

Health and safety

Beyond the legislation

Almost 20 years ago, tank number 610 at the Union Carbide plant at Bhopal exploded. Proper safety precautions for the storage of methyl isocyanate were not followed and the resulting gas cloud probably killed around 22,000 people and injured a further 200,000. This event only serves to underline the importance attaching to the maintenance of health and safety in the workplace.

UK legislation

Health and safety legislation in the UK is wide-ranging. The main legislation, the Health and Safety at Work Act, goes back to 1974 and places a general duty on employers to establish safe working practices. But what is safe?

If one takes safety to its extreme, no-one would work or drive and society would grind to a halt.

Regulations detailing specific measures - ranging from the use of VDUs to the transport of hazardous chemicals - assist employers in ascertaining what level of safety society regards as acceptable.

Yet in certain areas, and without any great publicity, case law has developed further and faster than regulation.

Seller as policeman

Sales staff may be dismayed to discover that they could be liable for failing to monitor whether a customer was fit to purchase a product. Taking Bhopal as an example, if an outside company had been selling methyl

isocyanate to Union Carbide, would it have been partially responsible if it ought to have known about the lack of safety procedures? An obvious example of this would be the sale of a gun to a child. If the child injured or killed someone, the man in the street may regard the gun seller as liable for the death or injury.

Employment contract

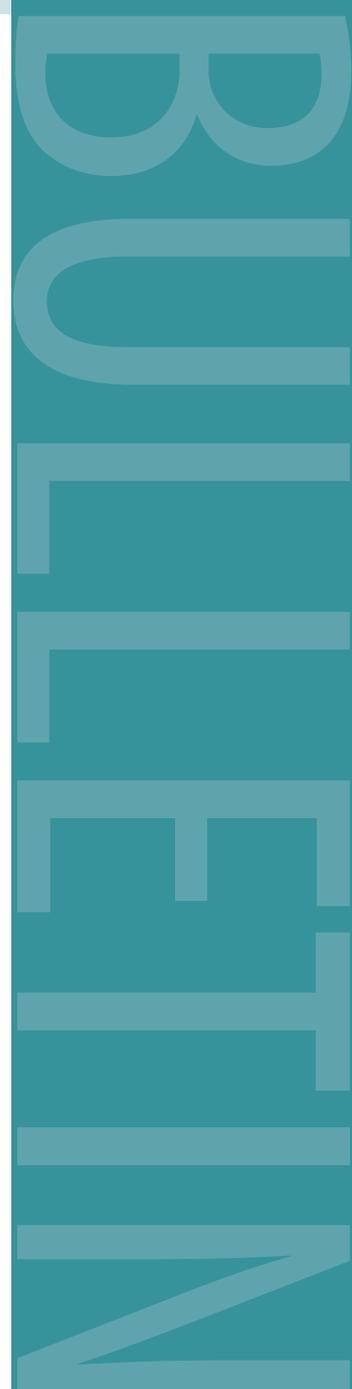
Breaches of health and safety regulations which could give rise to personal injury or death would almost certainly be gross misconduct whether or not identified as such in the contract of employment. However, our recommendation is that disciplinary procedures should make it clear that breaches of health and safety rules do amount to gross misconduct.

Whilst staff may be aware of specific regulations affecting your industry, they may not be aware of the impact that case law might have. This is a matter for training.

This is not to denigrate the importance of legislation. A point you may need to mention to your main board directors is that they may be held personally responsible for breaches of health and safety and similar legislation, and could face fines or imprisonment in severe cases.

If you have any questions, or would like us to work with you in an in-house training programme, please contact:

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When is an employee not an employee

Sejal Raja explains why it does

It is important for legal purposes not only to get the distinction right between an employee and a self employed individual, but also between an employee and a 'worker'. Most employment protection rights are currently available only to employees, but workers are increasingly being offered more of these rights.

The issue was recently considered in the case of *Bryne Brothers - v - Baird*. The applicants in this case were self employed building trade workers who were required to sign a standard form sub-contractors' agreement. Under this agreement they were not entitled to holiday pay. However, they claimed that they were entitled to holiday pay under the Working Time Regulations because they were 'workers'.

It was held that the applicants were obliged to perform personally work or services for the company and that they did not do so in the capacity of a business undertaking. Therefore they were workers for the purposes of the Working Time Regulations and accordingly were entitled to holiday pay.

Distinction between employee and self employed

The distinction between whether an individual is an employee or self employed is important because an employee status triggers a number of obligations on the employer including vicarious liability, an obligation not to unfairly dismiss, and the duty to deduct tax and national insurance.

There are a number of factors which would indicate whether or not an individual is self employed or not. Basically, individuals are treated as self employed if they are in business on their own account and bear the responsibility of the success or failure of the business.

The test to determine whether there is an employment relationship is to determine if the following three conditions are satisfied:

1. There is a wage or other remuneration for the performance of some service.

2. That the individual agrees expressly or impliedly that in the performance of that service he will be subject to the other's control.
3. Other factors in the contract are consistent with an employment relationship. For example, whether the individual is integrated into the workforce, wears a uniform, or uses the employer's tools and equipment.

Common indicators of 'employee' status are:

- The company has the right to control what the individual does - where, when, and how it is done.
- The individual does not risk his or her own money and there is no possibility that he or she will suffer a financial loss.
- The individual has no business organisation, for example: yard; stock; materials; or workers.
- The individual is paid by the hour, day, week or month.
- The individual has formal induction training.
- The individual receives sick pay and holiday pay.
- The company can exercise disciplinary powers over the individual and the individual can utilise a grievance procedure.

Distinction between 'employee' and 'worker'

It is also important to assess whether an individual is or is not a worker. The Working Time Regulations define a 'worker' as an individual who has entered into or works under:

- (a) a contract of employment, or
- (b) any other contract, whether express or implied, whereby the individual undertakes to do or perform personally any work or services for another party to the contract, whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.

.... but does it matter?

For an individual to fall within the wider definition of a 'worker', there must be a contract between the person providing the service and the person taking the benefit of that service.

Mutuality of obligation and personal service are important elements in determining who is a worker. The definition is intended to create an intermediate class of protected worker who is in the same need of protection as traditional employees, but on the other hand cannot in the narrower sense be regarded as carrying on a business.

The Government has issued a discussion paper asking for views on extending the coverage of employment protection rights beyond those individuals that fall within the traditional legal definition of an employee.

Our advice

When considering the employment status of an individual it is not a matter of choice. Parties cannot simply decide to treat working arrangements as either self employed, employed or a worker. It is therefore important to distinguish an individual's employment status because the status has a wide range of implications including tax matters and the type of employment claims that may be brought by the individual.

A brief summary of employment rights according to status is provided in the table below:-

Employment status		
Rights	Employee	Worker
Unfair dismissal rights	✓	X
Redundancy rights (including right to consultation)	✓	X
Right to minimum period of notice	✓	X
Right to statutory sick pay and statutory maternity pay	✓	X
Employer vicariously liable	✓	X
Implied contract terms (e.g. mutual trust and confidence)	✓	X
Protected under a TUPE transfer	✓	X
Sex, race and disability discrimination	✓	✓
National Minimum Wage	✓	✓
Maximum 48-hour week	✓	✓
Right to rest breaks under Working Time Regulations	✓	✓

If you have any questions, then please do not hesitate to contact:

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Meet the team

Michael Elks was invited to lead our Employment Group of specialist lawyers in April 2002. Another member of the Employment Group, Robert O'Donovan, asks him a few questions.

How did you first become interested in employment law?

I qualified in the 1970s when the legal world was less specialised. I began working in general litigation but new employment laws were coming into being, unfair dismissal was relatively new and I found it a particularly interesting area. I have been fortunate in my career in being able to specialise in both property and employment litigation.

How do you feel about heading the Employment Group?

I find it difficult to express my emotions here. I would much prefer that our former head, Mike Thomas, was still here to develop the work he began before he died so tragically. On the other hand, I think it is a case of both pride and pleasure to have the opportunity to work with an exceptionally able and close-knit team.

What is the proudest moment in your career?

I find it impossible to define a particular moment. I can think of a number of particularly difficult cases which my clients have won, and where the result has made a real difference to them.

What do you most like or dislike about employment law?

To me, the attraction is that one is seeking to share problems in a very rapidly changing legal environment and at the same time often helping individuals, whether employer or employee, through a difficult time.

As to what I dislike most, it is cases in which employees bring spurious claims, trying to force employers to pay them off with a few thousand pounds simply to avoid the legal expense of tribunal proceedings. I have recently seen an increased willingness on the part of employment tribunals to make costs orders, which I hope will reduce such claims.

What do you do outside office hours?

Tennis, theatre, travel. One of the advantages of fairly adult children is that they give one an excuse to travel. For example last year, we visited one of our sons who was working in Australia during his gap year.

Is it true that you are Lord High Executioner of the Falkland Islands?

No, that is purely a malicious rumour. For reasons now lost in history a RadcliffesLeBrasseur partner is the Deputy Registrar of the Court of Appeal of the Falkland Islands and St Helena. The effect is that if there are appeals, I have to organise the court proceedings. On occasion, they have been held in the main boardroom here. Fortunately appeals are fairly few and far between, probably because of the costs involved. However, when they do occur, appeals certainly take me away from my normal area of practice - three appeals have been in cases of murder.

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Covering personal and occupational pensions and how to vary contractual terms - if you can.
19 February 2003

Data Protection - a practical approach

June 2003 (date to be announced)

Harassment and Discrimination

September 2003 (date to be announced)

For further details of workshops please contact:
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If you require any further information regarding the issues mentioned in this bulletin please contact Robert O'Donovan or Sejal Raja.

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