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New Health and Safety Allocation Guidelines in England and Wales Effective 1 March 2016

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As *England* and *Wales* gear up for the new sentencing guidelines for health and safety offences coming into force on 1 February 2016 – which will drastically change the way health and safety offences are sentenced – companies should also be aware of a new, related legislative development. On 10 December 2015, a new Allocation Definitive Guideline was published that will affect the way health and safety offences are tried. The new allocation guideline will become applicable on 1 March 2016.

Allocation Definitive Guideline

The new allocation guideline states that generally health and safety offences should be tried summarily in the Magistrates' Court. The guideline set out exceptions to this, meaning a case would only be deemed unsuitable to be tried summarily and should be referred to the Crown Court (to be tried on indictment) where:

- The outcome would clearly be a sentence in excess of the court's powers for the offence(s) concerned after taking into account personal mitigation and any potential reduction for a guilty plea; or
- For reasons of unusual legal, procedural or factual complexity, the case should be tried in the Crown Court. This exception may apply in cases where a substantial fine is the likely sentence. Other circumstances where this exception will apply are likely to be rare and case specific and the court will rely on the submissions of the parties to identify relevant cases.

All parties should be asked by the court to make representations as to whether the case is suitable for summary trial. The court should refer to definitive guidelines (if any) to assess the likely sentence for the offence in light of the facts alleged by the prosecution case, taking into account all aspects of the case including those advanced by the defence.

However the defendant should be aware that all sentencing options remain open and if the defendant consents to summary trial and is convicted by the court or pleads guilty, they could still be committed to the Crown Court for sentence.

Why are the new guidelines necessary?

The guidelines have been introduced following Sir Brian Leveson's report 'Review of Efficiency in Criminal Proceedings' which was published in January 2015 to find ways to make the criminal justice system more streamlined and efficient. One of the findings in the report was that too many cases are being sent unnecessarily to the Crown Court, which is a major problem in terms of cost (on average a Crown Court trial costs 4 times that of a Magistrates' Court trial). Leveson believes that a larger proportion of cases should be heard in the Magistrates' Court where cases are dealt with in less time. He recommended that even in circumstances where Magistrates are uncertain about the adequacy of their powers, they should be able to retain the case and commit to the Crown Court for sentence if they later take the view that the case falls outside their sentencing powers.

Will the new guidelines affect the level of sentencing?

No, the guidelines make no changes to the level of fines courts should be imposing. The guidelines only indicate where the case should be heard and sentenced. Courts will refer to the appropriate sentencing guidelines when deciding the level of the fine. Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (which came into force on 12th March 2015) had the effect of increasing the level of most fines available to Magistrates to an unlimited fine (previously £20,000 for most health and safety offences). The new sentencing guidelines for health and safety offences confirm that fines for breaches of s.2 and s.3 of the Health and Safety at Work (etc.) Act 1974 are unlimited in both the Magistrates' Court and the Crown Court.

What does this mean for health and safety offences in the UK?

Presently, most health and safety offences are triable either in Magistrates' or Crown Court, so are capable of being dealt with either summarily or on indictment. Corporate manslaughter is an indictable only offence so will always be tried in the Crown Court.

The new allocation guidelines mean that most health and safety offences, from March 2016 onward, should be tried in the Magistrates' Court, although this will make little difference as to the level of fine a Company receives.

The main advantage for companies having a case heard in a Magistrates' Court is that it will be dealt with far more quickly. This is likely to be preferable to defendant companies as it will significantly reduce their own legal costs (not recoverable even if the defendant company is acquitted) as well as the prosecutions' costs which they will be held to be liable for if convicted. One concern about health and safety cases being heard in the Magistrates' Court, is that a lay panel of Magistrates may not have the experience to determine the appropriate level of fine and the process has historically be seen as somewhat of a lottery. However, it is understood that most health and safety offences will be heard by a District Judge going forwards combined with the introduction of the new sentencing guidelines, so these concerns will be somewhat negated.

Companies should be aware that they could still be committed to the Crown Court for sentencing, if one of the above exceptions applies. As the Magistrates' Court can impose unlimited fines it is unlikely that the first exception will apply, however the second exception could apply, particularly if the defendant is a large corporation. The guideline says that this exception (legal, procedural or factual complexity) may apply where a 'substantial fine' is likely.

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