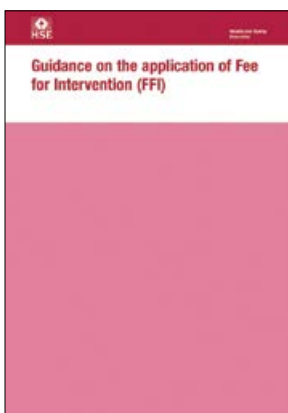


Guidance on the application of Fee for Intervention (FFI)



Fee for Intervention (FFI) is effective from 1 October 2012, under regulations 23 to 25 of the Health and Safety (Fees) Regulations 2012. These Regulations put a duty on HSE to recover its costs for carrying out its regulatory functions from those found to be in material breach of health and safety law.

This will shift some of the cost of health and safety regulation from the public purse to businesses and organisations that break health and safety laws.

This guidance will help businesses and organisations to understand what FFI means for them and how it fits with HSE's existing approach to enforcement. It sets out the general principles and approach of the FFI scheme.

This guidance includes examples of material breaches but does not cover every scenario where FFI might apply. Inspectors will apply this guidance and their enforcement decisions will be made in accordance with the principles of HSE's existing enforcement decision-making frameworks – the Enforcement Management Model (EMM) and the Enforcement Policy Statement (EPS). It also explains the process for handling queries and disputed invoices.

This guidance was first published in June 2012 in line with the Department for Business Innovation and Skills *Code of Practice on guidance on Regulation 2009* (www.bis.gov.uk/files/file53268.pdf) which states that guidance on regulation should be published at least 12 weeks in advance of the Regulations coming into effect. The present version, published in September 2012, is a corrected version of the 1st edition approved by the Executive on 11 June 2012. The corrections are not substantial but have been made to help businesses better understand FFI and to more accurately describe the actual timing of HSE invoicing periods.

The corrections made in the guidance are, for ease of reference, also set out below:

- Paragraphs 24, 63, 70, 159, and 170–172 – the addition of the words 'notification of contravention', to make clear that where HSE's existing EMM refers to a letter that includes a notification of contravention.
- Paragraph 38 – changes to the list of the months in which HSE will issue two-monthly invoices.
- Paragraph 46 – a link to HSE's *Procedure for queries and disputes for FFI* on the HSE website.
- Paragraph 54 – the addition of telephone and email contact details for HSE's FFI Team.

In November 2013, paragraph 48 was amended to reflect changes to the employment tribunals appeals process.

In March 2014, paragraph 46 was amended to reflect changes to the dispute procedure, namely the removal of the level 1 dispute process so all disputes will instead be reviewed by the disputes panel.

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Preface

Fee for Intervention (FFI) is effective from 1 October 2012, under regulations 23 to 25 of the Health and Safety (Fees) Regulations 2012. These Regulations put a duty on HSE to recover its costs for carrying out its regulatory functions from those found to be in material breach of health and safety law.

This guidance is issued by the Health and Safety Executive.

It will help businesses and organisations understand what FFI means for them and how it fits with HSE's existing approach to enforcement. It sets out the general principles and approach of the FFI scheme.

The guide includes examples of material breaches but does not cover every scenario where FFI might apply. Inspectors will apply this guidance and their enforcement decisions will be made in accordance with the principles of HSE's existing enforcement decision-making frameworks – the Enforcement Management Model (EMM) and the Enforcement Policy Statement (EPS). The guidance also explains the procedure for handling queries and disputed invoices.

This guidance was first published in June 2012 in line with the Department for Business Innovation and Skills *Code of Practice on guidance on Regulation 2009* (www.bis.gov.uk/files/file53268.pdf) which states that guidance on regulation should be published at least 12 weeks in advance of the Regulations coming into effect. The present version, published in September 2012, is a corrected version of the 1st edition approved by the Executive on 11 June 2012. The corrections are not substantial but have been made to help businesses better understand FFI and to more accurately describe the actual timing of HSE invoicing periods.

The corrections made in the guidance are, for ease of reference, also set out below:

- Paragraphs 24, 63, 70, 159, and 170–172 – the addition of the words 'notification of contravention', to make clear that where HSE's existing EMM refers to a letter, that includes a notification of contravention.
- Paragraph 38 – changes to the list of the months in which HSE will issue two-monthly invoices.
- Paragraph 46 – a link to HSE's *Procedure for queries and disputes for FFI* on the HSE website.
- Paragraph 54 – the addition of telephone and email contact details for HSE's FFI Team.

What is FFI?

1 HSE's inspectors inspect work activities and investigate incidents and complaints. If, when visiting a business, they see material breaches of the law, the business or organisation will have to pay a fee. The fee is based on the amount of time that the inspector has had to spend identifying the material breach, helping businesses to put it right, investigating and taking enforcement action.

2 On 21 March 2011, the Minister for Employment, the Rt Hon Chris Grayling MP, launched the Government's approach for reforming the health and safety system in Britain with *Good Health and Safety, Good for Everyone* (www.dwp.gov.uk/policy/health-and-safety/). This proposal included a package of measures to change the culture of health and safety in Great Britain.

3 These measures include shifting the cost of health and safety regulation from the public purse to businesses and organisations that break health and safety laws. The Health and Safety (Fees) Regulations 2012 put a duty on HSE to recover its costs for carrying out its regulatory functions from those found to be in **material breach** (paragraphs 14–19) of health and safety law.

4 This scheme is called Fee for Intervention (FFI) and is effective, for dutyholders[†] who are regulated by HSE, on and after 1 October 2012. FFI will not apply to HSE interventions started before this date, or to dutyholders regulated by other enforcing authorities such as local authorities (www.hse.gov.uk/foi/internalops/fod/oc/100-199/124-11.htm).

5 Under FFI, HSE will only recover the costs of its regulatory work from dutyholders who are found to be in material breach of health and safety law. Dutyholders who are compliant with the law, or where a breach is not material, will not be charged FFI for any work that HSE does with them.

6 This guide will help dutyholders to understand what FFI means for them and how it fits with HSE's existing approach to enforcement. The guidance will be reviewed regularly and the current version will be published on the HSE website www.hse.gov.uk/fee-for-intervention.htm.

Does FFI apply to you?

7 FFI applies to dutyholders where HSE is the enforcing authority. This includes employers, self-employed people who put others (including their employees or members of the public) at risk, and some individuals acting in a capacity other than as an employee, eg partners. It includes:

- public and limited companies;
- general, limited and limited liability partnerships; and
- Crown and public bodies.

8 Other organisations that enforce health and safety law, such as the police, local authorities, the Maritime and Coastguard Agency, Civil Aviation Authority and Office of Rail Regulation, will not be able to recover their costs under FFI.

[†] Dutyholders are those who have duties under the Health and Safety at Work etc Act 1974 and Regulations made under the Act.

Exemptions and disapplications to FFI

9 FFI does not apply to either self-employed people who only put themselves at risk, or employees. In addition, FFI does not apply to individuals who have committed an offence under sections 36 and 37 of the Health and Safety at Work etc Act 1974 because these provisions do not create a duty which can be breached. Instead they specify the circumstances in which a director, manager, secretary or other similar officer can be guilty of an offence. Where an employee is in material breach and their employer is also in material breach, FFI only applies to the material breach by the employer.

10 The following work activities are currently exempt:

- licensable work with asbestos by those who hold a licence for work with asbestos under the Control of Asbestos Regulations 2012 (the licence fee contains an element to cover the costs of inspection); and
- work activities involving biological agents at containment levels 1 to 4, as it is intended that a full cost recovery scheme will be introduced for this work within two years.

11 HSE will not charge FFI for work where another fee is already payable for some or all of that work. This includes:

- sites subject to the top-tier requirements of the Control of Major Accident Hazards Regulations 1999 (COMAH) and HSE's work at lower-tier COMAH sites connected with the control of major accident hazards;
- offshore oil and gas production facilities;
- Gas Safety (Management) Regulations 1996;
- sites licensed under the Nuclear Installations Act 1965;
- onshore boreholes – a separate cost recovery scheme is being brought in for this work by the Health and Safety (Fees) Regulations 2012; and
- other work activities such as first-aid approvals services where HSE already recovers a fee.

12 HSE will not charge FFI for carrying out its functions under the following statutory instruments:

- the Control of Major Accident Hazards Regulations 1999;
- the Genetically Modified Organisms (Contained Use) Regulations 2000;
- the Biocidal Products Regulations 2001; and
- the Chemicals (Hazard Information and Packaging for Supply) Regulations 2009.

13 HSE will not recover its costs under FFI in the following circumstances:

- where the material breach relates only to any of the laws listed in Appendix 1 because these laws are not made under the Health and Safety at Work etc Act 1974;
- for HSE's work in connection with an appeal against an improvement or prohibition notice at an employment tribunal;
- for HSE's work in relation to a prosecution in England and Wales after an Information is laid at court – any subsequent prosecution costs will be recovered through the courts (at the courts' discretion);
- for HSE's work in relation to a prosecution in Scotland after HSE submits a report to the Procurator Fiscal for a decision as to whether a prosecution should be brought. Any subsequent prosecution costs cannot be recovered under Scottish law; and

- for HSE's work in relation to Crown bodies from the point where HSE formally notifies the Crown body that it would have begun a criminal prosecution against them, had it not been a Crown body.†

How does FFI work?

What is a material breach?

14 Under FFI, HSE will only recover the costs of its regulatory work from dutyholders that are found to be in material breach of health and safety law.

15 A material breach is when, in the opinion of the HSE inspector, there is or has been a contravention of health and safety law that requires them to issue notice in writing of that opinion to the dutyholder.

16 Written notification from an HSE inspector may be by a notification of contravention, an improvement or prohibition notice, or a prosecution and must include the following information:

- the law that the inspector's opinion relates to;
- the reasons for their opinion; and
- notification that a fee is payable to HSE.

17 The written notification should also make it clear which contraventions are material breaches.

18 When deciding whether a dutyholder is in material breach of the law, HSE inspectors must apply this guidance and the principles of HSE's existing enforcement decision making frameworks, the Enforcement Management Model (EMM) (www.hse.gov.uk/enforce/emm.pdf) and the Enforcement Policy Statement (EPS) (www.hse.gov.uk/pubns/hse41.pdf). Where alternative law, which is not the Health and Safety at Work etc Act 1974 or law made under that Act may apply to a particular situation, inspectors must apply the most appropriate law relevant to the whole circumstances of the contravention.

19 The EMM principles are used by inspectors in making decisions about enforcement action. The underlying principle of the EMM is that enforcement action should be proportionate to the scale of health and safety risks identified and to the seriousness of the breach of law. This guidance includes a simple guide to the EMM (paragraphs 55–182), with examples about what a material breach might look like in practice.

† HSE may not serve an improvement or prohibition notice on, or prosecute a Crown body under section 48(1) of the Health and Safety at Work etc Act 1974. In appropriate cases, alternative procedures (Crown notices and Crown censures – equivalent to a prosecution) may be pursued instead. HSE will recover its costs for its regulatory work in relation to material breaches (including Crown notices) up to the point noted above.

How much is the fee?

20 With effect from 1 October 2012, the fee payable by dutyholders found to be in material breach of the law is £129 per hour (except where HSL or third-party involvement is required where the actual costs of the work will be recovered (paragraph 28). The method of calculating the fee is set out in Appendix 2. This fee may change in the future, and the updated fee will be provided on the HSE website.

21 The total amount to be recovered will be based on the amount of time it takes HSE to identify and conclude its regulatory action, in relation to the material breach (including associated office work), multiplied by the relevant hourly rate. This will include part hours.

What does the fee cover?

22 The fee is payable for the costs that HSE reasonably incurs during regulatory work in relation to a material breach. This includes all work that is needed to identify a material breach and all work to ensure that the breach is remedied. It also includes any investigation or enforcement action, up to the point where HSE's intervention, in relation to the material breach, has been concluded or a prosecution is started or a report submitted to the Procurator Fiscal in Scotland. One such example is when the decision has been made to close an investigation and a prosecution is not proposed.

23 The fee will be applied to each intervention where a material breach is identified and any other associated work (paragraph 24). Where the material breach is identified during a visit, costs for the whole visit are recoverable, from the point of entry at the site to the point of leaving. This is because to make appropriate judgements about the action to be taken in relation to material breaches, the inspector has to assess the dutyholder's capability to effectively manage the risks and comply with the law. This process begins at the start of the visit and continues to the end.

24 Costs for other associated work are also recoverable, including:

- writing notifications of contravention and reports;
- preparing and serving improvement or prohibition notices;
- follow-up work to ensure compliance (eg site visits, telephone calls, email correspondence, reviewing documentation provided);
- taking statements;
- specialist assistance (where specialist assistance is from HSL or a third party, those costs are recovered at the relevant rate applied by HSL or the third party – see paragraph 28);
- gathering information/evidence;
- assessing the findings and the documentation of inspection, investigation and enforcement conclusions;
- recording conclusions and inspection, investigation and enforcement information;
- reviewing investigations to ensure progress and appropriate lines of enquiry are followed; and
- research related to the material breach that is needed to carry out the tasks outlined above.

25 HSE's interventions are monitored to ensure they are fair, thorough and efficient. The costs of interventions and associated work will vary depending on the

complexity of the issues. Interventions and associated work may take longer, for example where there are multiple breaches requiring detailed guidance on precautions, or complex breaches or precautions. The length of time taken is affected by factors such as the:

- response and needs of the dutyholder;
- individual circumstances of the case;
- complexity of the breach and the extent of work that is required for HSE to regulate effectively in relation to material breaches;
- inspector's level of experience; and
- standards of compliance found at the time.

26 HSE will not recover costs for the same work twice. This means that functions such as training of inspectors, travelling to and from visits, management, and work by administrative staff will not have the hourly rate applied to them. The costs of these activities have already been built into the hourly rate calculation as described in Appendix 2.

Health and Safety Laboratory and third-party involvement

27 As part of its functions, HSE may need to contract elements of work to the Health and Safety Laboratory (HSL), which operates as an internal agency of HSE but with its own cost recovery rates, or to external third parties (eg commercial, technical and scientific consultancies). Such work may be contracted either to provide additional expertise or because HSE/HSL does not have the relevant expert resources available at the time.

28 Where work is contracted to HSL or a third party, the actual cost to HSE of the service will be recovered from the dutyholder. This will be shown as a separate item on the invoice and the rate will differ from, and may be higher than, the FFI hourly rate. HSE has arrangements to ensure that the quality and duration of work contracted to HSL and third parties is properly monitored and controlled.

29 External contractors must identify any potential conflict of interest and must provide a statement that no such conflict of interest exists before work begins. Normally, HSE seeks to check with the relevant dutyholder that there are no commercial sensitivities in using a particular third-party company on a particular issue or site. HSE seeks to find a replacement if such sensitivities exist but reserves the right to engage the relevant contractor where there are overriding operational or health and safety reasons.

30 Where it is necessary to engage HSL or a third party urgently, HSE may not be in a position to check with dutyholders whether any commercial sensitivities exist.

31 Work done by HSL and third-party providers will be subject to appropriate management oversight to ensure that costs are reasonably incurred, work is done efficiently, and fees charged relate only to work done in relation to a material breach.

Material breaches involving multiple dutyholders

32 Where more than one dutyholder is responsible for a material breach, the inspector will apportion the time spent inspecting, investigating, or enforcing the breach, to the extent that the work done is reasonably attributable, to each

dutyholder. The division of the overall time will be in accordance with the time spent regulating the material breach each has made.

33 In some circumstances, this will involve a dutyholder paying a fee for regulatory work done with the employees of another dutyholder. For example where the employees of one dutyholder are witnesses to a breach by another dutyholder, the dutyholder in breach will pay the fee, not the employer of the witnesses.

34 In some instances it may be that one dutyholder is in material breach while others are not. In these cases, only the costs that can be reasonably attributed to the dutyholder who is in material breach will be recovered. The other dutyholders will not be charged a fee.

Administrative and financial arrangements

35 HSE is responsible for the administration of the FFI scheme, including issuing invoices and, if needed, debt recovery. Invoices will normally be sent to the dutyholder's workplace address that was visited. If dutyholders wish to change the address to which future invoices may be sent, they should contact HSE at the address provided (see Contacts for advice and guidance). If the dutyholder is at a temporary workplace (eg construction sites, fairgrounds, or landlords of domestic properties for gas safety issues), invoices will be sent to the main address of the business or organisation.

36 The invoice will contain the following information:

- the period of time the invoice relates to;
- a breakdown of the activities or services for which costs can be recovered for each member of HSE staff involved, and HSL or third parties;
- the time spent against each activity;
- the total fee payable; and
- a brief description of the work undertaken.

37 Invoicing and debt recovery functions are carried out centrally within HSE. Inspectors are not responsible for issuing invoices or for any follow-up actions relating to non-payment of invoices. They will not be able to assist with queries about invoices or payment. Any queries relating to making a payment should be raised with the FFI Team (see Contacts for advice and guidance).

38 Invoices will generally be sent to dutyholders every two months, within 30 working days of the end of each invoicing period. Invoices will be issued in January, March, May, July, September and November.

39 As FFI fees arise from HSE carrying out its statutory functions, these fees fall outside the scope of VAT, so no VAT will be charged.

40 Payment is due to HSE within 30 days of the date of invoice and HSE will pursue any failure to pay in accordance with its own debt recovery procedures.

41 Where HSE seeks to recover debts under FFI through the courts, those costs can only be recovered through the civil process. HSE cannot recover these FFI costs through the criminal courts (magistrates' or Crown courts).

Procedure for handling queries and disputed invoices

42 HSE aims to resolve all queries or disputes promptly, fairly and in a transparent way. Queries may include:

- method of payment;
- the total amount of an invoice;
- changing the invoice address;
- requests for further information;
- confirmation that the work was necessary; and/or
- other issues, such as whether there was a material breach or the time taken to regulate a material breach with a particular dutyholder.

43 All queries and disputes should be sent to the address provided in Contacts for advice and guidance.

44 All initial enquiries about an invoice will be treated as a query for which no fee is payable. If dutyholders are not satisfied with the response to their query, they can formally dispute the invoice, or the part of the invoice they do not agree with, by writing to HSE and setting out the specific reasons why they do not believe the charge is valid. A fee may be payable for handling disputes (paragraph 47).

45 Dutyholders are not required to pay the disputed invoice or the disputed part of an invoice until the dispute is resolved (if the dispute is upheld). Where part of an invoice is disputed, HSE will agree with the dutyholder the value of the disputed amount and the dutyholder should then pay the remainder of the invoice that is not in dispute.

46 Disputes are considered by a panel of HSE staff and an independent representative. The procedures are described in more detail in *Procedure for queries and disputes for FFI* (www.hse.gov.uk/fee-for-intervention/queries-and-disputes.pdf).

47 HSE will meet its costs in resolving queries about invoices. However, HSE will recover the costs of any dispute that is not upheld, based on the FFI hourly rate of £129 multiplied by the time taken to resolve the dispute. If a dispute is not upheld, the dutyholder remains liable for the full amount of the outstanding HSE invoice(s) plus the additional cost of handling the dispute. If a dispute is upheld, the invoice(s) will be amended or cancelled. If payment has already been made, the amount paid will be offset against any outstanding HSE invoice (if applicable) or refunded in part or full depending on the circumstances.

48 The existing arrangements for making an appeal against an improvement or prohibition notice remain unchanged – dutyholders should refer to the information on appeals provided by the inspector when the notice was served. Appeals against HSE enforcement notices will still be heard by an employment tribunal. The appeal form (ET1A) and the details of the method of making an appeal (T420: *Making a claim to an Employment tribunal*) are available from the HM Courts and Tribunal Service at www.gov.uk/government/publications/employment-tribunal-claim-form. Concerns about invoices related to notices should be referred to the address provided in Contacts for advice and guidance, and should not be sent to the employment tribunal.

49 The existing HSE procedure for dealing with complaints about the professional conduct of HSE staff will remain unchanged – dutyholders should contact the line manager of the relevant HSE employee. The line manager will investigate the

complaint and inform the complainant of the action taken. Further information about complaints can be found on the HSE website (www.hse.gov.uk/pubns/hsc14.htm).

Repayments

50 HSE must repay part or all of the fee paid under the FFI scheme if it was paid in 'error'. This includes disputes when it is subsequently shown that a particular fee was not payable or payable by another person. The extent of repayment will depend on the particular circumstances and, wherever it reasonably can, HSE will endeavour to identify specific costs attributable to the breach(es) in dispute to allow an appropriate repayment.

51 Where HSE brings a prosecution but there is no conviction, it will repay any fee paid that wholly and exclusively relates to the offence for which there has been no conviction. In some cases, a number of offences may be charged and there may be convictions on some charges but not others.

52 Again HSE will repay any fees paid that wholly or exclusively relate to any offence charged that did not result in a conviction. However, the fee paid may be attributable both to the offence(s) that resulted in conviction and to the offence(s) that do not. If the fees attributable to the offence(s) that did not result in conviction were equally attributable to the offence(s) that did, then no repayment will be made because that work would have been carried out in any event.

53 If there are specific elements of the fee that were wholly and exclusively attributable to the offence(s) that did not result in a conviction, a repayment will be made of that part of the fee. For example, if HSE obtains a specialist report, which only related to an offence charged that did not result in a conviction, that part of the fee would be repaid even if other offences (that did not require such a report) did result in a conviction.

54 Similarly, where HSE serves improvement or prohibition notices, and one or more are subsequently cancelled by an employment tribunal, HSE will repay costs or parts of costs recovered as outlined above.

Contacts for advice and guidance

Health and Safety Executive
FFI Team
6.4 Redgrave Court
Merton Road
Bootle
L20 7HS

Telephone: 0300 0033 190

Email: feeforintervention@hse.gsi.gov.uk

How does FFI fit with HSE's existing approach to enforcement?

55 Inspectors have always made decisions about whether businesses are compliant with health and safety law and what action to take if they are in breach. Understanding how these decisions are made will help you to understand when FFI applies. It will also help you to consider how well you are complying with the law so that you can put right issues requiring attention before an inspector visits.

56 When inspectors come across contraventions (breaches of law) they use two long-standing frameworks to guide them in deciding on appropriate enforcement action that is matched to the circumstances they come across. These are the Enforcement Policy Statement (www.hse.gov.uk/pubns/hse41.pdf) and the Enforcement Management Model (www.hse.gov.uk/enforce/emm.pdf).

Enforcement decision making

Enforcement Policy Statement (EPS)

57 The EPS requires HSE and its inspectors to comply with certain principles, including:

- proportionality – to ensure that the scale of enforcement action is appropriate for the circumstances;
- targeting – to ensure that HSE has more contact with businesses that pose the most serious risks;
- consistency – to ensure that similar situations are met by similar responses;
- transparency – to ensure that businesses understand what is expected of them; and
- accountability – to ensure that HSE has clear policies and standards against which the public can judge its performance.

Enforcement Management Model (EMM)

58 When an inspector finds a contravention/breach of health and safety law, the EMM helps them to decide whether a verbal warning or advice is sufficient or whether a written notification, improvement or prohibition notice etc is more appropriate. In certain cases, eg incident investigations, inspectors must keep a formal record of how they have applied the process.

59 The rest of this guidance explains the EMM and how it relates to FFI.

60 The starting point for an inspector's enforcement decision making is to identify the risks associated with a particular work activity.

61 The inspector will use the EMM to consider the following before taking further action for each risk identified:

- **Stage 1** What is the actual risk?
- **Stage 2** What standard of compliance does the law require and what level of risk is left when the law is complied with?
- **Stage 3** Identify the risk gap – how far is the actual standard of compliance from the expected standard of compliance?
- **Stage 4** Identify the dutyholder factors – what is the employer's current and previous approach and performance towards health and safety?
- **Stage 5** Identify the public interest factors (known in EMM as strategic factors) – does the indicated enforcement action meet the public interest factors?

62 These stages are explained in more detail below.

63 Once these factors have been considered, the inspector decides whether regulatory action is required and, if so, what form it should take. This could include:

- a verbal warning;
- written confirmation of the need for improvement – this includes a notification of contravention;
- an improvement notice;
- a prohibition notice where the risks are so serious that the work has to be stopped immediately (or a deferred prohibition notice where the work is stopped for example when it is safe to do so);*
- prosecution in the courts.

Stage 1 – What is the actual risk?

64 When faced with a potential breach of health and safety law, inspectors ask themselves three questions to help determine the actual level of risk.

What harm could arise?	How badly could someone be hurt or their health damaged? Would any injury or ill health be serious, significant or minor?
How likely is it that the event leading to the injury or ill health will happen?	Is it highly unlikely (remote), possible or highly likely (probable)?
How many people are likely to be affected?	Will one, several or many people be affected?

Stage 2 – What standard of compliance does the law require?

65 The inspector identifies the law or relevant standards enforceable under the law. These often allow a level of acceptable risk, which remains even after the law or standard has been complied with. For example, the law allows the use of portable lean-to ladders for low risk, short duration work. In other cases, virtually no risk is tolerated, such as work on fragile roofs. The inspector considers what level of risk remains after that legal standard is complied with.

Stage 3 – Identify the risk gap

66 The inspector then compares the actual risk with the legal standard of compliance required to identify the ‘risk gap’ between them. The gap between the actual risk and the legal standard of compliance required could be:

- nominal (insignificant);
- moderate;
- substantial; or
- extreme.

* Dutyholder and public interest (strategic) factors are not applied to the decision to serve a prohibition notice because the risks are so serious that the work has to be stopped immediately or the stoppage deferred for example to when it is safe to stop the work. EMM principles are applied to the situation after the prohibition notice is served to guide the decision on whether further enforcement action required.

67 Once the inspector has determined the risk gap, they then consider how clear the legal standard actually is. For example, some standards are clearly defined under health and safety law, whereas others require interpretation.

68 Health and safety law, or relevant standards enforceable under the law, can be divided roughly into three categories.

- **Defined** – the standard is clear in law and needs little or no interpretation. For example, the Provision and Use of Work Equipment Regulations 1998 require effective measures to be taken to prevent access to any rotating stockbar.
- **Established** – the standard is not set in law but there are commonly known and published standards that, if met, demonstrate compliance with the law. For example, the Provision and Use of Work Equipment Regulations 1998 require that effective measures are taken to prevent access to dangerous parts of machinery. In most cases this means providing effective guarding to prevent access to the danger zone. The HSE Printing Industry Advisory Committee *Guide to the safe use of power-operated paper-cutting guillotines* provides the established detailed standard on safeguarding for these machines to prevent access to dangerous parts.
- **Interpretative** – the standard is not set in law and there are no commonly known or published standards. The law must be interpreted from first principles and applied to the particular circumstances and the risk involved.

69 When applying the EMM principles, inspectors will consider which of these categories is applicable to the relevant standards. This will influence their decision about the appropriate level of enforcement.

70 Using the EMM, inspectors consider how the risk gap relates to the legal standard to help them arrive at an initial expectation about the appropriate enforcement action:

- Where the risk gap is extreme and the legal standard is clearly defined or established, enforcement notices are the initial expected enforcement action and prosecution will be considered.
- Where the risk gap is substantial and the legal standard is clearly defined or established, enforcement notices are the initial expected enforcement action.
- Where the risk gap is moderate and the legal standard is established or interpretive the expectation is for a letter (notification of contravention).
- Where the risk gap is nominal, irrespective of the legal standard, the expectation is a verbal warning.

71 Sometimes the law is not based on directly controlling or minimising physical harm, for example when the following are required:

- risk assessments;
- provision of toilet and welfare facilities (where they are not needed to control a risk);
- records – to hold documentation such as records of statutory examination of lifting equipment;
- to report certain incidents.

72 If such requirements are not met, it can undermine the workings of an effective health and safety management system. In the case of welfare facilities, it may mean that important basic standards are not being met such as the provision of readily accessible toilet or washing facilities.

73 In these cases, inspectors follow a similar process to that outlined above using the compliance and administrative arrangements section of the EMM. They consider how well the legal standards for compliance are met (ie is the actual deficiency minor, inadequate or absent), compared to how clear the legal standard is (defined, established or interpretive). They then form a view about what action should be taken and consider the same factors as outlined in paragraphs 75–77 of this guidance before a final decision is made.

74 So far, the analysis of the risk or compliance gap against the clarity of the legal standard has simply led to an initial view about what action should be taken. Before a final decision is made, the inspector will consider two further factors – dutyholder and public interest factors, which are set out in stages 4 and 5. As a result, the initial enforcement expectations may change to a higher or lower level of enforcement action.

Stage 4 – Identify the dutyholder factors

75 The inspector considers the dutyholder’s past and present approach, and performance towards health and safety to help them decide the most appropriate enforcement action. The questions considered include:

- Does the dutyholder have a history of relevant enforcement action taken against them?
- Do they have a history of similar incidents?
- Are they deliberately avoiding compliance for commercial gain?
- Is there a poor, reasonable or good inspection history?
- Are they generally compliant in most areas?
- Do they demonstrate the necessary competence and capability to provide confidence that the risks will be properly dealt with?

76 Where the standards are so far below the legal standard of compliance that the level of risk is unacceptable, dutyholder factors will have less influence on the enforcement decision.

Stage 5 – Identify the public interest (strategic) factors

77 Finally, the inspector considers how the broader public interest may influence the enforcement decision. The questions considered include:

- Will the enforcement action proposed be in the wider public interest?
- Will vulnerable people such as the young, old or inexperienced be better protected by the proposed enforcement action?
- Will the action promote sustained compliance?
- Will it set an example and act as a warning or deterrent to others?
- Will the minimum legal standard be achieved?
- Will the action benefit those who may be affected by the risk?

78 In most cases, a decision about the enforcement action to be taken (if any) is made at this stage.

Review

79 If the inspector concludes that a different approach to enforcement action could be taken, they will review their conclusions with support from their manager if needed.

How does EMM apply to FFI?

80 The inspector will apply EMM principles when deciding what enforcement action is appropriate in relation to a contravention. FFI will apply when an inspector:

- identifies a contravention of health and safety law;
- is of the opinion that the contravention is serious enough to require written notification (ie it is a material breach); and
- notifies the person contravening the law of their opinion, in writing, by a notification of contravention, improvement or prohibition notice or prosecution.

81 If this is the case, costs will be recovered from the start of the investigation or inspection, where the material breach was identified, up to the point where HSE's work, in relation to the breach, has concluded.

82 The inspector may conclude that the contravention is not a material breach, in which case FFI will not apply. This includes when:

- an inspector gives a verbal warning or advice because the breach is minor; and/or
- an inspector gives written advice that is not about a contravention, eg to confirm a discussion between the dutyholder and inspector about what action could be taken to ensure best practice that goes beyond legal compliance.

83 The written notification from HSE will make it clear what breaches are material breaches, to which FFI applies.

Examples of FFI in practice

84 The examples in this section illustrate some situations where risks would be deemed likely to result in significant or serious personal injury or ill health and would be likely to result in formal written enforcement (eg a notification of contravention, improvement or prohibition notice, prosecution), and therefore FFI will apply. The examples in the next section (paragraphs 86–128) show how the EMM is applied in more detail for some specific situations.

85 In this section, each issue is described generally, followed by some more specific examples. These examples are only indicative, not exhaustive lists, to help illustrate the range of circumstances that might trigger FFI. They represent a range of issues and inspectors may cover some of them at visits. They are not a checklist of all the issues an inspector will cover when they visit. The issues are broken down into four broad areas:

- **health risks** – where failure to comply might lead to exposure to harmful substances such as dust, fume and chemicals or energy such as noise or vibration;
- **safety risks** – where the potential effects are immediate due to traumatic injury, eg contact with moving machinery, falls from height or contact with vehicles;
- **welfare breaches** – requirements that are either part of the controls required for health risks, or are a basic right of people in a modern society.
- **management of health and safety risks** – requirements related to capability to manage health and safety risks to a sustainable acceptable level.

Health risks

86 Inadequately controlled exposure to some dusts, fumes and chemicals, and to energy such as noise and vibration, can cause permanent disabling effects or death. While some effects are immediate, more often symptoms only show themselves some time after exposure. This might be many years later, but when they do they are often irreversible.

Asbestos

87 Known as the hidden killer, exposure to asbestos fibres can cause fatal and serious diseases from cancer or debilitating lung disease. It is responsible for around 4000 deaths each year. Exposure is usually due to working on or near damaged asbestos-containing materials (ACMs) resulting in breathing in high levels of asbestos fibres.

88 Some examples of failures might include:

- ACM in poor or damaged condition, resulting in the potential release of fibres;
- maintenance activities carried out on suspected ACMs with limited or no controls, resulting in the potential release of fibres;
- results of an asbestos survey have not been addressed in an up-to-date management plan for ACMs, leading to a failure to control the risk;
- maintenance staff unaware that asbestos is present in a building, or its location (if asbestos is confirmed as present).

Asthma

89 A number of substances that people are exposed to at work are known to cause asthma (eg flour, wood dust, resins, solder rosin fume, isocyanates, grain dust, metal working fluids). Occupational asthma includes severe shortness of breath that can prevent people from doing the simplest things, eg walking upstairs. Some sufferers are unable to work again.

90 Some examples of failures might include:

- not examining and/or maintaining extraction systems at suitable intervals, so their effectiveness is not assured;
- machines in engineering workshops using metal working fluids without effective mechanisms to prevent the generation of oil mist;
- not providing suitable and sufficient information, instruction and training, to employees likely to be exposed, about the use of engineering controls and any personal protective equipment provided;
- not providing suitable health surveillance for employees exposed to asthmagens so that any early signs of ill health can be identified and the causes dealt with.

Confined spaces

91 A confined space is a place that is substantially enclosed (though not always entirely), and where serious ill health or injury can occur from hazardous substances, lack of oxygen, overheating or through fires and explosions, or engulfment (eg in a grain silo).

92 A number of people are killed or seriously injured in the UK each year in confined spaces. These occur across a wide range of industries, from those involving complex process plant, through to simple storage vessels such as grain silos.

93 Those killed can also include people who try to rescue others working in a confined space without proper training and equipment.

94 Some examples of failures might include:

- work in a confined space with no understanding of the risks or precautionary measures;
- lack of adequate precautions for the work including safe systems of work, arrangements or equipment for rescue in emergencies, procedures or trained staff;
- lack of suitable air monitoring when it is necessary to test the atmosphere before entering a confined space, or during the work.

Hand-arm vibration

95 Hand-arm vibration comes from the use of hand-held power tools and is the cause of significant ill health (painful and disabling disorders of the blood vessels, nerves and joints in the hands, including loss of strength in the hands). Once the damage is done, it is permanent. Some examples of failures might include:

- exposure to vibration exceeds, or is likely to exceed, the action values set in regulations where it is reasonably practicable to eliminate or reduce the exposure;
- employees at risk from vibration have not been informed about the risks and how to reduce them;
- exposure to vibration has not been reduced to as low as reasonably practicable by adoption of alternative working methods such as job rotation to work with less vibration.

Hazardous substances

96 There are a wide range of hazardous substances that could be present in the workplace and the range of ill-health effects they can cause are equally broad, eg breathing in dust or fume can lead to chronic obstructive pulmonary disease or cancer, and skin contact with some substances can lead to dermatitis.

97 Some examples of failures might include:

- dry cutting or sawing of stone or concrete products producing hazardous levels of dust with no effective extraction or respiratory protective equipment;
- not thoroughly examining and/or maintaining extraction systems at suitable intervals, therefore effectiveness is not assured;
- inadequate information, instruction and training to employees about the risks and precautions;
- lack of suitable washing facilities where good personal hygiene is a health control measure, eg when using cement or oils which bring a risk of burns and dermatitis; and
- dry sweeping of sawdust on the floor of a woodworking shop leading to large quantities of dust in the air.

Legionellosis, including legionnaires' disease

98 People contract legionnaires' disease (a potentially fatal form of pneumonia) and other similar, less serious diseases after inhaling small droplets of water in the air, often generated by cooling towers that contain the bacteria.

99 Legionnaires' disease is a potentially fatal form of pneumonia, with symptoms similar to flu. Outbreaks of the disease can cause multiple deaths and/or significant ill health among the local population as well as workers.

100 Some examples of failures might include:

- lack of water treatment or a monitoring programme, or lack of cleaning or disinfection being carried out in an 'at risk' system;
- signs of organic contamination and/or scale in the water system; and
- cooling tower/equipment that has a legionella risk and no assessment or appointed person to manage the control system.

Musculoskeletal disorders (MSDs)

101 The term MSD covers any injury, damage or disorder of the joints or other tissues in the upper/lower limbs or the back. These can occur from manually lifting heavy, unwieldy weights, or from repetitive work. These are the most common cause of occupational ill health affecting a million people each year.

102 Some examples of failures might include:

- significant uncontrolled risk from manual handling or repetitive work where reasonably practicable controls are available;
- failure to provide instructions/training appropriate to the task where there are significant risks; and
- failure to make employees aware of risk factors and the need for early symptom reporting, safe systems of handling and use of controls and/or workplace adjustments.

Noise

103 Noise-induced hearing loss is irreversible. Damage to the ears caused by exposure to high levels of noise can also result in permanent ringing in the ears (tinnitus). Some 17 000 people in the UK suffer from work-related hearing loss.

104 Some examples of failures might include:

- not reducing exposure to high noise levels by controlling at source, eg providing silencers on air powered machinery, or reducing exposure, eg by enclosing noisy machines, providing noise refuges or limiting the time spent in noisy areas;
- not providing suitable personal hearing protection to employees whose daily personal noise exposure is likely to be high; and
- not providing adequate health surveillance where employees are likely to be exposed to high noise levels.

Safety risks

Falls from height

105 Falls from height are a frequent and well-known cause of death, or serious injury such as broken bones and partial or total paralysis.

106 Some examples of failures might include:

- not adequately planning and/or supervising work at height;
- not ensuring workers are competent for work at height;
- not choosing appropriate access equipment where falling from a height is possible;
- not inspecting and maintaining access equipment, such as scaffolding, harnesses or ladders, to ensure it remains effective at preventing or reducing injury;

- not providing adequate controls for safe access to fragile roof surfaces, such as asbestos cement sheet, plastic sheet or roof lights;
- using forks or a pallet on the forks of a fork-lift truck for a person to work at height, instead of a suitable working platform; and
- using damaged/defective ladders/stepladders, eg splits in timber ladders, cracked welds at rung/stile connections on metallic ladders, missing rungs or steps and missing anti-slip devices.

Gas work

107 If gas appliances are not installed and maintained correctly, there are risks of explosions or of people being overcome, sometimes fatally, by carbon monoxide.

108 Some examples of failures might include:

- anyone carrying out any gas work without being Gas Safe Registered;
- a landlord failing to ensure domestic gas appliances have been maintained in a safe condition where there is evidence of risk such as confirmed carbon monoxide poisoning; and
- a landlord failing to ensure gas appliances and flues have been checked for safety within last 12 months.

Flammable liquids

109 Failure to control flammable liquids gives rise to the obvious risks and consequences of fires and explosions.

110 Some examples of failures might include:

- drums of solvent stored in a workshop without lids leading to fire/explosion and health risks;
- flammable liquids stored in a wooden cupboard with no protection against spills; and
- using flammable liquids in the vicinity of sources of ignition, such as spray painting a large vehicle chassis in a workroom with unprotected electrical sockets and switches.

Lifting equipment

111 Lifting loads can create many risks, including failure of equipment such as hooks, chains and slings to inadequately planned or supervised lifting operations leading to heavy loads being moved in close proximity to people.

112 Some examples of failures might include:

- use of unsuitable lifting equipment leading to its failure, overturning etc;
- use of poorly maintained lifting slings with no system for identifying and inspecting them;
- continuing to use lifting equipment after having been notified of a serious defect identified by a competent person during a thorough examination;
- no statutory thorough examination of lifting equipment;
- no inspection or maintenance system for ensuring lifting equipment remains safe to use; and
- lifting operations that are not properly planned, supervised or done safely.

Liquefied petroleum gas (LPG)

113 LPG is a widely used, highly flammable gas that is usually kept under pressure in a tank or cylinder. Leaks of LPG from poorly maintained and corroded metal pipework, and tanks, or inadequately sited or protected tanks, can lead to fires and explosions.

114 Some examples of failures might include:

- LPG tanks with no protection against impact where vehicles are in use close to the tank;
- combustible materials around LPG tanks;
- buried metallic LPG pipework without corrosion protection and not subject to regular and periodic inspection; and
- inadequate separation distances between LPG cylinder storage areas and occupied buildings.

Machinery guarding

115 Many machines are capable of causing death or severe injuries. They range from the common conveyor belt and its associated pulleys through to more specialist machines such as circular saws, power presses and pedestal drills.

116 Injuries commonly occur because adequate guarding is not in place and workers may easily or foreseeably come into contact with the dangerous moving parts of machinery.

117 Some examples of failures might include:

- a broken or missing guard for the flywheel or tools of a power press;
- access to the in-running nip of rollers on a machine exposing operators and maintenance staff to a risk of crushing and de-skinning because simple nip guards are not in place;
- no guards or effective safety devices on the rotating chuck and drill bit of a pillar or radial arm drill;
- inadequate guarding of the powered roller of a conveyor system fitted with a heavy, tight belt that could draw in and crush an employee's arm;
- inadequate safe system for checking that guarding is in place when needed; and
- deliberate defeating of guard interlocks designed to ensure that the machine cannot be operated without the guard properly in place.

Pressure systems

118 There are many types of pressure systems in use, including boilers, steam heaters, compressed air systems, pressure cookers, autoclaves and heat exchangers. They all contain stored energy, which, if released inadvertently, can cause serious injury or death. Some examples of failures might include:

- an air receiver in regular use that has not been maintained or thoroughly examined and is not marked with any safe operating limit; and
- a steam boiler in use with no written scheme of examination or preventive maintenance schedule, or being serviced by untrained personnel.

Safe maintenance

119 Maintenance is essential to keeping plant and equipment in a safe condition, but it introduces its own risks. Often maintenance can only be carried out when the first line of defence, such as a guard on a dangerous machine or a valve on a section of process plant, has been removed. Safe systems of work are critical to ensuring safety in these circumstances.

120 Some examples of failures might include:

- employees not securely isolating dangerous parts of machines before carrying out maintenance, cleaning etc; and

- no effective permit-to-work system, which authorises work only after certain precautions, such as equipment isolation or testing for harmful substances, have been undertaken on high hazard plant.

Workplace transport

121 Every year, a significant number of people are killed or suffer significant injuries from being run over or having vehicles overturn on them in poorly planned or managed transport systems in workplaces. The key to safe transport is ensuring safe drivers, a safe site and safe vehicles.

122 Some examples of failures might include:

- not ensuring a safe site, eg poorly defined traffic routes, obstruction of aisle ways or roadways, poor lighting, uneven surfaces and no separation of pedestrians from vehicles where this is reasonably practicable;
- not providing safe vehicles, eg defective steering, brakes, mirrors, lights, and no reversing aids where required; and
- not ensuring safe drivers, eg fork-lift truck drivers who are neither trained nor competent.

Construction

123 The construction industry is one of the largest and most hazardous industries in Great Britain with more than 40 deaths and 3000 major injuries such as broken bones and amputations each year.

124 In addition to the other examples in this section that may apply in the construction industry, such as falls from height, workplace transport, asbestos, use of lifting equipment etc, some examples of failures might include:

- not organising the safe movement of pedestrians and vehicles on site;
- not keeping a construction site in good order, eg safe access to and from a place of work, safe storage of materials etc;
- demolition or dismantling carried out in an unsafe manner;
- failure to prevent danger from the collapse of an excavation;
- failure to ensure workers are trained and competent to control the risks to them and others, eg crane drivers operating cranes, managers who are competent in site management, mobile plant operators, scaffolders for the safe erection and dismantling of scaffolding;
- failure to ensure stability of structures on site, including temporary structures; and
- uncontrolled or inadequately controlled disturbance of asbestos containing materials during construction/demolition work.

Welfare breaches

125 Adequate welfare facilities are important to health where people work with hazardous substances, eg so that they can wash their hands before eating to avoid contamination. In other cases, the provision of toilets, washing facilities etc does not reduce risk but it is a basic right of people at work in a modern society.

126 Some examples of failures might include where employees:

- have no readily accessible working toilets;
- have no readily accessible, suitable washing facilities, eg no hot and cold running water;
- have no adequate supply of drinking water;

- have no suitable rest facilities to eat meals, where meals are regularly eaten at work, and food is likely to become contaminated.

Management of health and safety risks

127 The examples in this guide are sometimes the result of a 'one-off' failure. However, often they are evidence of a failure to control the risks in general. This can be due to poor or inadequate health and safety management that exists or has been occurring for some time.

128 Some examples of management failures might include:

- no effective arrangements in place for managing health and safety (including emergency arrangements) where significant risks are present, such as not considering the safety implications of new processes, or not effectively managing contractors on site;
- no assessment of risks to vulnerable people, such as young people or expectant mothers, where significant risks to them are present (eg exposure to lead or mercury);
- no access to competent in-house or external health and safety advice where significant risks are not adequately controlled;
- not providing comprehensible information or training to employees on significant risks and precautions where such information or training is a key control measure; and
- not making a suitable and sufficient risk assessment where significant risks are not adequately controlled and the precise control measures tailored to the circumstances are not straightforward (eg to identify and implement safe traffic management systems suitable for a particular site, or to identify noise sources and solutions for a range of noisy machinery).

Examples of EMM application

129 The following are examples of situations where the EMM has been applied in detail to help guide the enforcement action to be taken. You may find it helpful to use these examples in association with the EMM. **Under FFI, the costs of HSE's work in relation to examples 1 to 4 are recoverable**, and the costs of example 5 are not recoverable. Where the enforcement outcome is a 'letter', this includes a notification of contravention.

Example 1: Prosecution

Health risk: Exposure to metalworking fluid mist

Circumstances

130 An engineering company used large quantities of metalworking fluids to cool and lubricate the machine tools and components during machining of components. A number of their employees had been diagnosed by their doctors as suffering from occupational asthma related to their exposure to metalworking fluid mist.

131 The HSE inspector investigated and found that the company had not acted on previous HSE written requirements to improve the control of metalworking fluid mist. The controls previously required included managing the cleanliness of the metalworking fluids, enclosure of the machines with adequate extraction, and instructions on when it was safe for the operator to open the machine enclosures provided to prevent the escape of mist into the workplace.

132 The company had significantly increased production since the previous HSE visit. The metalworking fluid mist was now clearly visible in the air, the cleanliness of the fluids was not managed, a large number of machines were not fully enclosed, and extraction had not been provided. Also, instructions and supervision had not been provided to ensure appropriate time delays for opening machine enclosures.

Risk gap analysis

133 Actual risk: (Tables 2.1 and 2.2 of the EMM): The lack of fluid management, enclosure, extraction, and instructions/supervision on appropriate time delays for opening the enclosures created a **probable** risk of serious ill health (**serious personal injury**) arising from exposures to metalworking fluid mist.

134 Legal standard of compliance to be achieved (Table 3 of the EMM): The Control of Substances Hazardous to Health Regulations 2002 establish a **defined** standard requiring the precautions described above to prevent or adequately control exposure to hazardous substances such as metal working fluid mist. This is supported by more detailed **established** guidance *Mist control: inhalation risks* (www.hse.gov.uk/pubns/guidance/mw01.pdf). The standard applied in this case is **established**. Providing these controls would result in a **nil/negligible** likelihood of a serious health effect (**serious personal injury**).

135 Risk gap (Tables 2.1 and 2.2 of the EMM): Applying this to the risk gap table in the EMM, the risk gap is **extreme**.

136 Initial enforcement expectation (Table 5.1 of the EMM): The initial enforcement expectation for an **extreme** risk gap with an **established** standard is an **improvement notice** and **consideration of prosecution**.

137 Dutyholder factors (Table 6 and flowcharts in the EMM): There is a clear, written previous enforcement history relating to metalworking fluid mist and previous incident history at the company, with a number of cases of diagnosed serious

actual harm related to the breaches. The general standard of conditions is poor and the inspector has limited confidence that the risks will be adequately managed in the future. There is no evidence that the dutyholder sought a deliberate economic advantage in failing to comply with the law. The enforcement expectation remains as **improvement notice** and **prosecution**.

138 Public interest factors (Table 7 and flowcharts in the EMM): In the circumstances, serving an improvement notice to ensure the required controls are provided, and prosecuting the company is in the wider public interest and meets public expectations of action because the longer-term improvement, legal standard of compliance and benefit to the employees will be achieved. Also, the disregard for clear, previous advice requires punitive action by prosecution. There is no effect on vulnerable groups as the workers are experienced employees.

Enforcement expectation

139 The risk and the circumstances of the failure to comply with clear requirements are so serious that the dutyholder and public interest factors reinforce the need to take strong enforcement action in this case, leading to an **improvement notice** to improve standards and **prosecution**.

Example 2: Prohibition and improvement notices

Safety risk: Work at height on an unsafe working platform

Circumstances

140 An employee was seen standing on the raised forks of a fork-lift truck, with no safe working platform, to maintain a number of air conditioning units on the outside wall of a factory. The forks were about 2.5 m above the concrete ground. The work was planned to take about a day.

141 The lack of a safe working platform with adequate guard rails and toe boards means the employee was at a significant risk of death or serious personal injury if they fell from the forks. There is a well-established incident history of people falling from the forks of fork-lift trucks.

142 In these circumstances, the EMM expects the inspector to consider a prohibition notice to control the risk by stopping the work so that it is highly unlikely that the employee will be injured. It is therefore likely that an inspector will serve a prohibition notice to address this serious risk. The EMM would then be applied to help decide any additional enforcement action needed.

Risk gap analysis

143 Actual risk (Tables 2.1 and 2.2 of the EMM): Any fall onto concrete from a height of 2.5 m is likely to cause **death or serious personal injury**. In the circumstances described, the likelihood of such a fall is considered **possible** as a minimum.

144 Legal standard of compliance to be achieved (Table 3 of the EMM): The Work at Height Regulations 2005 provide a **defined** standard requiring suitable equipment to be selected and used for work at height, which prevents a fall occurring. This includes the provision and correct use of an adequate safe working platform, such as a scissor lift, cherry picker (mobile elevating work platform), or, for occasional work, a purpose-built work platform securely fitted to the forks of a fork-lift truck. Providing and using the systems described above would result in a **nil or negligible** likelihood of falls resulting in **death or serious personal injury**.

145 Risk gap (Tables 2.1 and 2.2 of the EMM): Applying this to the risk gap table in the EMM, the risk gap is **extreme**.

146 Initial enforcement expectation (Table 5.1 of the EMM): For an **extreme** risk gap with a **defined** standard the initial enforcement expectation is an **improvement notice and consideration of prosecution**. Whenever a prohibition notice has been issued, dutyholder factors may also require consideration of prosecution.

147 Dutyholder factors (Table 6 flowcharts in the EMM): There is no previous enforcement or incident history relating to work at height issues for this dutyholder, and no actual harm has arisen from the incident. The inspection history and general conditions for the dutyholder are reasonable and their failure to comply with the law was not as a result of seeking a deliberate economic advantage. Inspector confidence in their ability to manage the risk was limited given their lack of knowledge and competence in work at height issues.

148 Public interest factors (Table 7 and flowcharts in the EMM): The dutyholder planned to continue to complete the work, and to do other work at height in the future. Therefore, serving an improvement notice is in the wider public interest because it targets resources on a key ongoing risk at the premises, and meets public expectations of action in relation to a well-known, high risk situation. There is no effect on vulnerable groups as the employee concerned was an experienced employee. An improvement notice would achieve a longer-term improvement and the legal standard of compliance would be met while benefiting the employees.

Enforcement expectation

149 While the prohibition notice might address the specific risk of people standing on the forks of a fork-lift truck, an improvement notice will also be required to ensure that the company has an effective system for selecting and using appropriate equipment for other work at height. The dutyholder and public interest factors suggest that an **improvement notice** is appropriate to ensure the situation does not arise again.

Example 3: Improvement notice

Safety risk: Machinery guarding

Circumstances

150 A waste paper company uses a paper-cutting guillotine to reduce the size of waste paper so that it is small enough to feed into the baling machine to prevent blockages. The dangerous parts of the guillotine (clamp, back gauge, and cutting blade as it shears against the machine bed) are capable of crushing and amputating arms, hands and fingers.

151 The front operator's side of the machine is adequately guarded, but the rear of the machine is poorly guarded, which allows access by the operator or others to the unguarded, dangerous parts of machinery when clearing the rear of the machine. The machine is positioned against a wall to the rear, but there was enough space for easy access to the rear.

Risk gap analysis

152 Actual risk (Tables 2.1 and 2.2 of the EMM): Contact with the moving dangerous machinery will result in serious personal injury. In the circumstances described, the likelihood of accessing the moving dangerous machinery is considered **remote**.

153 Legal standard of compliance to be achieved (Table 3 of the EMM): The Provision and Use of Work Equipment Regulations 1998 require that effective measures are taken to prevent access to dangerous parts of machinery. In most cases this means providing effective guarding to prevent access to the danger zone. This is further clarified in the HSE Printing Industry Advisory Committee *Guide to the safe use of power operated paper cutting guillotines* (www.hse.gov.uk/pubns/books/power-guillotines.htm). The latter provides an **established** standard on detailed safeguarding for this type of machine. The standard applied in this case is established. With the machine adequately guarded, the likelihood of the operator suffering a serious personal injury is **nil/negligible**.

154 Risk gap (Tables 2.1 and 2.2 of the EMM): Applying this to the risk gap table in the EMM, the risk gap is therefore **substantial**.

155 Initial enforcement expectation (Table 5.1 of the EMM): For a **substantial** risk gap with an **established standard**, the initial enforcement expectation is **improvement notice**.

156 Dutyholder factors (Table 6 and flowcharts in the EMM): There is no previous inspection or enforcement history as HSE has not visited before, nor has the dutyholder had any relevant previous incidents. No actual harm has arisen from use of the machine in this unguarded state, and the general conditions are also reasonable. The dutyholder did not seek a deliberate economic advantage in failing to comply with the law. Inspector confidence in their ability to manage the risk was limited given their lack of knowledge and competence of machinery safety. The enforcement expectation remains at improvement notice.

157 Public interest factors (Table 7 and flowcharts in the EMM): Serving an improvement notice is in the wider public interest because it targets resources on a key ongoing risk at the premises, and meets public expectations of action in relation to a well-known, high-risk situation. There is no effect on vulnerable groups as the operators of the machine are experienced employees. An improvement notice would achieve compliance with the legal standard, and a longer-term improvement, while benefiting the employees.

Enforcement expectation

158 The dutyholder and public interest factors suggest that an **improvement notice** may be appropriate to ensure the situation is remedied and does not arise again.

159 With different dutyholder factors, such as good standard of general conditions and increased inspector confidence in their ability to manage the risk, the enforcement expectation may be altered to letter (notification of contravention). Equally with a history of previous enforcement or evidence of other material breaches that are not managed, the enforcement expectation could increase.

Example 4: Letter (notification of contravention)

Health risk: Asbestos training

Circumstances

160 A large, multi-site company employs an in-house maintenance team to do maintenance and minor repairs on its various factories and offices. During an inspection visit, a damaged suspended ceiling was being replaced.

161 The workers had not been provided with information about asbestos containing materials (ACMs), or whether ACMs were present in the existing ceiling tiles or ceiling void.

162 Further enquiries showed that the company maintained up-to-date asbestos surveys and registers for all their properties, and the asbestos register for this site confirmed that the tiles and ceiling void in this case were free from ACMs. However, these employees had not been provided with asbestos awareness training, and there was no effective system in place to ensure that in-house maintenance workers were informed of the presence of ACMs that may be disturbed during maintenance work.

163 Enquiries confirmed that maintenance work had previously been done with ACMs and is expected to be done in the future. It could not be confirmed whether the workers in the previous case(s) had disturbed the asbestos or whether appropriate precautions had been taken. The company could show that some employees had been provided with asbestos awareness training, and that in this case, the lack of compliance was not due to a widespread management failing.

164 Ceiling tiles and voids often contain ACMs and can be disturbed during maintenance work such as cutting, drilling and breaking up. This can release asbestos fibres, putting employees and others at risk of fatal and serious asbestos-related lung diseases.

Risk gap analysis

165 Actual risk (Table 2.1 and 2.2 of the EMM): The lack of a robust management system for ensuring that workers were made aware of work with ACMs, together with the lack of awareness training for some workers, created at least a **possible** risk of a serious health effect (**serious personal injury**) arising from exposures to ACMs above the control limit due to inadvertent exposure.

166 Legal standard of compliance to be achieved (Table 3 of the EMM): The Control of Asbestos Regulations 2012 establish a **defined** standard requiring people to be provided with relevant information where they are liable to disturb ACMs, and for any worker liable to advertently disturb ACMs to have received appropriate awareness training. Providing this would result in a remote likelihood of a serious health effect (**serious personal injury**).

167 Risk gap (Tables 2.1 and 2.2 of the EMM): Applying this to the risk gap table in the EMM, the risk gap is therefore **substantial**.

168 Initial enforcement expectation (Table 5.1 of the EMM): The initial enforcement expectation for a **substantial** risk gap with a **defined** standard is an **improvement notice**.

169 Dutyholder factors (Table 6 and flowcharts in the EMM): There is no previous enforcement history relating to asbestos management within the company, and no actual harm has arisen from the incident. A robust management system exists for work that is contracted out. There is no evidence that previous work may have resulted in asbestos exposure.

170 The inspection history for the dutyholder is reasonable, and general conditions are also reasonable. The dutyholder did not seek a deliberate economic advantage in failing to comply with the law, and the inspector's assessment of management competence indicated they knew and understood the risks and precautions, and could and would comply. This altered the enforcement expectation to a **letter** (notification of contravention).

171 Public interest factors (Table 7 and flowcharts in the EMM): In the circumstances, serving an improvement notice would not be in the wider public interest or meet public expectations of action because the longer-term improvement, legal standard of compliance and benefit to the employees will be achieved by use of a letter (notification of contravention). There is no effect on vulnerable groups as the workers are experienced employees.

Enforcement expectation

172 In light of the dutyholder and public interest factors, the enforcement expectation is reduced to a **letter** (notification of contravention) to notify the dutyholder of a contravention. Therefore a Notification of contravention would be provided to the dutyholder and FFI applies. With different factors, such as a history of previous enforcement or evidence of other material breaches that are not managed, the enforcement expectation could increase.

Example 5: Verbal warning

Non-risk based compliance: Scaffold register

Circumstances

173 During the inspection of building refurbishment work, it was noted that the record of inspection for the access scaffold has not been completed for 15 days. There are no evident defects to the scaffold, and it has been erected by a reputable contractor.

174 The inspections were normally carried out by the site manager, who had been absent due to illness. The acting site manager had not been trained to inspect scaffolds, and had already arranged for an independent scaffold company to undertake weekly inspections until the site manager returns to work. An inspection had been arranged for the following day.

175 As there were no physical indications that the access scaffold was below the required safety standard, it was appropriate to consider this situation using the EMM Compliance and administrative arrangements section.

Compliance gap analysis

176 How well are the legal standards for compliance being met (Table 4 of the EMM): The site records confirmed that weekly inspections had previously been done and this was a one-off failure. The inspector considered how well the legal standard for compliance had been met, deciding it was minor rather than absent or inadequate.

177 Legal standard of compliance to be achieved (Table 3 of the EMM): The Work at Height Regulations 2005 set the **defined** standard of the inspection of scaffolds at least every seven days.

178 Initial enforcement expectation (Table 5.2 of the EMM): With a **defined legal standard** and minor non-compliance, the initial enforcement expectation is a verbal warning.

179 Dutyholder factors (Table 6 and flowcharts in the EMM): The dutyholder has a history of good compliance, and has always responded effectively to regulatory advice. There is no record of any previous issues with scaffold inspection registers, and the company has trained all its site managers in scaffold inspection. Such training has been arranged but not yet provided for the acting site manager at the refurbishment site.

180 The inspector's assessment of management capability indicated they knew and understood the risks and precautions, and they had already arranged for the scaffolding to be inspected. There were no other significant issues noted during the inspection visit, and the scaffold had been erected to a good standard.

181 Public interest factors (Table 7 and flowcharts in the EMM): In the circumstances, the public interest would be met by a verbal warning.

Enforcement expectation

182 The enforcement expectation was a **verbal warning**.

Appendix 1: Health and safety law enforced by HSE for which costs cannot be recovered under FFI

FFI cannot be charged for HSE's performance of its functions in relation to the laws listed below. This is because HSE's power to charge is limited to the performance of functions conferred on HSE by the 'relevant statutory provisions'. The laws listed here are not relevant statutory provisions.

- 1 Activity Centres (Young Persons' Safety) Act 1995
- 2 Adventure Activities Licensing Regulations 2004
- 3 Cableway Installations Regulations 2004
- 4 Civil Contingencies Act 2004 (Contingency Planning) Regulations 2005 and the Civil Contingencies Act 2004 (Contingency Planning) (Scotland) Regulations 2005
- 5 Control of Pesticides Regulations 1986
- 6 Detergents Regulations 2010
- 7 Electrical Equipment (Safety) Regulations 1994
- 8 Electricity (Non-Fossil Fuel Sources) (England and Wales) Order 1990
- 9 Electricity Safety, Quality and Continuity Regulations 2002
- 10 Employers' Liability (Compulsory Insurance) Act 1969
- 11 Employers' Liability (Compulsory Insurance) Regulations 1998
- 12 Environmental Impact Assessment (Scotland) Regulations 1999
- 13 Equipment and Protective Systems Intended for Use in Potentially Explosive Atmospheres Regulations 1996
- 14 European Communities (Recognition of Professional Qualifications) Regulations 2007
- 15 Export and Import of Dangerous Chemicals Regulations 2008
- 16 The Fire (Scotland) Act 2005
- 17 Fireworks Act 1951
- 18 Food and Environment Protection Act 1985
- 19 Gas Appliances (Safety) Regulations 1995
- 20 Health and Safety (Consultation with Employees) Regulations 1996
- 21 High-activity Sealed Radioactive Sources and Orphan Sources Regulations 2005
- 22 Import of Goods (Control) Order 1954

- 23 Infrastructure Planning (Applications: Prescribed Forms and Procedure) Regulations 2009
- 24 Infrastructure Planning (Compulsory Acquisition) Regulations 2010
- 25 Infrastructure Planning (Interested Parties) Regulations 2010
- 26 Infrastructure Planning (National Policy Statement Consultation) Regulations 2009
- 27 Justification of Practices Involving Ionising Radiation Regulations 2004
- 28 Lifts Regulations 1997
- 29 Nuclear Safeguards (Notification) Regulations 2004
- 30 Personal Protective Equipment Regulations 2002 (NB this relates to product safety requirements)
- 31 Planning (Hazardous Substances) Regulations 1992
- 32 Plant Protection Products Regulations 2011
- 33 Pollution Prevention and Control (Scotland) Regulations 2000
- 34 Pressure Equipment Regulations 1999
- 35 Provision of Services Regulations 2009
- 36 Pyrotechnic Articles (Safety) Regulations 2010
- 37 REACH Enforcement Regulations 2008
- 38 Regulatory Reform (Fire Safety) Order 2005
- 39 Simple Pressure Vessels (Safety) Regulations 1991
- 40 Specified Animal Pathogens Order 2008
- 41 Specified Animal Pathogens (Scotland) Order 2009
- 42 Specified Animal Pathogens (Wales) Order 2008
- 43 Supply of Machinery (Safety) Regulations 2008
- 44 Town and Country Planning (Development Management Procedure) (England) Order 2010
- 45 Town and Country Planning (Development Management Procedure) (Scotland) Regulations 2008
- 46 Town and Country Planning (Environmental Impact Assessment) (Scotland) (Regulations) 2011
- 47 Town and Country Planning (General Development Procedure) Order 1995

- 48 Town and Country Planning (Hazardous Substances) (Scotland) Regulations 1993
- 49 Transfrontier Shipment of Radioactive Waste and Spent Fuel Regulations 2008
- 50 Working Time Regulations 1998

Appendix 2: Methodology used for calculating amounts payable

FFI hourly rate

Costs to be recovered are calculated on the basis of the time spent on FFI activity (where a dutyholder is in material breach) multiplied by a pre-determined hourly rate. The hourly rate is calculated using a rate-setting model in accordance with HM Treasury's *Managing Public Money* guidance and includes the full cost of all resources used in carrying out FFI activity.

This FFI rate-setting model is based on an estimation of how many inspection, investigation and enforcement days will be spent regulating dutyholders, including relevant office-based work, for 2012/13, in areas where HSE is not currently recovering its costs.

The estimates are based on historical data about how many days have been spent regulating dutyholders. They exclude time spent on prosecution work and take into account the changes in inspection policy set out in *Good Health and Safety, Good for Everyone* (ie a reduction in the number of proactive inspections and a shift from proactive to reactive work in response to incidents or complaints).

The hourly rate was calculated by dividing the total potential recoverable costs by the expected FFI frontline days.

The recoverable costs include:

- gross salaries of direct staff – staff actually carrying out their work, their line managers and support staff;
- corporate services and overheads, including common services, eg finance and planning, accommodation and information technology costs;
- capital charges – depreciation of fixed assets, cost of capital and notional insurance; and
- general administrative expenditure, including:
 - travel and subsistence;
 - staff development and training;
 - office services (eg postage and telecommunications); and
 - any other appropriate costs that may arise.

The recoverable costs do not include external research and support, HSL planned research and support, or costs related to activities such as stakeholder engagement and provision of advice and education. Also excluded are HSL, and externally contracted, reactive support costs, which will be charged directly to individual dutyholders.

Memorandum Trading Accounts (MTAs) will be prepared annually. They will show costs set out under the above headings and identify HSL, and externally contracted reactive support. These will be subject to scrutiny internally by HSE's Internal Audit department and externally by the National Audit Office. Summary MTAs will be published on HSE's website in the autumn following each financial year (ending 31 March).

The rate-setting model will be reviewed each year to provide a revised FFI rate for the following financial year.

Further information

For information about health and safety, or to report inconsistencies or inaccuracies in this guidance, visit www.hse.gov.uk/. You can view HSE guidance online and order priced publications from the website. HSE priced publications are also available from bookshops.

This document is available at: www.hse.gov.uk/pubns/hse47.htm.

This guidance complies with the eight golden rules of good guidance (see www.bis.gov.uk/files/file53268.pdf).