

24 February 2005

To all interested parties

PROPOSALS FOR NEW REGULATIONS AMENDING THE MANAGEMENT OF HEALTH AND SAFETY AT WORK REGULATIONS 1999 AND THE HEALTH AND SAFETY (CONSULTATION WITH EMPLOYEES) REGULATIONS 1996:

THE MANAGEMENT OF HEALTH AND SAFETY AT WORK AND THE HEALTH AND SAFETY (CONSULTATION WITH EMPLOYEES) (AMENDMENT) REGULATIONS 200[]

Introduction

1 This Consultative Letter sets out the Health and Safety Commission's (HSC's) proposals for regulations to amend the Management of Health and Safety at Work Regulations 1999 (MHSWR) and the Health and Safety (Consultation with Employees) Regulations 1996 (HSCER).

2 The Letter seeks your views both on the proposed response necessary to address concern that has been expressed to the HSC and Ministers and on the proposed regulations which can be found at **Annex 1**.

Background

3 MHSWR were amended by the Management of Health and Safety at Work and Fire Precautions (Workplace) (Amendment) Regulations 2003 (the 2003 Amendment Regulations) to enable employees to claim damages from their employer in a civil action, where they suffer injury or illness as a result of the employer being in breach of MHSWR or the Fire Precautions (Workplace) Regulations 1997 (FPWR). The 2003 Regulations also amended MHSWR to enable civil claims against employees for a breach of the employees' duties under regulation 14 of MHSWR that results in injury or illness.

4 These amendments were offered by the UK to the European Commission (EC) to address their concerns over the implementation of the EC Framework Directive on health and safety (89/391/EEC).

5 Consultation on the 2003 Amendment Regulations ended on 28 March 2002 and the HSC considered the results on 15 October 2002. It addressed conflicting views over the proposal that employees as well as employers should be open to compensation claims for breach of their statutory duties (be it from their fellow employees, employer, or third parties). Views differed among consultees as to whether employees should be liable for damages for injury or ill health arising from breach of regulation 14 of MHSWR.

6 Some of the original consultees supported the proposal, contending that it would capture those cases where accidents resulted from employees failing to follow control measures which would not necessarily be pursued by the enforcing authorities. However, other consultees were concerned about its

possible practical effects, including the need for employees, or where appropriate their trade unions, to have personal indemnity insurance cover. Further, concerns were expressed about the potential liability of employees to third parties. The Health and Safety Executive (HSE) advised that the scope for claims against employees (who are already open to common law claims for negligence) was limited in practice by their employer's vicarious liability (that is the legal principle that a breach by an employee is so closely connected with the performance of their employment that it would be fair to place the liability on the employer).

7 At that time, the TUC and UNISON proposed removing any such confusion by amending the draft regulations, so that employees were not open to civil claims. The HSC, having considered the issue of employee liability, concluded that the regulatory proposal should proceed as set out in the Consultative Document. The HSC considered it inappropriate to maintain the civil liability exclusion for employees, given that the proposals arose in context of the Framework Directive and that the Directive placed duties on both employers and workers. In conclusion, the HSC noted the TUC's proposed amendment to exempt employees from civil liability claims and agreed to the regulatory proposals as consulted on. In addition, the HSC agreed to monitor the effects of the changes and assess the impact of the new civil liabilities on both employers and employees.

Current Issues

8 Public Concern at Work (PCaW), wrote to the HSC Chair, Ministers at the Department for Work and Pensions (DWP) and the Office of the Deputy Prime Minister (ODPM) and others in June 2004 to raise a number of concerns about the 2003 amendments to MHSWR insofar as they relate to employees. The main focus was that the amended MHSWR as constructed would permit claims against employees by third parties who are affected by the work activity, eg members of the public.

9 PCaW noted that while the new civil liability placed on employers was restricted to actions for damages brought by their employees, the liability on employees was drawn more widely with the opening up of actions by third parties. PCaW also noted concerns that had been raised by business that in light of the law relating to vicarious liability the liability of the employee to third parties for damages arising from ill health or injury caused by the breach would, in effect, be borne by their employer.

10 HSC/E's underlying policy intention in placing a civil liability on employees for a breach of their duties under MHSWR was to promote employee responsibility and to ensure that liability was placed on the person who caused the breach. The intention was that the breach by the employee would be actionable by a fellow employee or their employer; it was not intended to give rise to actionable claims against employees by third parties.

11 HSE received its own Counsel's Opinion on issues concerning employee liability in October 2004. Counsel advised, among other things, that:

- third parties would have the right to bring civil claims against employees for personal injury caused by a breach of duty under MHSWR;

- cases in which an employer would not be vicariously liable for personal injury caused by an employee's breach of duty under regulation 14 of MHSWR would be very rare and may never arise;
- the 2003 Amendment Regulations, when read with the common law on vicarious liability, give effect to the principle of employer's responsibility in Article 5 of the Framework Directive;
- if the Government was minded to introduce new laws to expressly exclude the right of third parties to bring a civil claim for damages against employees it would not be exposed to the risk of a Community law challenge by a third party.

12 The opportunity is also being taken to amend regulation 9 of HSCER¹ which contains a qualified exclusion of civil liability, to the effect that breach of a duty imposed by those Regulations may now confer a right of action in civil proceedings so far as it causes damage (see regulation 5 of the proposed Regulations at **Annex 1**). In addition, employers are also protected against claims by third parties insofar as they may owe a duty to them (see regulation 4 of the proposed Regulations at **Annex 1**).

13 The opportunity is taken to further limit the statutory presumption of civil liability by amending regulation 22 of MHSWR so as to protect self-employed persons who are not employers against claims arising from breach of any duty imposed on them by the 1999 Regulations. In addition, the regulation is amended so that civil action may be brought by employees of an employment business, to whom duties are owed by host employers under regulation 15(2) and (3) of the 1999 Regulations. These changes are intended to further tidy up the civil liability aspects of the Regulations.

Proposals

14 The draft Management of Health and Safety at Work and Health and Safety (Consultation with Employees) (Amendment) Regulations 200[] are attached at **Annex 1**. In view of the arguments set out earlier, these proposals, if agreed, will:

- amend Regulation 22 of MHSWR to exclude the right of third parties to seek damages from employees in breach of their duties under MHSWR; and
- remove the civil liability exclusion in the HSCER – a breach of the duty by an employer (regulation 5) would confer a right of action in civil proceedings so far as it causes damage.

Regulatory Impact Assessment

15 The Regulatory Impact Assessment (RIA) is at **Annex 2**.

Consultation

16 If you reply to this Consultative Letter in a personal capacity, rather than as a post holder of an organisation, you should be aware that information you

¹ The Health and Safety (Consultation with Employees) Regulations 1996 (HSCER) requires employers to consult their employees on matters that effect their health and safety where the employees are not covered by representatives appointed by recognised trade unions.

provide may constitute 'personal data' in the terms of the Data Protection Act 1998. For the purposes of this Act, HSE is the 'data controller' and will process the data for health, safety and environmental purposes. HSE may disclose this data to any person or organisation for the purposes for which it was collected, or where the Act allows disclosure. You have the right to ask for a copy of the data and to ask for inaccurate data to be corrected.

17 HSC tries to make its consultation procedure as thorough and as open as possible. Copies of the responses to this consultative letter will be lodged at HSE's Information Centres after the close of the consultation period. Members of the public may inspect them or obtain copies on payment of the appropriate fee to cover our costs. The two HSE Information Centres are located at:

Bootle Information Centre
Magdalen House
Stanley Precinct, Bootle
Merseyside L20 3QZ

Buxton Information Centre
Harpur Hill
Buxton
Derbyshire SK17 9JN

18 Responses to this Consultative Letter are invited on the basis that anyone submitting them agrees to them being dealt with in this way. Responses, or parts of them, will be withheld from the Information Centres only at the express request of the person making them. In such cases a note will be put in the index to the responses identifying those who have commented and asked that their views, or part of them, be treated as confidential.

19 You should also be aware that there may be circumstances in which HSE will be required to communicate information to third parties on request in order to comply with its obligations under the Freedom of Information Act 2000, the Environmental Information Regulations 2004 and the proposed Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005 exercise.

20 If you wish to comment on the proposals, you are invited to do so by **Wednesday 18 May 2005**. Please send any comments to:

Stewart McEwen
Health and Safety Executive
Policy Group
Room 104 Daniel House
Trinity Road, Bootle
Merseyside. L20 3TW

Tel: 0151 951 3271

Fax: 0151 951 3418

email: stewart.mcewen@hse.gsi.gov.uk

HSC statement on openness and confidentiality

1 The Health and Safety Commission has a statutory duty to consult interested parties when proposing new Regulations. The Commission tries to make its consultation procedures as thorough and open as possible. Responses to this consultation paper will be lodged in the Health and Safety Executive's Information Centres after the close of the consultation period, where they can be inspected by members of the public or may be copied to them on payment of the appropriate fee to cover costs.

2 Responses to this Consultation Letter are invited on the basis that anyone submitting them agrees to their being dealt with in the way described above. Responses, or part of them, will be withheld from HSE's Information Centres only at the express request of the person making them (under the Code of Practice on Access to Government Information; Environmental Information Regulations 1992 and the Data Protection Act 1998). If such a request is made, a note will be put in the index to the responses identifying those who have commented and have asked that their views, or part of them, be treated as confidential.

3 Many business e-mail systems now automatically append a paragraph stating the message is confidential. If you are responding to this consultation paper by e-mail and are content for your responses to be made publicly available, would you please make this clear.

4 If you reply to this Consultation Letter in a personal capacity, rather than as post holder in an organisation, you should be aware that information you provide may constitute "personal data" in terms of the Data Protection Act 1998. For the purposes of this Act, HSE is the "data controller" and will disclose this data to any person or organisation for the purposes for which it was collected, or where the Act allows disclosure. You have a right to ask for a copy of the data and to ask for inaccurate data to be corrected.