

ENTERPRISE AND REGULATORY REFORM ACT 2013

EXPLANATORY NOTES

COMMENTARY ON SECTIONS

Part 5: Reduction of Legislative Burdens

Miscellaneous

Civil liability for breach of health and safety duties

Summary and background

464. Professor Löfstedt's review *Reclaiming health and safety for all: An independent review of health and legislation* (November 2011) identified the potential unfairness that arises where health and safety at work regulations impose a strict liability on employers, making them legally responsible to pay compensation despite having done all that was reasonable to protect their employees. Professor Löfstedt recommended that regulatory provisions which impose strict liability should be reviewed. In its response to the review the Government recognised this unfairness and agreed to look at ways to redress the balance, in particular by preventing civil liability from attaching to a breach of such provisions.
465. The amendment to the Health and Safety at Work etc. Act 1974 ("HSWA 1974") reverses the present position on civil liability, with the effect, unless any exceptions apply, that it will only be possible to claim for compensation in relation to breaches of affected health and safety legislation where it can be proved that the duty holder (usually the employer) has been negligent. This means that in future, for all relevant claims, duty-holders will only have to defend themselves against negligence.

Section 69: Civil liability for breach of health and safety duties

466. **Section 69** amends the HSWA 1974 in order to provide that there should be no civil right of action for breach of a duty imposed by certain health and safety legislation, other than where such a right is specifically provided for.
467. Previously, section 47(2) of the HSWA 1974 provided a right of action for breach of a duty contained in a health and safety regulation (a regulation made under section 15 of the HSWA 1974) if that breach caused damage. The section contained a power to make exceptions to this rule in the regulations that imposed the duty.
468. In addition, section 47(1)(b) provided that Part 1 of the HSWA 1974 did not affect whether or not a duty in one of the "existing statutory provisions" gave rise to a right of action. The "existing statutory provisions" are statutes listed in Schedule 1 to the HSWA 1974 that existed before the HSWA 1974 came into force (for example the Factories Act 1961) and secondary legislation made under those statutes. The effect of this was that if a right of action for breach of statutory duty existed (or had been excluded) under one of these statutes the position was not altered after the HSWA 1974 was enacted.

*These notes refer to the Enterprise and Regulatory Reform Act
2013 (c.24) which received Royal Assent on 25 April 2013*

469. *Subsections (2) and (3)* taken together change the position by repealing section 47(1)(b), replacing section 47(2) and inserting sections 47(2A) and (2B).
470. New section 47(2) provides that there is no right of action for a breach of a health and safety regulation unless the regulations expressly provide for this. The provision applies to health and safety regulations (i.e. those made under section 15 of the HSWA 1974) and includes regulations which are made in reliance on other powers in addition to section 15 of the HSWA 1974, for example regulations that also rely on section 2(2) of the European Communities Act 1972.
471. The effect of the removal of section 47(1)(b) and the insertion of section 47(2A) is to remove any pre-existing rights of action accrued under the “existing statutory provisions” and exclude any claims for breach of statutory duty under those statutes. Regulations made under section 47(2A) can provide for an exception to this rule, and there is a power to modify the existing statutory provisions in order to create such an exception.
472. Previously section 47(3) of the HSWA 1974 enabled regulations to include a defence to an action and section 47(5) provided that any terms of an agreement which purported to exclude or restrict liability for a breach of duty would have no effect unless a regulation provided to the contrary. As there is no automatic right of action these provisions are no longer needed but a power has been provided so that similar provisions can be included in regulations that create any exceptions to the general rule. Accordingly section 47(2B)(a) provides that where exceptions have been made and a right of action created under either section 47(2) or section 47(2A) the regulations that create those exceptions can also provide the duty holder with a defence or defences to the action. Section 47(2B)(b) gives a power to include a provision in the regulations that would make agreements trying to exclude liability for breach of the duty ineffective.
473. *Subsection (8)* provides for the amendments of section 47 to have effect in relation to matters outside Great Britain if an Order in Council is in force (under section 84(3) of the HSWA 1974) that applies section 47 to matters (which means persons, premises, work, articles, substances or other matters) outside Great Britain.
474. The subject matter of the HSWA 1974 is reserved to the UK government but there are minor exceptions relating to fire safety. *Subsection (9)* excludes the application of any of the amendments to section 47 to a breach of duty which could be imposed in legislation made by the Scottish Parliament.
475. The effect of *subsection (10)* is that the relevant date for determining whether a claim can be brought is the date on which the breach took place, not the date on which the action is brought. Therefore as long as the alleged breach of statutory duty takes place before the amendments come into force a claim can still be brought, even if it is after the commencement of the amendments, subject to the usual time limits. For example, in an illness with a long latency period, such as mesothelioma (asbestos related cancer) a claim could still be brought in the future, where the breach of duty that led to the exposure to asbestos that caused the illness is shown to have taken place before the new provisions had come into force.
476. Other subsections make minor amendments consequent on the main changes set out above.