Depending on the nature and scale of the organisation, other roles including regional managers in national organisations and managers of different operational divisions such as HR managers, are also likely to be under consideration. If management of safety and responsibility for complying lies with an HR department or manager, they will need to be competent to discharge that duty and ensure that the company's procedures are in fact implemented.

Because the police will need to look at the role of individuals more closely in order to prosecute a company, they are likely to investigate such senior people more thoroughly and, in the process, may uncover further evidence of individual gross negligence at senior levels. Under the new Act, more prosecutions should be expected of individuals who might not previously have been "controlling minds" of their companies but who might be "senior managers".

The requirement for a gross breach means a breach far below what could have been reasonably expected. Juries are required to consider, when assessing if there has been a gross breach:

- the extent and seriousness of failures to comply with health and safety obligations,
- and the degree of danger this posed.

GUIDANCE OVERVIEW

When deciding whether an organisation is guilty of Corporate Manslaughter, consideration may also be given to, amongst other things, relevant health and safety guidance (such as Approved Codes of Practice). The Health and Safety Commission (HSC) and Institute of Directors (IOD) have now issued their guidance document on promoting health and safety at work. The guidance is aimed at company directors and specifically covers the Corporate Manslaughter and Homicide Act. The guidance is not obligatory but by following the guidance, directors would normally be considered to be doing enough to assist their organisation meet its legal obligations. In the event of a death, the CPS could point to provisions in the guidance which had not been followed as evidence that the company's failings were gross. Whilst targeted at directors, the guidance is useful for others in terms of identifying action to be taken to comply with the legislation. HR professionals may wish to enquire what guidance and published information exists to set out the standards required of them by law.

The guidance states that the starting point is to follow three 'essential principles':

1. Strong and active leadership from the top
2. Worker involvement
3. Assessment and review.

The guidance goes on to list a four point agenda in order to embed the essential principles. The four points are to 'Plan', 'Deliver', 'Monitor' and 'Review' health and safety. Each point recommends core action to be taken, as well as suggested good practice, with the aim of assisting directors in providing effective leadership of health and safety.

CORE ACTIONS

In order for effective health and safety planning, the board is advised to be aware of the significant risks faced by the organisation and to agree a policy which sets out the board's role and the role of individual board members. The health and safety policy should be a 'living' document which evolves as required.

The guidance suggests adequate resourcing, competent advice, the use of risk assessments and employee involvement in health and safety decisions which affect them.

In respect of monitoring health and safety, organisations must give appropriate weight to reporting, audit the effectiveness of management structures and risk controls and report the impact of new procedures etc.

The reviewing guidance highlights the importance of reviewing the health and safety performance yearly, examining whether the health and safety policy is appropriate and that there has been effective reporting. If any action is needed to address the shortfalls then this should be decided and the action monitored.

PENALTY

The penalty for a company convicted of Corporate Manslaughter is an unlimited fine. The Court may also impose a Publicity Order requiring the company to advertise its own conviction and misdemeanours or a Remedial Order to put right any outstanding safety issues.

The Sentencing Advisory Panel is currently consulting in respect of how to approach sentencing organisations convicted >

THE CORPORATE MANSLAUGHTER AND CORPORATE HOMICIDE ACT – WHAT IT WILL MEAN FOR BUSINESS TRAVEL

THE NEW ACT, DESIGNED TO MAKE ORGANISATIONS CULPABLE IF THEY ARE NEGLIGENT AND FAIL TO DEMONSTRATE A DUTY OF CARE TO THE HEALTH, SAFETY AND WELLBEING OF EMPLOYEES, WILL MEAN A TRAVEL RISK MANAGEMENT PROGRAMME WILL BE ESSENTIAL TO PROTECT TRAVELLING EMPLOYEES AND THE BUSINESS REPUTATION. MATTHEW JUDGE, DIRECTOR, ANVIL GROUP, ANSWERS SOME KEY QUESTIONS THAT HR DIRECTORS AND LINE MANAGERS NEED TO ADDRESS:

Will it cause a change in travel policies?

Companies need to look at the effectiveness of their health and safety systems, with regard to travel. Are they rigorously followed? What are the health and safety attitudes, policies, systems or accepted practices within the organisation?

How should businesses/corporations approach business travel when the Act becomes law?

Businesses should be looking to implement a travel risk management programme that incorporates health and safety policy, traveller training and awareness, traveller tracking and support. Businesses should also be aware of employee whereabouts in case of an incident that might put the employee at risk.

What can businesses and corporations do to protect themselves from prosecution in the case of an employee dying overseas?

If they have not done so already, HR directors and senior managers need to start enforcing strict travel policies incorporating corporate governance and health and safety associated issues. Organisations should provide the same duty of care to its employees working abroad as it would if they were working in the UK.

What parts of the business will be affected by the CPMS?

The boardroom agenda should regularly include Corporate Manslaughter to ensure compliance with all health and safety legislation relevant to the organisation. HR must ensure employees conduct themselves responsibly and adhere to the company policy.



Matthew Judge
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www.anvilgroup.com



PROFESSIONAL SUICIDE?

RECENT RESEARCH CARRIED OUT BY THE BRITISH SAFETY COUNCIL (BSC) IN DECEMBER 2007 FOUND THAT MANY ORGANISATIONS ARE STILL NOT PREPARED FOR THE CORPORATE MANSLAUGHTER ACT.

Although the Act received Royal Assent in 26 July 2007, the research shows that many organisations still do not understand the ramifications of not being properly prepared. The BSC survey of 1250 organisations found that:

- 46% of employers do not understand or are not aware of the Corporate Manslaughter Act
- 60% of employers do not have any senior executives qualified in even the most basic health and safety practices
- 42% employers said their business does not have a health and safety management system
- 30% of workplaces do not have formal health and safety inductions
- 28% of companies with 251-500 employees are unaware of the Act
- 44% of companies in London are still not fully prepared for the Act
- A worrying 59% of organisations in the South West and West Midlands are not properly prepared for the Act.

With more than one in seven employees still unclear about what they are legally required to do to make their workplace safe and more than one in six employees feeling that employers are not doing enough to improve health and safety in the workplace, it seems that businesses are not taking the implications of the Act seriously.

"The new legislation is a wake up call to the many thousands of employers who freely admit to not understanding or even knowing about the new Act", says Brian Nimick, CEO of the British Safety Council. "Our report reveals that around a fifth of businesses of all sizes have not heard of the Act, even though it becomes law in just three months' time. Staggeringly this includes 40% of civil service and public sector organisations."



If businesses do not begin to familiarise themselves with such a vital piece of legislation, then it will not just be a legal complication, it really could be a matter of life or death.

For further information:



www.britishsafetycouncil.org

- > of Corporate Manslaughter. The consultation document, dated 15 November 2007, asks those consulted for opinions regarding aggravating/mitigating factors and aims of sentencing.

The panel proposes, in respect of the level of a fine, to look at an organisation's annual turnover. The panel considers that an offence under the Corporate Manslaughter Act should attract a much higher level of fine than an offence under the existing legislation which results in death due to the elements of serious management failure. The panel's provisional proposed starting point, for conviction on trial of a first time offender, is a fine of five per cent of turnover (averaged over three years prior to the incident). It is proposed that the Court will then take into account aggravating and mitigating factors, arriving at a fine in the range of 2.5% to 10% of the average annual turnover of the organisation.

The panel's provisional view is that a Publicity Order should be imposed on every offender convicted of Corporate Manslaughter. The consultation document also asks those consulted for their opinion on this course of action. This will have a real impact and views are sought so as to co-ordinate an objection to such a change being introduced from current levels of fines.

INDIVIDUAL LIABILITY

Prosecutions have historically been unsuccessful for gross negligence manslaughter due to the "controlling mind" requirement which has now been removed in the new offence. As such an organisation's liability will now be assessed on a much wider basis. However, the offence of gross negligence manslaughter in respect of individuals will still be available, and it is likely that with the availability of the more viable new offence, individuals may find themselves facing gross negligence manslaughter prosecutions at the same time as the company facing a corporate manslaughter prosecution. An extensive investigation would have already been completed in respect of the Corporate Manslaughter offence with individuals' behaviour being focused on.

There is also the potential for relevant individuals to be charged with a s.37 offence if the health and safety failings of the company are found to be with the consent or connivance of the individual or attributable to any neglect on their part. Such proceedings may result in a fine or imprisonment.

CONCLUSION

In light of this new legislation, it is important to evaluate the health and safety performance yearly - examining whether the health and safety policy is appropriate and that there has been effective reporting. If any action is needed to address any shortfalls then this should be decided and the action monitored.

For further information:

www.hse.gov.uk/aboutus/hsc/
www.sentencing-guidelines.gov.uk/about/sap/index.html



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