

REGULATORY COMPLIANCE- ARE YOU ON TOP OF IT? IF NOT BREACHES ARE ABOUT TO GET A LOT MORE EXPENSIVE

Introduction

Section 85 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) came into force on 12 March 2015 increasing the maximum level of fine available to Magistrates' Courts to an unlimited fine (currently £20,000 for most health and safety offences). Under section 152(1) these changes apply to England and Wales but not to Northern Ireland or Scotland. The increase has no retrospective effect so will only apply in respect of offences committed after 12 March 2015.

So why is this so important?

The law has changed, and now for all offences committed on or after 12 March 2015 all fines of £5000 and above and maximum fines in magistrates' courts are now unlimited, meaning that magistrates will be able to impose much higher fines than before. Where legislation imposes a maximum fine this will now become an unlimited fine.

For offences which occurred prior to 12 March 2015, fines payable on conviction in the magistrates' court will continue to be capped at either the previous statutory maximum of £5,000 or a higher amount where the legislation provides for it (e.g. up to £50,000 for some summary waste offences).

Despite the Magistrates' Court now having unlimited maximum fines available, section 3 of the Powers of Criminal Courts (Sentence) Act 2000 can still be utilised to pass a case to the Crown Court for sentence.

What does this mean for my company?

Companies (and individuals) are subject to many different laws which create criminal offences if a breach occurs including the Companies Acts, town & country planning, health & safety and environmental legislation to name but a few.

Environmental offences

We single out environmental offences because these are already the subject of sentencing guidelines published by the Sentencing Council. Environmental Offences - Definitive Guideline (the "Guidelines") has been in use by both Crown Court judges and magistrates since 1 July 2014 (regardless of the date of the offence).

The Guidelines set out a 12-step sentencing process to punish offenders, prevent reoffending and remove financial gain, aimed at ensuring a consistent approach by courts with recommendations for the level of fine based on various factors. As magistrates courts start to consider cases in relation to offences committed after 12 March 2015 we expect to see much higher fines imposed as they begin to take advantage of their new unlimited sentencing powers.

The court applies a 12 step sequence of steps when considering how to sentence an organisation (as opposed to an individual). Matters to be considered include:

- the offence category- determined using only the sliding scale of culpability and harm factors set out in the Guidelines;
- the starting point and category range for a fine. Organisations are expected to provide comprehensive accounts for the last three years, to enable the court to make an accurate assessment of the organisation's financial status, failing which reasonable inferences can be drawn. The Guidelines include a table that lists starting points and category ranges for large organisations (those with a turnover or equivalent of £50 million and over), medium organisations (between £10 million and £50 million), small organisations (between £2 million and £10 million) and micro organisations (up to £2 million). The Guidelines also state that for very large organisations that very greatly exceed the threshold for large companies, it may be necessary to move outside the suggested range to achieve a proportionate sentence; and
- using a combination of financial orders (compensation and confiscation orders and fine) to remove any economic benefit derived from the offence.

The court then reviews all aspects including turnover and any other relevant factors to ensure that the fine will bring home to both the management and shareholders the need to improve regulatory compliance.

As an example the Guidelines recommend that the range of fine for the very worst type of deliberate breach by a large organisation for a category 1 offence be between £450,000 – £3,000,000.

Comment

The Magistrates' Court Sentencing Guidelines (February 2014) provide guidance to magistrates that 'Particular care needs to be taken when considering whether to accept jurisdiction or to commit a case to the Crown Court, especially when the defendant is a large company'.

Serious consideration needs to be given as to whether it is in a defendant's best interest to indicate guilty pleas in the magistrates' court and run the risk of being sentenced there, or to elect for a trial in the Crown Court and then indicate guilty pleas at the earliest opportunity following committal to the Crown Court jurisdiction. In the absence of any cap on fines we may see penalties varying across England and Wales as the new system settles down.

The potential impact of the increased sentencing powers given to magistrates courts will be all the greater if the proposals contained in the recently concluded Sentencing Council Consultation (which will lead to significantly higher penalties being imposed) are implemented. We may also see additional guidelines being issued akin to the Guidelines for different types of offences created by statute.

This information is necessarily brief and is not intended to be an exhaustive statement of the law. It is essential that professional advice is sought before any decision is taken.

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