



RISK & SAFETY PLUS
The science of compliance

DEFENSIBILITY HEALTH CHECK

INTRODUCTION

Risk and Safety Plus (RS+) enables organisations that care about the wellbeing of their staff to proactively manage their risk and safety obligations in a way that supports their operational processes. For the purposes of this health check, the term defensibility, simply means that an organisation has solid and reliable systems and procedures in place, which are legally capable of being defended, in the event of external scrutiny, especially in relation to enforcement action and / or litigation.

Accordingly, these questions are designed to probe an organisation's resilience, in terms of occupational risk compliance and its ability to defend criminal prosecution(s) and / or civil claim(s), resulting from operational failures (e.g. unsafe conditions and / or activities, serious untoward and / or near miss incidents, accidents, occupational illness, discrimination and unfair dismissal etc.).

It really matters because it is also about the management of risk, downward, so that there are fewer and / or less severe incidents, bearing in mind both criminal penalties and compensation are increasing, significantly. In fact, the latest sentencing guidelines, published by Sentencing Council on 1st February 2016: <https://www.sentencingcouncil.org.uk/wp-content/uploads/HS-offences-definitive-guideline-FINAL-web1.pdf> have dramatically raised the bar in criminal cases and since 2013. The civil claims procedures, including those for employment tribunals, have also been toughened, in relation to both reduced response timescales and disclosure of information. The impact of both criminal and civil changes will be to require organisations to improve operational procedures, in readiness to provide relevant documentation that will support the defence of any claim, much more quickly.

Defensibility starts before any incident actually occurs, as it is normally too late once it has taken place. Accordingly, although this *'preliminary'* self-administered health check will help to identify general areas of weakness, a comprehensive defensibility review is recommended, as it will specifically identify the weak links in operational practices. It will also suggest changes that may be needed to improve policies and their supporting systems, procedures and practices. Obviously, good risk management procedures will provide the foundation of a solid compliance regime but the value of a comprehensive defensibility review is that it relates directly to your organisation's claims history and looks forward, to see why things might fail, in the future.

Recommendations are specifically tailored to an organisations size, needs and complexity.

Enforcement action (i.e. prosecution) and civil litigation (i.e. claim) is seldom defensible without supporting documentary evidence, be that the accident report, incident investigation findings, risk assessments, training records, maintenance logs, equipment registers etc.



HOW TO USE THIS HEALTH CHECK

Preferably, someone in the organisation with responsibility for risk management should complete this health check, with the documentation needed to defend any prosecution or claim, close to hand. In many instances, this will be the Principal or Senior Executive, acting as the “Responsible Person”, who is ultimately liable, on behalf of the Senior Management Team (SMT), in relation to all criminal and / or civil actions.

As you are completing the health check, you are encouraged to think wider than obvious health and safety risks (e.g. disease claims present their own unique challenges) and the ability to defend civil claims, especially, over time. These may occur many years down the line, when processes have been changed, sites have closed and members of staff have moved on. Indeed, history tells us that it may be the evidence gathered or actions taken (or missed) at the time of the incident that determine the outcome(s) of future prosecutions and / or claims!

If possible, a response should be provided for each item in the health check. If the response to any of the questions is negative, unknown or unsure, you should seriously consider arranging for a comprehensive review of your defensibility so that you can develop and implement a robust defensibility strategy for those particular areas and to get independent verification that all others areas are sufficiently defensible.

Question:	Explanation:	Response:
<p>Are the Principal(s) and / or SMT members within the organisation (i.e. the ‘guiding’ mind) aware that they are both individually and collectively (e.g. Board of Directors, Senior Partners, Board of Trustees etc.), accountable for all governance and risk management failures?</p>	<p>Statutory duties exist to ensure that the Principal(s) / SMT fully understand the nature of the risks affecting the organisation and implement “effective” controls, including strategic oversight, of any / all risk management programmes.</p> <p>Note: Failures can arise with: People; Processes, Premises and place (environment); Plant and Equipment (technology).</p>	
<p>Have all potential organisational risks, including financial risks, been anticipated, over the short, medium and long terms, together with associated costs of failure or over-provision and responsibility levels assigned?</p> <p>Note: Risk management systems (strategic and tactical) are of little value if not built into the organisational processes.</p>	<p>Failure to understand and implement both strategic and tactical risk management programmes leads to rushed decision making and inefficient responses that can be extremely costly, in terms of harm and financial consequences, including reputational issues.</p> <p>Note: Leadership dependency can also lead to organisational harm if the leader is unexpectedly absent.</p>	



RISK & SAFETY PLUS

The science of compliance

Question:	Explanation:	Response:
<p>Does the organisation have a recruitment and selection system that ensures that the right people are in the right positions, doing the right things? (e.g. Office Managers are often made 'Health and Safety' Managers with no training of health and safety).</p>	<p>Comprehensive HR systems can be installed that tick all of the right boxes, yet things still go wrong, involving people, even at the highest level.</p> <p><i>Note: The 'Peter Principle' suggests, "individuals rise to the level of their incompetence". Selection of a candidate is frequently based on their current performance rather than the abilities relevant to the intended role.</i></p>	
<p>Does the organisation have a written policy (or policies), in relation to risk management, generally (i.e. safety, health, environmental and fire) (SHEF), together with any relating to employment issues, which contain: a signed and dated statement(s) of intent, organisational responsibilities and operational arrangements, to ensure that the policy statements are fulfilled.</p>	<p>It is an 'absolute' legal requirement for all employers to have in place a "regularly reviewed" Health and Safety (H&S) Policy and where an organisation has 5 or more employees, this must be in writing.</p> <p><i>Note: For the purpose of defensibility, however, written SHEF and HR policies are highly recommended, regardless of the type, size and nature of the organisation.</i></p>	
<p>Does the organisation have access to a "competent advisor", either within the organisation or externally and are there a sufficient number of "competent persons" appointed to ensure compliance with all appropriate H&S legislation and regulations, as well as "competent advice" for fire and environmental matters and HR?</p>	<p>This is also an 'absolute' legal requirement, in relation to H&S and although preference is given to in-house provision, external consultants can also provide this service.</p> <p><i>Note: Competence incorporates Skill, Knowledge and Experience (SKE), although appropriate personal attributes (e.g. conscientious and methodical etc.) are also essential.</i></p>	
<p>Have "suitable and sufficient" assessments of risk been undertaken, in all situations where "significant" hazards (i.e. the potential to cause harm) present a generally "foreseeable" risk of harm (e.g. fire, electricity, hazardous substances, working at height or over water etc.), to an "average person" and where appropriate, method statements relating your activities both on your premises and off-site?</p>	<p>This is also a legal requirement and will be expected, in all cases, to be "specific" to the relevant premises, person, process, plant and equipment.</p> <p><i>Note: For the purpose of defensibility, although not a legal requirement, method statements provide a documented process by which tasks are broken down and controlled, in a systematic way.</i></p>	



RISK & SAFETY PLUS

The science of compliance

Question:	Explanation:	Response:
<p>Are “safe systems of work” fully documented and communicated effectively, to all those affected, once steps have been taken to eliminate, reduce or control the risks identified by the assessments of risk?</p> <p>Note: This includes arrangements for monitoring and supervision, including enforcement of organisational rules.</p>	<p>Again, this is a legal requirement and “unsafe working practices” is a phrase that commonly appears in litigation and usually difficult to defend.</p> <p>Note: Allegations of “custom and practice” or a practice being “condoned by weak management” indicate a poor organisational culture.</p>	
<p>Can the organisation demonstrate that “appropriate” personal protective equipment (PPE) has been selected, provided and most importantly, used?</p> <p>Note: PPE is a “last resort” measure but where needed, its use must be enforced.</p>	<p>This should be based on the findings of a risk assessment and the selection and use is generally a “mandatory” legal requirement.</p> <p>Note: It is a supervisory issue, to both communicate the need for PPE and to take disciplinary action, where individuals neglect or refuse to wear PPE provided.</p>	
<p>Does the organisation support “proper” work procedures by providing and recording “appropriate” staff training?</p>	<p>Phrases that commonly appear in respect of training include, amongst others, “failure to provide proper training”, which is, too often, generic, not competence-based and not refreshed, so of little value in defending against legal action.</p> <p>Note: It is vital that staff are properly inducted and provided with task-specific training that is periodically refreshed and “competence” should be validated and documented.</p>	
<p>Are records of individual “competence”, performance, discipline and corrective behaviour(s), in relation to unacceptable acts and omissions (e.g. harassment and bullying etc.) maintained, to prove that appropriate (i.e. legal) interventions have been made, when appropriate / necessary?</p>	<p>Making the “wrong call” or allowing inappropriate behaviour to go unchecked can prove prohibitively expensive, with the average award against employers standing, currently, at over £12,000, with an additional cost estimate of £8,500 per incident, in case management time etc.</p>	



RISK & SAFETY PLUS

The science of compliance

Question:	Explanation:	Response:
<p>Are records of pre-employment medical information and / or periodical medicals maintained, to confirm an individual's "capability" and / or to identify susceptibilities that require workplace adjustments?</p> <p>Note: This also protects employers from those persons, with pre-existing conditions, who might attempt to lay blame for them on post-engagement workplace incidents.</p>	<p>Lack of appropriate records would probably support allegations that an individual was not properly assessed, in terms of their fitness to work, or that the work allocated compounded an existing medical condition.</p> <p>Note: Supervisors also need to be made aware of any individual's lack of capability or susceptibility.</p>	
<p>Are absence management processes used, to ensure that members of staff returning from periods of sickness absence are returned to their pre-absent state, as soon as possible?</p>	<p>There is a legal requirement to provide relevant occupational health services and rehabilitate returning workers, in certain cases (e.g. work-related injuries and ill-health). In addition, claims often follow long spells of sickness absence, especially following a workplace incident.</p> <p>Note: Where individuals fail to engage with rehabilitation initiatives they could be seen as not "mitigating" their loss.</p>	
<p>Does the organisation have a culture of reporting all unplanned and / or unexpected events (e.g. near miss / hit etc.) and following up with a report and learning from failures?</p> <p>Note: This is not just referring to personal injury (PI) accidents (i.e. chance events) but all untoward incidents (i.e. intentional events), such as violence and aggression or arson etc.</p>	<p>Contractual obligations should be in place for both members of staff (contract of employment) and / or contractors (contract for services) to report all workplace accidents and incidents, without avoidable delay?</p>	
<p>Does the organisation undertake robust accident and incident investigation (A&I) processes, based on the severity of the harm (or potential harm) and / or the potential consequences (e.g. civil claim or criminal prosecution), that identify the "root cause" of all incidents, with a view to preventing any reoccurrence and implementing improvements?</p>	<p>The legal duty to investigate workplace incidents is contained in Social Security Regulations (i.e. industrial injury benefits) and the Management Regulations, which requires a "review of the relevant risk assessment" when circumstances change or the risk assessment is no longer considered "suitable and sufficient" to "prevent a reoccurrence" of the incident.</p>	



RISK & SAFETY PLUS

The science of compliance

Question:	Explanation:	Response:
<p>Are all Principals, Managers and Supervisors aware of the reporting and notification requirements for certain types of the more serious incidents?</p>	<p>The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations (RIDDOR) specify certain incident types that must be notified to the HSE.</p> <p><i>Note: There is no statutory requirement, under these regulations to investigate incidents, as they are designed purely to collect statistics, although the enforcement authorities (HSE and / or Environmental Health) are notified.</i></p>	
<p>Are “appropriate” records maintained of all incidents, in addition to the statutory ‘accident book’, or online reporting form(s) etc., particularly within the preceding three years?</p> <p><i>Note: In more serious cases, the Accident Book / Report Form will not be enough, with additional evidence (e.g. witness statements, training and maintenance records etc.) needed, which will also need to be referred to in the A&I report.</i></p>	<p>There is a legal requirement for employees to notify their employer, in writing, of any injury that may become subject of a benefit payment, which is normally in the form of an accident book (BI 510).</p> <p><i>Note: All records, including electronic records, containing personal / confidential information must also be kept in accordance with the requirements of the Data Protection Act.</i></p>	
<p>Are contractors and / or freelance staff required to maintain appropriate SHEF procedures and are they properly supervised?</p>	<p>Precedent (i.e. decided case law) states that, with very few exceptions, employers have “vicarious liability” for all acts and omissions of employees, whilst they are at work, whether authorised or not.</p> <p><i>Note: The organisation will also be held legally responsible, in most circumstances, for the acts and omissions of any contractors working on its behalf.</i></p>	
<p>Do you know the difference between a criminal prosecution and a civil claim?</p>	<p>Most organisations are unaware of the risk of “double-barrelled” actions, involving both criminal and civil actions.</p> <p><i>Note: The burden of proof is different in each case but each need to be defended on the basis that the organisation must prove that all “reasonable” control measures were taken to prevent harm.</i></p>	



RISK & SAFETY PLUS
The science of compliance

NEXT STEPS

Now that you have completed the Defensibility Health Check, review your responses and pay particular attention to any of the questions where you are not fully confident that area could be defended in the event of external scrutiny, especially in relation to external enforcement and / or litigation. In some of the areas the actions required may be completely obvious. In others you may want to more information and we would be happy to help.

One issue we regularly find is that organisations think they have all the bases covered but find out, when it is too late, that it is not of a sufficiently high standard, when looked at "*under the microscope*".

RS+ has a wealth of experience in this area and offers a range of practical and simple solutions to assist and support organisations, large and small, in the private, public or third sectors. If you have any doubts about your ability to defend your implementation of SHEF or HR compliance then we recommend our comprehensive Defensibility Review, which will provide you with a complete written road map of all the things you need to do to get things into shape.

The benefits of undertaking a comprehensive Defensibility Review include:

- 📦 Identification of improvements in documentation and procedures to reduce system failures;
- 📦 Improved ability to argue a complete defence or contributory negligence;
- 📦 Reduction in fines or compensation etc. and hence increased insurance premiums;
- 📦 Protection against 'soft' claims.
- 📦 Reduction in the cost of investigation and response times;

Call us on 0845 430 9461 or email info@riskandsafetyplus.com for more information about the **comprehensive Defensibility Review** or simply to discuss the implications of your health check findings with one of our experienced advisors.