

# Tough new health & safety sentencing guideline in force: A stark warning to all

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So it begins...one of the most significant developments in health and safety law in recent times is now in force - the first comprehensive sentencing guideline to include non-fatal health and safety offences.

The long-awaited *Definitive Guideline for Health and Safety Offences, Corporate Manslaughter and Food Safety & Hygiene Offences* will apply to all cases sentenced on or after 1 February 2016, irrespective of when an offence was committed.

The HSE has confirmed it is pursuing 440 workplace cases from last year alone.

In January this year, Balfour Beatty were subject to significant fines plus costs, indicating judges were already sentencing with the new Guideline in mind, providing a stark warning of things to come, particularly for larger organisations.

## How do they work?

The Guideline distinguishes between organisations and individuals, providing a nine-step framework that requires courts to decide the defendant's culpability and the level of harm or potential harm, in order to assess the seriousness of the offence.

Those factors are then taken into account to determine the starting points for fines, and the ranges of penalties. Fines are based on turnover for organisations and weekly income for individuals (unless a custodial or community sentence is appropriate).

The Guideline for corporate manslaughter recognises that the level of culpability - i.e. "grossness" - and harm are, by definition, very serious. They therefore pose a set of questions to allow sentencing judges to categorise offences as A or B; A being reserved for defendants who demonstrate a high level of culpability, or harm within the context of corporate manslaughter.

## Potential Penalties

The Sentencing Council confirmed last year that the Guideline will mean higher penalties "particularly [for] large organisations committing serious offences - such as when an organisation is convicted of deliberately breaking the law and creating a high risk of death or serious injury."

For organisations, turnover is used to bracket defendants as micro (up to £2 million), small (£2-10 million), medium (£10-50 million), or large (more than £50 million). When sentencing "very large" organisations - with a turnover greatly exceeding the "large" bracket - the Guideline indicates that courts should move outside the suggested range. To put this into perspective, proposed fines for large organisations are up to £20 million for corporate manslaughter offences, and £10 million for health and safety offences. This creates the potential for fines in the tens of millions for very large organisations sentenced in fatal cases.

For health and safety offences committed by individuals who show a level of "reckless" or "deliberate" culpability, the Guideline suggests a custodial sentence, unless the category of harm is low. This may increase the number of custodial sentences for directors, officers and other employees convicted of offences under sections 37 and 7 of the Health and Safety at Work Act 1974.

All penalties set out in the Guideline represent the starting point before mitigating and aggravating factors are taken into account. The Guideline then permits courts to look beyond turnover to gauge the true economic position of an organisation and to take account of the impact of a fine on third parties, such as employees.

Whilst the Sentencing Council stated they do not anticipate fines will be significantly higher in the majority of cases, this remains to be seen. Not only are fines likely to increase significantly, the cost and time element of sentencing hearings could rise dramatically, as the use of complex financial evidence and expert evidence from accountants becomes the norm.

## What to do next?

DAC Beachcroft will be running a series of legal updates in May on the Construction (Design and Management) Regulations 2015, which will incorporate the Sentencing Guideline. We can also provide bespoke in-house training, tailored to your

needs.

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