

BUSINESS MATTERS UPDATE

Health and Safety breaches: businesses increased criminal liability

New legislation introduces greater risk of criminal liability for businesses and their executives.

The Health and Safety Offences Act 2008 came into force on 16 January 2009 and applies to offences committed after this date. The stakes for businesses and their employees getting this area of law wrong have dramatically increased.

This new act together with the recent Corporate Manslaughter and Corporate Homicide Act 2007 and draft sentencing guidelines in recent health and safety cases increases the likelihood of prison sentences and higher fines.

Three key aspects of the new Act are noteworthy:

- Firstly, a spell in jail is now an option for most health and safety offences in the lower (Magistrates) and higher (Crown) courts. Where the Magistrates Court could previously only give a maximum of six months imprisonment, this has now increased to 12 months.
- Secondly, the maximum fine for most health and safety offences has been increased to £20,000 in the Magistrates Court. Courts may now impose both a fine and a jail sentence, rather than one or the other. In 2007/08 the average fine per conviction in health and safety offences was just £12,896. This was in part because the maximum fine which could be imposed was only £5,000 per breach. The increase to £20,000 under the new Act will surely increase this average considerably.
- Thirdly, two offences which previously could only be tried in a Magistrates Court may be escalated to the Crown Court as they are now classed as "either way". This increases the potential exposure to sterner sentences.

Will the Act result in more prison sentences? We think the answer to this is emphatically yes for the following reasons:

- In 2007 the Court of Appeal held a director could be guilty of an offence even if they did not know

about the unsafe practices of their company. Under those circumstances would the Court now feel imprisonment was the correct sentence? We expect that prosecutions of individuals will increase given the combined effect of such case law, the new legislation and the increasing involvement of the police force in the investigation of fatal accidents.

- Guidelines published in October 2007 by the Institute of Directors on "Leading Health and Safety at Work" benchmark what is expected of directors and senior managers (see <http://www.hse.gov.uk/pubns/indg417.pdf>). The Regulator, the Health and Safety Executive (HSE), can now measure industry best practice and this also suggests that prosecution could become more likely.
- By increasing powers for sentencing Courts through the new Act, Parliament has clearly demonstrated that health and safety breaches should be considered as serious criminal offences.

When to seek legal advice?

The new Act will impact upon those investigating, prosecuting and defending such cases. Given the higher penalties, vulnerable individuals should seek legal advice before providing a statement to a health and safety inspector. Companies should consult a lawyer before conducting an internal investigation to minimise the risk of such investigation documents being seized by a health and safety inspector at a later date. Furthermore it is likely the Court will see an increase in agreed written and detailed basis of pleas, before they sentence.

Individuals and companies must now reflect on their working practices, ensure training and compliance with the legislation and seek legal advice if they have any concerns.

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Can you guarantee payment?

With well established brands falling by the wayside, most businesses are looking carefully at their own debtors lists, wondering if any of their customers will be next, and whether their own invoices will be paid. Elsewhere in this newsletter, Julian Trahair has looked at whether there are any claims for wrongful trading against a director. However, this does not necessarily mean that the supplier sees any payment.

Suppliers are looking at ways of limiting their exposure to their customer's financial difficulties. One such way is through the use of guarantees. This is a promise, given by someone other than the primary contractor (the customer) that they will personally take on the obligations (for example payment) of the customer if the customer fails to honour its own obligations.

The person giving the guarantee (known as the guarantor) is usually a director or shareholder. This is known as a personal guarantee. In the case of a group of companies, the parent company may agree to meet a subsidiary's obligations through a parent company guarantee. In both cases, if the customer defaults, you, as the supplier, are entitled to enforce the guarantee against the guarantor and seek payment. This is a contractual way to get around the limited liability of a customer company.

In our experience, the use of guarantees is on the rise, even in relatively low level transactions, due to increased anxiety

about customers creditworthiness and ability (or willingness) to pay bills. Whereas in a buoyant market, offence was often taken if a long-standing customer was asked to guarantee payment, the frequency of their use now means that they are more common place. Confident directors and shareholders often give the guarantee that the company will not default on payment. Less confident directors may be prepared to sign up, to make sure there is continuity of suppliers and to help cash flow for their company.

However, personal guarantees are not the answer to every problem – they are only as good as the assets of the person who has given the guarantee. So if you are seeking one from the shareholder or director of one of your customers, you should do your research to check that the individual is not in financial difficulties of his/her own.

For further information please contact Rachel Robinson, solicitor on 01392 685214 or email rachel.robinson@footanstey.com

Brand protection – a new weapon?

In an increasingly competitive market-place, having a clear brand will identify your business, build customer loyalty and set you apart from your competitors.

Your brand is a valuable asset to your business and as such it should be protected. Trade marks are one way of protecting your brand and since October 2008 brand owners have another line of defence.

Before October, the registration of a company name could only be challenged if it was "too like" an existing company name; this challenge was only available to incorporated companies. A company name could only infringe a trade mark (or be capable of passing off in the case of unregistered marks) if the company traded in the name.

Now, the Companies Act 2006 allows anybody who has goodwill associated with a name (including a brand name) to object to the registration of a company name if the registration has been made "opportunistically" to obtain money or to prevent registration of the name.

A complaint is made by applying to the Company Names Tribunal. The applicant will have to show that he or she has "goodwill" in the name but this is a wide

definition and includes any kind of reputation linked to the name.

The principle behind the new provisions is to enable disputes over company names to be settled quicker, easier and cheaper than trade mark infringement proceedings.

This is great news for brand owners – it presents a new weapon in the protection of brand names.

We offer full brand protection services which include company name watching services that can help you respond quickly to potential threats to your brands.

For further information, please contact Marlene Howels, associate on 01392 685330 or email marlene.howels@footanstey.com

Companies House gets tough – increased fines for late filing

Tougher rules came into force on 1 February 2009 on the filing of company accounts.

Companies now have a month less to file accounts under the new rules laid down by the Companies Act 2006 and those that miss the deadline could be subject to an increased fine of up to £1,500.

238,699 companies in the UK filed their accounts late last year according to the Financial Times, a 10% increase on the year before. The current economic climate may result in a further increase this year particularly if companies need to discuss their status as a going concern with their auditors.

Banks and credit providers may also keep an eye on when accounts are filed when considering whether credit lines should remain open and companies should be aware that some trade credit insurance may be invalidated if accounts have not been filed on time.

For companies whose accounts start on or after 6 April 2008, their company secretaries will have nine, not ten

months from the company accounting reference date to file the accounts.

The new regime of fines for companies who do not file by the new deadlines are:

How late are the accounts delivered	Penalty Private Company & LLP
Under 1 month	£150
1 to 3 months	£375
3 to 6 months	£750
Over 6 months	£1,500

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Directors' personal liabilities for wrongful trading

One of the foundations of our business system is the ability of companies to trade with limited liability. As a consequence a company can incur debts without exposing shareholders and directors to liability.

Whilst this is good for shareholders and directors it is much less attractive for the company's creditors. When a business becomes insolvent its creditors are inclined to review how the business was managed in the past. It is frustrating for creditors to realise that the directors have taken unnecessary risks which led to the collapse of the company and yet they are not exposed to any personal loss.

The injustice of that situation led to the wrongful trading provision in the Insolvency Act in 1986. This enables a liquidator of a company to apply to court for an order that a director of the company should contribute personally to the company's assets.

In considering the application, the court needs to be satisfied that the company continued to trade after the director knew or ought to have realised that there was no reasonable prospect that the company would avoid insolvency.

To counter this, the director will have to show that he or she took reasonable steps to minimise the potential loss to creditors. Taking professional advice and considering the facts, before making the decision to proceed will certainly

work in his or her favour. In most cases, where directors have been found liable they had wilfully ignored the reality of the company's position.

If the case is proved an order can be made for the director to pay an amount into the liquidation, which reflects the extent to which the company's assets have been depleted by a director's conduct, since the point at which he or she should have realised that it could not avoid insolvency. This could involve a substantial payment from the director's own assets.

Also, the court can link this with an order that the director be disqualified from acting as a director of a limited company.

So the sanctions which face directors are severe and in a tough financial climate professional advice should be sought sooner rather than later.

For more information please contact Julian Trahair, solicitor on 01752 675165 or email julian.trahair@footanstey.com

Dispute resolution options for inclusion in your contract

Although most contract drafting and negotiation involves a significant amount of time and expense to make sure the commercial terms and the legal drafting are just right, dispute resolution clauses are often the poor relation, often left until the end of the negotiation, and treated as part of the boilerplate or small print.

In the excitement of a new deal or concluding a new business opportunity that is understandable. Most people don't enter into new arrangements already thinking how they will sue if it goes wrong.

However, a little thought at the time of concluding contracts can save a lot of time and expense in the unwanted event that a dispute arises. The best opportunity to manage the procedures applicable to any future disputes undoubtedly arises at the contract negotiation stage. By the time a dispute arises it is often already too late and too difficult to get the necessary agreement between the parties to deal with those issues.

If the applicable dispute resolution procedure is not agreed in advance, or if the relevant clause is inadequate, a party can make the proceedings more complicated in a number of ways including arguing that any body appointed does not have jurisdiction; arguing that the relevant clause is unenforceable; or arguing that any award or decision does not bind them, as well as generally increasing the time and expense you must invest in those proceedings.

Often a company will either not turn its mind to dispute resolution at all, or it will have one simple clause which it uses in all of its contracts without considering whether or not it is appropriate for the contract in question. In fact, there are a range of options available for parties to provide for the resolution of disputes that may arise between them, including:

- (a)** Straightforward negotiation between the parties
- (b)** A non binding dispute resolution process, which involves a third party to facilitate discussion (i.e. mediation, conciliation, early neutral evaluation)
- (c)** A binding dispute resolution process which almost invariably ultimately involves a third party imposing his or her view of events (i.e. expert determination, adjudication, arbitration, Med-Arb)

The courts are still the most commonly used forum, with arbitration coming in a relatively distant (although increasingly popular) second. However, alternative forms of dispute resolution are increasingly popular for the following reasons:

- (a)** Speed – some forms of dispute resolution are generally faster than others
- (b)** Cost – some forms of dispute resolution may, if successful, prove cheaper than others (i.e. a negotiated settlement will usually prove cheaper than obtaining and enforcing a court judgment)
- (c)** Confidentiality – some forms of dispute resolution (i.e. mediation, arbitration) are private whereas court hearings typically take place in public
- (d)** Whether third parties will be bound by any outcome (i.e. does the issue in dispute have precedent value or significance to the wider market?)
- (e)** Flexibility – some forms of dispute resolution have mandatory procedures, whereas other allow the parties to agree the applicable procedure
- (f)** Finality – some forms are based on the consent of the parties and require cooperation, others impose a decision on the parties
- (g)** Enforcement – some forms of dispute resolution can be mandatorily enforced both in the United Kingdom and abroad.

Foot Anstey has a team of lawyers with extensive experience of the various methods of dispute resolution and can advise you on how to draft your contracts to minimise the difficulties that may arise in the event of a dispute.

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