Our Health and Safety Team attended the Institute of Occupational Safety and Health (IOSH) Legal Update and we wish to apprise you with a summary of the presentations.

Kevin Bridges, Partner at Pinsent Masons LLP Solicitors and Richard Voke, Partner and Head of Regulatory Risk at Ashfords LLP Solicitors gave presentations on what the HSE have been doing / plan to do.

The following was discussed during the seminar:

- Important Changes to 2017
- Looking ahead to April 2017
- Review of significant cases under new sentencing guidelines
- A look at the latest appeals against sentence.

**Important Changes and Legislation Update:**

**Control of Electromechanical Fields at Regulations 2016**

Electromechanical Fields (EMFs) are present in virtually all work places and exposure can cause:

- Health effects
- Sensorial effects
- Inclined effects

Control of Electromechanical Fields at Work Regulations 2016 came into force 1 July 2016. The majority of employers will not need to take action on EMF as most workplaces are at a low level. Places with high EMF should already have controls to reduce risk and exposure.

Telephones, fax machines, Wi-Fi, IT equipment etc. are low level. Broadcast and telecoms stations, MRI, electrically powered trains and trams, air traffic control etc. are examples of items needing control.

There will be seven main duties for employers:

- Assess the levels of EMFs to which your employees may be exposed;
- Ensure that exposure is below a set of ELVs (Exposure Limit Values);
- When appropriate, devise and implement an action plan to ensure compliance with the exposure limits;
- When appropriate, assess the risks of employees’ exposure and eliminate or minimise those risks. You must make sure you take employees at particular risk, such as expectant mothers and workers with active or passive implanted or body-worn medical devices, into account.
- Provide information and training on the particular risks (if any) posed to employees by EMFs in the workplace and details of any action you are taking to remove or control them. This information should also be made available to their safety representatives, as appropriate;
- Take action if employees are exposed to EMFs in excess of the ELVs;
- Provide health surveillance or medical examination, as appropriate.

**Fee For Interventions (FFI)**

HSE’s inspectors inspect work activities and investigate incidents and complaints. If, when visiting a business, they see material breaches of the law, the business or organisation will have to pay a fee. The fee is based on the amount of time that the inspector has had to spend identifying the material breach, helping businesses to put it right, investigating and taking enforcement action.

- Health and Safety and Nuclear (Fees) Regulations 2016 came into force 6 April 2016
- Introduced a 4% fee increase in fees payable (in most cases) to the HSE
- FFI now £129 per hour. (This includes time on site / premises as well as office based work)
- HSE’s Annual Report and Accounts 2015/16 – show an income from FFI of £14.7m but the cost of recovery of these fees to be £17.5m. This shows that the system is currently operating at a deficit.

FFI being challenged by a Judicial Review (JR) by the OCS Group UK Ltd.
• OCS argument is that HSE is essentially prosecutor, Judge and Jury over FFI Scheme
• HSE decide if FFI applicable
• HSE would claim FFI regime implemented by parliament
• HSE decide if you receive a notice of contravention. If you challenge a notice, you have a first query / appeal to the HSE which is free of charge. If the dispute is not upheld, HSE will recover the costs of dealing with the dispute using the FFI hourly rate of £129 per hour. This rate will be applied to all HSE staff involved in responding to the dispute
• There is concern that the paying of fines could be an admission of guilt is being challenged.

**Personal Protective Equipment (PPE) Regulations 2016 / 425 (not PPE at Work Regulations)**

• Concerns producing, importing and manufacturing (basically the equipment). Ensure the equipment works, is efficient and not misleading.
• The old PPE Directive is now 20 years old, but it has been recognised that PPE faces regular technological progress.
• The older PPE Directive sets out a goal for EU countries to achieve, its reclassification as a Regulation makes it a binding legislative act which must be applied in its entirety across the EU.
• Introduced in April 2016, there will be a transition period of 24 months before the regulation in its entirety comes into force April 2018.
• Manufacturers to re-classify existing products against changes in classification.
• Importers will need to ensure compliance with new regulations.
• Distributors to verify that the CE marking is present. Distributors who consider or have reason to believe that PPE which they have made available on the market is not in conformity with the new Regulation shall make sure that the corrective measures necessary to bring it into conformity, to withdraw it or to recall it are taken.
• If you are responsible for the purchase of PPE you need to ensure that your PPE providers are able to meet with the new Regulation in the same way as you needed to ensure they met with the old Directive.
• Identifying true product compliance is difficult for the user. The responsibility falls to the manufacturer, who may not have the resources in place to ensure regular testing. Anyone who has concerns over the safety of the equipment they are being supplied should follow these steps:
  o Ask your suppliers for a declaration of conformity that shows original certification for the PPE you are purchasing.
  o Ask your suppliers to define their process for sample testing to ensure safety products continue to meet the required standards.
  o Ensure your suppliers are members of the BSiF Registered Safety Supplier Scheme.
  o Ask your suppliers to define their process of quality assurance at the manufacturing facility to ensure the products are being manufactured as they were originally certified.
  o Always buy from a trusted source.

**Civil Use Explosives – Explosives Regulations 2014 (Amendment) Regulations 2016 (ERAR 2016)**


The directive concerning civil use of explosives is one of nine directives which have been updated, or recast, as part of a package known as the new legislative framework (NLF). The NLF aims to improve market surveillance requirements across a range of products on the single market.

The main changes between the requirements in Explosives Regulations 2014 and ERAR 2016 are:

• Clearly defined legal duties for all economic operators (manufacturers or their authorised representatives, importers and distributors) involved in the supply chain
• Clearly defined legal duties for Market Surveillance Authorities (MSAs), such as HSE, in terms of their co-operation with other member states
• MSAs can require corrective action to be taken by economic operators, or commensurate with any risk, can require economic operators to withdraw or recall conforming civil use explosives from the market
Civil use explosives placed on the market must now be accompanied by instructions and safety information, in a language which is easily understood by consumers and end-users. In the UK, this information must be in English.

Record keeping duties have now been increased – manufacturers (or their authorised representatives) and importers are required to keep a copy of the EU declaration of conformity and technical documentation, in a readable format, at the disposal of the MSA for 10 years.

The revised regulations explicitly bring commercial ‘own use’ of explosives within the scope of conformity assessment.

Non-compliance is now explicitly considered as both administrative (i.e. no CE mark applied) and safety based.

Makes accreditation the key route for Notified Bodies.

The regulations are supported by a suite of overarching and subsector guidance.

2015 / 2016 – A Year in Review – Statistics

- The UK has one of the lowest rates of injury in the EU:
  - 144 Fatalities
  - 621,000 non-fatal injuries
  - 72,702 RIDDOR reports
- The UK had a fatal accident rate of 0.5 fatalities per 100,000 employees. Italy had a rate of 1.2 and France had a rate of 3.
- These figures all show a generally downward trend, although these are signs of levelling off.
- HSE continues to have around a 90% conviction rate, and collected £38.3m in fines.
- 11,403 Notices of various forms issued in the financial year.
- Where are the injuries happening?
  - Agriculture, forestry and fishing far exceeds the industry average.
  - Construction, Transport and Manufacturing also exceeds the average.
  - Retail, food service and human health services scrape over the average.

Looking Ahead.

ISO 45001 Health and Safety Management Standard

ISO 45001 has been postponed and could now be ready in March 2018.

With the revisions of the ISO 9001 Quality Management and ISO 14001 Environmental Management Standards complete, the new ISO 45001 will be aligned with these new revisions to ensure that they work seamlessly together and complement each other. The new edition of the BS OHSAS 18001 Health and Safety Management Standard has now been postponed after the first draft of the new international standard was rejected. A secondary International Committee meeting has been scheduled for October of this year. When released the new standard will seek to:

- Reduce the risks to personnel and additional relevant parties
- Create a focus of continual improvement so as to constantly seek to improve health and safety standards in the workplace
- Ensure that all activities are carried out, along with a company’s health and safety policy are in line with an internationally recognised standard
- Context of Organisation: Will look at the internal and external factors of a business, addressing the risks and examining how to control them
- Leadership: Will identify the means of communication on different levels, not just at management level
- Documented information: Will take in to account all documentation and records.

HSE Reviews of Legislation

HSE are reviewing requirements for the inspection / examination of work plant and equipment in:
Health and Safety Law Development

- Lifting Operations and Lifting Equipment Regulations 1998 (LOLER)
- Provision and Use of Work Equipment Regulations 1998 (PUWER)
- Pressure System Safety Regulations 2000
- Work at Height 2005.

These regulations are likely to be amended during 2017.

Reduction in Sentence for a Guilty Plea.

The Sentencing Council is consulting on a draft reduction in sentence for a guilty plea guideline and is seeking the views of people interested in criminal sentencing. The revised guideline seeks to encourage those defendants who are aware of their guilt to enter a plea as early in the court process as possible. New guidance expected in spring 2017.

Health, Safety and Brexit – After the Vote and its Impact

- Present uncertainty but no changes in short term
- UK’s ‘gold standard’ founded in Health and Safety at Work etc. Act 1974
- UK Government had committed anyway to reducing regulation via its ‘Red Tape Challenge’
- Role of the Court of Justice of EU – Still influential.

The UK has now voted to leave the European Union (EU). Pre-referendum we contemplated a future for health and safety out of the EU. That future will now be a reality. Exactly what it will look like, and the consequences for this area, will depend on the outcome of exit negotiations and the shape of UK’s resultant relationship with the EU, if any. At this stage all we can do is speculate. What is clear is nothing is likely to change in the short term – the UK must give at least two years’ notice of its intention to withdraw, in accordance with article 50 of the Treaty of the EU. During this time, existing health and safety legislation derived from Europe will continue to apply.

The UK is seen as the ‘gold standard’ in health and safety matters, with the Health and Safety Executive (HSE) generally agreed to be an effective regulator, whose expertise is sought overseas. The foundation of Britain’s regulatory regime in health and safety, the Health and Safety at Work etc. Act 1974, is derived wholly from within the UK (as are other significant pieces of legislation in this area, including the Corporate Manslaughter and Corporate Homicide Act 2007). EU legislation has had an impact, of course, with many directives (negotiated by the HSE on behalf of the British government and binding in their entirety on member states which are obliged to transpose them into national laws) adding to the perceived regulatory burden in this area. Despite one of the cornerstones of the ‘Leave’ campaign being a desire to be free of the ‘business stifling’ regulations emanating from the EU, particularly in regulatory matters, however, workers and their representatives have come to expect certain standards and it is difficult to envisage agreement to settle for less protection, whatever the model of relationship finally agreed upon with the EU.

Whilst there well may be fewer new regulations in this area as a result of the vote – the UK government is committed to reducing regulation via its ‘Red Tape Challenge’ as indeed is the EU via its ongoing ‘Regulatory Fitness and Performance Programme’ – the consensus appears to be that ‘for health and safety… it’s business as usual.’

The UK Government must now decide what form of relationship to seek with the EU, if any. Options to the UK to include:

- Seeking to re-join the European Free Change Association (EFTA) (It left to become a member of the EEC) and becoming part of the European Economic Area (EEA) as a non-EU member state, like Norway, Iceland and Liechtenstein. This would be close to ‘business as usual’ for health and safety professionals – Norway’s health and safety legislation, like that of the EU member states, accords with the Framework Directive.
- Seeking to re-join the EFTA but without joining the EEA, like Switzerland, instead negotiating a series of bilateral agreements with the EU. This route could provide certain trading benefits but it would still entail compliance with many social and employment laws, which would be enforced by the EFTA court. Switzerland’s legislative framework for safety and health is not based on EU legislation, as the country is not obliged to adopt EU laws. However, it does largely comply with EU-standards, albeit with some differences, such as the non-reporting of occupational accidents.
Outside of European trade structures, the UK would be free to regulate or deregulate as it sees fit; however, the impact on health and safety related legislation is likely to be limited as noted above, particularly in the short to medium term.

Once it has left the EU, the rulings of the Court of Justice of the EU (CJEU) will no longer be binding in the UK, although until then they will remain binding. At present, the UK courts must interpret EU-derived legislation in accordance with CJEU rulings.

It is arguable that the decisions of the European court would remain influential, in part due to the fact that the UK courts are likely to find its rulings persuasive in respect of any EU-derived legislation that is retained.

The landscape may have changed and the future may be in some doubt, but in health and safety matters, at least, it is difficult to see that there will be drastic change especially if the country remains in EFTA and the EEA. In the longer term, health and safety regulations in the UK will undoubtedly be examined and a decision taken on which remain, potentially leading to changes to some regulations and the stripping away of others. There also may be changes to some regulations to the Working Time Directive and to Human Rights, but again, political and social will may not be for wholesale change here either.

Driving Offences

Ministry of Justice are currently consulting on driving offenses and penalties that follow:

- Speeding, mobile phone use, driving whilst intoxicated etc.
- Considering the allowance of life sentence in the event of a death.

We should expect changes to the law in the near future.

Corporate Manslaughter and Corporate Homicide

Kevin Bridges gave an overview all Corporate Manslaughter cases since its introduction, he also elaborated on recent and pending prosecutions. We have not detailed these but summarise the charges below.

Corporate Manslaughter Charges Summary

| Total number of cases brought: | 28 |
| Total number of cases in England and Wales: | 23 |
| Total number of cases in Scotland: | 0 |
| Total number of cases in Northern Ireland: | 5 |
| Total convictions: | 21 |
| Guilty plea: | 15 |
| After trial: | 6 |
| Total acquittals: | 5 |
| Total number of cases outstanding: | 2 |

Since Sentencing Guidelines 2016 came in last year, we have seen more £1m plus fines in last 10 months than there has been since the introduction of the Health and Safety at Work etc. Act 1974. The average of the fines handed out are approximately £800k. There has also been a significant increase in the number of custodial sentences handed out.