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A legal guide

HEALTH & SAFETY:
COSHH regulations



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COSHH

The use of chemicals and other hazardous substances at work which can put employees' health at risk is regulated by the Control of Substances Hazardous to Health Regulations 2002 (the COSHH Regulations) which came into force on 1 October 1989 in their original form, but have since been modified.

Hazardous Substance

The definition of a "hazardous substance" is not straightforward, but examples are substances that are explosive, corrosive, flammable, carcinogenic, toxic, oxidising, sensitising (by skin or inhalation) or otherwise harmful and irritants. Substances that would be dangerous to the environment are also included. Dust is specifically included, when present in substantial concentrations in the air, as are biological agents.

Examples of the effects of hazardous substances include skin irritation or dermatitis as a result of skin contact, asthma as a result of developing an allergy to substances used at work, losing consciousness after becoming overcome by toxic fumes or more severe conditions such as cancer which may appear after prolonged exposure to a chemical or substance.

At work, common hazardous substances are paints, cleaning agents and adhesives which are normally marked as hazardous to health. However, less obvious are flour dust or grain dust and substances generated in a factory environment such as fumes from machinery. Hazards that do not come from the workplace, such as viruses caught from colleagues are not likely to be classed as hazardous under these Regulations.

Lead and asbestos are specifically excluded because there are separate Regulations which apply to them in particular. Carcinogenic substances and biological agents carry separate provisions under the COSHH Regulations.

According to HSE statistics for 2008/9, there could be as many as 4000 chronic obstructive pulmonary disease (COPD) deaths each year due to past exposures to fumes, chemicals and dust.

Risk Assessment

The COSHH Regulations impose an obligation on employers to carry out a risk assessment *before* work begins. This should identify hazardous substances present in the workplace to see how such a substance would affect health. This includes considering who is liable to be exposed to such substances, how often, how much substance is in use and how such a substance could be absorbed into the human body.

The person carrying out the assessment should have access to the COSHH Regulations and relevant approved Codes of Practice. There is a requirement for re-assessment if there has been a significant change in the work or workplace to which the assessment relates. In any event, such assessments should be updated regularly and at not less than 5-yearly intervals.

Prevention and Control of Exposure

Once any hazardous substances have been identified, action needs to be taken to **prevent** employee exposure entirely. Only if prevention is not reasonably practicable should the employer go on to consider measures to **control** adequately the exposure to employees. The risk assessment should therefore include details of possible preventative measures and why prevention is not reasonably practicable.

Control of exposure might involve changing the type of substance used for a job and/or changing the actual activity itself so that exposure is minimised. General considerations should involve better ventilation, better systems of work and minimising the number of employees who are exposed to such substances. Exposure controls would normally include the implementation of good working practices. Advice in this respect is usually available from suppliers and manufacturers of hazardous substances.

The question will therefore be "what is an *adequate* level of exposure?" The Regulations state that "adequate" means having regard only to the nature of the substance and the nature and degree of exposure. The provision of personal protective equipment alone will not be sufficient to comply with the Regulations and is to be regarded as a final measure once everything else has been done.

Inhaled Substances

For inhaled substances, occupational exposure standards are set out in schedules to the Regulations. However, even if exposure is within such limits, the control of exposure shall, so far as the inhalation of that substance is concerned, only be treated as being adequate if the level of exposure is reduced so far as is reasonably practicable. It is not sufficient to show that exposure is within the limits and if it is clear that other measures to further reduce exposure were practicable, then the Regulations will have been breached and the employer will be liable.

Individuals

Control measures must have regard to the individual employee. So if it is known that a substance that is not particularly hazardous to most people is likely to be more so to an individual employee, the risk assessment must provide for this and suitable control measures implemented to protect that individual.

Monitoring

Once adequate measures have been put into place and recorded in the risk assessment or similar document, the workplace and any protective equipment must be monitored regularly (to assess exposure to such substances). Employees' health must also be monitored in accordance with a suitable procedure. Monitoring records should be kept for a minimum period of 5 years and in some cases, for 40 years.

REACH

REACH is a EU regulation concerning the Registration, Evaluation, Authorisation and restriction of Chemicals that came into force on 1/6/2007. REACH replaced a number of existing EU Directives and Regulations with a single system. The REACH system operates alongside COSHH to ensure that information regarding:

- The hazards associated with the chemical and
- How to use the chemical safely

are passed down from the chemical manufacturers through the supply chain through improved safety data sheets.

New international hazard warning symbols were introduced in 2009 to replace the existing European symbols. Examples of these can be found at HSE.gov.

Information

Once measures to prevent exposure are decided upon, employees should be fully briefed and trained. Furthermore, COSHH places specific duties upon employers to ensure that the measures are maintained. These would include providing proper information to employees about the hazards involved, how they arise and what employees can do to minimise the risks to themselves. It is also advisable for employers to prepare plans and procedures to deal with accidents, incidents and emergencies involving dangerous substances.

Court of Appeal

A 2002 decision from the Court of Appeal has confirmed that the duty on employers to protect employees from such hazardous substances is absolute. Therefore if an exposure occurs, he will be immediately liable for a personal injury claim by the employee.

In the Court of Appeal case of *Dugmore v Swansea NHS Trust*, the Claimant developed an allergy to latex protein found in the powdered latex gloves she used at work. As a result her employer provided her with vinyl gloves. However when using vinyl gloves she had picked up an empty box used for latex gloves and suffered an anaphylactic attack and was not able to return to work.

Latex was classed as a hazardous substance and as the employers had not adequately prevented exposure to latex for this particular Claimant, they were found to be liable for the ensuing injury.

The Court held that whilst it would not have been reasonably practicable to eliminate latex entirely from the hospital where the Claimant worked, it would have been reasonable to replace all latex gloves with vinyl ones. Since the hospital could not prove otherwise, the Claimant succeeded. It was emphasised that it is for the employer to find out about the degree and magnitude of the risks to which employees were potentially exposed and to take precautions against them.

The Court of Appeal further confirmed that as the employer had an absolute duty to prevent or control exposure, the normal requirement of reasonable foreseeability will therefore not apply. It was argued that it was not reasonably foreseeable that the Claimant would have suffered such an attack by picking up an empty box. However, the argument failed since exposure had clearly taken place because the risk had not been adequately controlled.

SUMMARY

The COSHH Regulations are very detailed, but the principles are the same as for most other workplace injuries.

- There should be a risk assessment.
- The primary duty is to avoid exposure to hazardous substances.
- It is for the employer to demonstrate that avoidance is not reasonably practicable.
- The secondary duty is for the employer to control the risks of exposure adequately by means of
 - a safe system of work
 - safe plant and equipment (in relation to the substance)
 - changing the substance used.
- The employer must reduce the risk to its lowest practicable level, not just to within the guidelines.

The onus is always on the employer to investigate the hazards, record the findings and take steps to protect the employee.

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