

Risk, red tape and the compensation culture

A study of the impact of health and safety legislation on UK organisations



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Introduction

Health and safety never seems to be far from the headlines, whether it's international issues sparked by high profile accidents or more local concerns about the burden of health and safety red tape.

In 2010, the prime minister tasked Lord Young with reviewing the health and safety landscape in the UK. The review was aimed at tackling red tape and the compensation culture. In October 2010, Lord Young delivered his recommendations, which ranged from introducing the recommendations in Lord Justice Jackson's review of civil litigation costs, to introducing low cost online risk assessments.

Much of the policy activity and the media commentary is based on the basic premise that health and safety red tape and the 'compensation culture' in the UK provide serious hurdles to business. Health and safety practices are often presented as onerous and damaging to innovation. We sought to explore whether this was really true.

As a legal practice, we speak with our clients every day about the best ways to implement health and safety legislation. We also advise on the best ways to deal with the outcome when things don't go according to plan. Those conversations often differ markedly from the broader negative perception of health and safety in the workplace.

That was the starting point for our survey. We were keen to find out whether health and safety regulation in the UK was having a negative impact on business in the UK. Are employers drowning in red tape, or does the UK implement health and safety measures relatively sensibly? Does the 'compensation culture' exist and does it have a profound effect on business decisions, or has the general media portrayal distorted the picture?

We collaborated with *Safety & Health Practitioner Magazine* and started speaking with those involved in the debate. What the health and safety community told us proved revealing.

Caroline May
Partner
Norton Rose LLP
January 2011

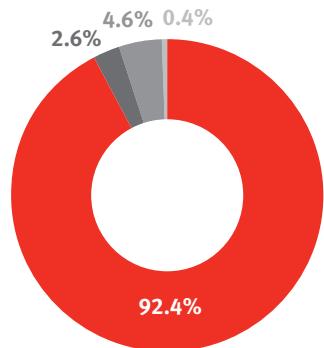
Methodology

The research was carried out as a detailed online questionnaire by Norton Rose LLP in conjunction with *Safety & Health Practitioner Magazine*, the leading trade title for health and safety professionals in the UK.

There were 557 respondents, each of whom has responsibility for aspects of health and safety and/or compliance. Their job titles included business risk manager, health and safety manager, site EHS engineers and head of safety & compliance.

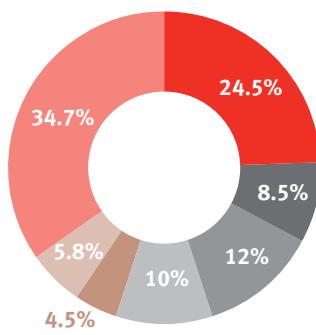
The quality of respondents ensured that the survey provided a wide-ranging and authoritative picture of how current legislation is viewed by the professionals that it most closely affects.

Where is your head office based?



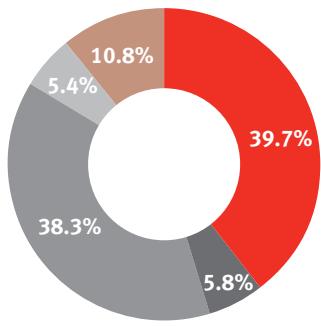
- England
- Scotland
- Wales
- Northern Ireland

How many employees does your company have?



- Under 50
- Between 51 and 100
- Between 101 and 250
- Between 251 and 500
- Between 501 and 750
- Between 751 and 1000
- Over 1001

How does health and safety legislation impact upon the development of your business?



- Under £10m
- Between £10m and 25m
- Between £25m and £50m
- Between £50m and £75m
- Between £75m and £100m
- Over £100m

Around 60 per cent of respondents reported that health and safety legislation has some negative impact on the development of their business. However, the fact that almost 40 per cent reported ‘no impact’ suggests that a significant minority do not see health and safety compliance (and the associated red tape) as a factor that directly affects business development.

Very few respondents saw cost factors as a primary issue but they recognised that significant investment of management time was often needed (and this of itself had added indirect cost).

One in nine respondents highlighted the creation of a risk-averse culture as a key impact, which is potentially a cause for concern given the increasing focus being placed on entrepreneurialism by the current Government.

Overall, a major theme in the health and safety community seems to be that regulation is not the problem, but interpretation of regulation is. With a legal framework that leaves individual organisations free to determine what is “reasonably practicable” to create a safe and secure working environment, many in the industry are aware that establishing ‘best practice’ is a highly subjective test.

“H&S is getting a bad image due to the amounts of paperwork having to be completed for even the simplest of tasks.”

A Longmire CMIOSH MIIRSM, Operations Director, Speedy Hire Plc

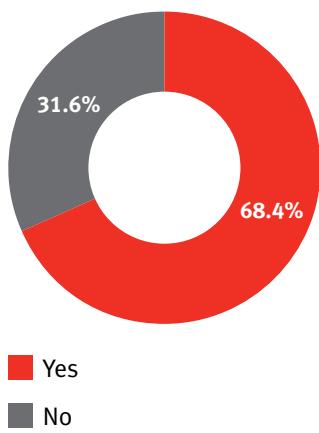
“Health and safety costs are an essential overhead, no different to energy, water or taxes. You have to have them; you have to pay for them.”

Survey respondent

“Having a good HS&E record has gained us business.”

Survey respondent

Should more be done to lessen the burden of health and safety red tape on businesses?



Although the media often presents a picture of businesses in the UK being strangled in red tape, almost a third of respondents answered 'no' to this question. Of course, the fact that many of them are dedicated health and safety practitioners may suggest that they do not see it as a burden but rather as their livelihood.

The central issue seems to be where the greatest burden lies. The impact of legislative compliance is likely to fall more heavily on entrepreneurs and SMEs, as they lack the time and resource to manage it effectively. Larger organisations on the other hand, will often have dedicated professionals (or even whole departments) to manage health and safety with significant resources.

In addition, many existing regulations are currently applied on a blanket basis to all organisations. However, this blanket application often becomes inappropriate when offices and schools are expected to comply with the same legislation as high-risk businesses such as oil refineries or construction firms.

There is a demand for a more sector-specific application of the general regulations, especially when many organisations currently tender for suppliers using the same generic pre-qualification questionnaires. For example an IT services provider may often be expected to answer the same health and safety questions as a building contractor when there is simply no sensible comparison to be made.

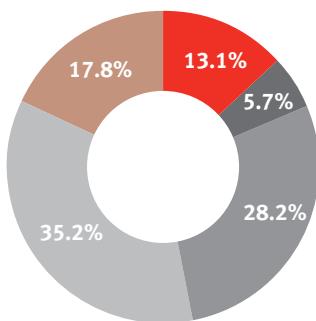
The Health and Safety At Work etc Act 1974 demands that businesses do what is "reasonably practicable" to safeguard the health and safety of their employees, but there is a growing feeling that to meet this legal requirement a barrage of risk assessments and reports need to be prepared. There is currently a considerable amount of duplication often in inverse proportion to the level of risk.

"Interpretation of H&S legislation is a stumbling point."
Bob Phillips, SHE Manager, Linde Severnside Ltd

"H&S practitioners need to be better aware of the level of compliance required and apply risk controls proportionately to the level of risk. This in turn will lessen the burden."
Survey respondent

"In a lot of cases, it creates unnecessary costs for small businesses who find it harder to absorb the additional expenditure/overheads."
Survey respondent

Which of the following most affects the way in which you manage health and safety in your organisation?



- The prospect of criminal prosecution and fines
- Costs of remediation/compliance
- Concerns of reputational damage which may occur following a high profile accident/incident
- The operational needs of the business
- The time resource we are able to dedicate to complying with health and safety legislation

Although the operational needs of business were highlighted by most respondents as the key factor in health and safety management, it was very interesting that concern over damage to the corporate reputation was the second most important factor, with the dangers of criminal prosecution (and the associated fines) coming third.

Recent high-profile incidents and the advent of the Corporate Manslaughter Act 2007 have thrown the issue of reputational damage and prosecution risk into sharp focus. Firms can face substantial fines and can be required under the Act to publicise their failings which lead to the incident.

Reputational damage has significant commercial consequences. It affects all stakeholders. Businesses looking to raise finance or purchase insurance will find a poor reputation for health and safety precedes them and increases costs and availability, it may also restrict business opportunity. Procurement procedures require disclosure of health and safety performance as a matter of routine. Thus a poor performance can seriously affect operational performance.

"We cannot afford to incur adverse publicity as the ramifications to the client base are too large to comprehend."

A Longmire CMIOSH MIRSM, Operations Director, Speedy Hire Plc

"Due to the financial climate, some organisations do not even have an H&S budget. If they do, the money is being pulled out of that to put elsewhere."

Janice Stanislas, Health and Safety Coordinator, NCB

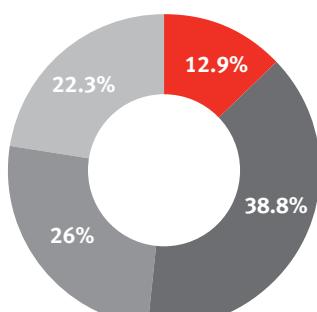
"The threat of manslaughter charges affects the way in which most firms manage their health and safety."

Roger Burton, Director, Burton Transport Consultants Ltd

Managing health and safety is becoming more complex given the changing nature of the UK workplace. The 'workplace' is a much broader concept than many organisations realise. Employees driving on business-related journeys – even if they're in their own car – and staff members volunteering at local schools and charities are still considered at work for the purposes of the Health and Safety at Work etc Act 1974. A failure of compliance in any of these areas (even whilst off employers' premises), and a lack of a suitable risk assessment can expose an organisation to serious risk.

In the current economic climate there are significant pressures on budget and the potential for health & safety risks to be ignored, this presents considerable risk.

How much impact does the risk of claims from employees (following an accident) affect the way your business decisions are made?



- █ Major impact
- █ Some impact
- █ Small impact
- █ No impact

“Large organisations tend to swallow up litigation claims.”

Survey respondent

“Until a claim is made, no thought is given to the end cost of investigation, defence costs etc Heads are embedded firmly in the sand.”

Malcolm Pink, Malcolm A Pink Health & Safety Services

“Litigation for small claims seems to be escalating due to the ‘no win no fee’ claims.”

Harold Hodgins, Health and Safety Manager, AE&E inova

Curiously, almost a quarter of respondents stated that the risk of employee accident claims was having no effect on their business decisions, while only 13 per cent reported a major impact. Together, these statistics suggest the so-called ‘compensation culture’ may not be as far-reaching as some media commentators would have us believe.

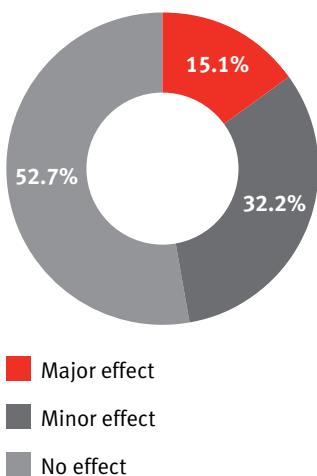
The common perception is that the growing claims culture is affecting employers, but the feeling among the health and safety professionals surveyed is that this is not the case.

This is an area where many organisations could potentially improve – by taking a more proactive approach. Reducing the risk of claims in the first place by creating effective management systems, risk assessments and audit trails may substantially reduce the risk of claims.

Furthermore, several respondents highlighted the growth in ‘no win, no fee’ claims as a key factor in increasing claims risk. This is an area that has caused significant debate since the law on the private funding of litigation and recovery of costs changed in 1999. Many see it as the key driver in increasing the threat of litigation for employers. Lord Young was critical of development in this area in his recent review, stating that the introduction of conditional fee arrangements, the growth of after the event insurance and the proliferation of claims management companies are at the root of the problems.

However, the fact that overall around half of respondents say claims risk has little or no impact suggests that claims are not a number one concern for most organisations (possibly because this is an area assumed to be covered by insurance).

What effect does the “compensation culture” have on the pricing of your products/services?



Over half of those surveyed believed that the compensation culture is having no effect on their pricing structures.

Overall, this reinforces the response to the previous question by suggesting that the compensation culture does not have the impact that many believe. The media and public perception of claims is that the system is weighted against employers – which was the view that led to Lord Young’s Review of health and safety in the first place.

The truth seems to be less clear-cut. Many organisations see health and safety as a business overhead – just like any other – and therefore many will include those costs (including increased insurance costs) into their pricing matrices.

“The compensation culture is a myth.”
Survey respondent

“We have always tried to absorb costs within the business but this has led to resource reductions to pay for the additional insurance premiums.”
Survey respondent

“The cost of claims comes from the bottom line, therefore there is a cost implication.”
Survey respondent

What issues would affect your decision to settle or defend such a claim?

“Available paperwork to support a defence.”

Paul Webber, Health and Safety Manager, Treloar Trust

“The insurance company always has the final say.”

Survey respondent

“The relative legal costs vs. settlement costs.”

Survey respondent

“Time to collate records vs. current business needs.”

Survey respondent

“The company would settle a claim to stop bad publicity.”

Survey respondent

“Legal recommendations.”

Survey respondent

Many respondents commented that their legal advisers were their first port of call when deciding how to determine claims.

However, during the survey a number of other issues came to light that suggest it is not always purely a legal issue.

The cost perspective

Settling out of court may be cheaper than defending the claim, even if the organisation feels it has a good chance of winning.

Reputation

The risk to the business's reputation and potential bad publicity that comes from defending a health and safety claim may encourage it to settle.

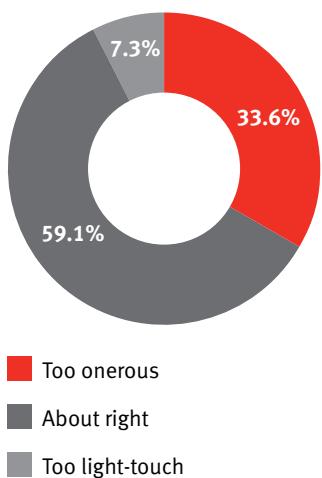
Insurers

Many respondents noted that the decision to defend or settle was taken by their insurance company, which often directs an organisation to use the insurer's lawyers rather than its own. Many believe this is their only option. However, business always have the option to consult and use their own solicitors and need to consider matters of corporate reputation and brand damage in addition to the extent of the claims. The choice of legal representation therefore needs to be carefully considered at the outset.

Lack of evidence

Again, if organisations are being forced to compromise claims because they don't have the evidentiary support to defend them, it highlights the critical importance of the health and safety audit trail.

In comparison with countries outside the EU, do you think health and safety legislation in the UK is too onerous; about right; or too light-touch?



"Legislation in the UK is good. There could be some rationalisation here and there but the basic tenets underpinning the legislation are great. It's the application and the fear of defending no win no fee claims that are the problem."

Jon Young, H&S Officer, Lee Filters

"This is not about H&S legislation, this is about enforcement."

Survey respondent

"Our enforcement regime is based on proportionality too. In comparison to US OSHA, our regulators have a degree of judgement, whereas in the USA OSHA has no choice but to issue citations for civil fines."

Survey respondent

A third of those surveyed saw the UK legislation as too onerous in comparison with other countries, but six out of ten respondents were actually in favour of the UK's approach to health and safety.

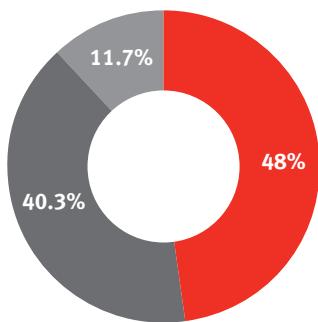
The concern voiced by many was that there needs to be a level playing field so that health and safety legislation does not become a competitive advantage that one nation can play off against another.

This is not so much an issue of legislation (particularly within the EU where the same laws usually apply) but of enforcement. The lack of legal playing field for enforcement issues has often been identified as a key concern for business.

Comparisons were also drawn with the US in several cases, where the 'civil fines' system was highlighted as restrictive. It lacks the flexibility of the UK system because the regulators are not given the same amount of leeway to make decisions on the merits of a particular situation. There is also the issue of individual responsibility where individual employees have more responsibility to ensure their own safety rather than it being entirely in the hands of the employer.

Generally speaking, most health and safety professionals were in favour of the UK approach. The concerns arose from the lack of a level playing field for enforcement.

Do you think you have enough freedom to decide the best way in which to manage health and safety within your organisation?



- Yes – I feel the legislation allows me enough freedom to implement health and safety measures appropriate for my individual business
- Mostly – there are only some instances where the legislation seems too rigidly applied
- No – I feel overly burdened by legislation designed without my individual business in mind

With almost 90 per cent of respondents replying ‘yes’ or ‘mostly’, it is clear that, as reflected in the response to the previous question, the flexibility of the UK legislation is a key factor in promoting the sensible application of health and safety in the workplace.

The question is whether it is flexible enough. When asked whether more should be done to lessen the burden of health and safety red tape on businesses, responses suggested that some organisations found the legislation a burden because some regulations were too generic and not tailored enough to their particular industry sector.

However, the fact that UK organisations are required to do what is “reasonably practicable” allows them a significant amount of freedom, provided they are not caught up in what they see as unnecessary complications.

Again, it seems to come down to interpretation and enforcement rather than the legislation itself. Most of those surveyed favour the freedoms of the UK regulations but would perhaps appreciate simplification and a level playing field for enforcement.

“The legislation itself isn’t the problem – in most cases it’s fairly clear and easy to comply with. The problem is the failure to apply common sense to the regulations’ interpretation.”

Survey respondent

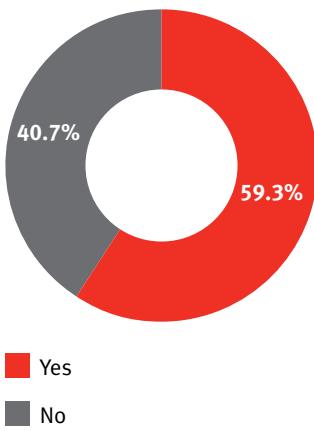
“One size fits all legislation does not work well – it must be scaled to the risk and industry.”

Survey respondent

“Reasonably practicable” is a brilliant freedom.”

Fiona E Greaves, Director, Steele Safety Ltd

Do you believe that the regulators apply enough advice and explanation on compliance with health and safety legislation?



Six in ten respondents were positive about the role of the regulators and the level of support they provide. The Health and Safety Executive (HSE) does have certain advantages over other regulators, in that it has a solid base of legislation to work from. Several of those surveyed also highlighted that the HSE information available online was relatively simple and easy to use.

The concern raised by many was that the HSE does not provide clear, definitive advice on specific situations. Instead it provides guidance on generic issues of health and safety only. It does not commit to saying: 'you should do X, Y and Z and you will be compliant'. Instead, it says: 'you should do something like this and you may be compliant'.

With the UK legislation based so heavily on interpretation, several respondents felt that more specific guidance would be welcomed. In addition, a number identified the lack of "face time" with the regulators to clarify issues – a problem likely to become increasingly exacerbated as public sector cuts bite.

Another point raised was the changing face of the regulators themselves, which is likely to change further as recruitment freezes reduce staffing levels and experienced staff retire. The use of new technology, including internet resources and the HSE website, were seen as useful in attempting to bridge the information gap.

"Plenty on HSE website, which is getting better all the time."

Survey respondent

"More help in interpreting legislation would be useful."

Survey respondent

"There is ample information on the HSE website but it would be helpful to develop relationships that enabled more regular conversations to be held."

Kelvin Ward, Health & Safety Manager, Sandwell Homes Ltd

"They try but are understaffed. They face a real problem in being able to match the detailed knowledge there is in industry."

Survey respondent

Conclusion

The common perception is that health and safety legislation is one of the greatest burdens on business and that the UK is in the throes of a compensation culture.

Our survey findings suggest otherwise. Health and safety professionals are aware of the cost and time issues involved both with managing health and safety, but the “compensation culture” does not have the impact that many believe.

Instead, the survey has highlighted the continuing importance of health and safety to the business and the public sector community. On the one hand employers have a moral as well as legal obligation to ensure they provide a safe working environment, while on the other there are an increasing number of factors that affect their ability to do so. The current economic climate exacerbates this.

This is why the flexibility inherent in the UK health & safety legislation is so important and supported by practitioners. Managing health and safety effectively takes up management time, while the lack of a proper audit trail can increase claims costs and make it more likely that organisations have to settle claims that they might have been able otherwise to defend.

In addition, the potential for adverse publicity ranks almost as highly as the operational needs of the business when it comes to managing health and safety. High-profile accidents and the recent introduction of the Corporate Manslaughter Act have led to firms viewing reputational risk as just as much of a concern as financial risk. Even organisations in less overtly high-risk sectors are increasingly concerned about the bad publicity and adverse commercial consequences that can arise from employee litigation.

With public sector cutbacks and pressure on internal budgets, health and safety professionals face an increasing challenge to manage health and safety risks in the current climate. Red tape may occasionally interfere with their work, but thankfully it does not appear to be strangling them.

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A study of the impact of health and safety legislation on UK organisations

A report on whether health & safety regulation in the UK is having a negative impact
on business in the UK.