



OUTSOURCE SAFETY

HSE and Fee For Intervention

The impact on your business

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Chartered Safety and
Health Practitioner*

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Health and safety consultants for construction and industry throughout the UK

Executive Summary

On October 1st 2012 HSE will introduce Fee For Intervention, also known as FFI. This development will turn the last 200 years of safety regulation on its head and signals the start of HSE implementing a charging model for its services inspecting occupational safety in the UK.

This document is based entirely on the information made available before the launch of the FFI scheme and represents our best knowledge at the time of writing on how this change will affect you and your business.

Background to the FFI scheme

Fee For Intervention will come into force from October 1st and will be a significant change in the way in which HSE approaches its clients.

Up until now we have expected a letter, a visit with a tour of the site, a chat about how we manage safety all rounded off with a pleasant talk through any issue over a cup of tea – no more!

HSE is currently in a £80m budget cut and FFI is likely to be the income which replaces this loss. Estimated charge out in year one could approach or exceed £40m

From October 1st an Inspector will be looking for ‘material breaches’ of safety legislation during their visit, what constitutes such a breach is still unclear, as we will explore later. Once a breach has been identified then the entire period of that visit will become chargeable to the client. Further, once the Inspector has left these charges will continue for each hour the Inspector spends working on that issue until the matter has been resolved to their satisfaction, if that involves using other external resources their charges will also be applied.

Even for relatively minor breaches this change could see what would have been an exchange of letters or emails over the weeks following a visit becoming an expensive process.

How will the FFI scheme operate?

Does FFI actually apply to your business?

You may take some comfort from the fact that FFI does not affect all of us. The likelihood is however, that you're covered.

Most of our clients are under inspection from HSE rather than the local authority. Shops and small to medium sized offices are unlikely to be affected, but manufacturing, construction, engineering and so on will be under the new scheme.

Tip: If you feel you're on the cusp between the local authority and HSE for inspections now is the time to act. Some businesses will have been swapped between the two enforcers over the years.

What will be the cost of the intervention?

The current rate of charge out is set at £124 per hour but this is open to change - most likely on an annual basis. Other factors which affect the cost are;

- Other specialists which are brought in to advise on the project. These can be internal to HSE such as specialist inspectors or external, perhaps scientists from the Health and Safety Laboratory (HSL) or from other specialist organisations depending on the nature of the breach;
- Research time for the Inspector. Should the inspector need to familiarise themselves with the specific risk issues through contacting designers or suppliers of specialist machinery or similar then that time would be chargeable;
- Writing and reading of emails and other correspondence. Once you arrive at a stage in the process where you wish to discuss and represent your views on the issue, be prepared for the costs to escalate. You may well wish to, or even need to, influence the Inspector to relent on a possible control for the good of your business and what you think is reasonable, however, this will keep racking up a charge at the hourly rate whilst your representations are considered and evaluated.

Another factor which only came to light in the recent guidance is that charges will be applied retrospectively from the start of the inspection. Should the Inspector take several hours to discover a material breach at your site the cost of the time leading up to that event then becomes part of the fee. This could lead to a high stakes game where once an Inspector is a certain amount of time into a visit they feel more pressured to find some evidence of material breach to justify the hours they have spent at your site, swiftly followed by a bill nearing four figures.

When and how will FFI be applied?

The crux of the matter here is a material breach. At present it remains a little unclear as to what exactly will constitute a material breach and this is also likely to depend to some extent on the opinion of the Inspector. This variability is difficult for us to predict as it will be influenced by a number of factors which are largely outside of our control.

Consider a typical situation where an Inspector may visit unannounced and find that the Health and Safety Manager is not present. Who will be able to provide the answers necessary to the Inspectors technical questions on H&S matters, even if they are present will they have to hand the evidence necessary to demonstrate their compliance. Beyond this, what of the more intangible elements of the visits, influences can be wide ranging and include the previous visits the inspector has made to a business that morning, a similar business in the past or the reception they receive by any member of staff during the visit. Whilst efforts will surely be made to ensure that the implementation of FFI is fair and consistent we are all aware of situations which similar promises are made but not always kept for whatever reason.

We see a situation arising where the current relationship between ourselves, our clients and the HSE changes quite significantly into a climate of claim and counter claim as businesses seek to protect themselves and limit their liability. An appeals process does exist and it will be interesting to see how much use is made of this in the coming months.

Effects on multiple duty holders

This presents a further complication where a duty is shared across more than a single business. In this event, for example a shared workplace with failings, then the Inspector will seek to attribute and apportion an appropriate share of the fee to each – how this will work in practice remains to be seen and may well be a test of some business relationships which could see them stretch to breaking point.

Examples of FFI enforcement situations including information on material breaches

The examples presented by HSE in their guidance document on the new scheme are broken down to one example in each of four sections headed as follows; health, safety, welfare & management.

Health

- poor management of asbestos within a site or a commercial building which could give rise to a potential release of fibres or perhaps failing to address issues identified within an asbestos management plan;
- failings under COSHH which have resulted in poor assessment and management of risks from substances which may give rise to

occupational asthma such as solder fumes, resins, isocyanates and wood dusts);

- Poor management of the risk arising from work in confined spaces such as a lack of robust risk assessments and written procedures, poor or no staff training and a lack of suitable air monitoring.
- Poor controls on the risk from hand arm vibration such as the application of action and limit values, poor information and training and failure to implement controls such as job sharing;
- Poor management of the risks from hazardous substances such as generation of dusts from dry cutting materials where water suppression is possible, lack of understanding through training and instruction of employees and lack of maintenance on local exhaust ventilation equipment;
- Legionellosis management is poor such as a lack of a robust management plan or water treatment system or signs of organic contamination and or scale in the system;
- Musculoskeletal disorders such as poorly planned manual handling techniques and a lack of training and / or awareness or a lack of controls or alternative methods of handling;
- Poor management of the risk from noise such as a lack of controls at source to reduce noise levels, a lack of health surveillance through audiometry testing or a failure to provide entirely suitable hearing protection to affected staff.

Safety

- Falls from height not being controlled adequately through supervision, planning and management or poor choices of access equipment or a lack of inspection of this access equipment or poor controls on fragile surfaces or using inappropriate equipment for access or defects in such equipment;
- Gas work being carried out by a person not fully qualified for that work or landlords failings on maintenance and inspection;
- Flammable liquids which are not stored or used appropriately such as lids being missing or stored within cupboards which are combustible and without spill protection or inadequate protection against sources of ignition;
- Lifting equipment which is being used inappropriately, poorly maintained or is without evidence of thorough examination and test or failing to plan and supervise lifts correctly where applicable;
- LPG tanks without impact protection or close to combustible materials or with poor separation distances or with corroded pipework;
- Machinery guarding which is missing or fails to protect dangerous parts of the machine, lack of chuck guards on pillar or radial arm

drills or of powered rollers on conveyor systems, poor checks on guarding systems or interlocks which have been defeated;

- Maintenance procedures which do not consider fully isolation or do not make use of appropriate permit to work systems;
- Workplace transport with poorly defined travel routes, inadequate segregation of vehicles and pedestrians or poorly maintained vehicles or poorly trained drivers;
- Construction works where vehicles and pedestrians are poorly segregated, poor housekeeping and storage, poor practices in demolition, poor practices in excavation, poorly trained operators for plant machinery or scaffolding defects and failure to ensure the stability of temporary structures adequately or disturbance of asbestos materials which is poorly controlled.

Welfare

- Poor provision and maintenance of working WC's or hand washing facilities, lack of hot or drinking water and poor rest facilities.

Management

- Poor provision for safety management including emergency arrangements;
- Poor management of the risks from contractors;
- Poor assessment of the risks to vulnerable workers such as the young or expectant mothers;
- Lack of access to competence external health and safety advice or to internal competent advice where risks are not adequately controlled;
- Poor provision of information, instruction and training to employees where training is a key control measure;
- Failing to make a suitable and sufficient risk assessment where circumstances are not straightforward (perhaps in noise or COSHH assessment or in terms of sector specific machinery or plant).

Types of enforcement action and how FFI applies in these circumstances

What may surprise some readers is the fact that FFI enables costs to be recovered not just where a material breach is spotted and brought to the attention of the business but also when the gap in control is large enough to make the issue one which results in a prosecution. In such a circumstance the fee which becomes due is likely to be very significant.

Guidance:

Prohibition notices are issued where there is an immediate and serious risk to safety and stops work at that site or process.

An Improvement Notice is given where the current standard falls well below requirements and gives a limited time in which standards must be improved.

An Inspector may also choose to give a verbal warning for situations which are not in line with good practice but for which no harm is presented – for example a scaffold which has not been thoroughly inspected in the past 7 days but which remains in good overall condition.

Similarly, when an Improvement or Prohibition notice is issued HSE costs will remain recoverable. These more serious breaches will also see a significant amount of time and cost being charged against the business and may in some cases far outweigh the cost of putting adequate controls into place. We discuss below what effect this may have on the traditional cost versus benefit view of health and safety controls.

Finally, the most likely way in which we will hear that FFI fees will be applicable is through a letter from HSE notifying us of a material breach.

How will this alter the current position?

Our first thoughts on reading the guidance are that construction and manufacturing / engineering are likely to be hit hardest simply because they have the largest array of risks to control. I or my colleagues could take you to a business each day of the week in which we could spot more than one 'material breach'.

Similarly, we know that HSE is currently in the middle of an £80m budget cut (equivalent to 35% of their budget). This has been hard for all and has resulted in major job losses and because of this Inspectors, regardless of what personal opinions they might have on the charging model, will be forced into a position where they must make this work in order to stem further losses of colleagues. This view is further supported in the wording of the guidance which explains how the fee can be increased as required and also by reference to the press releases surrounding the issue where the government has hinted that it doesn't believe HSE should be centrally funded but rather supported by those companies who fail to maintain adequate safety standards. In future this could lead us towards a situation where enforcement is entirely self-funded from the FFI model and this is likely, in time, to include those smaller businesses covered by local authorities which are not currently part of the FFI scheme.

One important aspect which will be affected is the traditional approach enshrined in guidance issued by HSE and adopted by all in health and safety, the principal of cost versus benefit.

The application of FFI in circumstances where the breach is serious enough for an improvement or prohibition notice to be issued could see FFI fees outweighing the cost of putting adequate controls in place, be they physical or organisational. In these circumstances it could be argued that FFI could prevent a company without adequate resources from putting into place controls to protect its workers which it might otherwise have been able to do.

How this will sit with HSE staff, let alone members of the business community and the public at large, is something which remains to be seen but the fall out could be something which sees the scheme making changes in future around the principal of ability to pay.

In summary

What we can say with certainty is that the scheme will launch on October 1st and very soon after that we will see the first of many FFI invoices being issued. Those within higher risk industries with more varied risk, particularly construction and manufacturing, are likely to be hardest hit but, almost any sector is vulnerable to a breach being found based on our experience of the last 20 years. We would expect the first year to see a total income sufficient to plug the hole in HSE's pre-cuts budget - that is likely to be painful for business in what remains a challenging economic climate.

The question which we will have to try and answer is how do we best protect ourselves and the answer is a difficult one, particular in sectors where the workplace changes daily and risks are all around, but consider the following;

1. Noise & vibration
 - a. Neither of these issues are completely understood in most businesses. What actions you need to take will vary quite widely depending on your business but consider the following, audiometry (hearing tests) for existing staff and new starters, good PPE which is worn correctly (not plugs which are half out half in the ear canal and review what exposure your staff actually have to vibration and get a figure by using a log of what staff do over a typical week (longer if your work is very varied).
2. COSHH including occupational health and hygiene
 - a. Another area where understanding is usually less than it could be. Consider health surveillance, it is a requirement under regulation 11 but it is seldom done to an adequate standard. Changes might be straight forward and could be as simple as issuing and assessing questionnaires. Make sure your staff understand what they're chemicals they are using and check again to see if an alternative safer method or substance could be introduced.
3. Asbestos and asbestos containing materials (ACM's)

- a. This remains a big issue in safety. Make sure that documents and management remains up to date and that all contractors at your sites know where ACM's are. Make sure staff also know their position and ensure they are adequately protected from accidental damage.
4. Manual handling
 - a. This is better understood but is an older issue for most businesses which may have received a limited amount of attention over recent years. Revisit manual handling and look at it afresh as a business improvement process. Make sure staff are properly trained not just sat through an hour long session or 30 minute video. Manual handling training should be specific and last a morning if it's done right.
 5. Statutory and periodic tests
 - a. These may be performed by various contractors, from your insurers through to small independents. Do you check to make sure that every gas boiler / air compressor / lifting chain and electrical system is checked within its statutory period? Should you breach this statutory provision you will be making a very costly mistake, think 6 monthly for anything lifting a person and annually for everything else from pressure systems to gas boilers (contact us for more advice).
 6. Work at height
 - a. Still the biggest killer in the UK. Serious injury occurs from heights of less than 2 metres so make sure that you've considered all of the controls. If you're using ladders make sure that they are the correct BSI classification for your use, asset tag and inspect them regularly taking damaged equipment out of service straight away.

We hope we have provided an insight into what you can expect from FFI. You only have a short time to prepare before the scheme starts so now is the time to take action to ensure that you are managing these risks well and that any visit by an Inspector is met by the right person armed with the right information.

If you are a Safety~net member please contact your retained consultant for more information on how this affects your business.



About the Author

Roger Hart is a Chartered Safety and Health Practitioner and a Chartered Member of the Institution of Occupational Safety and Health (IOSH) with over 20 years consultancy experience. He holds a Masters Degree in Environmental Management and Honours Degree in Chemical Engineering and Project Management. He also serves as Treasurer for the Working Well Together Campaign in the Southwest (a partnership between the Health and Safety Executive and the construction industry).

About Outsource Safety Ltd

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