

# QBE INSURANCE ISSUES FORUM

NOVEMBER 2006



## NOISE: 'QBE BANGING THE DRUM'

### OVERVIEW

Last year QBE released an Issues Brief advising of the Control of Noise at Work Regulations 2005, now in force. These new regulations resulted from a European Union Directive requiring member states to adopt similar basic laws to protect workers from risks caused by noise.

This Issues Forum looks at the history of noise in the workplace, the development of statutory and common law, the impact of the new regulations and the challenges presented from a civil claims perspective. We shall present an Insurer's perspective on the scale of problem, looking at the claims position and discussing the crucial role the Insurance industry continues to have in encouraging effective noise control and hearing conservation strategies. With reference to the new regulations we will suggest a two tiered preventative and liability control strategy, such that exposure is minimised, but also ensuring that employers' noise strategies are sufficiently holistic and robust to defend claims in the future.

QBE believe that the regulations will have an impact on the prevalence of noise induced hearing loss in the workplace if employers implement controls in the spirit of prevention intended. The HSE's message is that work related hearing loss could be completely eradicated if the new regulations prove successful. While this may be the case, in the civil claims arena the new regulations can potentially take on a new persona. In general, reduced exposure should have a concurrent effect on numbers of NIHL claims. However, conversely, employers should recognise that the hurdle for establishing liability has fallen.

# NOISE INDUCED HEARING LOSS

## BACKGROUND

Hearing loss is the process of losing auditory sensitivity. It can occur both naturally with age and as the result of an external agent. The damaging effects of noise in the workplace are a function of the level of noise, the duration of exposure and, to an extent, the susceptibility of the individual.



pdf available:  
**NIHL explained**

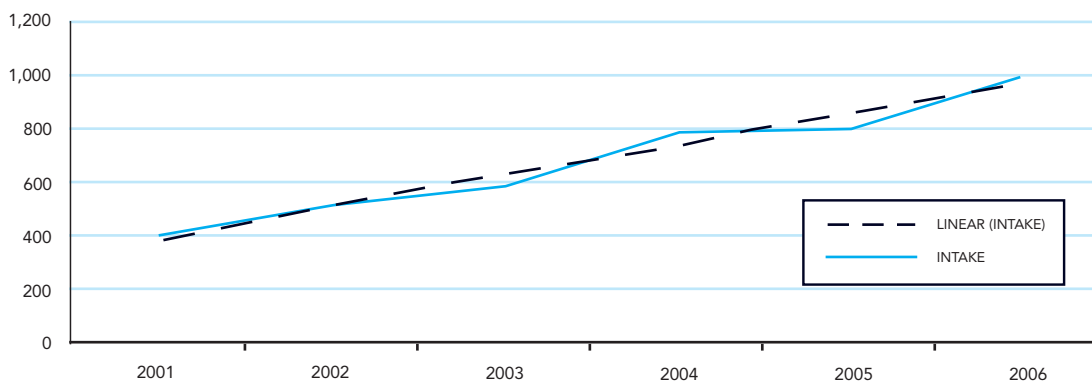
The HSE estimates that over one million employees in the UK are exposed to levels of noise that put their hearing at risk and around one hundred and seventy thousand people in the UK suffer deafness, tinnitus or other ear conditions as a result of exposure to excessive noise at work. The new Control of Noise at Work Regulations have come about, in part, due to medical evidence suggesting that people may actually be prone to damage from continuous noise exposure at levels as low as 70 dB(A). The levels in the new Regulations have not been set that low but are a dramatic reduction in comparison with the 1989 law and bring a significant number of additional workers within the protection of statutory legislation. Indeed, although the action values will drop by only 5 dB, this actually represents a 70% reduction in exposure levels. The music and entertainment sector has a two year transitional period until the 6th April 2008 to comply with the new Regulations, although the 1989 Regulations will continue to apply.



pdf available:  
**Study: Music and entertainment sector**

While we are unlikely to return to the deluge of hearing loss claims seen in the 80s and 90s, QBE have already seen a steady rise in claim frequency since 2001. The new regulations now protect significantly more employees who are now in turn effectively potential claimants. Despite this, at QBE, we believe that full 'evidenced' compliance will have a significant positive effect on the frequency and severity of cases of work related NIHL with a resulting impact on claims.

**Intake of QBE Employers' Liability deafness claims 2001 – 2006**



# LEGAL FRAMEWORK AND CLAIMS OVERVIEW

## THE LEGAL POSITION

### DUTY OF CARE

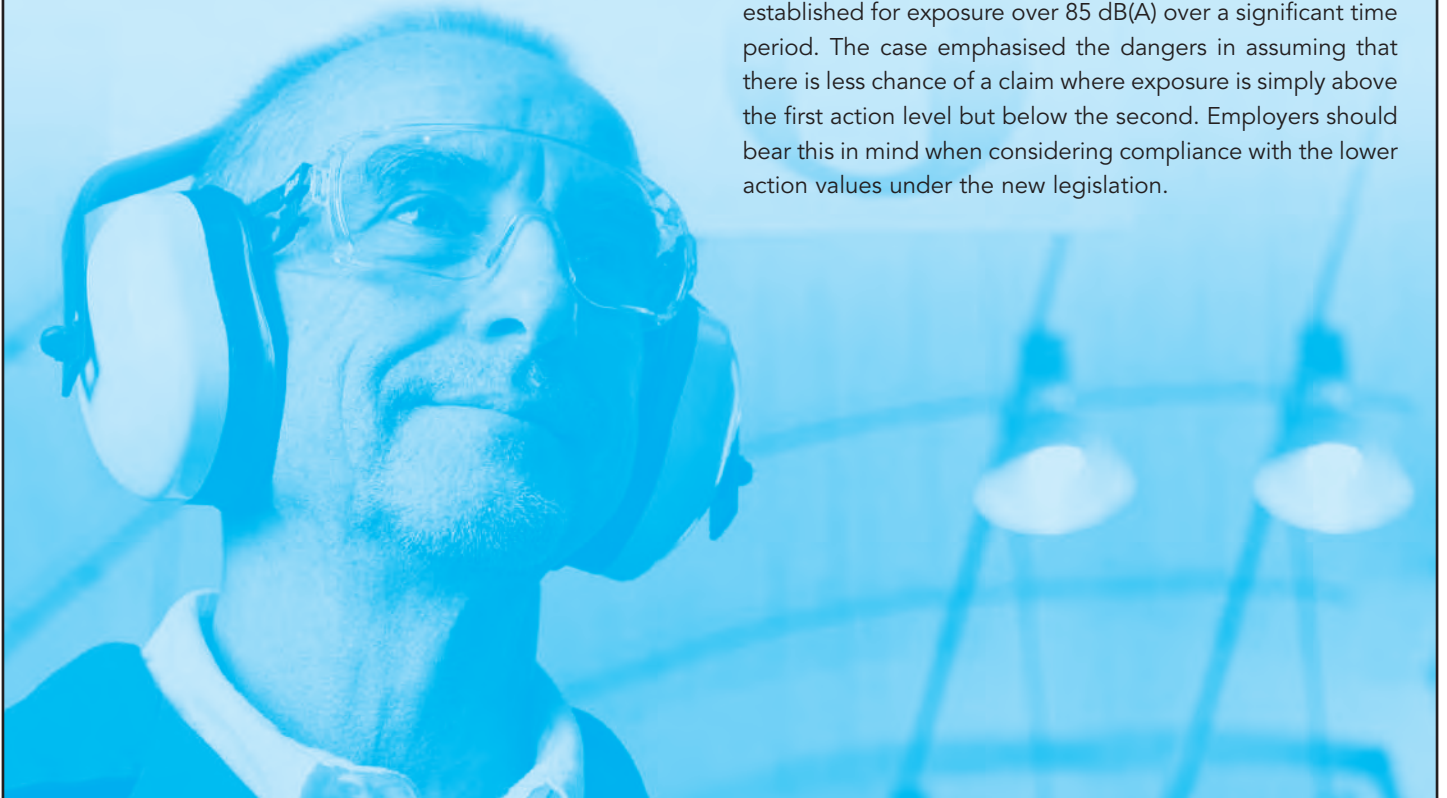
Where an employer knows or ought to know of a risk of injury or danger to health, then he is under a duty to take such steps as are reasonable, to protect the workforce from that risk or hazard. Despite an early appreciation in the medical arena of potential problems related to exposure to loud noise it is only within the last 40 years that industry in general has been fixed with knowledge of possible risks and only from 1989 were statutory obligations imposed upon employers.

The case of Thompson -v- Smith Ship Repairs (1984) set the industry date of knowledge in NIHL cases at 1963. The major reason for choosing this date was the publication by the then 'Factories Inspectorate' of the advisory booklet 'Noise and the Worker' which established a correlation between deafness and noise at work. Whilst 1963 has been applied as a general rule there have been exceptions where employers or even a particular industry has been held to have had an earlier date of knowledge. For example in the case of Kellet -v- British Rail, liability ran from 1955, and in Berry -v- Stone Manganese Marine, liability ran from 1957.

The Noise at Work Regulations of 1989 came into force in January 1990 and imposed certain obligations on employers where noise exposure was at or greater than set action levels of 85 dB(A) and 90 dB(A). The 2005 regulations take these obligations a stage further.

### BREACH OF DUTY

Exposure to noise levels in excess of the first action levels under the 1989 and 2005 regulations, combined with a failure on the part of the employer to provide hearing protection, should in theory result in the claimant being able to establish breach of common law duty. Exposure over the second action level has generally provided claimants with a greater chance of success but liability has been established under the 1989 regulations in certain cases where exposure was below 90 dB(A) prior to 1990. This was in the main where the Defendants concerned were shown to have actual knowledge of potential hazards to hearing from exposure to noise levels in excess of 85 dB(A). In the recent case of Harris -v- English Welsh and Scottish Railway (2005) breach of duty was established for exposure over 85 dB(A) over a significant time period. The case emphasised the dangers in assuming that there is less chance of a claim where exposure is simply above the first action level but below the second. Employers should bear this in mind when considering compliance with the lower action values under the new legislation.



## CAUSATION

Causation is invariably a matter for medical opinion. As we have seen, hearing loss can arise for a variety of reasons. Where workplace noise exposure is the culprit there are diagnostic clues from the results achieved by measuring hearing thresholds. The diagnosis of NIHL is normally strengthened by the absence of any other explanation for the loss. In the event that occupational noise exposure is not the only factor where there is a measured hearing loss, it is necessary to apportion the extent of the disability between the multiple causes. This may also arise where more than one employer has exposed an individual to damaging levels of noise and also where part of an individual's employment pre-dates the employers' 'date of knowledge' of the risk. The extent to which the total problem is attributable to the actual breach is a matter for medical opinion.

## CONTRIBUTORY NEGLIGENCE

Where hearing protection is available to an individual but not worn then the failure on the part of that individual can be alleged. However, simply providing some form of protection will not always be sufficient to satisfy the duty on the employer. Each case will turn on its own facts. In some cases the danger is so obvious and the protection so simple that the mere provision of it will suffice so long as the employee is made aware of its availability and how to wear it properly, and the employer ensures its use is enforced. In other cases the danger may be far from obvious and the resulting injury may be both serious and also insidious in its growth so that much more is required than the mere provision of a safeguard.

The debilitating consequences of noise exposure are not always obvious to the workforce and disability may not be apparent until many years after the first exposure. Because hearing protection can be inconvenient and uncomfortable to wear then, given the choice, many employees would possibly not use it. The law recognises that, in addition to the supply of hearing protection, there is a need to warn and educate employees of the consequences of exposure to noise and the steps they should take to protect themselves. The need for this 'information, instruction and training' was recognised and incorporated in the 1989 regulations and remains in the 2005 regulations.

## LIMITATION

The law applying to deafness claims is broadly similar to other forms of personal injury, which is to say that the claimant has a period of three years within which to bring his claim (issue proceedings). The clock starts running at the point at which the claimant has 'knowledge' that his injury was significant and of his potential cause of action against his employer (the situation is different in Scotland where even if the claimant has such knowledge, the three year period will not start to run until the last date when he was negligently exposed to noise). It is therefore potentially a complete defence to a claim, for an employer to be able to say that the claimant knew that he was suffering hearing loss and was aware that it was the result of negligence or breach of duty on the part of his employer more than three years ago (and in Scotland, that he had not been negligently exposed to noise during that period).

Damage to an employee's hearing should cease at the time that an effective hearing protection regime is introduced and so at that point in time they should be as deaf as they are going to get by reason of occupational exposure (as opposed to the effects of ageing). Consequently, if they bring a claim more than 3 years after this point, saying that they experience hearing difficulties and that their employment was to blame, the employer is entitled to ask why they should not be held to have had the same level of knowledge of their disability at the time that protection was issued and so have run out of time to bring a claim for compensation.

However, a difficulty in NIHL cases is that the consequences of noise exposure are not always obvious to the employee at the time of exposure, and disability sufficient to provide 'knowledge' may not be apparent until many years after the first exposure. Hearing loss claims are often brought many years after a claimant has left his allegedly negligent employer and it is usual for claimants to say that they had no idea at the time of employment that they were suffering an injury or what that injury was caused by. Furthermore, even if a claimant is shown to have had knowledge more than three years before bringing his claim a Judge may still exercise his discretion to allow the claim to proceed after the limitation period has expired.

## CIVIL CLAIMS STRUCTURE

NIHL claims are dealt with as part of the current Disease Protocol in England and Wales (not Scotland). They can involve a degree of complexity, with the exposure often occurring many years ago. As a result, there can be inherent difficulties in investigating such claims, particularly when the employer at that time may no longer be in existence.

The first notification to the employer is often the letter of claim. In line with market practice this is usually sent on to the last insurer on risk. The claimant has to prove that there has been negligent exposure to excessive noise and that damage has been caused as a consequence of such exposure, hence the initial intimation of claim will normally be accompanied by medical evidence.

Allegations of negligence, and hence insurers' investigations, have historically concentrated on exposure and the adequacy and attenuation of hearing protection, if provided. Noise surveys are useful but have often only represented a snapshot in time of the claimant's working conditions. Helpful documentation will include works medical records, personnel file, any documentation relating to a hearing conservation programme, and copies of invoices relating to the purchase of hearing protection, together with documentation as regards the provision, supply and enforcement thereof.

## DAMAGES, AWARDS AND DISCOUNTS

In the past, scheme agreements were devised between insurers and trade union solicitors for measuring percentage hearing loss and percentage handicap for the purposes of compensation. To make them workable a large element of simplicity was introduced. It is indeed arguable that the provision for considerable social handicap was inadequate. Such agreements are rare today.

Today NIHL claims settlements can be valued using a number of tools. The Judicial Studies Board Guidelines give very broad figures. Authoritative industry tables can also be used, together with any relevant case law decisions. Age is a particularly relevant consideration because impairment of hearing affects most people in the fullness of time anyway, thus impacting on both causation and valuation in the civil claims arena.



pdf available:

[Damages, awards and discounts, case study](#)

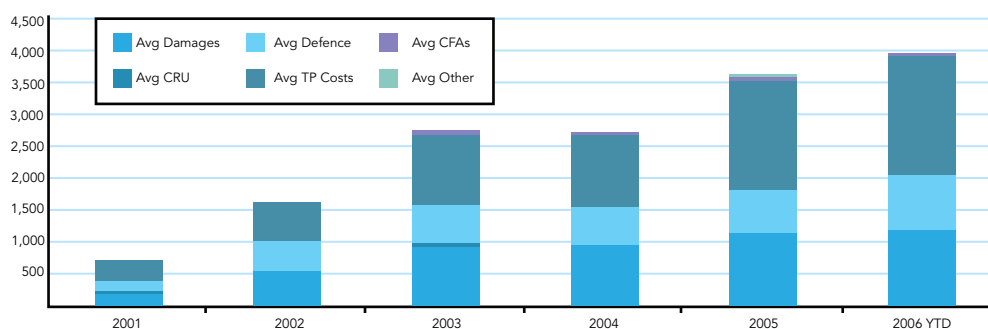


## QBE EXPERIENCE

The following graph shows the average claim value where liability and causation have been established and a payment made. It should be noted that these values do not take account of 'proportional settlements' where other Insurers may have contributed in accordance with their time on risk, or where employment was with another firm. Individual claim values, looked at in isolation, and ignoring proportional discounts are likely to be higher. The general trend shows rising claim settlement values, with third party solicitors costs representing an increasingly significant 'slice' of the overall settlement.

If this trend continues, combined with the increase in claims frequency seen earlier, and where workplace noise exposures remain uncontrolled, NIHL claims are likely to represent an increasing proportion of many Insured's overall claims costs, with the concurrent potential impact on premium costs in the context of their employers liability insurance programmes.

**Average Cost of Deafness Settlements QBE Employers' Liability  
Deafness Claims excluding £0 settlements 2001-06**



## EXISTING APPLICABLE LEGISLATION

Notwithstanding that which is specific to noise, much is already required of employers by other health and safety legislation, including:

- The Health and Safety at Work etc Act describes the general duties of employers, employees and equipment suppliers. Although not directly actionable the principles are well established and are actionable under common law.
- The Management of Health and Safety at Work Regulations include the requirements for risk assessment and provide a hierarchy of prevention principles to be applied (schedule 1). There are also requirements for health surveillance, employee competence and training.
- The Provision and Use of Work Equipment Regulations require suitable and maintained work equipment without risks to health, operator competence and training.
- The Workplace (Health, Safety and Welfare) Regulations require a safe working environment.
- The Reporting of Injuries, Diseases and Dangerous Occurrences Regulations require the reporting of NIHL.
- The Safety Representatives and Safety Committee Regulations require employee consultation.

# THE CONTROL OF NOISE AT WORK REGULATIONS 2005

## ACTION LEVELS

The main thrust of the new regulations is to lower the acceptable levels of noise exposure above which both employers and employees are required to take action. The levels are as follows:-

### Lower Exposure Action Values (LEAV)

- Daily or weekly personal noise exposure of 80 dB (A-weighted)
- Peak Sound Pressure of 135 dB (C-weighted)

### Upper Exposure Action Values (UEAV)

- Daily or weekly personal noise exposure of 85 dB (A-weighted)
- Peak Sound Pressure of 137 dB (C-weighted)

### Exposure Limit Value (ELV)

- Daily or weekly personal noise exposure of 87 dB (A-weighted)
- Peak Sound Pressure of 140 dB (C-weighted)

The Exposure Limit Value (ELV) is a new concept to noise legislation. It has been introduced to ensure that no employee

shall be exposed to this level or above and, if exceeded, the employer must take immediate action to bring the exposure to below this level. When applying the ELV only, employers can take account of attenuation offered by personal hearing protection.

In seeking to comply with the ELV, employers will need to take particular care in the way they evaluate the attenuation and suitability of hearing protection from manufacturers' data. The regulations and guidance recognise that the performance of hearing protection is rarely tested by manufacturers in 'real world' scenarios and employers should make allowances for this i.e. the de-rating of suggested effectiveness.

Most organisations need not concern themselves with the 'peak' action levels as such levels of noise are rare and relate to a limited section of industry where employees may be subject to very high levels of impact noise, for example processes such as industrial punch pressing, stamping and heavy metalworking.

## NOISE LEVEL AVERAGING

There will be a subtle but not insignificant change from the 1989 regulations in relation to the way noise levels and exposure can be measured. Where noise exposure varies from day to day the employer can average out the exposure over a one week period instead of the eight hour period allowed under the 1989 regulations. The personal dose average will generally reduce when applying this derogation and in some circumstances this could actually mean the lowering of present standards. For example, where a worker is exposed to a very high level of noise on a single day, the use of weekly averaging might in theory bring personal exposure under an action value and negate the need to invoke the relevant controls. HSE guidance attempts to clarify the situations where weekly averaging is acceptable. As a general rule weekly averaging should not be used where there is likely to be a lowering of existing standards or as a method of avoiding requirements of action levels. It is unlikely that such intentions will be accepted in the criminal or civil law arenas.

## A NEW APPROACH?

A key intention of the regulations is to encourage employers to move on from noise measurement and to take appropriate action to control the risk. Historically employers have focused efforts on establishing where they stand in comparing their own noise levels against the requirements of the 1989 Regulations, deciding which side of the line they fall, and then handing out hearing protection. The new regulations attempt to break this mindset by focusing on risk assessment and reduction of noise at source, clearly stating that measuring actual sound levels may not be necessary. A number of subjective 'checks' are suggested in the first instance to allow employers to gauge whether they have breached the Lower Action Value and the emphasis is rightly on 'prevention' of exposure utilising safe place and safe person strategies.

## KEEP ON MEASURING!

There is, however, a problem in striving to simply comply with the regulations and associated guidance when considering the issue of measurement, as it has increased significance in the arena of civil claims. Where an employee can demonstrate that he has a noise related condition which he attributes in whole, or in part, to his service with an employer, the onus of proof effectively shifts to the employer to prove that his condition has not resulted from his period of exposure in the workplace. Without documented measurements this defence can present a major problem, even where it is arguable that there was no negligent exposure.

The reason the regulations play down the role of measurement can be explained by the fact that HSE does not have a remit for civil matters. To satisfy legal requirements and the HSE, an organisation may well not need to measure noise levels. Employers need to be aware that not doing so could lead to a legacy of indefensible civil claims. It is therefore still imperative that measurements are taken where it is identified that noise levels are likely to be close to, or above, the new action levels.

## CALCULATING EXPOSURE

So how does an employer know whether any of the first, second or peak action levels have been reached? Regulation 4 requires that an assessment should be made by a 'competent person' wherever it is likely that anyone is exposed to the first action level or above. Guidance suggests that an assessment of daily or weekly personal exposure will probably be needed wherever people have to shout or have difficulty being heard clearly by someone about 2 metres away, or they find it difficult to talk to each other. In reality, where there is 'borderline' exposure this may prove to be too subjective an assessment, and a sound level meter or personal dosimeter should be used for an initial documented assessment, even if simply to demonstrate that action levels have not been reached.



pdf available:

[Noise measuring equipment and its limitations](#)

## COMPETENT PERSON

Competence is not defined under these regulations but in this context it will mean having the necessary skills and knowledge required to assess and manage noise risks. Where such competence is not available in-house, the services of a third party will be required. In the long term employers may consider organising training for certain employees. The ability to understand the law, guidance and liability principles may be more important than formal qualifications but there are some areas, such as noise-control engineering, where the person providing the advice would be expected to have formal qualifications. While a variety of training courses and qualifications are available for the variety of skills required, if in doubt QBE would recommend that Insureds' recognise the specialist nature of the task and seek the advice and services of occupational hygiene and engineering professionals.

## NOISE ASSESSMENT IN PRACTISE

Typically an assessment requires sample noise measurements to be made and details of working patterns to be collected. A composite picture of representative daily noise exposures can then be constructed and compared with the action levels. Where there is a likelihood of exposure to the second action level or above, then the employer has to take steps to reduce the noise exposure other than by the provision of personal hearing protection. The competent person or external consultant should be looking for such means while carrying out an assessment, and should include suggestions of practicable methods of reducing noise. An experienced consultant may also suggest where detailed diagnostic examination may be appropriate to develop noise control measures for particular items of machinery.

## RISK ASSESSMENT

The requirement for a noise risk assessment is fundamental to the new regulations. As we have mentioned, the emphasis moves away from noise measurement although this will still normally be 'part of' the risk assessment. The principles and methodology to be applied are more prescriptive. For example, specific reference is made to the hierarchy of controls in Schedule 1 to the Management of Health and Safety at Work Regulations i.e. to eliminate risk at source and, where elimination is not possible, then the employer must reduce risks down to as low a level as is reasonably practicable.



## HEARING PROTECTION

One possible area of confusion arising from the new regulations is that account can be taken of hearing protection when considering the ELV. The accompanying guidance goes to great lengths to clarify that the reduced exposure offered by hearing protection can only be taken into account for the purposes of measuring an individual's personal exposure against the ELV alone. All other requirements do not allow account to be taken of attenuation from hearing protection.

Attenuation is likely to be an estimate from the manufacturer of the hearing device used. Compliance with the ELV by relying on hearing protection places an additional burden on the employer as they will have to show that the equipment is in good order, regularly maintained, appropriate for the noise and frequencies it is protecting against, and worn in the correct manner as to afford the proper protection.

**It is also important to point out that the ELV does not represent a 'safe' level or threshold of noise exposure. Civil claims for noise induced hearing loss can still succeed below this level. Employers should not interpret the ELV as a safe benchmark or target for achievement when considering noise control and hearing conservation policies.**

Generally, while hearing protection can and should be used as an interim measure while other controls are being developed, it should not be used as an alternative to reducing noise by technical or organisational means. Employers should also consider the long term costs of providing hearing protection to, what will likely be a significantly larger section of the workforce. Five pairs of disposable plugs per day at 18p per pair represents a £20000 annual spend per 100 workers. This is in addition to the costs associated with those already using hearing protection e.g. re-assessment as to suitability of attenuation, replacement costs (normally for higher value equipment) etc.

Put simply, in the short term hearing protection can and should only be used as an interim measure while 'higher order' hierarchical controls are being developed or have been discounted (after a cost/benefit business case analysis) as 'not reasonably practicable.'



## HEALTH SURVEILLANCE

While already an implicit requirement under the Management of Health and Safety at Work Regulations, the new regulations and associated guidance are more prescriptive in describing the role of health surveillance and outlining the steps that need to be taken. The new regulations relate the need for health surveillance directly to the risk assessment process. Regulation 9(1) states:

If the risk assessment indicates that there is a risk to the health of his employees, who are, or are liable to be, exposed to noise, the employer shall ensure that such employees are placed under suitable health surveillance, which shall include testing of their hearing.

Employers wondering who should be included in the programme should refer to the guidance indicating that employees regularly exposed to noise levels of 85 dB(A) or higher must be subject to health surveillance, including audiometric testing. Where exposure is between the action values or sporadic above the UEAV, employees should be included where it is known that they are particularly sensitive or predisposed to noise induced hearing loss.

Employers may have concerns regarding the short term potential for claims in relation to Regulation 9(4)(a) i.e. the duty to inform the employee where hearing damage is found to be the result of exposure to noise. However this is to an extent a moot point as employees already have the right of access to medical information held by their employer under other legislation. Notwithstanding legal obligations, employers should recognise that by failing to introduce pre-active noise health surveillance and inform their employees of the results, they are susceptible to a continual and long term 'drip' of claims as employees gain knowledge of their condition by other means e.g. when leaving their employer or retirement. At that stage the extent of hearing loss may be more advanced (and their claim more expensive) and could have been managed at a far earlier stage. In addition, Insurers have to make premium adjustments (invariably upwards) for long-tail exposures such as NIHL. Where the extent of exposures are known and effective control strategies in place, Insurers are able to take an informed and longer term view to pricing, mutually beneficial to both parties.



**pdf available:**

**Health surveillance and audiometry**

## PREVENTATIVE AND LIABILITY CONTROL STRATEGIES

Meeting the requirements of the new legislation from both a criminal and civil standpoint will require the ability to demonstrate effective preventative noise control strategies and incorporating robust documented liability controls. It is notable that there are very few HSE prosecutions for noise related offences. When comparing this with the legacy of noise induced hearing loss claims there is no surprise that the insurance industry has played a major role in improving standards in relation to noise control and employee protection. This is an important point employers should consider when considering their focus and energy in relation to noise control strategies.

Preventative controls taking a legislation/compliance based approach are aimed at reducing exposure to injurious noise. While this will have an associated knock on effect on civil claims it is by no means a foolproof strategy in isolation. Liability control strategies involve the employer ensuring that there is an evidence based framework in place, with high standards of documentation and records to defend against allegations of negligence and causation. Both strategies should be considered in tandem, and require the implementation of key initiatives and investments, improvements to your systems, and action plans with important milestones over a long timeframe.

PREVENTATIVE	LIABILITY
HIERARCHY OF CONTROL CONTROL AT SOURCE SAFE PLACE STRATEGY SAFE PERSON STRATEGY	SYSTEMATIC DOCUMENTATION NOISE POLICY AND EMPLOYEE COMPETENCE SUPERVISION AND ENFORCEMENT OCCUPATIONAL HEALTH/AUDIOMETRY

## PREVENTATIVE STRATEGY

### HIERARCHY OF CONTROL

While the lowered action levels have attracted the majority of the attention, the new regulations effectively incorporate the requirement for a preventative hierarchical risk management strategy aimed at eliminating/reducing noise at source. UK legislation thankfully still recognises that a balance has to be struck in the cost v risk debate with the use of the 'reasonably practicable' defence. Employers should not however, hide behind this as an excuse to rely on lower order controls such as hearing protection as it is unlikely that the HSE, and indeed the courts, will tolerate such strategies in the longer term. The challenge for employers is to design out noise through technical, process and physical change in the workplace, but also to maintain a robust hearing conservation policy while higher order controls are developed or not reasonably practicable to implement.

### CONTROL AT SOURCE

Where possible Insured's should involve their purchasing department and, with the help of a specialist, consult with their machinery and equipment suppliers in order to meet specific and measurable standards in relation to noise. This may be in the form of a 'buy quiet' purchasing policy.

While it may not be economically viable to immediately replace old and noisy kit, it may be possible to carry out simple and cost effective modifications e.g. using plastic/rubber coated rollers on a conveyor belt moving glass or metal. Many machines impart vibration energy to associated panels and the simple measure of isolating the machine on anti-vibration dampers or rubber mountings may reduce noise levels considerably. Planned maintenance, replacement of worn parts and regular oiling will reduce noise and will probably increase efficiency. It may also be possible to relocate some sources of noise e.g. the use of compressor rooms.

### TRANSMISSION PATH ATTENUATION

If it is impracticable to reduce a noise at source to an acceptable level employers should consider a safe place strategy i.e. it may be possible to isolate the noise source itself or to move the workers away from the noise. This may be in the form of:-

- Isolation i.e. preventing transmission through the floor through machine mounting or the use of springs.
- Barriers. This involves the use of acoustic screen between the noise source and the receiver.
- Acoustic Enclosures: In many cases the best method of noise control is to enclose the noise source using airtight enclosures and the use of noise absorbing materials.

### CONTROL AT EMPLOYEE

In facilities where there is a range of noisy plant a reasonably practicable and economic alternative to enclosing or controlling the noise of all plant and machinery may be to enclose the worker in an acoustically insulated control room or haven. As this is a workplace in itself employers need to consider environmental and workplace issues to ensure that workers use the haven without risk or discomfort.

### HEARING PROTECTION

In most cases however, the safe person strategy will be through the use of personal hearing protection. The two basic systems used for hearing protection are earplugs and earmuffs. Some 'active' hearing protection incorporates circuitry which electronically cancels noise to achieve the desired level of attenuation. In the main however 'Passive' protectors are used. These protect the individual by acting as a physical barrier between the user and the noise source.

## LIABILITY CONTROL STRATEGY

### RECORD RETENTION

Liability for Noise Induced Hearing loss exposure has often in the past had to be conceded even in cases where it is was arguable whether there was negligent exposure. This has often simply been due to poor standards of historical documentation and record retention, particularly given the potential time lag between the initial exposure and the claim for damages. The actual work processes (and memories of them) may have changed considerably. Where an employee can provide medical evidence suggesting a link between noise exposure and his condition, without contrary evidence it is clearly difficult to refute that workplace exposure was a factor. In addition, employers need to satisfy the court that a worker was not exposed to excessive levels of noise in the specific work activities undertaken. This might necessitate the need for accurate noise survey records including personal exposure levels (personal dose) to be established at the time the employee alleges the exposure, and will also require verification of the hearing conservation policy in place over the period of exposure. This will include records of the attenuation of hearing protection, hearing protection zones, signage, supervision, and evidence of disciplinary action for non-compliance.

A perennial issue in noise cases where surveys are available is the allegation that the layout and processes have changed materially over the years, with the result that the surveys are not an accurate representation of previous years. It is clearly difficult to refute such allegations retrospectively without accurate records. However, a lesson to be learned from these cases is that all material changes to the workplace (e.g. repositioning/purchase of new machinery) should be recorded, ideally as part of the risk assessment review process.

### NOISE POLICY AND EMPLOYEE COMPETENCE

The policy should clearly define employer and employee responsibilities in relation to noise. It should contain all necessary information on PPE, octave band analysis, noise maps and hearing protection zones. It should also include information on PPE signage, storage and procedures. All of this information

and any required associated instructions need to be shared with employees. This may be in the form of specific training. With the court room in mind and as with all information and training provided to employees, this should be documented, signed by the employee as being understood, and held on their training file as evidence of competence.

### SUPERVISION

Policies and systems are statements of intent and the reality on the 'shop floor' is often very different. Letters of claim can often cite the current or historical culture of non-compliance and lack of leadership from management as reasons why hearing protection provision was ineffective as a control to prevent their client's exposure. The employer needs to be able to show evidence of regular monitoring, auditing and supervision. For extreme and repeat cases of non-compliance there should be documented evidence of action via the disciplinary process for either failing to wear hearing protection, abusing it, or not using it properly.

### HEALTH SURVEILLANCE/AUDIOMETRY

Health surveillance and occupational audiometry can be used as part of organisations' long term monitoring system to ensure that noise control strategies are effective. Identifying affected employees allows appropriate action to be taken in the workplace and any necessary medical referral of the individual. In a liability context the importance of regular audiometry cannot be overemphasised as it can protect the employer from speculative and unmeritorious claims. Pre-employment, para-employment and post/exit-employment occupational health and audiometric data, gathered and interpreted by a competent person, will provide an accurate record of actual hearing performance over the lifespan of the claimant's employment. This can protect employers from claims where they can prove that exposure or damage has (or must have) occurred through other means or at a different stage in the claimant's working life with another employer.

## IMPACT

The problem of NIHL and associated claims has not gone away. In fact, in recent years the reverse can be said to be true. The lower thresholds under the new Regulations certainly increase the statutory legal duties on employers and have concurrent potential implications for an increase in civil negligence claims as the eligibility to make claims is widened. As employers' awareness will be raised, those of the unions and claimant solicitors will also increase. As the new regulations highlight and promote audiometric testing and encourage employee consultation, they will also serve to raise awareness amongst employees. On the other hand it is common sense that compliance with the new regulations which advocate a preventative approach should result in fewer people being exposed to, or affected by, harmful noise in the workplace.

Employers should have already taken actions to fulfil their moral obligations to protect the health of their employees and to avoid the financial penalties of criminal fines and civil negligence claims. The Insurance industry will be affected by the actions and attitudes of policyholders given the potential increase in claims. It will be in employers' interests to demonstrate evidentially that they have done everything possible to protect their workers from the harmful effects of noise.

## CONCLUSIONS

The Control of Noise at Work Regulations 2005 is now part of UK health and safety law. The major change from the existing position is that Action values will be lowered and a new exposure limit introduced. The HSE estimates around three quarters of a million additional workers will be exposed above the new Lower Exposure Limit Value. As a result many companies who are currently required to do little or nothing under the 1989 Regulations will find that they do, in fact, come under the scope of the new regulations.

The requirements for risk assessments, control measures and health surveillance have been updated and consolidate many existing requirements from other legislation. With the exception of the action values, the new legislation presents only subtle changes from the existing position. There is however a lot of detail which will require consideration and care in implementation.

QBE have considerable expertise in the area of NIHL civil negligence claims. Those employers who make pro-active efforts to manage and meet their duties employing robust preventative noise management and liability control strategies will be best placed to reduce the impact of this legislative change, and as a result will be a more attractive proposition to the employers liability insurance market.

QBE would strongly recommend that employers consult the regulations, and HSE/Industry guidance, with a view to investigating the impact on their business and identifying further measures and controls required to meet their new statutory and civil obligations.

## FURTHER INFORMATION

More information can be found on the HSE website: [www.hse.gov.uk](http://www.hse.gov.uk) and the published regulations can be found on the HMSO's web page at: <http://opsi.gov.uk/si/si2005/20051643.htm>. Full guidance on the regulations can be obtained from HSE books: ISBN 0 7176 6164 4

Please speak to your Liability Risk Manager, Claims Inspector or regular QBE contact should you require further information.

### Author Biography

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Mark joined QBE in 1998 serving 6 years as a claims inspector before joining the Liability Risk Management team in 2004. He has an honours degree in Risk Management and a Nebosh National Diploma in Occupational Safety and Health.



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