Fee For Intervention – the HSE's cost recovery scheme

What is Fee For Intervention?

From the 1st October 2012, the Health and Safety Executive (HSE) has been able to recover costs for carrying out some of its activities from those found to be in **material breach** of health and safety law. This cost recovery approach is known as Fee for Intervention (FFI) and is intended to shift enforcement costs from the public purse to those organisations that break the law. For those employers who remain compliant, or where a breach is not material, they will not be charged.

Only the HSE can recover costs in this way under the scheme. Other organisations, such as local authorities, that enforce the same requirements, are not able to do so. There are also a number of circumstances where FFI does not apply. This includes a range of circumstances where fees are already payable to the HSE under other requirements and that FFI will not be applied in Northern Ireland.

It is understood that the government anticipates it will recover around £40m from FFI. The HSE will be able to retain a percentage of all money raised, with the balance going to the Treasury. Many companies are still unaware of the risks they now face, particularly as it is thought that the first bills will be arriving throughout the first quarter of 2013.

What is meant by the term 'material breach'?

A 'material breach' is when in the opinion of an HSE inspector there has been a contravention of health and safety law that is serious enough to require them to notify the person of that opinion in writing.

Breaches may be identified when the HSE carries out a routine inspection of a site, investigates an accident or follows up on a complaint. If they then have to issue say an improvement or prohibition notice or simply notify you in writing of a material breach then, this would trigger the charges to be applied.

To decide if the breach is 'material', inspectors will apply the decision frameworks established under the HSE's Enforcement Management Model (EMM) and Enforcement Policy Statement (EPS). Further information is set out in HSE 47, 'Guidance on the application of Fee for Intervention (FFI)' available to download at www.hse.go

Typical areas where material breaches might arise relate to:

- controlling health risks – including exposure to hazardous substances (e.g. dusts, fumes and chemicals); noise, vibration, asbestos, confined spaces etc. where the effects are acute or chronic
- controlling safety risks – particularly where these could result in immediate, traumatic injury e.g. contact with moving machinery, falls from height, the use of lifting equipment, being struck by vehicles and so on
- providing adequate welfare facilities – e.g. toilets, washing facilities, drinking water, facilities to eat meals
- systems for managing health and safety where significant risks are not adequately controlled – e.g. inadequate risk assessments; ineffective arrangements/emergency procedures; inadequate access to competent assistance etc.

Other, more specific examples for the construction sector might relate to the safe movement of mobile plant on site; safe access and egress to places of work; demolition activities; steel erection; safety during

excavation work; the management of asbestos removal contractors and work or training for managers and others (e.g. crane drivers, site managers; scaffolders, steel erectors etc).

What might it cost?

All costs reasonably incurred will be recovered from the relevant duty holder (i.e. employers - including main contractors and sub-contractors, self-employed people who put others at risk etc). FFI charges will not be levied where the HSE provides written advice that does not concern a material breach, for example, to identify how to ensure best practice which goes beyond legal compliance.

Where more than one duty holder is responsible for the breach, the inspector will apportion the time spent (and the resultant charges) accordingly. For example, say an inspector discovers employees working in an un-shored trench during a routine visit – a material breach. Here, a number of duty-holders could be subject to enforcement action. Obviously, the contractor could be served a prohibition notice to prevent further work in the trench and for not supervising the site adequately. Additionally, if it was revealed that there were significant material breaches on the part of other CDM duty-holders (e.g. the CDM Coordinator or the Client), they too could be served – say an improvement notice to undertake training to enable them to comply with their duties effectively.

The FFI hourly rate for 2012/13 is £124, but the total amount charged will depend on the particular circumstances. The more complex the issue and the more time required of the inspector to take the correct enforcement action (i.e. identifying the material breach, helping businesses to put it right, investigating and taking enforcement action (including any associated office work), the more expensive the bills will be. Where the inspector requires input from another inspector, other third party assistance or the support of the Health and Safety Laboratory (HSL), the cost of their work will be recovered also. The rates for third parties and the HSL may differ from and be higher than the FFI hourly rate. Costs will be applied to each intervention where a material breach is identified.

Invoices will be issued once every two months and will be payable within 30 days. If a material breach is discovered at the end of a site visit, the hourly fee will be charged for the entire visit. Costs will be incurred up to the point where the HSE's intervention has been concluded, or if a prosecution results, at the time when the papers are served at court.

Other considerations

FFI costs are not covered by workplace insurance policies and will have to be met from a company's resources. As a result, the arrival of FFI could demand budgeting attention and Zurich is aware that some of their customers are already budgeting for these costs accordingly.

However, the issue goes beyond the initial costs. Under the scheme, an organisation has the right to appeal against an FFI charge. If a business raises a complaint concerning an invoice, and this is not resolved by the HSE's FFI team (see HSE's website for contact details), the organisation can elect to appeal against the invoice formally. This will be considered by a senior manager at the HSE, being one independent from the chain of responsibility as the inspector raising the invoice. If a satisfactory outcome cannot be reached, the dispute will then be considered by an appeals panel. This will include senior HSE staff and an independent business representative. A charge of £124 per hour for dealing with the appeal will be incurred and is payable if the appeal fails. Clearly companies will need to think very carefully about whether they appeal against decisions to determine a breach as a 'material breach' or whether to appeal against cost of an invoice, as they will be required to meet the costs of the appeal if they are not successful.

On the other hand, where an organisation does not appeal and accepts the charge that may not be the end of the issue, particularly if a subsequent injury claim arises at which point knowledge of the company paying the FFI charge could be used as an indication of blame on their part. As such, it might be

advisable to discuss the FFI potential with your legal advisers to determine what action should be taken should an FFI charge be received.

Another consideration would be for those construction companies who operate several sites with similar operations. Should the HSE find a material breach at one, this may suggest that others will also be at risk of intervention as HSE will have that knowledge from their earlier involvement.

Also, larger construction companies operate decentralised subsidiaries or activities. Here there is a risk that one subsidiary on the receiving end of an FFI charge may elect to pay it and not inform the centre. In this case, it may only be the realisation that HSE are turning up at several other decentralised operations that will alert the centre to the cost risks they might be running.

To add to this, it is possible that indications of FFI charges levied on an organisation might form part of future procurement process with responses required as part of a pre-qualification or tender process. Therefore, the requirement to disclose instances of FFI charges could lead to a reputational sensitivity.

FFI is a controversial issue, with some organisations regarding it as a form of taxation. Moreover there is talk of a possible Human Rights Act (Article 6) challenge on the basis that an appeal under FFI to HSE may not constitute an 'independent tribunal'.

A position of defence

It may be stating the obvious, but compliance is the key to minimising these costs. Ensuring that an organisation's management system remains sufficiently robust to identify specific health and safety requirements and ensure the continued implementation of required precautions will remain critical.

Of particular importance, will be the proactive monitoring processes (e.g. inspections, audits etc) that have been established – as part of the overall management approach. These will continue to play a key role in identifying any material breaches 'in-house'. Taking timely action to address these effectively and avoid these being repeated in the future will reduce the risk of enforcement action.

It is also important to ensure that statutory paperwork remains up to date and that there is evidence of any required checks, tests or inspections. This should extend to cover records of any training and information provided for employees and others.

A key response to the implementation of the scheme for most organisations is to have established a procedure for dealing with FFI activity. This will include arrangements for handling visits from and other contact with the HSE; dealing with notices in writing from the HSE (e.g. ensuring that they are escalated to right person, dealt with quickly and the inspector informed of resolution); the reporting of FFI activity to Head Office (for decentralised operations); identifying the appropriate address for invoices to be sent to and ensuring that this is communicated to the HSE (this is of particular relevance to organisations with multiple sites) and so on. These arrangements will need to be communicated to key managers and perhaps recorded as part of the health and safety policy or supporting documentation.

As part of the arrangements, organisations should identify when it will be appropriate to contact the company lawyers, especially given the possible implications of not appealing a notice if prosecuted. The arrangements should identify the procedure and responsibilities for doing this.

One final point, those in key health and safety roles should be aware of this fundamental change to the HSE's role. No longer should the HSE be seen as an advisory service. In fact, highlighting issues that are of concern to a business could result in a finding of a 'material breach' and a fee being applied.

The introduction of this cost recovery scheme simply reinforces the need to ensure that health and safety remains effectively managed. As such, it should remain a boardroom consideration and cannot simply be regarded as just an operational one due to the financial and reputational risks that are now attached.