

A Review of Certain Provisions within the Employers' Liability (Compulsory Insurance) Regulations 1998

June 2007

DWP Department for
Work and Pensions

Introduction

The Employers' Liability (Compulsory Insurance) Act 1969 requires most employers to insure against liability for injury or disease to their employees arising out of their employment. **This requirement is not under review.** The requirement for eligible businesses to obtain Employers' Liability Compulsory Insurance (ELCI) continues to be enforced by the Health and Safety Executive (HSE) and carries a penalty of up to £2500 for every day without appropriate cover. Guidance is available from HSE¹.

This consultation is limited to certain regulations introduced to part of the Employers' Liability (Compulsory Insurance) Regulations 1998² that relate specifically to the retention and display of ELCI policy certificates and the associated burden on business. The HSE are responsible for enforcing the current regulations and this review is being undertaken in consultation with them.

The Admin Burdens Measurement Exercise (ABME) in 2006 identified for each department the total administrative costs placed on business by regulation. It was an intensive exercise to identify and measure the administrative costs placed on business by central government regulation. Over 9,000 businesses and charities took part to gain understanding, to take stock and to establish departmental baselines against which targets for reducing administrative burdens could be set.

In the 2006 DWP Simplification Plan the Department set out its priorities for meeting its administrative burdens reduction target of 25%. Of the reviews announced in the Simplification Plan³, the administrative burdens arising out of the requirement to store and display ELCI policy certificates provided the largest admin burden at £71m. This burden has been estimated at such a considerable figure not for the cost of the individual compliance action but due to the number of businesses carrying them out.

The following document sets out the options for progress identified during discussions with a number of stakeholders listed at Annex C.

¹ <http://www.hse.gov.uk/pubns/hse40.pdf>

² Statutory Instrument 1998 No. 2573 <http://www.opsi.gov.uk/si/si1998/19982573.htm>

³ http://www.dwp.gov.uk/aboutus/better_regulation/simplification_plan.pdf Table 4, Page 17

How to respond

The consultation exercise will run for 12 weeks from 25 June 2007. Any replies received after that date may not be taken into account. Please send your response by **17 September 2007** to:

Employers' Liability (Compulsory Insurance) Consultation
Department for Work and Pensions
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The Adelphi
1-11 John Adam Street
London
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e-mail: ELCIconsultation@dwp.gsi.gov.uk

The consultation is being conducted in line with the Code of Practice on Consultation. The criteria for consultation are listed at Annex A. The full version can be accessed at www.cabinetoffice.gov.uk/regulation/consultation/index.asp

Feedback

A summary of responses will be published following the consultation. The Government will aim to publish this summary within three months of the consultation closing, including on the Department's website.

This document is available on the Department's website at: <http://www.dwp.gov.uk/consultations/2007/index.asp>

Regulations for Review

Regulation 4(4) and (5) – Retention of Certificates

4. (4) *An employer shall retain each certificate issued to him under this regulation, or a copy of each such certificate, for a period of 40 years beginning on the date on which the insurance to which it relates commences or is renewed.*

(5) *Where the employer is a company, retaining in any eye readable form a copy of a certificate in any one of the ways authorised by sections 722 and 723 of the Companies Act 1985 shall count as keeping a copy of it for the purposes of paragraph (4) above.*

Regulation 5 – Display of Certificates

5. (1) *Subject to paragraph (4) below, an employer who has been issued with a certificate in accordance with regulation 4 above shall display one or more copies of it, in accordance with paragraphs (2) and (3) below, at each place of business at which he employs any relevant employee of the class or description to which such certificate relates.*

(2) *Any relevant certificate which is required to be displayed in accordance with paragraph (1) above, shall be displayed in such number and in such positions and be of such size and legibility that they may be easily seen and read by any relevant employees, and shall be reasonably protected from being defaced or damaged.*

(3) *Copies of a certificate which are required to be displayed in accordance with paragraph (1) above shall be kept on display until the date of expiry or earlier termination of the approved policy mentioned in the certificate.*

(4) *The requirements of paragraphs (1), (2) and (3) above do not apply where an employer employs a relevant employee on or from an offshore installation or associated structure, but in such a case the employer shall produce, at the request of that employee and within the period of ten days from such request, a copy of the certificate which relates to that employee.*

Regulation 4 (retention of policy certificates for 40 years)

The current regulation, compelling the retention of records, was introduced in 1999 to assist the future tracing of policies and consequently is of limited value in long tail illness claims made today which continue to rely on historic company records. While it is accepted that the retention of information relating to insurance cover is important for future claims, the current regulation carries no penalty for non-compliance and is not enforced by HSE.

The Association of British Insurers (ABI) introduced a tracing system for ELCI policies in 1999 and has been working with representatives of the insurance industry and personal injury lawyers to ensure that the tracing system is faster and more comprehensive. The ABI Code of Practice covers 95% of ELCI providers and includes a commitment for insurers to maintain ELCI records for 60 years. This requirement to maintain ELCI records for 60 years overlaps with the requirement for businesses to keep ELCI policy certificates for 40 years.

The problem of traces for possible policies that pre-date the 1969 Act that made ELCI compulsory, and those that pre-date the 1998 regulations making retention of ELCI certificates compulsory, remains an issue and will continue to push down on trace success rates under the Code of Practice for some time. There is an additional problem of tracing insurance records for companies that have ceased trading. This will be true regardless of whether the regulation is repealed.

Options

- i. DWP introduce a penalty for failure to keep policy certificates for 40 years.

Current inspections by HSE and Local Authorities do not provide a compliance check for this regulation. Any effective penalty regime would need to see a rise in inspection rates, have major cost implications for the compliance bodies, and run counter to the Hampton⁴ principles. Stakeholders have agreed that regular policing would not be practical or possible.

⁴ <http://www.hm-treasury.gov.uk/media/A63/EF/bud05hamptonv1.pdf>

- ii. Businesses are advised to keep records for their own benefit and the regulation is repealed.

Retaining ELCI policy information in paper or electronic form is good business practice. Any liability from the failure to provide proof of cover would fall directly on the employer and therefore business should not ignore this risk. Strongly worded guidance may ensure that business is aware of its continuing liability and encourage them to make provision for the storage of records against any future claims.

- iii. Retain the current regulation

This option does not provide any administrative reductions for business. The enforcement bodies (HSE and Local Authorities) do not enforce the regulation as it carries no penalty for non-compliance. The retention of records to protect from any future liabilities is good business practice; therefore the regulation fills no purpose.

- iv. The creation of a database to record policies

A database of ELCI policies has been suggested by some stakeholders but others claim the cost would be prohibitive. Any set up and running costs could only realistically be met by the insurance industry and could increase premiums for business. Unrestricted access to the information stored in a database could create data protection and competition issues, therefore access would need to be regulated. It is also unclear whether a database would provide more comprehensive cover or simply duplicate the work of the ABI Code of Practice for tracing ELCI policies.

Recommendation

That the Department actions option ii) and repeals regulation 4 and amends the current published guidance⁵ with HSE and the Small Business Service (SBS) to ensure that businesses are aware of their remaining liability for claims.

⁵ <http://www.hse.gov.uk/pubns/hse40.pdf>

Regulation 5 (display of policy certificates)

The current regulation requires that the certificate is displayed at all business premises to enable inspection by enforcement authorities and employees. Regulation 5(2) sets out non-specific guidelines for the number, position and size/legibility of ELCI certificates without providing any guidance with regard to minimum standards. Businesses are also required to protect certificates from being defaced or damaged.

There is no provision in the regulation to allow businesses to make the information available electronically. Businesses with multiple sites have identified this as a considerable burden. Consideration should also be given to remote or home workers or those who carry out a majority of their duties outside the office environment. There is penalty of up to £1000 for failure to display and to provide a copy of a certificate to an inspector on request.

Options

- i. Requiring employers to make a copy available for inspection and allowing electronic display.

Allowing businesses to deal with this issue in a bespoke manner would remove a major part of the burden. Placing a copy of the ELCI certificate on an intranet/internet would provide significant administrative savings. Savings could also be made by removing the requirement to protect the certificate from damage. The information would remain readily accessible to employees and health and safety inspectors.

- ii. Regulation is repealed as business will, in the event of a claim, need to make copies available to claimants' solicitors

Some stakeholders believe that the display of certificates encourages compliance with the requirement to have ELCI. In addition stakeholders have claimed that the display provides assurance to employees and allows them easy access to the information in the event of a claim.

- iii. Retain the current regulation

This option does not provide any cost savings for business. Businesses with a number of sites have identified this regulation as burdensome and restrictive in its drafting.

Recommendation

That the Department actions option i) and allows businesses to deal with this in a bespoke manner. While we accept that small businesses may find the current arrangements the most cost effective this change would allow larger businesses to cut costs.

Request for Information

We have made every possible effort, given the data available, to ensure that our estimate of the admin burden reductions to business from the proposed changes to Regulation 5 is accurate. We would appreciate your help in ensuring that our estimate is robust. We are aware of the potential savings for businesses with multiple sites through electronic display and the savings to all businesses from the removal of the requirement to protect the certificate from damage.

We would be grateful if you could provide us with your estimate of the savings the proposed changes will bring and in doing so let us know the size of your business/workforce and the number of UK sites in which your business operates and therefore currently displays an ELCI certificate.

Conclusion

Stakeholders have raised concerns that any changes to the regulation would make it more difficult for future sufferers from long tail diseases to receive compensation and that the removal of this regulation will see less compliance with the requirement to have ELCI. However, while we accept those concerns are genuine we do not believe that the proposed changes weaken the protection for employees. When considering a response to the consultation it should be noted that:

- i. ELCI cover **will remain compulsory**.
- ii. The **liability for claims** made under ELCI policies remains and **will pass to the employer** if insurance information cannot be found. Therefore it is in their own interest that businesses maintain comprehensive records.
- iii. The **regulation requiring retention is not currently enforced** and those who support its retention admit that enforcing the regulation would not be practical or possible.
- iv. The **current certificate retention requirements can never assist claimants** tracing policies prior to 1999.
- v. The **insurance providers who are members of the ABI are maintaining ELCI records for 60 years** and therefore the regulation creates duplication. ABI members cover 95% of the ELCI market.
- vi. The **requirement to display the certificate will remain** but businesses will be able to deal with this requirement in the most cost effective manner.

The Six Consultation Criteria

1. Consult widely throughout the process, allowing a minimum of 12 weeks for written consultation at least once during the development of the policy.
2. Be clear about what your proposals are, who may be affected, what questions are being asked and the timescale for responses.
3. Ensure that your consultation is clear, concise and widely accessible.
4. Give feedback regarding the responses received and how the consultation process influenced the policy.
5. Monitor your department's effectiveness at consultation, including through the use of a designated consultation co-ordinator.
6. Ensure your consultation follows better regulation best practice, including carrying out a Regulatory Impact Assessment if appropriate.

If you have any comments, suggestions or complaints about the way in which this consultation exercise has been conducted please contact the Departmental Consultation Co-ordinator:

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LIST of abbreviations

ABI	Association of British Insurers
ABME	Admin Burdens Measurement Exercise
APIL	Association of Personal Injury Lawyers
BRE	Better Regulation Executive
DWP	Department for Work and Pensions
EEF	Engineering Employers Federation
ELCI	Employers' Liability Compulsory Insurance
FOIL	Forum of Insurance Lawyers
FSA	Financial Services Authority
FSB	Federation of Small Businesses
FSO	Financial Services Ombudsman
HSE	Health and Safety Executive
LA	Local Authorities
LMA	Lloyds Market Association
SBS	Small Business Service
TUC	Trades Union Congress

Stakeholders Interviewed as Part of the Review

Association of British Insurers

Association of Personal Injury Lawyers

Better Regulation Executive

BT Group PLC

Engineering Employers Federation

(With additional comments from
member businesses)

Rolls Royce PLC

Siemens IT Solutions and Services Ltd

Federation of Small Businesses

Health and Safety Executive

Lloyds Market Association

Trades Union Congress