

# Legal Update on Transport Operations

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# Working time

- EU rules and GB domestic rules.
- EU rules applicable where maximum permissible weight of the vehicle exceeds 3.5 tonnes
- UK rules where under 3.5 tonnes
- Consider domestic rules exemptions

## EU Rules

- After driving period of no more than 4.5 hours, driver must immediately take an uninterrupted break of at least 45 minutes
- 45 minute break can be replaced by one break of at least 15 minutes followed by another break of at least 30 minutes
- Maximum daily driving time is 9 hours.
- Maximum weekly driving limit is 56 hours in a week or 90 hours over two weeks

# Rest periods

- 11 hour regular daily rest period or split into two periods of at least 3 hours and 9 hours
- Driver may reduce daily rest period to no less than 9 continuous hours no more than three times between any two weekly rest periods.
- Multi-manning
- Travelling time not counted as rest or break where vehicle is neither at the driver's home nor at the employer's operational centre.

## GB domestic rules

- In any working day maximum amount of driving permitted is 10 hours
- The day is the 24 hour period beginning with the start of duty time
- In any working day the maximum amount of duty permitted is 11 hours. Exemption for drivers not driving for more than 4 hours on each day of the week
- Record Keeping
- Tachograph Rules

# HSE Working Time Enforcement

## HSE involvement

- Non compliance with the Regulations
- Allegations of risks to a third party due to worker's working hours
- A work rate is causing health and safety risk
- Allegations of working hours causing health and safety risks
- Prosecution under s.2 or s.3 Health and Safety at Work etc. Act 1974

## Working Time- Penalties

- The Produce Connection Ltd fined £30,000 in 2006 for breaching health and safety legislation as a result of a fatal accident after employee had worked 76 hours in four days
- Consider if turnover at between £2 million to £10 million. Under proposed new guidelines starting point for fine could now be £450,000
- Working time breach could be aggravating factor – cost-cutting at the expense of safety.

# Responding to an incident

Police investigations:

- Actions leading to harm intended
- Adverse consequences that were intended
- Corporate Manslaughter
- Gross Negligence Manslaughter
- Preparing for Inquest



# Responding to an incident

## HSE Role

- Investigation of potential breaches of s.2 & 3 and s.37 of the Health and Safety at Work Act (HSWA) 1974
- Section 2 – duty on employer to conduct its business in such a way as to ensure, so far as reasonably practicable, that employees are not exposed to risks to their health and safety
- Section 37 – Potential personal liability on the part of decision makers

# Responding to an incident

- Documentation
- Any relevant physical, scientific and documentary evidence should be secured and preserved before investigating authority arrives
- Police powers contained within Police and Criminal Evidence Act 1984
- HSE Powers under Section 20 HSWA
- Material likely to be of substantial value to the investigation, or material that is likely to be relevant evidence

# Legal professional privilege

- Legal advice privilege – protects communications between a lawyer and his client provided that the communications are for the purpose of seeking and receiving legal advice in a legal context
- Litigation privilege – protects communications between parties or their solicitor and third parties for the purpose of obtaining information or advice in connection with existing or contemplated litigation
- Litigation has to be a real likelihood
- Communication has to be for the sole or dominant purpose of conducting that litigation

# Best Practice

- Have a procedure in place to instruct your lawyers at the outset so that they can request the investigation report for legal purposes
- Set up a core investigation group and ensure that all communications in respect of the incident are limited to that group
- Do not waive privilege by disclosure outside the group
- Mark all communications including e-mails appropriately e.g.
  - **“Privileged and confidential – prepared in relation to a legal incident report and in anticipation of litigation”**

# Statements

- Section 24 PACE – involvement or suspected involvement in the commission of a criminal offence and
- Reasonable grounds for believing that the person's arrest is necessary
- An arrest can be made “to allow the prompt and effective investigation of the offence or of the conduct of the person in question” PACE Section 24 (5)(e)
- Interview – the questioning of a person regarding their involvement (or suspected involvement) in a criminal offence – must be carried out under caution
- Statements from witnesses are voluntary

## HSE's powers to take statements

- No general power of arrest
- Prefer to take voluntary statements (s.9 Criminal Justice Act 1967)
- No entitlement to legal representation
- Easier for HSE to use s9 statements in evidence against Company
- Section 20 power to require a person to provide a statement if:  
Reasonable cause to believe the person can deal with any information relevant to the investigation.
- Better protection for an individual if s.20 statement
- Right to have a nominated individual present
- Protection against self-incrimination

# Regulatory compliance issues

- Sentencing Guidelines Consultation. New Guidelines expected to come into effect in February 2016
- Dramatically increased penalties
- Fines based on turnover. Adjusted to the “economic realities of the organisation”
- Court to determine offence category using culpability and harm factors
- Four categories of culpability – Very High, High, Medium and Low

# Sentencing

- For local authorities the Annual Revenue Budget is the equivalent of turnover and the best indication of the size of the defendant organisation
- Unlikely to be necessary to analyse specific expenditure or reserves unless inappropriate expenditure is suggested



# Sentencing

- Range of fines for organisations based on harm / culpability category and turnover. Range between £50 to £10,000,000
- Fine must be sufficiently substantial to have a real economic impact which will bring home to both management and shareholders the need to comply with health and safety legislation.

# Impact of Guidelines

- Actions of victims are highly unlikely to be considered contributory events
- Increase in custodial sentences?
- Retrospective application of Guidelines?
- Increase in the number of trials?



# Magistrates Powers

- Magistrates now have unlimited powers to fine in respect of any health and safety case where they previously had the power to impose a fine of £5,000 or more.
- Limit of £20,000 fine per health and safety offence in the Magistrates Court abolished.

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