Health and Safety Executive

CD235

HSE Proposal for Extending Cost Recovery

A response by the Association of Personal Injury Lawyers

14 October 2011

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APIL welcomes the opportunity to respond to the Health and Safety Executive's (HSE) consultation regarding the proposals for extending cost recovery.

- APIL is supportive of the HSE's proposals to extend the range of activities for which it recovers costs. However, the proposals do give cause for concern when combined with the recent amendments to the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations 1995 (RIDDOR) changing the onus on businesses to report workplace injuries after seven days instead of three as previously.
- APIL still believes that the decision to amend the reporting to over seven day injuries is flawed. We suspect that the introduction of these proposals combined with the recent RIDDOR amendments may present real problems for the HSE at the expense of injured employees.
- The HSE should actively enforce the submission of RIDDOR reports. This would ensure that businesses are encouraged to comply with RIDDOR and will suffer consequences should they fail to do so.
- Investigations conducted by local authorities are excluded from these proposals. Every organisation and business should be treated equally and fairly, and so these costs should also be recoverable. Local authorities are principle enforcing for at least 29 per cent of employees. Therefore, the introduction of these proposals will be completely unbalanced as they will only apply to a specific margin of employers.

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APIL's long-standing position is that the 'polluters pays' principle should prevail, therefore, APIL is supportive of the HSE's proposals to extend the range of activities for

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These proposals alone potentially present businesses with a cost implication if it is to report an incident to the HSE that would subsequently require investigation. That cost implication is something businesses do not have to currently consider. In a recent consultation on proposals to amend the RIDDOR, the HSE stated that compliance with RIDDOR, as the rules were then, was estimated at 50 per cent[1]. This means that when the regulations required the reporting of workplace incidents resulting in over 3 day injuries, only 50 per cent of employers were complying with that requirement. APIL still believes that the decision to amend the reporting to over seven day injuries is flawed. The decision to change the way incidents are reported allows not only more accidents to happen in the workplace with no need to report these to the HSE but may also tempt businesses to risk "covering-up" or hiding a material breach that may have occurred, especially should there be a cost implication if the HSE were to discover a material breach upon investigation. We suspect that the introduction of these proposals combined with the recent RIDDOR amendments may present real problems for the HSE at the expense of injured employees.

In order to maximise these proposals, combined with the amendments to RIDDOR, the HSE should actively enforce the submission of RIDDOR reports. This would ensure that businesses are encouraged to comply with RIDDOR and will suffer consequences should they fail to do so.

[1] *A consultation document on proposed amendment to the reporting of injuries, diseases and dangerous occurrences regulations 1995 (RIDDOR),* Consultative Document CD233, Health and Safety Executive, Page 6

At paragraph 4.3 of the consultation document[2] there should be a definition of 'Self Employed' in order to ensure consistency in the HSE's approach. These proposals should apply to all businesses and, therefore, include all businesses employing fewer than 10 employees. These are not new regulations and no employer is required to do anything extra because of the changes in paragraph 4.3.1[3]. Compliance with existing regulations means no "extra" cost and having this exception suggests that such businesses do not need to concern themselves with health and safety as much as others. The law should be applied in an even handed way.

At paragraph 4.16.1[4] it is implied that the employer is able to fully exonerate itself from blame and can in fact place all blame on the employee.

> *If the employer has met their legal duties and it is only the employee who has breached the law then the employer will not be subject to cost recovery.*

It is extremely rare for the employee to be the only party to breach obligations and, therefore, for the employer not to be penalised. This may potentially encourage businesses to defend themselves and transfer blame to a different party in order to avoid making a payment to the HSE for investigation, which can create further imbalance in the employer versus employee relationship.

From page 10 of the consultation[5] it is understood that investigations conducted by local authorities are excluded from these proposals. Every organisation and business should be treated equally and fairly, and so these costs should also be recoverable for the local authority. Local authorities are the principle enforcing authority in the retail industry, a highly profitable industry. Yet, under these proposals, the local authority will be unable to recover the costs of investigation from the industry.

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[2] *HSE proposal for extending cost recovery¸* Consultative Document CD235, Health and Safety Executive, Page 12, paragraph 4.3.1.
[3] *HSE proposal for extending cost recovery¸* Consultative Document CD235, Health and Safety Executive, Page 12, paragraph 4.3.1.
[4] *HSE proposal for extending cost recovery¸* Consultative Document CD235, Health and Safety Executive, Page 17, paragraph 4.16.1.
[5] *HSE proposal for extending cost recovery¸* Consultative Document CD235, Health and Safety Executive, Page 10.

Local authorities are the principle enforcing authority for:

- Retail;
- Wholesale distribution;
- Warehousing;
- Hotel and catering premises;
- Offices; and
- The consumer/leisure industries.

According to statistics published on the HSE website:

- Hotels and restaurants accounted for 7 per cent of employees and 5 per cent (1 per cent fatalities, 4 per cent major and 5 per cent over three day injuries) of reported RIDDORs to employees in 2009/10. They also accounted for around an estimated four per cent all non-fatal injuries in 2008/09 (three-year average), according to the Labour Force Survey.
- Wholesale and retail accounted for 16 per cent of all employees, but 13 per cent of all reported RIDDORs to employees in 2009/10, (8 per cent fatalities, 12 per cent major and 13 per cent over three day injuries). It also accounted for an estimated 15 per cent of all non-fatal injuries in 2008/09 (three-year average), according to the Labour Force Survey.
- Public Administration accounted for 6 per cent of employment and 9per cent of all reported injuries to employees in 2009/10 (3 per cent fatalities, 8 per cent majors, 10 per cent over three day) The Labour Force Survey (LFS), estimates that around 8 per cent of all non-fatal injuries occurred in Public Administration in 2008/09 (three-year average).

Taking these statistics into account, local authorities are the principle enforcing for at least 29 per cent of employees. Therefore, the introduction of these proposals will be completely unbalanced as they will only apply to a specific margin of employers; those are not under the enforcement of the local authority. This imbalance creates an unequal platform for some industries over others, which is unfair. The proposals, if introduced, should apply across the industries to all employers regardless of whom the principle enforcing authority is.

- Ends -

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