

## Due Diligence and You

*When you're accused of a breach of a statutory regulation, the law assumes you to be GUILTY - it's then up to you to prove otherwise. The law will consider a defence of 'due diligence', but that's not easy to prove. Without considerable pre-investment in people, facilities, work management and information systems, your chances of success are slim. Nevertheless, prevention is infinitely better than the alternative...*



### Guilty until proven innocent

When the authorities accuse you of a breach of health, safety or environmental regulations, you're deemed to be guilty and the onus is on YOU to prove your innocence. This is because a breach of this type of regulation is a 'strict liability' offence – the Law says that your duty is 'absolute'.

### Strictly liable

Usually, before someone can be found guilty of a criminal offence, it has to be proven that the alleged perpetrator had a 'guilty mind' (or *mens rea* for those into legal-speak). This means that the unlawful act was committed intentionally, recklessly and without due care as to its consequences. However, in the case of a so-called 'strict liability' criminal offence, the authorities are not required to prove that a 'guilty mind' guided the unlawful act. The act is sufficient in itself to point the finger of guilt at the accused. Most of us have had some experience of this approach in relation to road traffic offences! The same forceful manner of enforcement applies to regulations framed under UK health, safety and environmental law.

This reverse onus of proof affects all organisations and has serious implications for those involved in facilities and maintenance management. As regulation and red tape mounts, your chances of

falling foul of the law have dramatically increased in recent years. As a result, both your organisation and **you personally** are now facing the real prospect of criminal sanctions for involvement in strict liability regulatory offences. If ever you experience this misfortune, forget about claiming that the alleged unlawful act or omission was unwitting or unintentional - it will hold very little sway with the authorities.

### Personally accountable

The issue of personal accountability has hotted up recently as a result of the many deaths caused in multiple rail disasters triggered by faulty track and trackside equipment and the deadly 2002 outbreak of Legionella in Barrow-in-Furness. In this incident, 7 people died and another 172 were infected with the disease as a direct consequence of deficient preventive maintenance. The public has become increasingly intolerant of these gross, engineering-related mistakes and is demanding that the individuals responsible are held more strictly and personally accountable for their negligent acts and omissions.

### Prevention is smartest

It's worthwhile taking every possible step to avoid a breach of statutory regulation that can bring that unwelcome knock on the door from the law enforcement authorities. It's not just for the moral imperative of not placing others and the environment in potential danger; it's in

your own best interests and makes clear economic sense. Without doubt, this is a situation where prevention is infinitely better than cure. Avoiding the risk of prosecution is a no-brainer.

Besides the personal trauma you, your family and members of your management group could experience, you will avoid the considerable costs to you and your organisation of a criminal investigation and prosecution. A prosecution for a regulatory offence brings with it a whole series of associated calamities. First, there are the legal-related expenses (solicitor and barrister's fees, court costs, fines and compensation - and possibly further damages awarded to a victim by a civil court). Remember, you may have to fork out personally for some or all of these. Second, there's the consequential loss to the organisation of diverting key people's time and attention away from the value-adding activities of the business. And third, even if you're eventually exonerated, 'mud sticks' and the adverse publicity and damage to reputation can be significant. Your career is quite likely to take a nose-dive.

To assure peace of mind and economic well-being, if not your continuing liberty, you have to be proactive, analytical and, as we shall see later, scrupulous in your record keeping. With a little foresight and, admittedly, a considerable amount of spadework, you can avoid ending up facing a court of law.

### **Due diligence defence**

Because strict liability regulations are so stringent, the law has provided for the defence of 'due diligence' to bring some balance to a situation that, on the surface, seems a bit harsh and unreasonable.

You can prove your innocence by convincing the court that the alleged offence was due to a mistake or reliance on information supplied by others, the act or omission of another person not under your control, or an accident or other cause

beyond your control: AND, exercising due diligence, you took all 'reasonable' precautions to avoid the commission of the offence by yourself or any person under your control.

What a court will accept as 'reasonable' precautions varies according to the nature and scale of the actual and potential consequences of the offence and the size and resources of your organisation. There are no definitive legal guidelines as to what 'reasonable' actually means - the court will make a determination in each case. It's safe to assume that if you have any doubts whatsoever about the sufficiency of the regulatory compliance provisions you or your organisation have made, the chances are that the court will also take a dim view of the situation and find against you.

Wherever the well-being of the public is concerned, the authorities and courts have big expectations in respect of the duty of care that must be exercised by any organisation. In these circumstances, the legal requirements are very demanding and you can expect major trouble when you haven't fulfilled them and you're caught out. The Food Safety Regulations and Control of Major Accident Hazards (COMAH) Regulations are just two of the many sets of regulations requiring very strict standards of diligence.

Under due diligence provisions, the liability for the acts and omissions of parties under your control is a notably onerous accountability. You'll have to have in place fairly watertight selection, training and competency review and assurance measures, as well as work monitoring and control systems for both internal staff and contractors. The challenge this presents can't be underestimated. The pervasive and ever-present threat of human failings - errors, mistakes and malicious acts - presents serious difficulties for anyone accountable for legal compliance. Without appropriate measures being in place to counter human failings, they can easily undermine what

you believe to be your best laid plans – and you're always answerable for the adverse consequences.

When alerted to an offence, the authorities will launch an investigation. They will very likely go through your policies, procedures and records with a fine-tooth comb to establish the facts and form a view of your circumstances, attitude and behaviour before reaching their findings. If they don't like what they have discovered, they'll identify the guilty parties from the company's accountability structure – the organisation chart and job descriptions. Those individuals will then find themselves in court. Where lines of responsibility are unclear, the authorities will go up the organisational tree until they identify a job holder with indisputable overall responsibility: that may well be a board member.

Whilst accused individuals may protest their innocence, they can only prove it by placing satisfactory factual evidence before the court. When an accused individual can't, the court will inevitably convict as charged.

## Getting yourself off



Documentary evidence is vital for a successful defence of due diligence. We're in the information age and it's a paperwork and data-driven world we live in. Because of the nature of the non-

compliance offences, the court will seek evidence of guilt or innocence from hard copy records and computer files. In some cases, the court may accept verbal testimony, but the investigating authorities rarely will. So, don't count on being able to talk your way out of it – it won't work! Just as in quality systems auditing, 'if it's not documented, it didn't happen'. You can explain and argue until you're blue in

the face, but it will almost certainly be fruitless.

The law requires you to have carried out a thorough risk assessment of your operations and put in place procedures and monitoring & control systems that will ensure continuing integrity and safety. The onus is entirely on you and your organisation to decide on and implement adequate provisions in accordance with your own circumstances and assessment of the prevailing risks. As a result of moving to this risk-based approach, the authorities have, in general, become quite 'hands off' on a day-to-day basis. In most industries they will usually leave you alone – that is, until something bad happens and the balloon goes up. Then, you can expect very close attention indeed.

You can be in breach of the regulations in a multitude of ways, so you'll need to take an analytical and 'systems' approach to countering the threats. Besides the comprehensive risk assessments which form the foundation of your compliance measures, you'll need to have in place an enabling framework of sound policies, procedures and control systems - and provide for an auditable history of all pertinent actions and events. According to the specific regulation, you will need all of the following records, and this list is not exhaustive: policies, procedures, job descriptions (with written personal acknowledgement of responsibilities), training records, inspection and test exhibits, 'as-built' plant schematics and other drawings, maintenance plans, purchasing specifications, warranties, permit to work records, schemes of work, O & M manuals, incident reports, material issue and job history and systems audit findings - with descriptions of corrective and preventive measures taken. The records should all be detailed, up to date and filed for easy retrieval.

Some words of advice. The court will view the orderliness of your records system as a fair indicator of the extent of management control you have. Murphy's

Law makes it likely that the records you haven't attached much importance to are the very ones you'll need to get yourself out of a scrape.

Because of the seriousness of some breaches of regulation, it's good practice to configure systems and prepare particular documentation with the thought in mind that the records are going to be used as part of a future legal defence. There's little doubt that the quality of your systems and documents will ratchet up a couple of notches when compiled with this in mind. The decision as to which records should receive particular attention should be identified as part of your risk assessments. For each activity, ask yourself: What's the worst thing(s) that could credibly happen? If and when it happens, what records must I have to demonstrate I've put in place reasonable management control? What information and level of detail is needed in these records to demonstrate reasonableness and due diligence?

Your records need to be time and date stamped. You should be able to show that your critical information systems are robust and tamperproof – you must have adequate procedures in place to prevent the falsification of critical records. You should be able to demonstrate effective change control and the ability to pursue an audit trail through your record systems. Remember, the amount of diligence expected from you depends on the scale of the risk, that is, the likelihood and consequences of those worst-case, credible events identified in your risk assessments.

### **Dog eats dog**

If you find yourself accused of a statutory offence, you shouldn't rely too much on unbounded, selfless support from your manager or your organisation! They may well be in the dock alongside you – but, if they can convince the authorities or the court that they delegated responsibility to you diligently, taking all reasonable steps by training and supporting you in your

duties, then you might find yourself alone in the dock, facing the rap all on your own. Common interest and brotherhood is frequently abandoned when self preservation is at stake. It can be a dog eat dog world at times!

### **Final words**

New statutory regulations are often issued with a preamble to the effect that 'if you're already doing things in the right way, you will not need to take any further action as a result of these regulations'. The law doesn't require you to adopt best practice, just reasonably good practice – in fact the law is extremely fair and reasonable in its expectations of your social responsibility. If you do more than the law requires to discharge your compliance obligations, it will, with little doubt, be advantageous for your business. The organisations that apply best practice, especially in respect of asset management, are invariably the most successful ones. The regulatory requirements in relation to health, safety and the environment add intrinsic value and directly benefit your organisation's overall day to day performance.

Finally, some questions calling for truthful answers. Do you know and understand all the regulatory requirements that apply to your work and area of responsibility? Is your organisation compliant with all applicable regulations? If not, and if you have any doubts whatsoever, have you informed your boss or other responsible persons in explicit terms and in writing? Do they understand the possible consequences of the situation? Have you colluded in sweeping any compliance problems under the carpet? Where do you stand? Have YOU shown due diligence?