

# New Year: A fresh start

Stephen Thomas of the Health and Safety Technical Team at Croner Consulting gives some tips on how organisations can start planning for safety success.

## Introduction

New Year...traditionally the time of badly thought-out "resolutions": yearly gym memberships that go unused after the first few months, crash diets, giving up smoking and the like, most of which are doomed to failure by the end of March.

Health and Safety (H&S) compliance is sometimes seen to be something to aspire to rather than a core business issue. However, the New Year is as good a time as any for employers to make a business "New Year's Resolution" to get to grips with sensible workplace H&S.

## Be realistic

In the business world, much like our home lives, sensible and, above all, realistic planning can make all the difference when it comes to making our aspirations come to life. The first step is often to stop kidding ourselves and acknowledge that we need to take action rather than burying our heads in the sand.

The law places a duty of care on employers. There is no avoiding it. If you have five or more employees you must have a written H&S Policy. You will need to have written risk assessments. You need to give suitable H&S training to employees. Enforcing authorities, such as the Health and Safety Executive (HSE) and Environmental Health Officers, will ask to see such documentation but do not forget that if you tender for work, your client may also want to see it. Too many lucrative jobs can be lost through providing poor H&S records and having to declare RIDDOR reportable accidents.

## Plan ahead

Planning is vital in business. Decide what the objectives are and plan realistically around that. For some organisations, their objective might be to get their documentation in order. For others, it may be time for a total overhaul and relaunch of H&S. Sometimes this may be the best option, particularly if the organisation has had an unsuccessful flirtation with H&S in the past.

As with most plans, there must be a budget attached. The law requires employers to provide suitable budgets for H&S in their organisation. Although the initial financial outlay may take some budget juggling, good H&S practice will reap rewards in terms of process efficiency, increased tendering success, reduced insurance costs and employee morale, as well as the more obvious benefits of avoiding the costs associated with an accident such as fines, legal costs, sick pay, repairs, bad publicity, poor business reputation and loss of work.

The main thing with H&S planning is to make it ambitious, but achievable. Do not necessarily expect total compliance with all best practice requirements over the first year of the plan. Instead, aim for good legislative compliance and work from there. Naturally some organisations are further down the H&S compliance road than others, but the key point here is scale.

## The right scale

It is a simple fact that high-risk activities will require a higher level of attention than low risk ones. An organisation using carcinogenic (cancer-causing) chemicals, for instance, will need to have more controls in place than would be required in a simple office environment.

The HSE is very keen to promote simple, direct documentation accurately reflecting the organisation's activities. No-one is expecting a small business to have an all-encompassing management system for H&S along the lines of OHSAS 18001 or BS 8800<sup>1</sup>.

Smaller organisations may not need a formal written management system, but they will need to make sure that control measures are implemented and adhered to.

## Get competent or get help!

H&S is sometimes seen as an esoteric subject, understood only by its practitioners, legal personnel and enforcers. However, it is not necessary for an employer to know everything about the subject — it is acceptable to delegate much of the management of H&S issues to others within an organisation.

The law<sup>ii</sup> requires the employer to appoint competent persons (ie persons with suitable qualifications, training and experience) to assist it with H&S matters. Again this is a question of scale — low-risk hazards may require a relatively basic understanding of H&S issues, whereas the more hazardous the environment, the higher a level of competence is required.

If it is not feasible to obtain in-house H&S competence, the services of a consultancy, such as Croner Consulting may be taken. There are a great many H&S consultancies in the UK but before entering into a contract, always check their qualifications and relevant work experience.

## Sell it to managers and staff

Manager and employee buy-in to H&S is critical. If the employees down through the ranks are not committed to improving safety standards, then a poor safety culture will almost inevitably follow. To help secure director and senior manager commitment, it may be helpful to highlight the financial and operational benefits outlined previously.

Once the management team is committed to the H&S plan, it can then be rolled out to the rest of the workforce. The key message here is that, despite the media-generated "nanny state" myth of H&S, the real thing is about sensible risk management, not making their working lives tougher. Consult with them about their work, ask for ideas for improvements and involve them in the risk assessment process.

<sup>1</sup> Both higher level standards for H&S Management Systems. <sup>ii</sup> Management of Health and Safety at Work Regulations 1999 as amended, s.7.

# Internships — what are they and how do they work?

Internships are often a good way for individuals to gain experience in business and for the business community to benefit from talent.



In most cases, internships are intended to be short periods of work experience, usually for students or graduates. Recently, the Government launched the Graduate Talent Pool, which is intended to match graduates with employers by providing them with opportunities to try out a potential career, gain experience or prove themselves to a potential employer.

An internship is a general term which can result in different situations from an

employment law perspective. Employers have to be careful when considering taking on interns, as there is a risk that the interns could be considered workers and should receive the National Minimum Wage (NMW). They will also be entitled to annual leave and rest breaks under the Working Time Regulations 1998.

The key issue is whether interns actually work for the employer. If they are just going to come to a place of work for a few hours a day, to get a feel for “office life” for example, this may not be considered work. Encouraging work shadowing and limiting the period of work experience to a short amount of time might help to demonstrate that the individual was not working for the employer.

However, the more interns do for the employer, the more likely it is that they will be working for the employer. Most interns will be looking to impress the employer in the hope of getting a permanent job, so they are likely to undertake work at some point. Recent stories reported in the press of interns being offered permanent jobs following successful internships indicate that the interns were genuinely carrying out work from the outset, such as covering another employee’s maternity leave, or having a set job for a fixed period of time.

Employers risk being fined for not paying the NMW, when they are legally obliged to do so. There may be some exemptions. For example, students undertaking work experience as part of a “sandwich” course in association with a higher education establishment will be exempt from the NMW, provided the placement does not exceed one year. However, this does not apply to all internships, so employers need to be aware of the risks.



## Compensation for worker’s back injury

A security services worker who was “forced to continue lifting heavy objects after he damaged his back” has received £13,500 in compensation, according to his lawyers, Thompsons Solicitors.

The worker, a 62-year-old member of the GMB union, from Atherstone in Warwickshire, worked for a security services firm in Coventry from 2002 to 2005. The company sorts change collected by banks and it was his job to move the heavy sacks of coins from a crate.

Thompsons says that the worker first hurt his back in June 2004 while lifting the bags of coins, weighing up to 7kg in the firm’s cash service centre. As a result of the first accident, he was off work for six weeks. When he returned, he was put on a different job.

He said it soon became apparent that he was still lifting heavy objects and asked his management to move him to a job where he did not need to lift. He said he was told to continue his work or leave the company.

In February 2005, he suffered a slipped disc caused by the repetitive nature of his job. He never recovered from the injury and he was forced to leave the firm.

Following the injuries he sustained, he contacted his union, the GMB, which instructed its lawyers Thompsons Solicitors to pursue a claim for compensation.

The company did not admit liability for the first injury but accepted 80% responsibility for the second and settled both claims out of court.

Joe Morgan, GMB Birmingham and West Midlands Regional Secretary, said, “This case shows that proper risk assessments are vital and should not be completed just to tick the box. Consideration should be given to the task and the risks involved for the worker. Experts should be hired to assess the safety of a job where appropriate.”

Expert View by Gillian Dowling,  
Employment Technical  
Consultant

# A look at the Agency Workers Regulations 2010

Draft Regulations were published by the Government in October 2009 to implement the Agency Workers Directive.

Subject to further consultation, it is the Government's aim that the Regulations will be passed in April 2010 and come into force on 1 October 2011. Although the legislation may change, as there is a General Election on the horizon, we do know that EU Member States have to implement the Agency Workers Directive by 5 December 2011 and so it is still worthwhile looking at the draft Regulations now to see how they are likely to affect the HR world.

By agency workers, we mean those who are usually referred to as "temps"; temporary agency workers who are employed or engaged by an agency to do work for an organisation. The organisation is often referred to as "the hiring firm" or often in case law, the "end user". In the draft Regulations, the terms "agency worker" and "hirer" (to mean the organisation) are used. The definition of a worker is based on the same definition as that used in the Working Time Regulations 1998. A worker is an individual who either works under a contract of employment, or undertakes to perform work personally and the relationship is not genuinely one of a client or customer on the one part and a profession or business undertaking on the other. It will not cover those who are genuinely self-employed or who are working through their own limited companies.

The overall aim of the Agency Workers Regulations is to ensure that agency workers have equal treatment. The agency worker is to receive the same basic working and employment conditions as if he or she had been taken on directly by the hirer to do the same job, at the same establishment and if relevant, with a similar level of qualifications and skill.

## Entitlements from the start

Agency workers should have the same access to canteen or other similar facilities, childcare facilities and the provision of any transport facilities from the first day with the hirer. From the start, agency workers also have the right to be informed by the hirer of any vacancies within the organisation, so that they have the opportunity of finding permanent employment. The agency worker would still have to apply for those vacancies, either by an internal or external selection process. This is along the same lines as employers already have to do for fixed-term employees and part-time workers. Pregnant agency workers will be entitled to paid time off for ante-natal care.

## Entitlements from 12 weeks

If an agency worker has completed 12 calendar weeks of work with the same hirer in the same role and any break has been for:

- less than six weeks
- less than 28 weeks, and the worker has been incapable of work through sickness, injury or jury service, or
- time off or leave to which the agency worker was entitled (either on a statutory or contractual basis)

the agency worker is entitled to the same basic working and employment conditions as if he or she had been directly recruited by the hirer for the same job at the same time. The pay, which will have to be the same, includes any fee, bonus, commission, holiday pay or other emolument referable to the assignment, such as overtime payments and



shift allowances. However, occupational sick pay, pension, maternity, paternity and adoption pay, redundancy pay or any payment or reward aimed at the long-term management motivation and retention of staff, expenses, loans, guarantee payments and paid time off (eg for trade union duties) are excluded. The same rest breaks, night work restrictions, rest periods and annual leave will have to be applied to agency workers.

## Who is liable?

If there are breaches and a claim is made by the agency worker, it is the agency which is primarily responsible, unless the agency can show that it obtained or took reasonable steps to obtain information from the hirer and acted reasonably in determining what the agency worker's basic working conditions would be.

There is also provision for the hirer to be held solely responsible if the agency did not play a part, or for liability to be split between the hirer and the agency.

## Top business issues

Every month we will bring you the top issues from callers to our telephone advice lines. These were the top issues in December.

Tax & VAT	Employment	Legal	Health & Safety
1. Redundancy pay — tax treatment of redundancy packages and pay in lieu of notice.	1. Conduct.	1. General contract issues.	1. Accidents recording and reporting.
2. Capital Gains Tax — tax-efficient methods of closing down companies.	2. Absence from work, including sickness absence.	2. Company law.	2. Risk assessments.
3. HMRC new information powers, following the entry into force of Schedule 36 to the Finance Act 2008.	3. Redundancy.	3. Property issues, including landlord and tenant.	3. Policy implementation.

## Event diary

### Legislation



For more information or to book please contact:

**Employment on  
01455 897193**

**or Health & Safety on  
01455 897192**

**Fax: 01455 897026**

All our courses can be designed to meet your specific requirements and are available on an in-house basis.

## Event diary — Open Course Schedule 2010

Health & Safety			
Course title	Duration	Date	Location
Health & Safety in the Workplace Level 2	2 days	13–14 January	Mercure London City Bankside
Health & Safety in the Workplace Level 2	2 days	20–21 January	Croner Consulting, Hinckley
Manual Handling Training for the Trainer	2 days	25–26 January	Bolton Arena
Health & Safety in the Workplace Level 2	2 days	27–28 January	Cophorn Hotel, Manchester
Health & Safety in the Workplace Level 2	2 days	3–4 February	Botleigh Grange, Southampton
Health & Safety in the Workplace Level 2	2 days	10–11 February	Saint Petros, Truro
Manual Handling Training for the Trainer	2 days	17–18 February	Mercure London City Bankside
Health & Safety in the Workplace Level 2	2 days	23–24 February	The Caledonian Hotel, Tyne & Wear

Employment			
Course title	Duration	Date	Location
Negotiating Skills	1 day	14 January	Holiday Inn Leeds, Garforth, Leeds
Essential Employment Law	1 day	21 January	The Devon Hotel, Exeter
Positive Absence Management	1 day	21 January	Holiday Inn, Warrington
Essential Employment Law	1 day	28 January	Swynford Paddock Hotel, Newmarket
Role of the Supervisor	1 day	1 February	Croner Consulting, Hinckley
Essential Employment Law	1 day	9 February	Holiday Inn Leeds, Garforth, Leeds
Essential Employment Law	1 day	11 February	Mercure London City Bankside
Essential Employment Law	½ day	18 February	The Dunsilly Hotel, Antrim

## Legislation

Area	Legislation	Details	Date
Medical information	Social Security (Medical Evidence) and Statutory Sick Pay (Medical Evidence) (Amendment) Regulations 2010	Legislation to change the format and content of medical statements to enable the doctor to say that the patient "may be fit for some work now" to facilitate the patient's return to work.	April 2010
Discrimination	Equality Bill	The aims of the Bill are to consolidate existing discrimination law, introduce positive action on recruitment for under-represented groups; make it unlawful to prevent employees from discussing their pay; extend discrimination by association to all aspects of discrimination; enable the Secretary of State to order employers with 250 or more employees to publish information on pay (subject to further consultation and not to come into force before 2013); introduce wider powers for employment tribunals to make recommendations in discrimination claims; create a single equality duty on public sector employers to include duties in relation to gender reassignment, age, sexual orientation and religion or belief, and extend age discrimination law to the provision of goods and services.	2010
Additional Paternity Leave	The Additional Paternity Leave Regulations 2010	Additional Paternity Leave will be available for fathers at 20 weeks after the birth of the child for a maximum of 26 weeks, if the mother returns to work. The remainder of the mother's statutory maternity pay will be paid to the father.	Legislation to be passed by April 2010 with effect for parents of babies due on or after 3 April 2011
Agency Workers	Agency Workers Regulations 2010	Temporary agency workers will be entitled to equal treatment after 12 calendar weeks in the same job, but this will not apply to occupational pension schemes or occupational sick pay.	1 October 2011

# Fork-lift operator fined for death of colleague

A fork-lift truck driver, whose actions contributed to the death of a colleague, was recently fined and ordered to pay court costs following action by the Health and Safety Executive (HSE). The HSE prosecuted the driver following the incident, which took place at a haulage company based in Crosshills, on 14 March 2006.

The court heard that the driver allowed his colleague to use the forks of the truck he was driving as an impromptu lift to access pallets on the second deck of a two-tier lorry. He slipped and fell from the fork-lift, sustaining serious injuries that required prolonged treatment in hospital. He died two months later at St James' Hospital in Leeds from complications, aged 48.

The court was told that, as an experienced and trained fork-lift operative, the driver should have known better than to allow anyone to stand on or near his machine while he was working. He pleaded guilty to breaching s.7 of the Health and Safety at Work, etc Act 1974 at Skipton Magistrates' Court. Section 7 of the 1974 Act covers the duty of employees while at work to take reasonable care for the health and safety of themselves and of other affected persons. He was fined £1500 and ordered to pay costs of £1000.

After the hearing, HSE Inspector Paul Yeadon commented that the driver "will forever live with the guilt of his momentary disregard for safety. Fork-lifts are extremely common and invaluable pieces of machinery. They are essential for loading and unloading, and are perfectly safe when used correctly. However, they also pose a serious risk if they are used for anything other than their intended purpose, or if operators fail to follow the required safe-working procedures."

<sup>1</sup> [www.hse.gov.uk/falls/vehicle.htm](http://www.hse.gov.uk/falls/vehicle.htm)



The case highlights the dangers encountered by those unloading vehicles. The number of falls reported has made prevention of this type of injury a priority

concern for the HSE. Their Guidance<sup>1</sup> offers the following tips for safe unloading.

- How high is the job from the ground?
- Is the surface the workers will be on strong enough to take the weight of them and their equipment?
- What is the ground condition under the area where access equipment might need to be set up, eg is it sloping, muddy or uneven? The access equipment used must be suitable for the ground conditions — stable, level and not liable to fall or collapse.
- Is it raining hard, or very windy?
- How often do you need to do the job and how many sites will you visit?
- If you do not need to work at height to unload the vehicle, then do not.
- When it is there, always use safety equipment, such as guardrails or work restraint.
- Be sensible and safe:
  - ~ Do not walk backwards when on the vehicle
  - ~ Do not jump off
  - ~ Keep the vehicle tidy.

Finally, employers must make sure the people who will be doing the job have the right skills, experience and training to use the equipment safely and have been consulted about the right equipment to use. The consequences of failing to do so were made clear by the above case.

## Man crushed to death by scrapyard claw



The death of a man crushed by a scrapyard grab claw has prompted a prosecution by the Health and Safety Executive (HSE) and a £50,000 fine for the company involved.

On 2 August 2007, a member of the public from Millbrook, Southampton, was killed when he and his brother visited a site run by metal recyclers in Sholing, Southampton.

The two men were examining a vehicle for its parts and entered the site by the open back gate, while the grab claw crane operator was elsewhere. The crane was used to move scrap around the site.

The member of the public was inside the van when the crane operator came back to start work. Despite his brother trying to tell the crane operator that he was in the van, the operator misunderstood and instead picked the vehicle up. He was instantly crushed by the crane's five-finger grab and died at the scene.

At the time of the incident, there were no warning signs around and outside the site to indicate which areas were out of bounds to members of the public. There were also no published site rules or formal systems of work.

The metal recycling company pleaded guilty to breaching s.3(1) of the Health and Safety at Work, etc Act 1974 (covering the duty of the employer to ensure that affected non-employees are not exposed to risks to their health or safety) and contravening regulation 3(6) of the Management of Health and Safety at Work Regulations 1999 (which covers the duty of the employer to undertake risk assessments). The company was fined £50,000 and ordered to pay costs of £34,373.80.



# Grainger plc & others v Nicholson



Belief in climate change and environment issues may be protected under discrimination law. The Employment Appeal Tribunal hands down guidance on the definition of philosophical belief.

Regulations 2003, because of his strongly-held philosophical belief on climate change and the environment. His witness statement said that "it was not merely an opinion but a philosophical belief, which affects how I live my life, including my choice of home, how I travel, what I buy, what I eat and drink, what I do with my waste and my hopes and my fears."

The Employment Appeal Tribunal (EAT) stated that the philosophical belief had to be a genuinely-held belief and not an opinion or viewpoint based on information available to the employee. It must be a belief as to a weighty and substantial aspect of human life and behaviour. It must attain a certain level of cogency, seriousness, cohesion and importance. The belief must be worthy of respect in a democratic society, not incompatible with human

dignity and not conflict with the fundamental rights of others.

A philosophical belief can be a one-off belief, not necessarily shared by others, following a similar judgment that a religious belief is not required to be one shared by others (from the 2009 EAT case of *Eweida v British Airways plc*).

Support of a political party would not qualify as a philosophical belief, but a belief in a political philosophy such as socialism might qualify. A philosophical belief can be one based on science, not just religion. The EAT held that the belief asserted by Mr Nicholson was capable of being a belief for the purposes of the 2003 Regulations. The employment tribunal still needed to hear evidence given by the claimant and cross examination directed to the genuineness of his belief.

Mr Nicholson was employed by Grainger plc until July 2008. His employer claimed that he was dismissed by reason of redundancy, but Mr Nicholson's case was that the dismissal was unfair and that he had been discriminated against, contrary to the Employment Equality (Religion or Belief)

## Ask an expert

Each month, one of our employment experts will be answering a question in this section. If you have an employment question that you would like our experts to answer, please e-mail it to [cronerinfo@croner.co.uk](mailto:cronerinfo@croner.co.uk).

**Q: Can an employee claim that she has been discriminated against because she is vegetarian?**

**A:** Yes, in theory she could make a claim if there has been an incident, or more than one incident, which could be considered to be discriminatory. Being vegetarian has been used in the past to demonstrate evidence of an employee's particular ethnic origin when alleging that there has been a breach of the Race Relations Act 1976.

It is also possible that being vegetarian could be linked to the employee's religion or religious or philosophical belief, such as a strongly held environmental belief (see this edition's case law update for more information). This would be contrary to the Employment Equality (Religion or Belief) Regulations 2003.

On the other hand, just being vegetarian for minor health-related issues or because of a dislike of meat, for example, might not be sufficient grounds to fulfil the criteria of a philosophical belief. The employee

would have to demonstrate to the employment tribunal that her belief was genuine and also have evidence of less favourable treatment on the grounds of race or religion, religious belief or philosophical belief. Other possible claims might be that she has been subjected to harassment or victimisation.

Harassment in discrimination law is defined as unwanted conduct, which has the purpose or effect of violating her dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the employee. Victimisation is where an employee is treated less favourably because the employee has done any act in reference to the particular discrimination law in question, eg by asserting his or her rights in raising a grievance about an issue of discrimination or bringing a claim.

In considering whether there is a case of harassment, it is important to consider the facts of the harassment alleged and the seriousness of the matter. In the recent 2009 case of *Richmond Pharmacology Ltd v Dhaliwal*, the EAT stated that someone's dignity "is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended."

## Contact us

If you have any questions about the topics covered in Solutions please call **0800 634 1700**, or e-mail [cronerinfo@croner.co.uk](mailto:cronerinfo@croner.co.uk).

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