

Health and safety onus cannot be outsourced

Clients cannot pass on the responsibility for poor health and safety to their contractors, warns **Melita Thomas**.

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The Health and Safety Executive (HSE) has recently published a new strategy, which once again emphasises that the onus is on the creator of risk in the workplace to manage it. Within this context, and given the ever increasing level of litigation, all businesses, regardless of size, need to ask themselves if they are taking their duties seriously and complying with the law.

Bearing in mind that health and safety legislation can be a minefield, is the answer just to outsource any activity that carries risk to a specialist and forget about it? Unfortunately, it is not as simple as that. Fundamentally, although it is possible to outsource the delivery of some, or all, of the activities which may be covered by the various health and safety regulations, it is never possible to outsource the *responsibility* for ensuring that the activity is carried out in accordance with the law. To quote the HSE, the “creator of the risk is responsible for managing it”. There are many cases where both client and contractor have faced criminal charges for breaches of health and safety legislation that have resulted in a worker or subcontractor being harmed.

So, given that the client cannot escape responsibility, is it more prudent to limit outsourcing only to those activities without foreseeable risks? Sadly, that might not be the answer either. In fact, to do work in-house which should properly be carried out by an expert could increase the client’s exposure.

Managing health and safety, therefore, can be broken into two parts – internal activities and outsourced activities – and the facilities manager must have a strategy for both.

INTERNAL ACTIVITIES

The first thing any business must understand is that failure to comply with legislation can result not just in fines for the company but criminal charges against directors, company secretaries and managers who, where an offence has been committed, can be shown to have:

- been aware of the circumstances and of the risks that caused the breach;
- known the risks but not done anything about them; or
- breached a duty of care they owed, without good reason (aimed at those directors who thought that by keeping themselves in ignorance they could avoid liability).

It is not possible to insure against misbehaviour by directors in this context. In addition, the Combined Code on Corporate Governance and the Turnbull Guidance require listed companies to take account of health and safety when establishing and reviewing their systems of internal control. Further, it is not actually necessary for any harm to have been caused – it is an offence just to expose staff or customers to unnecessary risk.

The Corporate Manslaughter and Corporate Homicide Act 2007, while not increasing the penalties against individuals, will make action against companies easier – juries may consider whether the attitudes, policies and systems in the organisation contributed to failure, rather than just a single incidence of failure. In addition, the Act introduces a “publicity order” as a penalty, meaning that the court can order both information about the case and the fine to be published. It is not true that there is no such thing as bad publicity – information that your company’s health and safety policy was so lax that someone died as a result is unlikely to improve sales.

Accordingly, it is important that responsibility for health and safety be given to someone senior, preferably at board level. Because there are so many detailed, tactical tasks it is tempting to pass the whole job to an administrator, but it is important that the strategic aspects and the management of non-compliance remain at board level. It will also be part of this director’s role to ensure that the human resources aspects of health and safety are covered (see below).

To deal with the tactical matters, it can be advantageous to appoint health and safety specialists to develop the detail (see box). For large organisations, this route has much to recommend it, particularly when the client has a range of outsourced contracts. By using a specialist to develop policy, it is easier to ensure consistency across contracts. It can also be useful evidence that the client is taking the matter seriously. Nevertheless, even with a specialist health and safety partner, the client still retains ultimate responsibility.

It is important to involve the human resources team in developing policies and procedures as, within the overall framework of employer responsibility, there are requirements for workers to:

- minimise risk to themselves and others;
- take part in training; and
- obey all relevant instructions.

Where certain activities are outsourced, it is even more important to identify internal staff who may need training. It is easy to overlook the fact that staff visiting sites need

to understand their obligations, even if they are not working there – for example, by wearing protective clothing, observing on-site instructions and complying with signing-in procedures. In-house employees must also understand that, in certain circumstances, they will have to comply with a contractor's health and safety policy.

Where a specialist health and safety partner is not appointed, it will be the director's job to develop the organisation's health and safety policies and procedures.

OUTSOURCED ACTIVITIES

Having the right people in place and a clear set of internal policies and procedures is the first step towards sound workplace health and safety. So what else needs to be in place before you appoint contractors? Before even beginning the tender process, the client must undertake a full risk assessment of the works proposed under the contract, which includes, among other items, considering how all the parties will communicate.

Having scoped the work, and weighed up the risk, the client needs to consider whether a prospective contractor has the skills and experience necessary to undertake the work, as well as meeting the commercial requirements of the job. Useful information to request as part of the tender process includes:

- the contractor's own health and safety policies, which should complement the client's;
- its safety method statement;
- relevant skills, qualifications and experience;
- the contractor's own methodology for selecting subcontractors; and
- any previous health and safety incidents.

Previous incidents are not necessarily a reason for rejecting a contractor. Provided it can show that lessons have been learned and policies adjusted accordingly, it may actually have proven to be valuable experience.

Once the contractor has been selected, how can the client ensure compliance with health and safety policy and legislation? This needs to be clearly addressed in the contract itself and also in the reward mechanism. There must be a key performance indicator requiring 100% compliance with all health and safety legislation, and with the client's own policy, with financial penalties for failure. To support this, the contractor must be obliged to cooperate with any compliance audits being undertaken. Spot checks should also be undertaken, particularly for activities that have a poor record of compliance, such as construction. Major failures of health and safety should constitute a breach that can be remedied by immediate termination of the contract.

In addition, the client and contractors need to develop a structure for identifying and managing risk, which both parties understand and adhere to, and enshrine it in the contract. Health and safety legislation requires an initial risk assessment to be undertaken. This should be done jointly by the client (or its specialist adviser), the contractor and any subcontractors. As

INTERNAL PROCEDURES

The director responsible for health and safety or an external specialist will need to carry out the following tasks:

- assess the risks of in-house activities;
- set up policies for internal activities based on their experience and on best practice;
- structure and run appropriate workplace consultation processes;
- identify minimum training and equipment standards for internal staff;
- set up and run risk registers;
- identify minimum standards that contractors should have, such as safe-contractor status, and put these on any tender lists;
- set up a permit procedure;
- undertake compliance audits and specify an auditing regime for internal and external work; and
- identify non-compliance both within the organisation and in any contractors, and suggest strategies for dealing with it.

mentioned before, the client is ultimately responsible for managing the risk, but the day-to-day management of the activities can be outsourced, provided that the client has put in place, either directly or through the contractor, strategies for managing any risks.

The risk assessment should result in a clear allocation of duties between the two parties. It is also important to review this allocation regularly during the life of the contract, both to reflect changes in the work being done and to take into account any legislative changes.

The other area the client needs to consider is how the contractor's work may affect the client's other contractors, staff or customers and what steps need to be taken. For example, if a contractor is undertaking a shop fit-out within a mall, the client needs to ensure that neighbouring units are kept fully informed – consider what might happen if a fire exit were blocked during works and no alternative escape route for neighbouring units had been arranged.

The client might deal with these types of situation in two ways. It might set out a policy and procedure for consultation and information sharing between different users of the premises and require adherence to the policy to be part of the contract. However, it would probably be better to ensure that it remains in control of communications by requiring the contractor to give adequate information in a reasonable timescale so that the client can deal with any issues.

NOT JUST A PAPER EXERCISE

The emphasis on health and safety is likely to increase, and, in a more litigious society, legal action will probably become more common. You can protect your company, and yourself, by having a well-thought-through policy that is incorporated into your contracts. However, this policy must be a living thing, reviewed, used, revised and taken to the heart of those responsible. It cannot be considered just another humdrum task, such as ordering new paper clips, which can be delegated to an administrator. **FM**

INFORMATION

Combined Code:
www.lexisurl.com/FM48.
 Turnbull guidance:
www.lexisurl.com/FM682.
 SafeContractor:
www.safecontractor.com.