Directors’ Duties – Health and Safety Issues

Introduction

Directors’ accountability for health and safety has now been enhanced by the Corporate Manslaughter and Corporate Homicide Act 2007 (CMA) and Section 172 of the Companies Act 2006 (The Act) which both now impose a duty on directors to consider and promote the interests and wellbeing of their employees.

Under the previous Companies Act and common law, company directors were required to act in a way that they believed was in the interests of their company and its shareholders, both current and future, as a whole. There was also a separate legal requirement for directors to have regard to the interests of employees in general.

The Act broadens these duties by stating that a director must act in a way that he, in good faith, believes would be most likely to promote the success of the company for the benefit of its members as a whole, and in doing so have regard to the interests of the company’s employees.

CMA came into force on 6 April 2008 and creates a new offence known as Corporate Manslaughter in England, Wales and Northern Ireland (Corporate Homicide in Scotland). An organisation may be found guilty of this offence if the way in which its activities are managed or organised causes a person’s death.

The Health and Safety (Offences) Act 2008 (HSOB) came into force on 16 January 2009. This raises the maximum penalties available to the courts in respect of certain health and safety offences and makes a prison sentence an option for most health and safety offences in both the lower and higher courts.

Due to the Act, HSOB and the CMA, more attention will have to be paid by boards as to the impact their actions with regard to health and safety will have on performance, on staff well-being and on reputation.

With the principal of leadership in mind, the Health and Safety Executive, in conjunction with the Institute of Directors, launched new guidance in October 2007 entitled “Leading Health and Safety at Work: Leadership Actions for Directors and Board Members” (The Guidance).

The New Guidance

The Guidance identifies three essential principles that should underpin successful health and safety leadership and hence performance:

- Strong and active leadership from the top;
- Worker involvement; and
- Assessment and review.
It then sets out how these principles can be followed through a four point agenda: plan; deliver; monitor and review. Within each action area, there are core actions, good practice principles and case studies to aid understanding. The four point agenda of Plan, Deliver, Monitor and Review (PDMR) is examined below.

Plan

Directors should be setting effective health and safety policies which can be embedded into an organisation’s culture, its values and performance standards.

The Turnbull guidance on the Combined Code on Corporate Governance requires listed companies to have robust systems of internal control, covering not just 'narrow' financial risks but also risks relating to the environment, business reputation and health and safety.

Good Practice

- Health and safety should appear regularly on the agenda for board meetings.
- The chief executive can give the clearest visibility of leadership, but some boards find it useful to name one of their number as the health and safety ‘champion’.
- The presence on the board of a health and safety director can be a strong signal that the issue is being taken seriously and that its strategic importance is understood.
- Setting targets help define what the board is seeking to achieve.
- A non-executive director can act as a scrutineer – ensuring that the processes to support boards facing significant health and safety risks are robust.

Deliver

Boardroom decisions should be made in the context of an organisation’s health and safety policy; it is important to ‘design-in’ health and safety when implementing change.

Good Practice

- Leadership is more effective if visible – board members can reinforce health and safety policy by being seen on the ‘shop floor’, following all safety measures themselves and addressing any breaches immediately.
- Consider health and safety when deciding senior management appointments.
- Having procurement standards for goods, equipment and services can help prevent the introduction of expensive health and safety hazards.
The health and safety arrangements of partners, key suppliers and contractors should be assessed: their performance could adversely affect yours.

Setting up a separate risk management or health and safety committee as a subset of the board, chaired by a senior executive, can make sure the key issues are addressed and guard against time and effort being wasted on trivial risks and unnecessary bureaucracy.

Providing health and safety training to some or all of the board can promote understanding and knowledge of the key issues in your organisation.

Supporting worker involvement in health and safety, above your legal duty to consult worker representatives, can improve participation and help prove your commitment.

Monitor and Good Practice

Monitoring and reporting are vital parts of any management system as this allows a board to see what is not effective within a policy and visit areas of concern.

Reporting to members of the workforce can also be very effective so that they can understand why certain actions have to be taken. For instance, in Africa, if a company is providing free treatment for HIV/AIDS and the number of deaths and leaves of absence decline, those members of the workforce who are perhaps skeptical about the treatment can see that it works and perhaps then start therapy.

Good Practice

- Effective monitoring of sickness absence and workplace health can alert the board to underlying problems that could seriously damage performance or result in accidents and long-term illness.
- The collection of workplace health and safety data can allow the board to benchmark the organisation's performance against others in its sector.
- Appraisals of senior managers can include an assessment of their contribution to health and safety performance.
- Boards can receive regular reports on the health and safety performance and actions of contractors.
- Some organisations have found they win greater support for health and safety by involving workers in monitoring.

Review

A formal boardroom review of health and safety performance is strongly advised. It allows a board to establish whether the essential health and safety principles have been embedded in an organisation, and whether the management system is effective in managing risk and protecting people.
Reputation is important for a company and therefore reporting on its health and safety performance is essential. The regulations contained within in the Companies Act 2006 in relation to the enhanced business review were embedded into statute to ensure that companies do report on such issues and to demonstrate to shareholders that health and safety policy is an integral part of a company’s strategy.

**Good Practice**

- Performance on health and safety and wellbeing is increasingly being recorded in annual reports to investors and stakeholders.
- Larger public and private sector organisations need to have formal procedures for auditing and reporting health and safety performance. The board should ensure that any audit is perceived as a positive management and boardroom tool. It should have unrestricted access to both external and internal auditors, keeping their cost-effectiveness, independence and objectivity under review.
- Board members can make ‘shop floor’ visits to gather information for review.
- Good health and safety performance can be celebrated at central and local level.

**Prism Perspective**

The introduction of the statutory recognition of a director’s duties and new statutory offence of corporate manslaughter emphasises the importance that is being placed on health and safety and a director’s role within an organisation.

Although the HSE guidance appears to contain action plans and best practice that are “all motherhood and apple pie” to most FTSE companies, directors should reflect on their organisation’s health and safety performance and standards and question whether they are doing everything possible to ensure compliance with their obligations.

As with all corporate strategies, if there is an interest and understanding at the top, all levels of the workforce are more likely to respond positively and deliver what is required.

Directors must be mindful that ultimately they bear responsibility for the welfare of their employees and others likely to be impacted by their acts or omissions such as third party contractors. The common denominator between many recent and well-publicised cases has been the attribution of neglect to the directors and officers of the companies concerned by demonstrating their failure to implement proper procedures and practices (Section 37, Health & Safety at Work Act 1974). The ability of directors to demonstrate compliance with the principles set out in the Guidance will provide useful evidence to show that they have not fallen foul of health and safety legislation.
Under a CMA prosecution the courts will look at management systems and practices across the organisation, and whether an adequate standard of care was applied to the fatal activity. Juries will be able to consider wider cultural issues within the organisation such as attitudes or practices that tolerated health and safety breaches. Directors should therefore ensure the Health and safety policies are embedded within the organisation’s culture.

The PDMR agenda should be linked to a company’s key performance indicators, reflecting the importance of employees’ welfare. The narrative reporting regime also gives a company the ideal opportunity to talk about all health and safety issues and directors.

In addition to the PDMR agenda, boards ought also to review their incident management procedures, including a review of insurances and procedures for managing the media, investors and staff.

Useful Resources

http://www.hse.gov.uk/leadership 
http://www.iod.com/hsguide

Ministry of Justice - A guide to the Corporate Manslaughter and Corporate Homicide Act 2007: 

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