

Alert | Labor & Employment



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UK HSE Successfully Prosecutes a Health and Safety Advisor for Deficient Advice

The Health and Safety Executive (HSE), the health and safety regulator for England and Wales, has **announced the successful prosecution before Luton Crown Court** of a self-employed health and safety consultant who provided "*inadequate and flawed*" advice to businesses concerning the management and control of risks in relation to hand/arm vibration, workplace noise, and substances hazardous to health.

The HSE's investigation found that the consultant incorrectly identified the risk from exposure to hand/arm vibration as being low and improperly recommended the use of 'anti-vibration gloves' as an appropriate control measure. The consultant also failed to identify that paints containing isocyanates (which are subject to controls under the *Control of Substances Hazardous to Health 2002* (COSHH)) can cause asthma. As a result of the consultant's advice, necessary remedial action was not implemented in order to prevent employees of the relevant businesses from being exposed to levels of noise, vibrations, and chemical substances which may have caused injury to their health.

The consultant pleaded guilty to breaching s3(2) of the *Health and Safety at Work etc. Act 1974* (the HSWA). Broadly, the HSWA imposes duties on various classes of person (be they individuals or corporate entities) to take all 'reasonably practicable' measures necessary to control and manage health and safety risks. Failure to comply with the HSWA may result in fines (as was the penalty in this case) and, in serious cases, custodial sentences. s3(2) provides that:

"it shall be the duty of every self-employed person [who conducts an undertaking of a prescribed description] to conduct [the undertaking] in such a way as to ensure, so far as is reasonably

practicable, that he and other persons (not being his employees) who may be affected thereby are not thereby exposed to risks to their health or safety".

While s3(2) may be more usually understood as imposing a duty on self-employed individuals to control health and safety risks arising out of their activities (for example, out of building services supplied by a self-employed contractor), in this case, the self-employed person's undertaking was the provision of health and safety advice to other businesses.

Delegating Health and Safety Duties

Although this particular case only – at least based on the facts as currently known - concerned the prosecution of a consultant engaged by various employers, it should not be thought that, as a general rule, employers themselves, or their managers, can shift or delegate their statutory responsibilities in relation to health and safety to third party consultants with the result being that only the consultant is at risk of liability for health and safety failures. Rather, the HSWA generally imposes strict criminal liabilities on employers and relevant individuals within organisations (in particular, the persons identified in s37 of the HSWA).

This is subject, however, to those persons being able to establish that 'all reasonably practicable' precautions to control health and safety risks were taken and that they had therefore satisfied their duties under the HSWA. Establishing that all 'reasonably practicable precautions' have been taken is not technically a defence to a prosecution under the HSWA. Rather, it serves to qualify the extent of the duty an individual is subject to under the HSWA.

The assessment of whether 'reasonably practicable' measures have been taken may involve considering, on one hand, the level of risk and, on the other hand, the measures taken (including by reference to money, time, and trouble) to avert that risk.

It may be that the hiring of a third-party advisor could be deemed to be a 'reasonably practicable' precaution (and indeed, in many health and safety contexts, seeking specialist third-party input will be essential), but this may only be the case where there is some evidence of appropriate due-diligence having been undertaken as to the advisor's qualifications and experience.

The HSE makes this point **in its guidance to employers**, i.e., that if an employer needs external advice, they are to ensure that the advisor is "*competent, suitable and [capable of giving the help the employer will] need*". Membership of a relevant professional body can be – as the HSE's ***Deciding who will help you with your duties*** guidance states - a relevant indicator of competence.

Relevance to the Coronavirus Disease 2019 (COVID-19) Pandemic

As we increasingly move into the opening-up phase of the pandemic, efforts to control the spread of the coronavirus are shifting from a primarily public-health based approach to one which focuses more on the health and safety duties of private economic actors. These duties are prescribed by the HSWA and, in certain cases, secondary legislation made pursuant to the HSWA (such as COSHH).

The duties in relation to COVID-19 (which exist in addition to existing health and safety duties) are, in essence, to follow the government's ***Working safely during coronavirus (COVID-19)*** guidance published online (making sure to also review the HSE's ***specific advice to help control the risk of coronavirus in workplaces*** which the government's guidance references and is deemed to incorporate).

The government's guidance serves to 'flesh-out' the HSWA's outcomes-focused duties in relation to the COVID-19 and the relevant regulatory bodies, the HSE and local authorities, will base their monitoring and enforcement activities around it.

It is essential, however, to remember that each undertaking has to adapt the implementation of the guidance to their specific circumstances, including by seeking specialist or technical advice and input where necessary. Many third-party advisors are marketing themselves as offering expertise in applying the government's guidance in relation to COVID-19. As demonstrated by this case, choosing a third-party advisor is an important decision and, if not done correctly, may result in health and safety risks not being eliminated or, if they are not being capable of being eliminated, managed appropriately.

While the recent HSE prosecution demonstrates that third-party health and safety advisors are themselves at risk of prosecution to the extent they provide deficient advice, businesses and managers need to remember that their own health and safety duties cannot simply be delegated to a third party – there is no ability to 'hire and forget' when it comes to managing health and safety.

Finally, while the HSE's press release concerned a prosecution made under the HSWA, failures with respect to health and safety may also potentially result in civil liability (for example under the common law tort of negligence).

** This GT Alert is limited to non-U.S. matters and law.*

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