

let's talk shop retail claims update

Temperature tantrums



Can it be too hot or too cold to work?

Whether it is on the shop floor, in the warehouse or in the office you will often (particularly at this time of year) hear someone say that it is too hot, or too cold, to work.

So can it be?

The Workplace (Health, Safety and Welfare) Regulations 1992 are a good place to start for most aspects of the working environment. Regulation 7 for instance deals specifically with the temperature in indoor workplaces and states that "During working hours, the temperature in all work places inside buildings shall be reasonable".

What is 'reasonable'?

Much of this turns on the workplace environment and the broad nature of the employee's responsibilities. Limited guidance is given as to what are permissible working temperatures. The Health and Safety Executive has suggested that "an acceptable zone of thermal comfort for most people in the UK lies roughly between 13°C (56°F) and 30°C (86°F) with acceptable temperatures for more strenuous work activities concentrated towards the bottom end of the range and more sedentary activities towards the higher."

What if an employee or employees are complaining about being too hot or too cold?

A risk assessment should be performed if the temperatures fall below 13°C (56°F), or rise above 30°C (86°F) for sustained periods of time and if:

- >10% of employees complain in air-conditioned office(s);
- >15% of employees complain in naturally ventilated office(s); and/or
- >20% of employees complain in a warehouse, in a factory or other indoor environments that do not benefit from air-conditioning.

You might be able to avoid performing a detailed risk assessment if you can find an easy solution to the problem e.g. closing windows in air-conditioned offices, pulling down blinds etc.

What should you do?

During spells of hot or cold weather, it would be prudent to review whether there has been an increase in reported accidents, an increase in absentee rates or complaints, or if more than 20% of employees are complaining of any other symptoms of thermal discomfort.

It may be appropriate to consider re-scheduling tasks and even shifts to when the temperature is more clement.

You can reduce employees' metabolic rates by introducing lifting aids, changing uniforms to suit the working environment or providing easily accessible heaters/coolers or air-conditioning.

Any review you undertake should be recorded and reviewed at appropriate intervals.

In summary

Our five recommended steps to workplace temperature risk assessments are:

1. Identify the regions/places at risk
2. Decide who is at risk
3. Evaluate the risk
4. Record your findings
5. Review your assessment

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Success stories

- We saved one retailer over £5,000,000 in claim settlements against optimum reserve
- We have also saved a high street department store over £500,000 in claimant solicitor costs this year alone
- Following a project to review training procedures we have increased employers' liability denial rates by 12% for an online clothing retailer
- We have identified 15 suspected fraudulent claims for a home delivery retailer, which have been repudiated, saving in excess of £250,000

Top overall client savings of the quarter

- 1 Supermarket chain 1: £5,406,457
- 2 Clothing retailer: £1,903,786
- 3 Supermarket chain 2: £1,214,560
- 4 Online clothing retailer: £421,386

WINNER

National law firm of the year
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Welcome

It is with real pleasure that we bring to you the first edition of our seasonal retail claims update.

We hope you find it of interest, and the content suitably diverse but of relevance to you, your business and the sector we all work within.

As many of you will already know, we are very passionate about the quality and value of our services and the contribution we can make to our clients. We want to help protect your business and brand by supporting your risk management programme and helping reduce indemnity spend; if you would like us to come to talk to you then please let us know.

Best wishes

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Stop press

We are proud to announce Hill Dickinson was awarded 'National law firm of the year' at the prestigious Legal Business Awards in February.

Our thanks go to our clients for their continued support as we continue to strive to develop our business for the benefit of our clients.

The complete retail solution

As a single-source legal services provider to the retail sector, claims services is just part of our complete retail solution, which includes:

- Claims
- Corporate
- Employment
- Logistics and supply chain
- Property
- Regulatory

Letters to the editors

We would welcome any comments readers may have on the articles in this newsletter, or on any related topic, and would be happy to publish suitable commentary in a subsequent edition.

Please contact our editor:

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Fit note not sick note

As the main feature of the new 'Fit for Work' Regulations introduced on 6 April 2010, a doctor must now issue a 'may be fit for work' statement rather than just simply 'not fit to work'.

This certificate will suggest any adjustments to help the employee back to work and provide advice about the employee's condition. Employers do not have to implement the suggestions but if they are unable to make the recommended changes to enable the employee to return to work, the employee is to be considered 'not fit for work' (with the usual sick pay arrangement then kicking in).

The advice on the statement is not binding and you must ensure it is consistent with your own safety guidelines.

You need to ensure that the duties do not exceed those stated in the certificate and also monitor the same. In addition it may be necessary to conduct a new risk assessment and carry out training if there is a change in circumstances for new duties, reduced hours or new equipment, and ensure that your records are in accordance with the Health and Safety Offences Act 2008.

If you can offer the adaptations and the claimant disagrees and does not wish to return to work you will need to consider consulting occupational health and HR.

Interestingly, if an employee wants to return to work before the end of the statement (stating they are not fit for work) they can do so and do not need to be signed as 'fit for work' - so long as both the employee and employer consider it is appropriate.

As this is only a recent change there is no case law with authoritative comment upon a situation where the claimant's GP considered he 'may be fit for work' but the medico-legal expert in the claim considered that they could not return to work.

In this situation we would expect to have to question the expert on why they reach a different conclusion to that of the GP.

The claimant would be able to claim loss of earnings and it would again be for the expert in the case to comment upon whether the time off work was reasonable or not.

Points to consider:

- Do your sickness policies need to be reviewed?
- Does your occupational sick pay scheme need to be reviewed?
- Does your HR department require training to deal with 'fit notes'?
- Do you need to carry out further risk assessments and/or training?

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The Jackson Report

In January 2010 Sir Rupert Jackson published his report on civil costs after undertaking an enquiry to examine and deal with escalating legal fees whilst maintaining access to justice. His report detailed a number of significant proposals that, if introduced, would reduce legal costs.

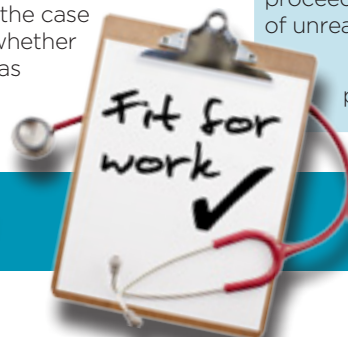
We remain confident that some reform will come under the new Government; there is still the will to complete the reforms, or certainly the main proposals, particularly in light of the £325 million cut from the Ministry of Justice budget.

The Government has stated it will consult this autumn on implementing the recommendations made by Jackson, particularly regarding the reform of conditional fee agreements which "should lead to significant costs savings. The Government is therefore taking these proposals forward as a matter of priority."

The Government also confirmed that work continues on other proposed changes such as fixed costs in the fast track and regarding referral fees. A number of pilot schemes are also being run in various courts to test costs management powers.

Claimants' costs represent the significant liability in the majority of the claims presented, particularly public liability claims (typically 40% of the outlay and in smaller cases more than the damages themselves). Therefore, any reform that will help restore some parity with defendants costs will no doubt be welcome news for retailers, who are so often defendants in the proceedings and at the receiving end of unrealistic claims for costs.

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WARNING

Don't forget the packaging!

The rising demand for home delivery services brings with it the risk of increased claims from consumers due to issues with the packaging of the product, not just the product itself.

A product's packaging falls within the remit of the General Product Safety Regulations 2005, creating a general duty on producers and distributors to comply with the general safety requirement - not to place a product on the market unless it is a "safe product".

An additional obligation is to supply consumers with relevant information to enable them to assess the risks inherent with the product and applies where the risks are not immediately obvious.

Whilst packaging is normally seen in the context of being tins, boxes etc, the definition of packaging also includes plastic carrier bags used to deliver groceries to the consumer. This was confirmed by the European Court of Justice in the case of [Plato Plastik Robert Frank GmbH -v- Caropack Handelsgesellschaft mbH](#).

Although retailers have moved away from using carrier bags for single items to a more sensible method whereby fewer bags are used, injuries have been caused to consumers lifting heavy bags. The regulations specifically refer to the need to take into account the consumer's

risk when using the product; an individual bag may be too heavy for an elderly person, but not for a younger recipient.

In many cases groceries are delivered in carrier bags within crates or boxes. To reduce the risk of injury and resultant claims, a clear warning should be given of the risks of lifting individual items and bags out of the container. Without such a warning, the supplier is at risk of a potential prosecution for breach of the regulations and a product liability claim should an injury be caused to the customer when lifting the goods supplied.

Suggestions

- Where bagged groceries or produce are delivered in a box, a warning label should be attached stressing that care should be taken when lifting individual bags out of the box
- Thought should be given to the goods' placement - somewhere easy for the recipient to unpack the goods (although not at the risk of putting the employee's safety at risk)
- Think about the recipient and how to flag up deliveries where extra care should be taken

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Ministry of Justice Reforms - three months on

After a lengthy planning process, the Ministry of Justice announced in September 2009, the imminent introduction of reforms to streamline the compensation system for low value road traffic accident (RTA) personal injury claims. These proposals included the introduction of an RTA online portal to accelerate the claims settlement process and assist both claimants and defendants in dealing with claims within the appropriate timescales.

The portal was eventually launched on 30 April 2010 and was plagued with problems as users struggled to gain access to the site. Many of our clients only succeeded in getting full access in late June. However, despite these challenges, we have been able to process 91% of cases

without them exiting the system.

Tim Wallis, independent chairman of the RTA portal project steering group, admitted that "the level of problems was not forecast to be of this volume" and conceded that the portal implementation had been "a bumpy ride".

While the new process is designed to streamline claims handling and reduce costs, we have not yet seen this translate into real-world savings. We predict this situation should improve, however, as clients, claims handlers and insurers become more familiar with the new rules and portal use becomes universal; in six months time we should know a whole lot more...

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Top retail results of the quarter

Fraudster tripped up

The claimant, a delivery driver, alleged he tripped over a defective kerb. We obtained covert surveillance, expert (orthopaedic and psychiatric) evidence and amended to plead conscious exaggeration and/or fraud. The claimant discontinued, saving the client in excess of £400,000. The claimant has been ordered to pay our costs in full and with punitive interest applied at 18%. The client is intending to publicise the result internally to deter future opportunistic claims.

Crushing defeat

The claimant was pulling a roll cage through a door into a walk-in freezer which was allegedly "jam-packed". As a result of the limited room, the claimant's left knee was crushed between the cage that he was pulling and the one already positioned in the freezer. Liability was conceded and the claim presented with potential damages in excess of £500,000. At trial and after a robust defence and service of surveillance footage, the judge found that the claimant had only suffered a minor injury and had grossly exaggerated his symptoms for the purposes of gaining a pecuniary advantage. The claimant was awarded £500 in damages and our client was awarded their costs in full.

Frozen out

In this noise-induced hearing loss claim staff were positioned on a counter located close to refrigeration units. It was argued that the units were excessively noisy and caused partial deafness. A full repudiation was achieved following detailed analysis of the work area, systems of work and most importantly discreet medical causation issues. The claimant discontinued and full costs recovery followed.

Cost-cutting bonanza

Knowing how popular claimants' solicitors costs are we thought we would report a few good results to prove that it doesn't always work in favour of the claimant solicitors and ATE providers. In two recent matters we successfully reduced costs from £52,000 to £28,000 (a 46% reduction) and from £21,500 to £8,000 (a 63% reduction). On a separate front we have also recovered our client's full outlay with the use of collective discounted fee agreements recovering £12,500 in a fatality and the subsequent recovery case and £21,500 in an assault claim.



Great expectations

Contrary to what some might think, there is no general obligation on an employer to carry out a risk assessment on a pregnant worker.

A recent judgment in the Employment Appeal Tribunal held that the obligation to carry out a risk assessment occurs when the following pre-conditions are met:

- the employee notifies the employer that she is pregnant in writing;
- the work is of a kind which could involve a risk of harm or danger to the health and safety of a new expectant mother or that of the baby; or
- the risk to the mother or baby arises from either processes, working conditions or physical biological chemical agents in the workplace.

Even so, it might still be prudent for employers to perform a risk assessment although only when it is reasonably practicable to do so. Careful consideration should be given to this as by doing so strays into the very dangerous territory of being required to assess a whole host of other 'risks' - which is another article in itself! Contact me if you have any queries about these wider risks.

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Did you know?

The retail industry employs over 2.9 million people as at the end of December 2009. This equates to 11% of the total UK workforce.

9% of all VAT registered businesses in the UK are retailers.

Card fraud losses were down 23% to £232.8 million in the first half of 2009 (compared to the same period in the previous year).

In excess of £10 million each day is paid in settlement of claims. A significant proportion of this outlay is met by retailers.

In June, hot weather and a boost in spending from the World Cup combined to give Britain's retailers their strongest month of sales growth since the pre-crash days of 2007.

Basket case - all systems go

His Honour Judge (HHJ) Walton, the designated circuit judge in the Newcastle County Court, has recently given a very helpful and favourable judgment for retailers in the case of Hinds -v- Iceland Stores Limited.

The claimant fell over a basket that had been left on the floor near tills located at the defendant's store. The claimant alleged that the defendant had no system of inspection in place (pursuant to Ward -v- Tesco) and that the basket should not have been present on the floor.

At first instance, the defendant lost but on appeal HHJ Walton found that the defendant had a good system in place and that this was supported by the defendant's witness evidence that the basket could only have been there for a short space of time. Indeed, it may well have been inadvertently placed there by another customer.

The importance of this judgment is that it found that no reasonable system could have picked up the hazard in time, emphasising the fundamental requirement to record properly all systems-related activity. It is a timely reminder for retailers about the importance of every employee working towards a well-defined, fully documented and understood system which is appropriately supervised.

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Coming up in the next edition...

- **Q&A session with a leading insurance and risk manager**
- **MOJ at six months**
- **Christmas specials**
- **Plus much more...**

If you would like to know more about our retail claims services, or any other services we provide, then please visit our website or contact:

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