

**A REVIEW OF CERTAIN PROVISIONS WITHIN THE
EMPLOYERS' LIABILITY (COMPULSORY INSURANCE)
REGULATIONS 1998**

THE GOVERNMENT RESPONSE

May 2008

DWP Department for
Work and Pensions

Introduction

On 25 June 2007 the Department for Work and Pensions launched a consultation seeking views on recommendations for changing the Employers' Liability (Compulsory Insurance) Regulations 1998. The Administrative Burdens Measurement Exercise (ABME) in 2005/6 identified the requirement to display employers' liability insurance certificates and subsequently retain the certificates for 40 years as a major burden that the Department places on business. The aim of the consultation was to seek views on how to reduce as far as possible administrative burden.

The requirement for most employers to insure against liability for injury or disease to their employees arising out of their employment 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.

When the consultation closed on 17 September 2007 the Department had received 28 responses. A list of those who contributed is attached at Annex A.

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

Regulation 4 (retention of policy 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.*

1. The consultation put forward the following options:

- DWP introduce a penalty for failure to keep policy certificates for 40 years;
- businesses are advised to keep records for their own benefit and the regulation is repealed;
- retain the current regulation; or
- the creation of a database to record policies.

2. The recommended option was to revoke regulation 4 and provide guidance to business reminding them that their potential liability for illness and injury at work does not end when the policy expires.

The Responses

3. The recommended option was seen by the TUC, Association of Personal Injury Lawyers and support groups for those with long-tail diseases as weakening the ability in the future to successfully trace historic employers' liability insurance policies.

4. Association of Personal Injury Lawyers, AXA, Asbestos Victims Support Groups' Forum UK, Clydeside Action on Asbestos, called for the regulation to be amended to include a penalty for non-compliance. The TUC and Communication Workers Union, while supporting the principle of an effective enforcement regime, accept that regular policing would not be practical or possible.

5. Association of Personal Injury Lawyers, John Pickering and Partners Solicitors, London Hazards Centre, TUC, Unite and University and College Union called for a database to record all Employers' Liability policies to assist in the tracing employers' liability insurance policies in the future. The Association of British Insurers considers the cost of a database to be prohibitive.

6. The Association of British Insurers are concerned that, rather than businesses maintaining records, there will be a greater reliance on the Employers' Liability Tracing Code. The Code was set up by the ABI and its members to act as a last resort for searches when all other avenues have been exhausted. The Association of British Insurers claim that the costs of a search under the Code are considerable and an increase in the numbers of searches could see costs passed on to policy holders.

7. The CBI, EEF and BT recognised that the current legislation does not achieve its intended aim of ensuring the preservation of records and that responsibility for maintaining records remains with companies.

8. The British Insurance Brokers' Association agreed that the regulation should be revoked and recommended to its members that they include with policy documents, a reminder of the need to retain documents.

Government Response to comments

9. At present Regulation 4(4) is not enforced in practice as the regulations carry no penalty. Establishing an effective penalty regime would require regular inspections from the enforcement authorities (Health and Safety Executive and Local Authorities). This would be a departure from the risk based approach currently taken and would require an increase in the number of inspections and have major cost implications for the enforcement agencies. The Government agrees with the assessment of the TUC and Communication Workers Union that effective enforcement would not be practical or possible.

10. The regulation only applies to policies held after 1 January 1999 and therefore tracing policies that pre-date the regulations will continue to rely on business and insurance provider records. The maintenance of historic records for companies that have ceased to trade is also a major obstacle to tracing historic policies. The regulation does not provide an effective solution for these issues and the Government does not believe that an effective regulatory solution could be found.

11. Estimates by the ABI of a database of all ELCI policies show the costs to be in their view prohibitive. Tracing of records by businesses and insurance providers can be expected to produce greatly improved success rates as the records move from paper to electronic formats. The Government is not convinced that a database would give significantly wider coverage than the current recording by businesses and insurance providers and supported by the ABI Code of Practice. Duplicating the electronic records and increasing the costs for business is counterproductive.

12. The Government accepts that an increase in the number of searches under the Employers' Liability Tracing Code could see costs passed onto policy holders. However, the Government believes that it would be unwise for business to fail to maintain their own records and rely on a third party to provide this information.

13. There are solid grounds for self-regulation here. Retaining ELCI policy information in paper or electronic form is good business practice. The failure to provide proof of cover would see any liability for claims fall directly on the employer and businesses should not ignore this risk. The Government believes that it is in the interests of all businesses to retain information relating to insurance policies for as long as claims can be made. Strongly worded guidance will ensure that business is aware of its continuing liability and encourage the retention of records to ensure that any future claims can be met.

Decision

14. The Government applies the Better Regulation principles to policy development and believes that it should only regulate where necessary. The current regulation carries no penalty for non-compliance and is therefore not enforced in practice. The Government is not convinced that effective enforcement is practical and the respondents did not put forward a compelling case to show that such a regime could be implemented. Retaining the current ineffective regime because an appropriate regulatory alternative has not been developed is not an acceptable solution.

15. The retention of records relating to insurance policies while potential liability for claims remains is good business practice. Businesses should not ignore the risks associated with future compensation claims being made for illness or injury in the work place. A regulatory regime that can overcome the inadequacy of the current regulations has not been recommended by stakeholders.

16. Regulation 4(4) will be replaced with guidance for business.

Regulation 5 (display of policy 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.*

17. The consultation put forward the following options:

- requiring employers to make a copy available for inspection and allowing electronic display;
- regulation is repealed as business will, in the event of a claim, need to make copies available to claimants' solicitors; or
- retain the current regulation.

18. The consultation recommended that the regulation be amended to require employers to make a copy available for inspection on request and allow this to be via electronic display. In addition it is proposed that the regulation remove references to being "reasonably protected from being defaced or damaged" and the references to the number, size and position of documents.

Responses

19. The TUC, Association of Personal Injury Lawyers and support groups for those with long-tail diseases expressed concern that allowing electronic display would weaken compliance providing less opportunity for employees to check that the certificate is current.

20. The TUC, Communication Workers Union and Unite questioned whether this is a burden on business.

21. The Association of British Insurers is concerned that employees would be less aware of who provided the insurance cover for their employer, slowing down the claims process.

22. The evidence provided by the Administrative Burdens Measurement Exercise and confirmed by the CBI, BT, IBM, Siemens and EEF shows that for companies with multiple sites, this is a considerable burden. BT confirmed that it currently displays certificates in about 2500 buildings in the UK.

23. IBM display employers' liability insurance certificates on an intranet site which allows staff to opportunity to check the policy is current. This also gives access to their staff working away from the office and to those subcontracted to other organisations. Posting the certificate on a wall is viewed by IBM as an unnecessary and costly duplication required to demonstrate compliance.

24. Health & Safety Executive have concerns that electronic display will increase the burden on inspectors as they will have to request access to the document.

Government Response to comments

25. The recommended change to the regulation retains the requirement to display the certificate but allows this to be done electronically. The Government is not convinced that this will provide less opportunity to check compliance.

26. The current regulation makes no provision for changes in the way information is provided and accessed. Many employees access internal information via company intranet sites and allowing businesses to display electronically would reflect these changes. Companies have indicated that they already display certificates electronically but are required to display physically also to comply with the regulation. This change would remove the duplication and administrative burden for companies. In addition this may provide greater access to staff working remotely or at home via computer. The Government recognises that there have been significant changes in the way employees access internal company information. Regulation should be flexible to adjust to these changes.

27. Compliance inspections are undertaken on a risk based approach, normally as part of health and safety inspections. Where companies have decided to display electronically inspectors would need to request sight of the certificate. HSE will therefore consider how it can accommodate the changes within its inspection procedures by looking at options for checking compliance that will not divert its front-line resource from inspection priorities and will minimise additional cost in time to its inspectors.

28. Removing the requirement to protect certificates from damage and making the regulations easier to understand will make compliance easier for all businesses. Posting a copy of the certificate on a notice board may remain the most cost effective option for small businesses. The Government believes

that the requirement to protect certificates from being defaced or damaged places an unnecessary cost on business.

Decision

29. An amended regulation that continues to require companies to display Employers' Liability certificates but allows this to be done electronically should not have a detrimental affect on access or compliance. Simplifying the regulation by removing the requirement to protect certificates from damage should further remove some compliance costs for all businesses.

30. Regulation 5(1) will be amended to allow display in an eye readable format as authorised by sections 722 and 723 of the Companies Act 1985. Regulation 5 (2) and (3) will be removed and regulation 5(4) will be amended to reflect the changes made.

Annex A

List of responding organisations

All-Party Parliamentary Group on Occupational Safety and Health

Asbestos Victims Support Groups' Forum UK

Association of British Insurers (ABI)

Association of Insurance and Risk Managers (AIRMIC)

Association of Personal Injury Lawyers (APIL)

AXA Insurance

Beachcroft LLP

British Insurance Brokers' Association (BIBA)

BT Group PLC

Clydeside Action on Asbestos

Communication Workers Union

Confederation of British Industry (CBI)

Department of Health, Social Services and Public Safety (NI)

EEF

Forum of Insurance Lawyers (FOIL)

Health & Safety Executive (HSE)

IBM United Kingdom Limited

John Pickering and Partners Solicitors

Liverpool Law Society

London Hazards Centre

Merseyside Asbestos Victims Support Group

National Federation of Roofing Contractors

Siemens IT Solutions and Services Ltd

Thompsons Solicitors

Trades Union Congress (TUC)

Unite (T&G Section)

Unite (The National Federation of Royal Mail and BT Pensioners
(Incorporating British Steel and Rolls Royce & Bentley Pensioners))

University and College Union