

# New HSE powers could increase costs to businesses



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The Health and Safety Executive (HSE) will soon have an extended power to charge for intervention time, on and offsite, where there has been a material breach of health and safety legislation. This would be the result of proposed extension to its cost recovery scheme, due to be introduced in spring 2012.

## **Fees extended to all sites not under an existing permitting scheme.**

Whilst the HSE already charges industry for regulating top tier sites under the Control of Major Accident Hazards Regulations (COMAH), as well as licensed nuclear safety installations, offshore oil & gas and some pipeline activities; currently it does not apply cost recovery fees for interventions on other premises unless a formal prosecution takes place in the courts. Under the planned changes, the so-called 'fee for intervention' would be extended to cover all material breaches on all sites not under an existing permitting regime. Premises which are regulated separately by local authorities such as offices, retail, commercial and leisure will be unaffected at present.

## **What this means in practice.**

In practice this means that from next year, sites not under an existing permitting regime which previously only received a formal improvement action (e.g. email, letter, improvement notice or prohibition notice), will now be charged for the time and resources incurred from the point of discovery of a 'material breach' of legislation. The clock will continue to tick up until the time the breach has either been resolved to HSE's satisfaction or information is laid for a prosecution, when the recovery of further costs will be sought through the courts.

What constitutes a material breach hasn't been defined, but it is expected to cover all but technical incursions, i.e. where there is no increased risk of harm. It could be suggested that this mirrors "the polluter pays principle" in the environmental field, whilst adding an extra level of deterrent to those who would otherwise fail to meet their legal obligations.

## **What kind of charges we could expect.**

The HSE is proposing that fees will be levied at £133 per hour and will apply to all activity undertaken from the moment a breach is discovered, including site visits, telephone calls, drafting reports and issuing notices. It estimates that the average cost for an inspection resulting in a letter to be £750, £1,500 for one resulting in an Enforcement Notice, and a minimum of £750 for a full investigation; however experience has shown that investigations can run into thousands of pounds in all but the simplest of cases as specialist Inspectors become involved in addition to the local Inspector. The Government estimates that, in total, this will generate £60 million per annum in revenue. Over the next four years HSE must achieve a 35% reduction in the gap between its grant from the Government and the income brought in through cost recovery. Therefore, by extending the scope of cost recovery, it will effectively reduce the absolute amount of the cost savings it will need to achieve, thereby potentially reducing the depth of cuts into existing resources.

### **Ensure you have the resources, insurance won't cover the fees.**

So, what are the implications for UK businesses? With the increased pressure to recover costs when UK growth looks like it is stalling and Government income dropping, we may well see a decrease in the amount of advice from HSE on achieving compliance and a corresponding increase in the amount of formal action (eg emails, letters) being taken in cases where, in the past, more informal action, for example a verbal warning, would have been applied. In addition, insurance policies will not cover the costs incurred as they are breach of the law and companies may not have the capacity to put money aside in case of receiving a 'fee for intervention', so will need to ensure they have the appropriate resources and control measures in place to prevent material breaches occurring.

### **Changing the relationship between businesses and the HSE.**

This may also turn out to be a pivotal point in the relationship between business and the HSE, particularly for SMEs who cannot employ professional health and safety advisors. Over the past five years, the HSE's own strategy has revolved around working with business to achieve compliance and many businesses would not think twice in either ringing, or inviting in, their local Inspector to discuss whether what they were doing was suitable and sufficient, or whether an accident should be reported under the Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR). However, this could now potentially lead to the situation where an Inspector who was invited in for a 'friendly' discussion now decides there has been a material breach and the business suddenly finds itself receiving an 'intervention fee' invoice.

### **Next Steps**

The consultation period closed on Friday 14<sup>th</sup> October. As the principle of cost recovery has already been agreed, we believe that this extension will proceed and come into force in April 2012. What we wait to see is whether any sectors or enterprises (such as new start-ups) will be excluded and the agreed hourly fee level. Once this has been defined, we intend to provide another update.

### **Prevention is better than cure – of course.**

Of course, prevention is better than cure, and the onus remains on the duty holder to prevent a material or technical breach from occurring in the first place by implementing a robust health and safety risk management programme. WSP's specialist team regularly advises clients not only on putting the necessary systems and techniques in place, but also on how to engage staff in the process in order to develop a culture of health and safety responsibility and understanding which minimises the risk of a breach occurring. For clients with developed H&S programmes, WSP is currently delivering legal compliance assessments in order to provide assurance to their corporate body, whilst supporting the site to improve the robustness of their monitoring tools and records to demonstrate compliance.

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#### **FURTHER INFORMATION**

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