HAZARDS 2016

Safety reps and organising: Reps functions and employer duties

FACILITIES & TIME-OFF FOR SAFETY REPS

Section 2(6) of the Health & Safety at Work Act requires employers to consult with safety representatives with a view to the making and maintenance of arrangements which will enable him and his employees to co-operate effectively in promoting and developing measures to ensure the health and safety at work of the employees, and in checking the effectiveness of such measures. Under section 2(4) safety representatives are required to represent the employees in those consultations. The SRSC Regulations (1977) identify the functions of SRs & stipulates the employers duties towards SRs so that the Act is implemented.

FUNCTIONS

SRSCR Regulations 4 and 4A details these statutory functions, which can be grouped under a number of main headings:

Investigative: to investigate potential hazards; dangerous occurrences; the causes of accidents; and complaints by employees.

Inspections: to inspect the workplace by regular quarterly inspections and to re-inspect when any remedial work has been completed; where there has been a reportable injury, dangerous occurrence or case of disease; inspect and take copies of documents relating to the health and safety of employees.

Representative: to make representations to the employer on both specific issues or on general matters relating to health & safety in the workplace; to attend meetings of the safety committee; to represent issues to inspectors of the Health & Safety Executive or other enforcing authority when they visit the workplace, and to receive information from such inspectors.

Consultation: To be consulted in good time on the introduction of measures in the workplace that may substantially affect employees health & safety; the nominations of competent persons to do risk assessments, take charge in emergencies etc; the provision of information about health & safety to staff; how training is planned and organised; and the consequences of the introduction of any new technology.

TIME-OFF

Employer duties

The provision in SRSC Reg 4(2) is as follows: An employer ***shall*** permit a safety representative to take ***such time off*** with pay during the employee's working hours ***as shall be necessary*** for the purposes of:

a) Performing his functions under the Health & Safety at Work Act 1974 S2(4), and SRSCR Regulation 4(1)

b) Undergoing such training in aspects of those functions as may be reasonable in all the circumstances

This duty is without restriction or qualification; it is not "reasonable" time-off, it is "such time-off……as shall be necessary." It is better to talk about time-off in relation to the employer's duty in this respect, rather than emphasising 'safety reps rights'. Rights can easily be ignored; duties are more clearly understood by employers and can be enforced.

One of the main problems that arise is that the qualification "reasonable in all the circumstances" applied to time-off for trade union representatives in Section 168(3) of the Trade Union & Labour Relations (Consolidation) Act 1992. This is commonly assumed by employers to include safety representatives, so some employers assert that this "reasonableness" test also qualifies their duty to permit safety reps to take time-off. **This is NOT the case.** The duty imposed on the employer is absolute

Training

In the case of permitting release for training, the word "reasonable" refers to the nature, content and appropriateness of training, **NOT** to the employer's duty to release the safety representative from work. The employer may temporarily postpone permission if there would be operational difficulties caused by the absence from work – for example if there was no-one available to cover the representatives normal job whilst they were attending the course. But, they cannot use this excuse continuously – to do so would deprive the representative of their legal right to be trained. If permission is refused for this kind of reason for one occasion, then that would be considered sufficient notice to the employer to enable them to make suitable arrangements to cover the reps release for a course running, say, three months later.

Enforcement of duty to provide time-off and training

Safety representatives can make a complaint to an Employment Tribunal if the employer either refuses time-off, or fails to pay the rep for the time off or deducts a proportion of salary (SRSCR Regulation 11). This needs to be done within your union's own procedures so check what these are. The promise that an ET application will be made is often enough to encourage management to observe their statutory duty. There are time limits for submitting claims to Employment Tribunals (3 months) so remember to take advice from your union on this too. From 29th July claimants who wish to take a claim to a tribunal or appeal tribunal will have to pay a fee. An initial fee will be paid to issue a claim and a further fee will be payable if the claim proceeds to hearing. There are two levels of fee which will depend on the type of claim.

FACILITIES & ACCESS TO INFORMATION

Regulations 4A(2) of the SRSC Regs places an absolute duty on every employer to "…provide such facilities and assistance as safety representatives may reasonably require for the purpose of carrying out their functions…"

Regulations 5(3) and 6(2) also impose the same duty on the employer specifically in relation to workplace inspections and the investigation of incidents, injuries and occupational diseases.

"Reasonably require" qualifies the representatives' needs, **NOT** what the employer has to provide. So the assistance and facilities required must relate to health, safety and welfare matters that affect your members. For example, a request for information about the ventilation regulations in coal mines would not be a reasonable request for a university safety rep; but HSE guidance on laboratories would. Access to HSE Guidance, Approved Codes of Practise and other publications would be covered, as would copies of relevant HSE research reports.

Facilities

The minimum facilities a SR is likely to require include:

- Secure storage for documents & records
- Somewhere to talk to members in private
- Access to telephones, fax, photocopiers, email etc
- Computers & printers
- Trade union noticeboard
- A library to store information that can be easily accessed

Depending on the hazards and risks your members are exposed to, additional specific facilities relevant to health & safety and welfare will be needed:

- Access to monitoring and testing equipment. For example, noise & light meters, dust sampling equipment
- Camera
- Specialist information e.g. books, journals, on-line subscriptions. What the employer uses should be available to you as a minimum.
- Information from suppliers and manufacturers of substances & equipment
- Copies of laws & guidance and other HSE and general health & safety publications
- Use of outside advisors
- Ready access to employer information, policies etc.

Information

SRSCR Regulation 7 imposes 2 separate duties on employers in respect of the provision of information. Reg. 7(1) says that safety reps shall be entitled to inspect, and take copies of, any document the employer is required to keep by law, provided they give the employer reasonable notice. To keep can also mean to create. So, for example, the employer is legally required to record the main points of a risk assessment where there are more than 5 people employed. That record is a document – therefore safety reps can ask the employer to give them a copy of it. Similarly, a RIDDOR reportable incident is to be reported by sending the HSE a form – safety reps are therefore entitled to a copy of this form.

In addition, employers shall make available the information within their knowledge related to health & safety that is necessary to enable the reps to fulfil their statutory functions. Such documents might include plans and any proposed changes, technical information, statistical records relating to health, incidents and injuries, the results of surveys (stress or bullying, for example) or monitoring exercises and any other information the reps may define as appropriate.

Enforcement of duty to provide facilities & access to information

This duty is enforced by the HSE although recent guidance issued by the HSE has stated that failure by the employer to do so is NOT considered to be a 'material breach'. See below.

CONSULTATION

SRSC Reg 4A requires employers to consult with safety representatives, in good time, on the introduction of measures in the workplace that may substantially affect employees health & safety; the nominations of competent persons to do risk assessments, take charge in emergencies etc; the provision of information about health & safety to staff; how training is planned and organised; and the consequences of the introduction of any new technology.

The HSE has now re-issued its guidance on the enforcement of the employer's duty to consult with employees. This can be found at http://www.hse.gov.uk/foi/internalops/fod/inspect/enforcement-consultation-regs.pdf

In the document the HSE re-iterates that *'consultation with workers is an essential element of successful health and safety management and the development of a positive health and safety culture. Inspectors should take all available opportunities to remind employers of their legal duties to consult.'*

HSE also instruct Inspectors to read this document in conjunction with their document 'Managing for Health & Safety Guidance for regulatory staff on the practice of assessing health & safety management', specifically the sections on collecting evidence to support enforcement activity. This document can be found at http://www.hse.gov.uk/managing/regulators/regulators.pdf

CHANGES TO HSE ENFORCEMENT

The HSE has now finally confirmed that the proposed 'Fee for Intervention' charging regime ***will*** come into operation in October 2012. Where an HSE Inspector identifies a 'material breach' in how employers deal with health and safety, it will charge a fee for the work the Inspector has to undertake to achieve employer compliance. Such work will include the visit that discovered the breach, and any associated work that follows, such as serving a notice, writing letters or giving advice and guidance; evidence gathering for a prosecution; any communications involved with the case; research work, getting specialist assistance etc. HSE will charge £124 per hour for an Inspectors time, and hopes to recover some of that to offset the recent 35% funding cuts imposed by government. We'll see if that happens.

HSE has published guidance at http://www.hse.gov.uk/pubns/hse47.htm which outlines what, in the HSE's opinion, would constitute a 'material breach'. The examples of 'material breaches' given in the document do **not** include material breaches such as:

- failing to undertake a suitable and sufficient risk assessment or to give employees information about its findings unless that failure is in respect of a vulnerable person, or of a significant risk;
- failure to give a safety representative such assistance as they reasonably require to undertake their functions;

- failure to give a safety representative a copy of a document the law requires the employer to keep when requested;
- failure to make available to the safety rep any information about health and safety relevant to the workplace, within the employers knowledge, WITHOUT having to be asked and
- failure to consult, in good time, over a wide range of health & safety matters;

So is there anything useful that health and safety representatives can get out of this development? Well, for a start, we can remind our employers that bad behaviour might cost them in the future, even though it doesn't at present. And even if failure to comply with many of the duties under the SRSC Regulations has not been deemed to be a material breach we can still make a complaint to the HSE where there is evidence of employers not complying.

REPORTING A COMPLAINT TO THE HSE

Some of us have kicked-up about the HSE hiding its contact details. This is what it now says on the HSE website. They have, apparently, re-discovered a telephone number – 0300 003 1647 available during normal office hours. If you call this number you will be asked to provide:

- your name, address and contact details;
- the name and address of the workplace or activity you are concerned about;
- a description of your concern, including who is at risk and why, if the risk is happening now, how long it is likely to go on for, how often it happens and when and where any incident occurred; and
- details about what you have done to try and resolve the issue.

This is then what the HSE say will happen:

First, we will check that the complaint relates to a work activity where HSE is responsible for enforcing the health and safety legislation. Then we will seek to identify from the information you provided:

- *Who is responsible for health and safety at the location of the complaint?*
- *Who is at risk of injury or ill health or has no adequate welfare facilities?*
- *What injury or ill health could result and how likely is this?*
- *A complaints officer will then assess your complaint and place it into one of the following categories:*
- *Red = Serious Risk and a complaints officer will follow it up as a high priority within 24 hours of receipt (or it will be passed to an inspector for an on-site investigation)*
- *Amber = Significant Risk and a complaints officer will follow it up within 5 days of receipt*
- *Green = Low Risk and it will not be followed-up by HSE*

What we will do:
We may ask the employer to investigate your complaint or we may look into it ourselves. However, we cannot successfully follow up your 'red' or 'amber' complaint if, from the information you provided, we are not able to identify or establish who is responsible for the work that you have complained about from the information you provided. In such situations, this will be recorded as a "matter of concern" and no

action will automatically be taken. However, if the "matter of concern" has been assessed as "red" it will be reviewed by an inspector.

The other situations where HSE will not investigate your complaint are:

- *when you make a complaint anonymously to HSE or withhold contact details. This is because we are not able to substantiate or discuss the information with you or ensure that it is not a malicious complaint*
- *when you have not raised the issue with the person responsible for health and safety or your trade union - unless, of course, you have good reason to believe you would be placed in a vulnerable position if you did raise your concerns with this person*
- *when there are no reasonably practicable precautions to deal with the matters that you raised*
- *when it is impracticable to pursue your complaint*
- *If you want feedback, we will contact you and let you know what we have done. Or, if we have assessed your complaint as low risk 'green' we will explain our decision.*