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LEGAL

WHAT'S YOUR SENTENCE?

Who is responsible now? Changes to the sentencing guidelines for health & safety at work will go further than just bigger fines and a threat of jail, says *George Lilley*, customer director at Vinci Facilities

The new sentencing guidelines for health and safety, corporate manslaughter, food hygiene and food safety offences came into force in February. They were widely reported in the trade media, but no one has yet picked up that despite no changes to substantive acts or regulations almost every specialist legal commentator reckons it is the biggest change in the law since 1974.

The headlines have been all about larger fines and threat of imprison for directors and managers. But real the story is about how outfits of all sizes (on the customer and supply side) need to adapt their processes and behaviours.

What does this mean for FMs?

Firms must be able to demonstrate that they have robust safety management systems in place, which are properly invested in and implemented.

For FMs that means a full assessment of their respective procedures, but it also means a far more collaborative approach to compliance. It has never been just good enough to 'tick the compliance' box during the procurement process. But the risks of high fines and brand damage may require a refocus when assessing and selecting outsourced partners.

Why the shift in emphasis?

The change in sentencing guidelines directs the courts to consider the sentencing of offending organisations by way of a step-by-step approach, primarily examining culpability, the seriousness of harm risked and the likelihood of harm. It is no longer based on actual injury and harm.

Fines are imposed in relation to an organisation's turnover, with some mitigating circumstances affecting a decision. ConocoPhillips (see box) was fined £3 million – equating to £1 million for each offence.

The fine is intended "to bring the message home to the directors and shareholders of offending organisations". Other factors affect the level of the fine and there are similar guidelines for the sentencing individuals for health and safety offences, with a strong focus on the risk of a custodial sentence for those found guilty of serious breaches.

What impact is this going to have on FM companies?

Service providers need to assess current contract terms and conditions and maybe adjust procurement processes that up to now have paid lip service to the need to work collaboratively to reduce risk. The changes imply it is no longer good enough to claim the responsibility was outsourced.

This is a reminder that FMs, often caught in the long grass of outsourcing agreements, need to reassess their own operations, those of their sub-contractors and those of their clients. The new rules might mean a test of the idea of collaborative responsibility.

In light of the guidelines' focus on company turnover, fines for large and very large firms that are guilty of committing health and safety offences are going to increase significantly. So arguments about which corporate accounts should be considered by the court will be critical.

Such battles will be especially pertinent when dealing with groups of companies and joint ventures consisting of distinct incorporated (or even unincorporated) entities – typical of many outsourcing arrangements. So, will the threat of larger fines and jail lead to a shift in the partner selection process with the requirement for a deeper assessment of culture, track record and the ability to pay should things go wrong?

These changes drive the customer and outsourced provider towards a closer collaborative approach, which is the general direction of travel for the whole industry. FM

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CASE LAW ON BREACHES

The recent Balfour Beatty fine stole headlines in April (following a fatality the company was fined £1 million), but more can be learned from an incident involving ConocoPhillips – the oil and gas operator. The company, which turns over £4.8 billion, pleaded guilty to three breaches of health and safety regulations for a series of uncontrolled and unexpected gas releases at one of its offshore installations.

Although nobody was injured as a result of the leaks, because of a communication breakdown workers were sent to investigate the incident while there was still gas present. At sentencing, the judge said the risk of death or serious injury would have been extremely high had there been a gas ignition. In applying the guidelines, this may have been regarded as a 'Harm Category 1 case' owing to the seriousness of the harm risked and the high likelihood of harm. Procedures and safeguards were in place, but the judge noted there was a failure to properly identify and control risks. The level of culpability in this case may have been classed as 'medium' as systems were in place, but they were not sufficiently adhered to or implemented.