

Michael Appleby explains what happens when a company and/or one of its employees is invited to an interview under caution after an offence has been committed

A word of caution

HSE INTERVIEWS

If the HSE believes an individual or a company has committed an offence under health and safety legislation, it will invite the suspect to an interview under caution. This is an interview conducted pursuant to the provisions of the Police and Criminal Evidence Act 1984 and is often referred to as a PACE interview.

In the case of a company, it will be interviewed through a company representative. The representative will be someone senior in the company and must be authorised by the company to be interviewed as its representative.

PACE interviews are usually tape-recorded. At the start of the interview the HSE inspector will caution the suspect by saying: "You do not have to say anything, but it may harm your defence if you do not mention when questioned something which you later rely on in court. Anything you do say may be given in evidence."

It is important when a company representative is interviewed that it is made clear the caution is being given in respect of the company. Complications arise where the HSE suspects the company representative as an individual, as well as the company, of committing offences.

In this situation the inspector should follow the guidance given in the HSE's enforcement guide, which can be viewed on its website (www.hse.gov.uk/enforce/enforcementguide/investigation/witness/questioning.htm). The guide says that in these circumstances, the inspector should invite the company to put forward another representative for interview. If this is not possible (e.g. because the company is so small, and there is no one else who could be interviewed on the company's behalf) then two interviews should be conducted: one for the company and one for the individual.

The guide observes that where one interview is conducted and the individual is asked questions both on his/her behalf and on behalf of the company, it will be impossible to identify which answers are admissible



Illustration by Arthur Phillips

against each. In those circumstances the guide accepts "...the entire interview is likely to be inadmissible in any later court proceedings".

If the suspect fails to put forward something which is later relied upon in court, then section 34 of the Criminal Justice and Public Order Act 1994 provides that an adverse inference may be drawn at trial from this silence. However, a conviction cannot be based upon an adverse inference alone.

Section 34 only applies where a PACE interview takes place, so an inference cannot be drawn where a defendant declines an invitation to attend an interview under caution.

This is an important difference between an interview by the police and an interview by a HSE inspector under caution: the police have the power to arrest a suspect and thus require a PACE interview to take place, whereas a HSE inspector does not have the power of arrest and so cannot compel someone to attend an interview under caution.

Despite this, companies often wish to attend interviews under caution

because they believe it is the 'right thing to do'. There are also other considerations.

Many of the health and safety regulations impose strict liability upon companies, i.e. the prosecution only needs to prove a breach of the regulation for a conviction, not that the company was actually to blame for the breach occurring. For a conviction under sections 2 and 3 of the Health and Safety at Work, etc. Act 1974, once the prosecution has proved there has been an exposure to risk from the company's business then it is for the company to prove it did all that was reasonably practicable to avoid this exposure. Therefore, a company may wish to attend a PACE interview to put forward its mitigation at the earliest opportunity.

However, where liability is not clear cut, which is often the position in cases against individuals, strong consideration must be given as to whether it is in the best interests of the suspect to attend the interview under caution. It may be that without the interview the HSE will not have sufficient evidence to prosecute. ■