COMPANIES BEWARE! NEW SENTENCING GUIDELINES FOR HEALTH & SAFETY AND FOOD HYGIENE OFFENCES

Date: 8 February 2016

Food, Drugs, Medical Devices and Cosmetics (FDA) Alert

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INTRODUCTION

On 1 February 2016, new guidelines on the sentencing of health and safety and food offences (Health and Safety Offences, Corporate Manslaughter and Food Safety and Hygiene Offences Definitive Guidelines the "**Guidelines**") came into force. The Guidelines use the turnover of the offender as the starting point for calculating fines and sentencing ranges are set according to culpability. For example, a company will be assessed to have had a very high culpability level where it has been in deliberate breach of, or had a flagrant disregard for, the law; a low level of culpability is where the failings were minor and occurred as part of an isolated incident. In the worst case scenario, where an organisation with a turnover of £50 million or more is convicted of corporate manslaughter and is found to have acted in deliberate breach of or in flagrant disregard of the law, the organisation may be fined up to £20,000,000. An individual director found guilty of "consent, connivance or neglect" in relation to the breach of his duty under the Health and Safety at Work Act 1974 may receive two years imprisonment. The Guidelines are punitive. This Alert will examine what immediate steps companies can take in order to avoid being fixed with a heavy fine.

BACKGROUND

The Guidelines represent an enormous increase on the penalties that may be levelled against corporates in breach of health and safety legislation, and the sentences which complicit individual directors may receive. They send a message that health and safety and food hygiene should be a priority for all boardrooms and, if directors are not taking these areas of corporate governance seriously, they may face prison and their companies may face heavy fines.

The Sentencing Council has confirmed that the new sentencing regime has been introduced to ensure that fines "fairly and proportionately" reflect the seriousness of the offence and the means of offenders. Michael Caplan QC of the Sentencing Council has stated that the Guidelines inaugurate: "a consistent approach to sentencing, ensuring fair and proportionate sentences for those who cause death or injury to their employees and the public or put them at risk." The Guidelines follow close on the heels of the HSE's publication of statistics on fatal injuries in the workplace for 2015. This reveals that there were 142 fatal injuries in the workplace for 2014/15, and that 102 members of the public were fatally injured in accidents connected to work for 2014/15. The test of the Guidelines will be whether an escalation in penalties will lead to a reduction in these figures for 2015/16 and beyond.

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FOOD SAFETY AND HYGIENE

The Guidelines also incorporate sentencing criteria for breaches of food safety and food hygiene regulations. This represents the first time that food safety offences have been included in a sentencing guideline. Food businesses are under general safety obligations, such as being required only to put safe food on the market, to ensure that the food is traceable, appropriately presented and that unsafe food is withdrawn or recalled. Any breach of these general obligations or any food safety laws is an offence. The penalties for food safety offences are also stiff: a large organisation found guilty of the most serious level of culpability for a food safety offence, which has a serious adverse effect on an individual or has a widespread impact, may face fines of between £500,000 and £3,000,000, with a starting point of £1,200,000. For many food businesses, whose profit margins are increasingly stretched, these figures will be shocking, and a threat to profitability and investment. Food safety offences are, by their nature, seldom committed intentionally, and invariably occur as a result of deficient due diligence and compliance.

HEALTH AND SAFETY, THE ENVIRONMENT AND FOOD: A BROADER COMPLIANCE FRAMEWORK

The Guidelines are part of a much broader compliance framework introduced under the Coalition Government. On 1 July 2014, the new 'Definitive Guidelines' on sentencing for Environmental offences came into force (the "**Environmental Guidelines**"). The Environmental Guidelines imposed much higher penalties for organisations and individuals in breach of environmental legislation and regulations.

The Environmental Guidelines were received with widespread alarm by businesses. Recent developments suggest that this alarm was justified. In *R v Thames Water Utilities Ltd* [2015] EWCA Crim 960 the court adopted a strict application of the Environmental Guidelines which sent a strong warning to organisations (in particular, very large commercial organisations) and to individuals that non-compliance with environmental regulations will be treated severely. Environmental breaches may now result in extremely significant penalties, far exceeding fines previously levelled. For example, a large company (with a turnover of at least £50million), found guilty of an environmental offence and of an "intentional breach or flagrant disregard for the law", will be facing a fine of in excess of £1million.

Clearly, the Sentencing Council wants to ensure that health and safety sentencing is coherent with and proportionate to the environmental penalties in place. The new Guidelines are modelled on the Environmental Guidelines and there is now every reason to expect that the courts will apply a consistently tough approach to organisations in breach of health and safety and food hygiene offences.

WHAT DO THE GUIDELINES SAY?

The Guidelines set out the principles to be used when assessing the appropriate level of fine or term of imprisonment to be applied in sentencing organisations or individuals in breach of health and safety and food hygiene regulations. The Guidelines will apply to all sentencing after 1 February 2016.

The Guidelines specify the range of sentences appropriate to each type of offence. Within each offence they set out a number of categories to reflect the varying degrees of seriousness, each of which attracts a corresponding level of fine. A starting point is also identified for each category of seriousness. Once the court has established a starting point for the offence, it must then consider what features of the case warrant adjustment of the sentence

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within the range, including aggravating and mitigating factors. The Guidelines contain a non-exhaustive list of aggravating and mitigating factors. Factors which may increase the seriousness of the offence include:

- Cost cutting at the expense of safety;
- Deliberate concealment of illegal nature of activity;
- Obstruction of justice; and
- Poor health and safety record.

Factors which reduce the seriousness of the offence include:

- No previous convictions or no relevant/ recent convictions;
- Evidence of steps taken voluntarily to remedy the problem;
- High level of co-operation with the investigation, beyond that which will always be expected;
- Good health and safety record;
- Effective health and safety procedures in place; and
- Self-reporting, co-operation and acceptance of responsibility.

IS THE FINE PROPORTIONATE?

Once the court has determined what the level of the fine should be, having assessed the culpability of the offender and having had regard to the aggravating and mitigating factors, it must 'step back', review, and, if necessary, adjust the initial fine based on turnover to ensure that it fulfils the objectives of sentencing for these offences. The court may adjust the fine upwards or downwards, including outside the range.

The Guidelines provide that the fine must be “sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.” In finalising its sentence, the court must consider:

1. the profitability of the organisation. A large profit margin may lead to an upward adjustment, where a small margin may lead to a downward adjustment;
2. any quantifiable economic benefit derived from the offence should be added to the fine; and
3. whether the fine will have the effect of putting an offender out of business. The Guidelines note that, in some cases, this may be an “acceptable consequence”.

Please click here for the Guidelines.

WHAT SHOULD COMPANIES DO?

Two important factors which may reduce the seriousness of the offence include “high level of co-operation with the investigation, beyond that which will always be expected” and “effective health and safety procedures in place”. The two are part and parcel of implementing a robust and effective compliance framework. In order to

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ensure that it is able to rely on these factors, and to secure a downward adjustment in the starting point of the fine, organisations need to be clear on what these terms mean.

LEVEL OF CO-OPERATION

The level of co-operation required is significant and, in practice, means that an organisation must begin to co-operate with the HSE at the *earliest possible moment* into its investigation; to ensure early and meaningful co-operation, organisations should set-up - whether through internal or external legal counsel - an effective point of communication between the business and the HSE. This will assist in facilitating the communication of requests and responses for documents, and in managing disclosure. It will also allow the company to retain a greater degree of control over the process. Organisations which have in place robust incident management procedures are invariably those best prepared to manage investigations by authorities, including the HSE, the Food Standards Agency, Environment Agency and the Competition Commission. A comprehensive incident management programme will help to protect the organisation by ensuring that all necessary steps are followed and that less obvious steps, such as updating the Board, informing the insurers and co-ordinating an internal / external communications response, are not overlooked.

The introduction of the Guidelines will prompt many companies to review the way they approach HSE prosecutions. Some corporates will adopt the 'beyond that which will be expected' approach, in order to benefit to the fullest extent on sentencing. However, given the prospect of eye-watering fines, many well-resourced corporates - experienced in litigation - may be more inclined to contest a prosecution. Each course carries a risk and reputational considerations will be paramount. Of particular interest will be how the courts decide to treat more wily defendants who co-operate with the investigation at a high level and subsequently plead guilty.

EFFECTIVE PROCEDURES IN PLACE

Companies should begin to respond to the Guidelines soonest, if they haven't started already. It is essential that a robust compliance framework is in place, tailored to the nature of the business and to the risks identified, which implements effective health and safety policies, procedures and training. An effective corporate compliance framework will not only assist the organisation to maintain a strong health and safety, environmental or food safety record, but will also enable the business to demonstrate, in the event that an accident does occur and for which the company is prosecuted, that the business has “effective health and safety procedures in place”. Recently the HSE published a 5 year plan which emphasised the importance of risk assessments, inspections, guidance and training in developing proportionate procedures.

CONCLUSION

All organisations should carefully consider the costs of implementing effective procedures and incident management programmes to prevent breaches of Health and Safety, Environmental and Food Hygiene regulations, in the context of potentially substantial fines now open to the courts in the event of non-compliance.

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