The Health and Safety Executive (HSE) has proposed to introduce a fee for the ‘intervention cost recovery scheme’, known as ‘Fee for Intervention’ (FFI) under the auspice of the Health and Safety (Fees) Regulations 2012. Subject to Parliamentary approval, the proposal will come into effect from October 1, 2012.

Under the proposals the HSE will be able to recover its costs for carrying out its regulatory functions from any organisation or self-employed person (the ‘duty holder’) found to be in material breach of health and safety law. A material breach occurs when, in the opinion of the HSE inspector, there has been a contravention of health and safety law that is serious enough to require them to notify the duty holder of that breach in writing.

Duty holders that break health and safety laws will then have to pay for the HSE’s time in putting matters right, investigating and taking enforcement action.

AN ESSENTIAL OVERVIEW: FEE FOR INTERVENTION

1. From October 1, 2012, the HSE will be able to recover the costs of its interventions from duty holders found to be in material breach of the law, even in the absence of a prosecution.

2. Non-compliant duty holders must pay HSE’s costs if:
   i. A material health and safety breach is identified and
   ii. a formal requirement to rectify it is made.

3. Before taking action the inspector must consider:
   - What is the actual risk?
   - What standard of compliance does the law require? What level of risk results with compliance?
   - How far below the ‘compliance level’ of risk is the level of risk in actual fact?
   - What is the employer’s current approach and performance toward health and safety? Compared with its previous approach?
   - What are the relevant public interest factors?
4. What is the duty holder's current approach and performance toward health and safety compared with its previous approach?
   - Verbal warning
   - Written confirmation of need for improvement (via a report, email or letter, including a notification of contravention)
   - Improvement notice
   - Prohibition notice (where risk is so serious that work must halt immediately)
   - Prosecution

5. The decision to enforce is subjective, but the HSE has provided guidance as to when it will intervene. If it does intervene, however, HSE will have no discretion on whether to recover its costs. It will be under a legal duty to recover costs in all cases where there is a material breach of health and safety law and a requirement to rectify the breach is made in writing.

6. An average hourly rate, currently set at £124 (subject to annual review) will be applied for all HSE staff. If the Health and Safety Laboratory (HSL) or other specialist support is required the duty holder will be liable to pay, in addition to the above fixed hourly rate, the actual costs of that specialist support.

7. The potential average costs for intervention activity, as set out in the HSE Consultative Document, are set out below:

<table>
<thead>
<tr>
<th>Intervention</th>
<th>Estimated Averages Costs Recovered</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inspection with no action taken</td>
<td>No costs will be recovered</td>
</tr>
<tr>
<td>Inspection which results in a letter</td>
<td>Approximately £750</td>
</tr>
<tr>
<td>Inspection which results in an Enforcement Notice</td>
<td>Approximately £1,500</td>
</tr>
<tr>
<td>Investigations</td>
<td>Ranging from approximately £750 through to several thousands of pounds to, in extreme cases, tens of thousands of pounds</td>
</tr>
</tbody>
</table>

Please note the figures are estimates only. Source: HSE Proposal for extending cost recovery.
8. HSE will invoice duty holders and expect payment within 30 days. A staged complaint process is proposed whereby duty holders can complain about an invoice, in the first instance to a senior manager in HSE. If their complaint is not upheld at that point, they can ask that their case be considered by a disputes panel. This panel would consist of senior HSE staff sitting alongside an external business representative.

9. Action taken by the HSE must be:
   - Proportionate
   - Targeted (i.e. focused on duty holders that pose the most serious risks)
   - Consistent (similar responses must be made for similar situations)
   - Transparent, so that duty holders can understand what is expected of them
   - Accountable

SCOPE OF FFI

10. FFI applies to public and limited companies, partnerships, the Crown and public bodies, and to self-employed people.

   It does not apply to:
   - Self-employed people who only put themselves at risk
   - Offences committed under s.36 and s.37 of the Health and Safety at Work etc. Act 1974
   - Employees (Partners are not employees)
   - Work where another HSE fee is already payable (for some or all of that work), e.g. under the Control of Major Accident Hazards Regulations 1999

11. Other organisations that enforce health and safety law, such as the police or local authorities, will not be able to recover their costs under FFI.

THE INSURANCE VIEW

At this present time, Willis is not aware of any insurance markets providing cover for these fees.

The Health and Safety Executive (HSE) intervention fees are primarily designed for HSE to recover its costs from the offender where a material breach of health and safety law has been discovered. HSE must give an opinion usually in the form of a notice of contravention, improvement or prohibition notice. There does not have to be an incident or prosecution to trigger such HSE involvement and so insurers are likely to view this cost as a business risk rather than as an insurable exposure.

In the event of a criminal prosecution relating to a breach of the Health and Safety at Work etc. Act 1974 these costs may form part of the prosecution costs awarded against the defendant, although this is not yet certain.
ABOUT WILLIS RETAIL PRACTICE

We advise over 50 retail organisations in the U.K. and Ireland. Our extensive experience allows us to develop a rich understanding of our clients’ businesses and the retail industry’s unique needs.

In 2011 we managed over £40 million in premium on behalf of our retail clients. Our industry focus allows us to build strong relationships with retail insurers, and these relationships create the platform to help us design, negotiate, select and implement insurance programmes for our retail clients.

For businesses with international exposures we are able to access our global resources in nearly 120 countries to provide locally compliant services.

Our experience spans all industry sub-sectors including:
– Clothing and department stores
– Food stores
– Home improvement electrical and furniture
– Other retail establishments, including, but not limited to, florists, toy outlets, sporting good stores and jewellers

CONTACT

Kelvyn Sampson
Retail Practice Leader
Tel: +44 (0)79 9052 7892
Email: sampsonkp@willis.com

Helen Grimberg
Partner
Tel: +44 (0)20 7638 2811
Email: helen.grimberg@blm-law.com
www.blm-law.com

This Bulletin offers a general overview of its subject matter. It does not necessarily address every aspect of its subject or every product available in the market. It is not intended to be, and should not be, used to replace specific advice relating to individual situations and we do not offer, and this should not be seen as, legal, accounting or tax advice. If you intend to take any action or make any decision on the basis of the content of this publication you should first seek specific advice from an appropriate professional. Some of the information in this publication may be compiled from third party sources we consider to be reliable, however we do not guarantee and are not responsible for the accuracy of such. The information given in this Bulletin is believed to be accurate at the date of publication shown at the top of this document. This information may have subsequently changed or have been superseded, and should not be relied upon to be accurate or suitable after this date. The views expressed are not necessarily those of the Willis Group.

Willis Retail Practice is a trading name of Willis Limited, Registered number: 181116 England and Wales. Registered address: 51 Lime Street, London, EC3M 7DQ. A Lloyd’s Broker. Authorised and regulated by the Financial Services Authority for its general insurance mediation activities only.