



# Health and Safety Sentencing Guidelines Update

## Leisure and Hospitality Risk Insight

### What are they and why were they introduced?

February 2016 saw the implementation of the Sentencing Council's 'new' guidelines for fines for health and safety offences, the content of which is used by both the Magistrates and Crown Courts to determine the level of fines handed down for breaches of health and safety regulations.

The primary elements of the guidelines are that any fine must:

- Reflect the seriousness of the offence
- Take into account the turnover (as opposed to profit) of the offender
- Reflect the extent to which the offender fell below the required standard

### Have they worked?

In terms of improving health and safety standards, it is still too early to draw any firm conclusions. HSE and local authority statistics indicate that enforcement proceedings have remained relatively static when compared to the period immediately prior to the introduction of the guidelines, which suggests no real change has thus far occurred. It is likely to be another year or two before a considered view on this Issue can be properly formulated.

What is apparent, however, is that fines have increased significantly. In 2014/15 the HSE and enforcing local authorities successfully pursued prosecutions in 606 cases, securing total fines of circa £16.5m, at an average of £25,000 per case. In April 2017, the HSE published details of 21 successful prosecutions in that month alone which resulted in total fines of £8.3m at an average of £398,000 per case. Further, it is worth noting that these were not 21 of the largest fines issued, as one case involved a fine of only £2,000 being handed down.

- Meet in a fair and proportionate way, the aims of punishment and deterrence.

The Sentencing Council's stated intention was to increase fines for serious offences' and create an element of consistency in sentencing across the board, with a view to 'incentivising' businesses to ensure the health, safety and wellbeing of their employees and visitors etc. by proactively managing health and safety.

### A new element to sentencing.

One reason the fines have increased so dramatically is that the Court now takes into account not only what did happen in terms of physical injury, but also what could have happened.

By way of example, in January 2018, a leading fast food restaurant chain was fined £950,000 when two workers sustained burn injuries to their wrists transferring hot gravy from microwave ovens, in contravention of the company's health and safety procedures which were not being actively enforced by management. Whilst neither injury was particularly severe in its own right, the consequences of the incident could have been very much worse.

It must also be remembered that the same health and safety obligations apply to temporary situations. In October 2017 a leading brewery was fined £140,000 when a waiter sustained burn injuries to his ankles whilst transferring hot water in a plastic ice cream container from a tea urn to a sink, after the kitchen's hot water boiler failed.

It is essential that all businesses comply with their own internal health and safety policies, remain vigilant for potential risk and ensure that they implement suitable control measures when deficiencies are found.

## How the guidelines are applied.

### Stage One

Identifies the available range of the likely fine. This is achieved by determining the turnover of the organisation and placing it within one of the four available brackets:

- Micro: Not more than £2m
- Small: £2m to not more than £10m
- Medium: £10m to not more than £50m
- Large: £50m and above\*

\*Note – Where an offending organisation's turnover or equivalent very greatly exceeds the threshold for large organisations, it may be necessary to move outside the suggested range to achieve a proportionate sentence.

**Table 1 – Health and safety fines for large organisations**

Turnover or equivalent: £50 million and over		
	Starting point	Category range
<b>Very high culpability</b>		
Harm category 1	£4,000,000	£2,600,000 – £10,000,000
Harm category 2	£2,000,000	£1,000,000 – £5,250,000
Harm category 3	£1,000,000	£500,000 – £2,700,000
Harm category 4	£500,000	£240,000 – £1,300,000
<b>High culpability</b>		
Harm category 1	£2,400,000	£1,500,000 – £6,000,000
Harm category 2	£1,100,000	£550,000 – £2,900,000
Harm category 3	£540,000	£250,000 – £1,450,000
Harm category 4	£240,000	£120,000 – £700,000
<b>Medium culpability</b>		
Harm category 1	£1,300,000	£800,000 – £3,250,000
Harm category 2	£600,000	£300,000 – £1,500,000
Harm category 3	£300,000	£130,000 – £750,000
Harm category 4	£130,000	£50,000 – £350,000
<b>Low culpability</b>		
Harm category 1	£300,000	£180,000 – £700,000
Harm category 2	£100,000	£35,000 – £250,000
Harm category 3	£35,000	£10,000 – £140,000
Harm category 4	£10,000	£3,000 – £60,000

### Stage Two

Determines where within the predetermined range of fines the penalty should sit, which is achieved by the judge using a set criteria to assess culpability and harm:

- Culpability of the defendant; from low to very high (see Table 2)
- Harm risked by the breach; from four categories (see Table 3)

**Table 2 – Culpability**

#### Very high

Deliberate breach of or flagrant disregard for the law

#### High

Offender fell far short of the appropriate standard; for example, by:

- failing to put in place measures that are recognised standards in the industry
- ignoring concerns raised by employees or others
- failing to make appropriate changes following prior incident(s) exposing risks to health and safety
- allowing breaches to subsist over a long period of time

Serious and/or systemic failure within the organisation to address risks to health and safety

#### Medium

Offender fell short of the appropriate standard in a manner that falls between descriptions in 'high' and 'low' culpability categories

Systems were in place but these were not sufficiently adhered to or implemented

#### Low

Offender did not fall far short of the appropriate standard; for example, because:

- significant efforts were made to address the risk although they were inadequate on this occasion
- there was no warning/circumstance indicating a risk to health and safety

Failings were minor and occurred as an isolated incident

The level of culpability and harm has a significant impact on the starting point of any fine. Moving up from one level of harm to the next, typically increases the starting point by over 100%.

**Table 3 – Harm**

Seriousness of harm risked			
	Level A	Level B	Level C
	<ul style="list-style-type: none"> <li>▪ Death</li> <li>▪ Physical or mental impairment resulting in lifelong dependency on third party care for basic needs</li> <li>▪ Significantly reduced life expectancy</li> </ul>	<ul style="list-style-type: none"> <li>▪ Physical or mental impairment, not amounting to Level A, which has a substantial and long-term effect on the sufferer's ability to carry out normal day-to-day activities or on their ability to return to work</li> <li>▪ A progressive, permanent or irreversible condition</li> </ul>	<ul style="list-style-type: none"> <li>▪ All other cases not falling within Level A or Level B</li> </ul>
<b>High likelihood of harm</b>	Harm category 1	Harm category 2	Harm category 3
<b>Medium likelihood of harm</b>	Harm category 2	Harm category 3	Harm category 4
<b>Low likelihood of harm</b>	Harm category 3	Harm category 4	Harm category 4 (start towards bottom of range)

**Stage Three**

In addition to using the new guidelines, the courts should also consider any mitigating or aggravating factors, which may make it appropriate to move outside the recommended sentencing range.

Mitigating factors can include:

- Lack of previous/relevant convictions
- Steps taken to remedy wrong-doing
- Levels of cooperation with the investigation, beyond that which will always be expected
- The existence of effective health and safety/food safety/hygiene procedures
- A good health and safety/food safety/hygiene record
- Self-reporting of the incident in question and the level to which responsibility is accepted

Aggravating factors can include:

- Previous relevant offences
- The breach of a relevant court order
- Obstruction
- Poor health and safety/food safety/hygiene record
- Deliberate concealment of the offence
- Committing the offence for financial gain.

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Having arrived at a level of fine, the court must still consider if there are any other factors that may justify an adjustment. For example, if an organisation has a small profit margin relative to its turnover, downward adjustment may be needed whereas a large profit margin might require upward adjustment.

For more information on the Sentencing Council and Safety Sentencing Guidelines, please visit [www.sentencingcouncil.org.uk](http://www.sentencingcouncil.org.uk).

**How can Willis Towers Watson help?**

Our Claims Defensibility Practice offers a Regulatory Defensibility Review which will assess your organisation's likely performance in the event of a regulatory investigation, and its prospects of avoiding potential prosecution and fines.

Additional services include Regulatory Mock Trial Training which has been designed and produced to give an authentic insight into the prosecution process and how witness and documentary evidence is interpreted by the Courts. Filmed using specialist practising barristers, the case is heard by a Crown Court Judge and jury, to ensure the training is as realistic as possible.

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