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Managing legionella risks

The Health and Safety Executive (HSE) has published a safety notice on the control of legionella bacteria in hot and cold water systems following recent inspections which identified "significant failings" in the control of the bacteria.

The HSE said it had taken formal enforcement action against the duty holders concerned and that it wished to remind duty holders of the requirement to:

- identify and assess sources of risk for legionella bacteria in hot and cold water systems
- take steps to prevent or control the risk by putting adequate controls in place
- maintain and monitor those controls to ensure effectiveness.

Legionnaires' disease is a potentially fatal form of pneumonia caused by the bacterium legionella pneumophila. The predominant route of infection is inhalation of contaminated aerosols.

On average, there are between 300 and 500 reported cases of legionnaires' disease each year in the UK. Not everyone exposed will develop symptoms and those who do not develop the full-blown disease may experience mild flu-like symptoms.

Assessing legionella risks

Identify the hazards and persons affected

There is no health and safety legislation specifically covering legionella, but the general requirements of the Health and Safety at Work Act and the Control of Substances Hazardous to Health Regulations apply to harmful micro-organisms, legionella included. This means that employers, and those responsible for building maintenance, must carry out an assessment of the risk from legionella, and take steps to prevent or minimise such risks.

As with any risk assessment, the first step is to identify the hazards. This is done by asking if any physical aspects of the water systems (such as cooling towers, evaporative condensers, water storage units and water supply pipes) may be able to support and encourage the growth of legionella bacteria.

This happens typically where standing water may contain nutrients such as algae, sludge, scale, insects or other organic matter and temperatures are between 20°C and 45°C — the optimal temperature for growth of the bacteria. At temperatures below this range, the bacteria remain dormant, while above this range the bacteria growth slows down. At 60°C, 90% of legionella will die within two minutes.

Because Legionnaires' disease is caught when water droplets containing the bacteria are inhaled, water outlets that might release a spray should be identified. These may include taps, shower heads, spas or whirlpool baths, pools (including hydrotherapy pools), humidifiers, fountains, evaporative condensers and wet cooling towers.

The risk assessment must also identify persons who may be harmed. Persons over the age of 40 are particularly at risk from legionellosis, especially if they are smokers, alcoholics, diabetics, have chronic respiratory or kidney disease, cancer, or if they are on renal dialysis or immunosuppressant drugs.

Controlling the hazards

There are four main types of control measure used to reduce the risk of Legionellosis. The first is making improvements to physical aspects of the system, eg water storage containers should be the right size to ensure uniform heating and to prevent stagnation, cisterns and storage tanks should have properly fitting covers, cold water tanks should not be sited in warm areas of buildings, pipe runs should be as short and direct as possible, avoid pipework deadlegs (which cause stagnation of water).

The second main control concerns water temperatures. Where possible, cold water should be stored below 20°C, with hot water stored at 60°C. The third is instituting a suitable regime of maintenance and cleanliness, ie producing a detailed preventive maintenance schedule which should incorporate regular visual inspection, cleaning, disinfection and physical maintenance.

The last control is introduction of a suitable water testing and treatment system to ensure that the maintenance regime is working correctly. In addition to these main controls, the staff involved in the controls should be suitably trained and emergency procedures put in place in case of an outbreak.

Competence

A requirement of the Approved Code of Practice[ii] (ACoP) concerning legionella is to insist on the competence of the appointed person who may carry out the assessment or of those to whom they have delegated the task.

If the assessment shows that there is a reasonable foreseeable risk, and it is reasonably practicable to prevent exposure or control the risk from exposure, the person on whom the statutory duty falls should appoint a person or persons to take managerial responsibility and to provide supervision for the implementation of precautions.

The actual person who carries out the assessment and who draws up and implements prevention measures should have the ability, experience, instruction, information, training and resources to enable him or her to carry out the tasks competently and safely. In particular, he or she should know:

- potential sources and the risks they present
- measures to be adopted, including precautions to be taken for the protection of people concerned, and their significance
- measures to be taken to ensure that controls remain effective and significant.

The ACoP recommends that if the appointed person is not "competent", outside help should be sought. It then falls to the appointed person to ensure that the contractors he or she has employed are themselves competent. In particular, he or she should establish channels of communication between contractors, employees and management.

Management communication procedures are key factors in preventing or restricting an outbreak of Legionellosis and they should be periodically reviewed.

[i] www.hse.gov.uk/safetybulletins/legionella.htm [ii] L8 (rev 2000) Legionnaires' Disease — Control of Legionella Bacteria in Water Systems — Approved Code of Practice and Guidance

In this issue: Holiday haze · Expert view · Event diary · Charity and voluntary workers · Case law update · Ask an expert

Holiday haze

In April, many people were affected by the disruption caused by volcanic ash. With the holiday season looming and experts warning of the possibility of continued disruptions, employers may find themselves faced with a number of common problems. The following guidance may be useful for employers dealing with these issues.

Employers would be advised to ensure that employees who are due to take holiday are aware of the company's absence policy and should be reminded that if their travel plans are disrupted unexpectedly, they should make contact with their employer as soon as reasonably practicable. Employers should clearly instruct employee's who are going to be delayed that they must keep the company updated of their situation. It may also be sensible, if possible, to get a contact number for the employee.

It would be unlikely that a reasonable employer would consider any absence caused as a result of disruptions to flights to be unauthorised absence or take disciplinary action, given that this is not as a result of the employee's conduct or actions. In the absence of an express contractual clause, there is no obligation on an employer to pay an employee for a period of absence caused by disruption to travel plans following a period of annual leave. However, it would be reasonable for the employee to be given the option to take the extended period of absence as paid holiday or as unpaid leave.

There may be circumstances where employers have cause to doubt that the employee was genuinely affected by the travel disruption. In such situations, an employer can, of course, ask the employee to provide proof of travel — for example, he or she could be asked to produce proof of airline booking, travel tickets, etc. If the employee is unable to provide such proof, the employer may decide to take formal disciplinary action. It is imperative that before doing so, the employer undertakes a thorough investigation so as to ascertain all the relevant facts before following a full and fair disciplinary process.

What if an employee had pre-booked a period of holiday and at the last minute has requested to cancel this because he or she has been informed that his or her flights have been cancelled and he or she is unable to get away? Subject to any specific internal policies and procedures, an employer is not legally obliged to allow the employee to cancel the holiday and can insist that the request remains in place. However, it is important for employers to show that they are reasonable and therefore they may consider allowing the employee to take this holiday at some other time in an effort to maintain good employee relations, or in order to cover the unexpected absences of other employees who have been stranded abroad.

Man crushed in building collapse

The Health and Safety Executive (HSE) recently prosecuted a building designer and the principal building contractor after part of an office block being built in Kirkham collapsed, seriously injuring a worker.

On 14 October 2008, Lancashire emergency services were called to the scene at Kirkham Crossroads after the collapse. One of the workers' legs had been badly broken after the rubble fell on him.

The HSE investigation found that a concrete block pillar, used to support the first and second floors, had been resting on the ground floor instead of going down into the foundations.

The building designer pleaded guilty to breaching s.3(2) of the Health and Safety at Work, etc Act 1974 which covers the duty of every self-employed person to ensure, so far as is reasonably practicable, that he or she and other affected persons (not being employees) are not exposed to risks to their health or safety. The designer was fined £4000 and ordered to pay court costs of £12,318.

The principal contractor pleaded guilty to breaching s.3(1) of the 1974 Act, which covers the duty of the employer to ensure, so far as is reasonably practicable, that affected non-employees are not exposed to risks to their health or safety. They were fined £3000 with costs of £12,318.

Expert View

Strike action and the courts

The ongoing dispute between BA and its cabin staff, who are members of the trade union Unite, has highlighted the use and role of the courts in industrial relations.

Lawful industrial action

To be lawful, and for the union and its members to enjoy the protection of the law by immunity from action for breach of contract, industrial action must:

- be a dispute between workers and their employer relating to terms and conditions of employment, sharing out work, discipline, or union issues
- not involve "secondary action" or action taken by the employees of an employer who is not involved in the dispute
- not involve unlawful picketing
- must follow a secret ballot, for which there is a legally-required procedure and timescale (see below).

Trade unions and organisers of lawful strikes will be immune from legal action taken against them and cannot be sued for damages.

The ballot

There are extensive and complex legal procedural requirements under the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) that a union must satisfy, including: meeting notice obligations to the employer on the ballot and the strike; ensuring that only those union members entitled to vote actually do so; and taking such steps as are "reasonably necessary" to inform its members about the results of the ballot. The trade union is only allowed to call for a strike if the majority of those voting answer "yes". These procedural hoops have proved fertile ground for litigation.

Employer remedies

Employers facing industrial action by staff can respond with a number of penalties, ranging from partial or total deductions of salary through to dismissal in the most serious cases. The dismissal of any striking employee during the first 12 weeks of lawfully organised official strike action will be deemed automatically unfair, but the employer can dismiss an employee after this period if it can show that it has made genuine attempts to negotiate, including the proper use of any joint disputes resolution procedure.

Employment legislation does not protect staff who are involved in unofficial industrial action (sometimes referred to as "wildcat" strikes or action) against dismissal.

As has been increasingly the case, the employer may seek an injunction in the High Court against the trade union to prevent or curtail the strike action on the ground that the union has failed to meet its legal obligations under TULR(C)A 1992.

Lessons from the recent case law

The hearings on the injunctions sought by BA against Unite the Union in the High Court and before the Court of Appeal dealt with procedural issues — notably on the balloting procedure — rather than the right to strike. When in May the High Court (subsequently overturned by the Court of Appeal) stopped Unite from going on strike on the ground that it failed to meet the legal requirements for disclosure of the strike ballot, this was not the first time that an injunction had been successfully used against a union for a failure to follow the statutory procedures. In December 2009, BA was successful against Unite in the High Court on the ground that the union had erroneously balloted members whom it knew would not be involved in the strike action because they would already have taken voluntary redundancy. Later, in April 2010, Network Rail was granted an injunction after alleged discrepancies in RTM's ballot for industrial action.

The Court of Appeal, in a majority decision in May 2010, overturned the High Court's decision to grant an injunction to BA. The trade union had merely communicated the results of the ballot (in which 81% voted for strike action) but not the information required by legislation, including the number (in fact, 11) of spoiled ballots. Nevertheless, the Court of Appeal believed that it was wrong to thwart the desire of staff to take strike action on the basis of a "technicality".

Significantly, the Court of Appeal in its judgment said that the dispute (and, by implication, others) could only be settled through mediation. As Lord Chief Justice Judge pointed out: "Legal processes do not constitute mediation. They often serve to inflame rather than mollify the feelings of those involved."

Despite the Court of Appeal's comments and approach, employers are likely to continue to look to the courts to halt strike action. Indeed, at the time of writing, BA has announced that it has put Unite on notice that it intends to appeal to the Supreme Court and seek a full hearing into whether the strikes are lawful and whether the union and strikers can continue to claim immunity.

Top business issues

Every month we bring you the top issues from callers to our telephone advice lines. These were the top issues in June.

Tax & VAT	Employment	Legal	Health & Safety
1. Capital Gains Tax — strategies for realising a gain in light of potential changes to rate of capital gains tax.	1. Conduct.	1. Contract.	1. Risk assessment.
2. Changes to "place of supply" rules for VAT purposes.	2. Absence/sickness.	2. Company.	2. H&S policy implementation.
3. HMRC information powers and years outside the enquiry window.	3. Disciplinary procedures.	3. Property and leases.	3. Accident recording and reporting.

Event diary

Legislation

For more information or to book please contact:

Employment on
01455 897193

or Health & Safety on
01455 897192

Fax: 01455 897026

All our courses can be designed to meet your specific requirements and are available on an in-house basis.

Event diary — Open Course Schedule 2010

Health & Safety

Course title	Duration	Date	Location
COSHH	1 day	20 July	Croner Consulting, Hinckley, Leicestershire
Health & Safety in the Workplace Level 2	2 days	27–28 July	Mercure London City Bankside
Health & Safety in the Workplace Level 2	2 days	3–4 August	Bolton Arena
Risk Assessment	1 day	10 August	Beardmore Hotel, Glasgow
Manual Handling Training for the Trainer	2 days	17–18 August	Botleigh Grange, Southampton
Risk Assessment	1 day	1 September	Bolton Arena
Manual Handling Training for the Trainer	2 days	8–9 September	St. Petrocs, Truro

Employment

Course title	Duration	Date	Location
Managing Investigations	1 day	3 August	Ramada Swansea
Performance Apraisal	1 day	12 August	Croner Consulting, Hinckley, Leicestershire
Dealing With Discipline	1 day	19 August	The Russell Hotel, Maidstone
Postitive Absence Management	1 day	2 September	Bedford Lodge Hotel, Newmarket
Essential Employment Law	1 day	9 September	Holiday Inn, Leeds Garforth
Essential Employment Law	1 day	14 September	Aztec Hotel & Spa, Bristol
Essential Employment Law	1 day	28 September	Mercure London City Bankside

IOSH Managing Safely Croner Consulting also offer 4-day IOSH Managing Safely courses. 23–26 August 2010 at Felbridge Hotel and Spa, East Grinstead. The 4-day course costs £600.00 plus VAT, and fills up quickly, so please book soon to ensure your place!
For further details on this IOSH course, please contact Emma Newman on Tel: 01455 897192.

Legislation

Area	Legislation	Details	Date
Discrimination	Equality Act 2010	The aim of the Act is to consolidate existing discrimination law, introduce positive action on recruitment for under-represented groups; make it unlawful to prevent employees from discussing their pay; extend discrimination by association to all aspects of discrimination; prohibit employers asking questions to job applicants about their health; enable the Secretary of State to order employers with 250 or more employees to publish information on pay (subject to further consultation and not to come into force before 2013); introduce wider powers for employment tribunals to make recommendations in discrimination claims; create a single equality duty on public sector employers to include duties in relation to gender reassignment, age, sexual orientation and religion or belief; and extend age discrimination law to the provision of goods and services.	The majority of provisions are expected to come into force in October 2010
Additional Paternity Leave	The Additional Paternity Leave Regulations 2010	Additional Paternity Leave will be available for fathers at 20 weeks after the birth of the child for a maximum of 26 weeks, if the mother returns to work. The remainder of the mother's statutory maternity pay will be paid to the father.	The Regulations will benefit parents of babies due on or after 3 April 2011 or children matched for adoption on or after 3 April 2011
Agency Workers	Agency Workers Regulations 2010	Temporary agency workers will be entitled to equal treatment after 12 calendar weeks in the same job, but this will not apply to occupational pension schemes or occupational sick pay.	1 October 2011
Pensions	Pensions Act 2008	The Government is proposing to provide access to a private pension to all employees aged between 22 and state retirement age, who are earning more than £5000 a year and are not currently enrolled in a workplace pension scheme.	2012

Charity and voluntary workers

There are over one million volunteering opportunities[i] covering wide areas of interest, such as working with animals and families and disaster relief. It can include single and group volunteering and residential positions within the UK or overseas. So it is important that organisations take suitable steps to ensure the safety of volunteers. Mubin Chowdhury of the Health, Safety and Environmental Helpline Team, looks at the training of volunteers.

Relevant legislation

From the enforcement point of view, the Health and Safety Executive (HSE) provides guidance on specific categories of workers[ii]. Volunteers may not be considered employees. Thus, specific health and safety law referring to employees may not be applicable. For example, s.2(2) (c) of the Health and Safety at Work etc. Act 1974 (HSWA) places a duty on employers to provide information, instruction, training and supervision to ensure, as far as reasonably practicable, the health and safety of employees and may not apply to volunteers.

However, the HSE can consider enforcement action under s.3(1) of HSWA if an organisation is an employer. So, if an organisation in addition to the volunteers has at least one employee, s.3(1) places a duty on them to take all reasonably practicable steps to ensure the health and safety of persons not in their employment. If they are not an employer, s.3(2) of HSWA places a similar duty on the self-employed. In addition, s.4 of HSWA imposes general duties on a person who has control of non-domestic premises and this may apply to volunteers who use the premises, or plant or substances provided there.

Other considerations

Apart from the legal reasons, an organisation should consider the moral and socially responsible reasons to train volunteers. After all they are giving up their own time, without getting paid (perhaps apart from expenses).

Further guidance

The HSE, together with other parties such as the Charities Safety Group (CSG) and IOSH are good sources of information and have jointly formulated guidance[iii] for voluntary and charity organisations. The guidance points out that: "it is good practice and strongly recommended that people working as volunteers are given the same level of protection as employees."

Information, instruction and training

Remember to distinguish between information, instruction and training. The guidance defines information as what you tell your workers verbally and in writing to make them aware of dangers associated with their work and the control measures in place and what their responsibilities are. An example includes display of suitable health and safety signs.

Instructions, verbal and/or written, include instruction manuals, safe working procedures and concern what a worker can and cannot do.

Training includes equipping workers with the knowledge and skills to carry out their specific jobs and tasks safely. It can include on-the-job training and/or external training, first day training, induction, work skills, professional development, refresher training and some compulsory training (eg first aid at work).

Conclusion

To conclude, although volunteers may not be considered employees, they are workers and all reasonable steps must be taken to ensure they have adequate information, instruction and training, to prevent injury and ill-health.

[i] I http://www.do-it.org.uk/ [ii] http://www.hse.gov.uk/enforce/enforcementguide/investigation/status-specific.htm#P53_8285 [iii] HSG192 Charity and Voluntary workers: A guide to health and safety at work

Company fined after MDF boards injury

An Essex shop fitting company was recently prosecuted after an employee's legs were crushed under improperly stored MDF boards.

On 12 August 2009, a 60-year-old joiner from Chingford had been working for an Essex-based shopfitting and joinery company for seven weeks.

He was helping a colleague retrieve a large piece of MDF from the middle of a vertical storage stack by supporting several boards, when he collapsed under the stack's weight. The boards crushed him against a machine, with his knees taking the full impact.

The incident caused ligament damage to both of the joiner's knees, requiring surgery and ongoing treatment. He has not been able to work since.

Upon investigation, the HSE found that his employer had failed to provide a safe system of work for the storage and management of MDF and other sheets of wood.

The company was fined £2667 and required to pay costs of £2460.80, after admitting breaching s.2(1) of the Health and Safety at Work, etc Act 1974, which covers the duty of the employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of the employees.

Shanahan Engineering Ltd v Unite the Union

In 2007, Shanahan Engineering Ltd won a contract for work on a power station which was being constructed by Alstrom, a transport and energy infrastructure company. By April 2008, Shanahan employed 145 employees at the site. Unite the Union was recognised by Shanahan in respect of these employees. Due to unforeseen difficulties in the construction project, Alstrom instructed Shanahan to stop work on one of the projects within three days. Subsequently, 50 individuals were made redundant, and were paid a week's pay in lieu of notice.

Unite issued a tribunal claim stating that Shanahan had failed to comply with its obligation under s.188 of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A) to enter into collective consultation before effecting the redundancies. Shanahan sought to argue the "special circumstances" defence and that it was not reasonably practicable to comply with the statutory requirement.

The tribunal held that the suddenness of the situation meant that there were "special circumstances". However, the circumstances did not absolve Shanahan of its consultation obligations altogether and it awarded the affected employees 90 days' pay, ie the full protective award. Shanahan appealed against this decision.

The Employment Appeal Tribunal (EAT) agreed with the tribunal that the special circumstances of the sudden and unexpected instruction from Alstrom did not mean that it was wholly relieved of its obligation to consult under (TULR(C)A). The EAT stated "it remained for Shanahan to decide whether employees should be dismissed for redundancy, how may employees should be dismissed, when they should be dismissed, and what, if anything, ought to be done to mitigate the consequences of dismissal" and that these were proposed matters for consultation. However, the EAT did find that the special circumstances were potentially an important mitigation in deciding the appropriate level of the protective award. Consequently, the EAT remitted the case back to the tribunal to reconsider the length of the protective award. (*Shanahan Engineering Ltd v Unite the Union [2010] UKEAT/0411/09*).

Ask an expert

Each month, one of our employment experts will be answering a question in this section. If you have an employment question that you would like our experts to answer, please e-mail it to **cronerinfo@croner.co.uk**

Q: Our company offers a 365-day-a-year, 24-hours-a-day service to our customers. From time to time, our engineers will be called out at night to carry out an emergency replacement.

My question is that if the employee works a rotating shift pattern (which means he or she often works split shifts) and is called out at 23:00 one evening during the week to work for, say, 2 hours, where would we stand with the 11 consecutive hour rest period requirement?

A: Under the Working Time Regulations (WTR) an employee or worker is entitled to a rest period of not less than 11 consecutive hours in each 24-hour period during which he or she works for his or her employer. However, this provision does not apply to workers who are engaged in activities split up over the day (ie a split shift worker).

To vary the way in which the 11-hour rest overnight is taken, you will either need special circumstances (such as the one detailed above), or an agreement.

The special circumstances are detailed under the regulations and include:

- where the work requires round the clock staffing ie hospitals, prisons, residential institutions
- work involves security or surveillance to protect property or individuals
- work has busy peak periods, ie agriculture, retail, tourism
- an emergency/something unforeseen occurs.

An agreement under the WTR is either a collective agreement with a recognised trade union, or a workforce agreement, where the employer does not recognise a trade union. The workforce agreement will need to meet the minimum criteria set out in Schedule 1 of the WTR.

Where either special circumstance or an agreement applies, the 11 hours' rest can be interrupted and, wherever possible, an equivalent period of compensatory rest should be given, to cover the period of interruption. This allows the rest to be taken in a different pattern to that set out in the regulations. The principle is that everyone gets his or her entitlement of 90 hours' rest a week on average; although some rest periods may come slightly later than expected.

Contact us

If you have any questions about the topics covered in Solutions please call 0800 634 1700, or e-mail cronerinfo@croner.co.uk

Alternatively, call the number on your advice line card to speak to a consultant, or if you are not currently a client, call 0800 634 1700 for further information on how Croner can help your business.

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