

Regulatory Services — COVID-19 and beyond

Introduction

The criminal sentencing guidelines for health and safety offences are used by both the Magistrates and Crown Courts to determine the level of fines and custodial sentences to be handed down for breaches of health and safety regulations.¹ The Sentencing Council's stated intention was to increase fines and penalties 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.

In the 16 months prior to the introduction of the guidelines the average fine for a health and safety prosecution was circa. £25,000 for large/very large businesses. According to figures published in May 2017, that figure increased to £370,800 in the same period after the guidelines were published.² When looking at annual fines before and after their introduction, this figure has risen from £16.5 million in 2014/15 to £54.5 million in 2018/19.³

The reason the fines have increased so dramatically is that the Court now takes into account the size of the business being prosecuted in terms of turnover. The bigger the turnover, the bigger the fine. In addition, the Court not only factors in what actually did happen in terms of physical injury or harm, but also what could have happened, as well as considering the extent to which the business failed to meet the required standards in terms of health and safety governance.

What is your risk exposure?

Businesses are categorised as follows:

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.

Source: www.hse.gov.uk

Why do you need to act?



Regulatory fines for health and safety breaches can have a significant impact on the financial performance of a business as fines are payable by a business rather than by insurers.



Legal costs, which are covered by insurers, can also escalate rapidly.



The personal liability of directors and senior managers in relation to offences can lead to custodial sentences.

How can Willis Towers Watson help?



Businesses and organisations must be able to evidence robust management 'from the top' in keeping people, employees and independent third parties safe.



Our Claims Defensibility & Regulatory Practice provides a number of services to help businesses avoid and defend regulatory action, including from COVID-19.

Regulatory defensibility review

The regulatory defensibility review will assess a business's likely performance in the event of a regulatory investigation and its prospects of preventing a prosecution and a fine, including as a result of managing potential exposure from COVID-19.

The regulatory defensibility review will involve detailed consideration of policies, procedures and documentation used in the management of health and safety.

¹ <https://www.sentencingcouncil.org.uk/about-sentencing/types-of-sentence/fines/>

² Figure 3, p.7 - <https://www.sentencingcouncil.org.uk/wp-content/uploads/Health-and-safety-guideline-assessment.pdf>

³ Sentencing outcomes, p.4 - <https://www.hse.gov.uk/statistics/enforcement.pdf>

It will include looking at defence strategies presently employed for defending such action and how these can be used more efficiently.

The focus is on the existence, evidential value and general availability of documentation or evidence which would assist in preventing or defending regulatory action, with the review covering a broad range of areas, including COVID-19.

The process will include a detailed review of documentation along with interviewing personnel from Health and Safety, HR and management within the business. It may also involve visits to other sites and locations.

Some of the benefits of the regulatory defensibility review are detailed below:

- It can help identify improvements in existing policies, procedures and documentation
- It can reduce the cost and time taken to formulate evidence following an investigation by enforcement authorities
- It can help a business to operate successful policies and procedures
- It can help identify strengths and weaknesses and the ability to prevent or defend regulatory action
- It can reduce or avoid payments made by insurers in respect of legal defence costs
- It can help develop procedures which can avoid regulatory enforcement action, including fines

Strategic defensibility review

The review is designed to enhance and maximise the defensive qualities of an organisation's existing internal health and safety governance structure. It involves providing guidance and support in relation to health, safety and wellbeing, in a manner akin to that of an independent, non-executive director.

We will work in conjunction with your health and safety management team via an agreed programme of pre-arranged review meetings and other 'as and when' intermittent communications for a period of 12 months.

The programme will be specifically tailored to the organisation's requirements. The process will:

- Assist with implementation of a strategic compliance monitoring programme embedded within the health and safety function.
- Formulate targeted 'Terms of Reference' promoting defensive management systems.
- Incorporate a review of all key defensive documents (i.e. accident/near-miss incident reports and records, investigation and audit reports etc.).
- Produce guidance and relevant instructions to assist those charged with undertaking accident/near-miss incident investigations.
- Offer ongoing coaching/mentoring and support to key health and safety individuals to enable them to successfully continue the ethos of the programme once the agreed duration has expired.

The long term benefits of the programme are detailed below:

- Improved health and safety related governance
- Enhanced ability to avoid and/or defend regulatory enforcement action and compensation claims
- Avoidance of regulatory action and associated fines
- Long term educational benefits linked to the personal development of key health and safety focused employees

Facilities management document and process review

The review will examine how an organisation's management systems (linked to real estate and property management) operate to ensure that required actions are correctly undertaken and recorded. This includes how these interact with systems of other interested stakeholders.

The review will also consider what systems and processes are in place to record inspections, required maintenance or other associated actions. It will assess their effectiveness to track and reproduce key documentation and evaluate the quality of evidence they create in relation to a regulatory investigation. It will also highlight any changes necessary to improve the ability to defend liability claims.

The review will cover the following areas:

- Facilities management systems
- Consideration of processes to add new properties to the management systems
- The undertaking of surveys of new properties
- Planned maintenance procedures
- Reactive maintenance procedures
- The management of on-site risk from COVID-19
- Management of contractors undertaking servicing, repairs and maintenance
- Recording of inspections/servicing and maintenance
- Record keeping

Regulatory mock trial training



The mock trial training is designed to raise awareness of the issues which can trigger enforcement proceedings and offer guidance on how existing systems and procedures can be modified and enhanced to regulatory standards.

The regulatory mock trial has been specifically created and recorded to demonstrate the court process of a regulatory prosecution. To ensure that the training is as realistic as possible, specialist practising barristers act as the advocates for the prosecution and defence, with the case being heard by a genuine Crown Court recorder before an independent jury.

Footage from the regulatory mock trial is shown here: <https://bcove.video/2T5KXt2>

The purpose of the mock trial training is to provide attendees with an understanding of the factors which can lead to regulatory enforcement action. Attendees will obtain experience and knowledge in the following learning points:

- An understanding of how the legal system works in relation to enforcement action
- An overview of the importance of the weight and admissibility of evidence
- An appreciation of the importance of detailed documentary records and how this can influence the Court
- An understanding of how accident investigations can either significantly enhance or undermine a defence and/or a key witness's credibility
- The importance of a witness's performance and credibility at trial
- An insight into the pressures a witness experiences whilst giving evidence at trial

Dealing with a serious workplace incident

Workplace incidents and accidents can happen at any time and they have the potential to trigger a regulatory investigation, prosecution or coronial inquest in addition to adverse publicity and damage to brand. Accordingly, it is essential that businesses ensure such events are appropriately managed and investigated as their immediate post incident/accident conduct can significantly influence subsequent regulatory proceedings and media coverage.

The training will be a blend of seminar, practical case study and involve audio visual based learning platforms, affording attendees the opportunity to watch a filmed regulatory 'interview under caution' which has been specifically written for the training.

An extract of the footage can be seen here. <https://bcove.video/2RDhSDo>

The training will help businesses to:

- Formulate strategies designed to proactively manage severe incidents
- Limit negative and adverse media exposure
- Enhance the defensive qualities of internal investigations
- Understand the regulatory investigative process and avoid the pitfalls that can increase the risk of prosecution

Contractor management training



Many businesses rely on the use of contractors and subcontractors to provide services or support without realising that they can significantly increase their risk profile.

Unlike civil compensation claims where potential liability can be limited, apportioned or predetermined

by the terms and conditions of relevant contracts, the criminal jurisdiction results in parties being responsible for their failings, regardless of the extent to which those failings actually caused an accident, incident, or near miss.

Our contractor management training will help identify potential weaknesses within existing contractor policies and procedures and facilitate improvement in relation to key elements of contractor management including:

- Planning
- Contractor selection
- Contractor competency
- Working activities/risk control
- Performance monitoring
- Operational review

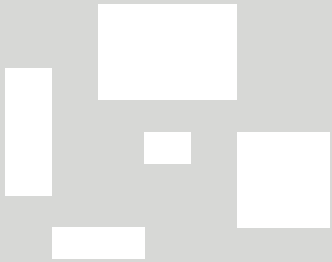
It will also provide practical examples of the circumstances in which contractor activities can create liability exposure and assist in the formulation of an effective management strategy designed to reduce and mitigate such exposure.

Our claims defensibility and regulatory team

Our services, which can be delivered remotely or on-site, are carried out by former practising lawyers possessing a 'real world' insight to the intricacies of both the civil and regulatory justice systems.

Team credentials

- 20 years + average legal practice experience per team member
- Active nationally across all industry and service sectors
- Proven track record



About Willis Towers Watson

Willis Towers Watson (NASDAQ: WLTW) is a leading global advisory, broking and solutions company that helps clients around the world turn risk into a path for growth. With roots dating to 1828, Willis Towers Watson has 45,000 employees serving more than 140 countries and markets. We design and deliver solutions that manage risk, optimise benefits, cultivate talent, and expand the power of capital to protect and strengthen institutions and individuals. Our unique perspective allows us to see the critical intersections between talent, assets and ideas – the dynamic formula that drives business performance. Together, we unlock potential. Learn more at willistowerswatson.com.



willistowerswatson.com/social-media

Each applicable policy of insurance must be reviewed to determine the extent, if any, of coverage for COVID-19. Coverage may vary depending on the jurisdiction and circumstances. For global client programs it is critical to consider all local operations and how policies may or may not include COVID-19 coverage.

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