



UK Health and Safety Regulatory Update

Food and Drink

A look at where we are now, and where we're headed

It's been three years since the Sentencing Council¹ updated its guidelines on sentencing for health and safety offences in February 2016. We've taken a good look at what has happened since, and what we think might be on the cards.

In those three years, we've seen a significant increase in the severity of fines handed down to businesses for health and safety breaches. Back in 2014/15, 606 prosecutions over the year saw total fines of £16.5m. In the single month of April 2017, just 21 prosecutions resulted in total fines of £8.3m. That's around a 16 fold increase in the per case average – from £25,000 per case to £398,000.²

There has also been a steep rise in individual prosecutions, leading to a number of managers or owners being given a prison sentence – including several high-profile cases..

How – and why – sentencing guidelines changed

Magistrates and Crown Courts follow guidelines set out by the Sentencing Council when determining fines for breaches of health and safety regulations.

When the Sentencing Council revised those guidelines back in February 2016, they did so with the stated aims of increasing fines and consistency, also focusing on incentivising businesses to proactively manage the health, safety and wellbeing of their employees and visitors.

¹ <https://www.sentencingcouncil.org.uk/>

² <http://www.hse.gov.uk/enforce/prosecutions.htm>

³ <http://www.scotland-judiciary.org.uk/8/2124/HMA-v-Allenbuild-Limited>

The primary elements of sentence guidelines

Any fine must:

- Reflect the **seriousness** of the offence
- Take into account the offender's **turnover** – not just their profit
- Reflect the extent to which the offender **fell below the required standard**
- **Punish** the offence, and act as a **deterrent** – in a fair and proportionate way.

As Sherriff Norman McFadyen put it in his sentencing remarks on a specific case:³

“ A significant purpose of a fine in a case of this nature is described in the Guidelines as to bring home to both management and shareholders the need to comply with health and safety legislation. It is not to put a value on a human life and that is not what the court is doing. It is punishing the company. ”

A new element to sentencing

As part of the February 2016 changes, the size of fine that a business can expect to receive now depends on three key factors:

- **Turnover** (not just profit) – the higher the turnover, the higher the fine.
- **Harm** – what could have happened as a result of a breach – not what did happen.
- **Culpability** – essentially, how well the organisation managed health and safety generally – their track record and policies and processes.

Under the new rules, organisations fall into one of four turnover brackets. Fines are calculated in proportion to turnover rather than profit.

The guidelines recommend the following:

Type of Business	Turnover (£)	Fine Range (£)
Micro	Turnover of not more than £2m	Micro: £50 – £450,000
Small	Turnover of £2m to not more than £10m	Small: £100 – £1.6m
Medium	Turnover of £10m to not more than £50m	Medium: £1,000 – £4m
Large	Turnover of £50m and above*	Large: £3,000 – £10m

*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.

What's happened since 2016?

We've looked at how the sentencing guideline changes have affected the food and drink sector in particular.

High-profile, significant fines for the food and drink sector

Since the changes, several health and safety cases in the food and drink sector have hit the news – and resulted in considerable fines.

Here are just a few examples of how courts are now dealing with health and safety failings:

- **£2m and £1.9m fines to well-known bakery business** for safety breaches that caused non-fatal injuries to two employees – 2017.
- **£1.4m fine for a food manufacturing and processing business** where an employee sustained serious injury caused by inadequate machine guarding – April 2019
- **£866,650 fine to a poultry-processing business** after inadequate risk assessments led to an employee being hit by a forklift truck – February 2019.

It's important to remember that it's not possible to insure against criminal fines like these, and so fines directly impact the profits and performance of a business.

Directors and managers at personal risk

Many directors and managers don't appreciate that they may be held personally liable if their organisation commits a health and safety offence – as well as their organisation.

Since the new sentencing guidelines were introduced, there has been a steep rise in individual prosecutions resulting in custodial sentences.

This usually happens if the regulator believes that the company's breach of duty occurred because an individual 'turned a blind eye' to health and safety failings, or because they knew (or ought to have known) that the health and safety governance of the business was inadequate.

In one recent case that garnered national press attention, a teenage customer died after eating a takeaway meal containing allergens. The judge noted that the business had no systems or processes to manage allergen control – and handed down a 3-year sentence for the business owner, and a 2-year sentence for the manager.

The judge noted that she hoped 'the message is heard' that food suppliers who fail to take proper care 'will face significant custodial sentences if a death results'.⁴

The future: an increased risk of local authority prosecution?

The current situation is certainly troubling for the sector. But looking ahead, we think it's likely that the risk profile of food and drink sector businesses may increase yet further – particularly for organisations that fall under a local authority's remit, with potentially more inspections and enforcement activity to come. Here's why...

Criticism of a decline in inspections by local authorities

In 2018, a report by the All-Party Parliamentary Group on Occupational Safety and Health criticised local authorities for:⁵

- failing to take adequate steps to monitor the health and safety activities of the organisations they regulate.
- failing to take regulatory enforcement action where necessary, to ensure compliance with legislation.

The group challenged the general assumption that businesses regulated by local authorities should be considered 'low risk' for health and safety purposes.

It noted, as an example, that warehousing can have extremely high injury and ill health rates'. Other areas, meanwhile, 'even if they have lower levels of injury, are often at higher risk of occupational diseases such as stress in offices, musculoskeletal disorders in supermarkets and violence in pubs and clubs'.

⁴<https://www.bbc.co.uk/news/uk-englandlancashire-46123858>

⁵<http://jostevens.co.uk/report-local-authorities-and-health-and-safety/>

Citing recently published HSE statistics, the group also noted the substantial 97 per cent reduction in proactive regulatory inspections, contributing to a 65 per cent reduction in all types of inspections and interventions from 2010 to 2016. The group noted that the fall in inspections may even be higher, as data analysis showed that local authorities sometimes recorded the nature of a visit incorrectly.

The group went on to express concern that the fall in inspections wasn't justified by fewer people experiencing ill-health at work. It commented that 'although ill-health statistics for the local government enforced sector are not published, the overall figures for all sectors show that there has actually been an increase in health-related illnesses in the years since 2010. While it cannot be shown that this is a result of the changes to inspection and enforcement, it does show that the fall in inspection activity is not justified on the grounds of a fall in risk'.

The report acknowledged that the full impact of the fall in inspections wasn't clear, but noted a 64 per cent decline in enforcement activity.

It pointedly concluded that **'This means far fewer employers are being brought to justice. This does not appear to be because fewer employers are putting their workforce at risk as there has been no fall in injury or ill-health statistics'**.

Could this change government policy on local authority inspections?

We feel that it's not unreasonable to suggest that this particular text from the report could potentially be seen as a signal to the government about a need for substantive change in existing health safety enforcement policy.

In fact, one of the key recommendations from the report was that the 'Fee for Intervention' scheme should be expanded to include local authorities. This scheme currently allows HSE to charge businesses found to have breached health and safety law for the time it takes to identify the breach and help put things right.

In these times of austerity and tight local authority budgets, what better way to improve the rate of inspections and enforcement activity than to turn the process into an income-generating operation?

Making sure you have effective policies and procedures

Taken together, these trends mean it has never been more important for food and drink businesses to be able to evidence the positive steps they've taken to mitigate health and safety risk.

Even the risks of stronger enforcement and heavier fines can pale into insignificance against the risk of lasting reputational damage – and, of course, director's and owner's personal liability.

The key to protecting employees, customers and visitors is making sure that you have well-documented policies and processes that are communicated to all staff and contractors.

How Willis Towers Watson can help you and your business protect against regulatory breaches

In a changing regulatory landscape, it's essential that food and drink businesses have practices and policies in place to keep people, employees and independent third parties safe.

At Willis Towers Watson, we use our deep food and drink sector expertise to provide targeted services that will raise risk awareness, reduce your risk profile, and enhance your regulatory compliance.

Key services include:

- Health and safety governance briefings for directors and senior managers.
- Regulatory defensibility review.
- Mock trial training.
- Bespoke accident/incident investigation training.
- Contractor management training.

If you would like to know more, please contact a member of your Client Service team, or your account manager, or contact our Food & Drink Practice Leader, **Sue Newton** via email sue.newton@willistowerswatson.com



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