A REVIEW OF FOOD HYGIENE LEGISLATION AND RELATED CRIMINAL OFFENCES

Local Authorities have draconian enforcement powers relating to food hygiene but, on many levels, they have to be in order to protect the public from unscrupulous food business operators. There is no doubt that the current legislation is a minefield and easy to fall foul of. Recent months have seen a number of Local Authorities ramping up their enforcement campaigns as a consequence of which many businesses and individuals may find themselves in the invidious position of having to defend allegations of criminal wrongdoing unless they take sufficient measures to be fully compliant. This article gives an overview of the current legislation and the related criminal offences.

Food safety legislation

In the UK, the primary legislation governing food safety is the Food Safety Act 1990. Under this legislation food businesses are responsible for ensuring that:

- They do not include anything in food, remove anything from food or treat food in any way which means it would be damaging to the health of people eating it
- The food they serve or sell is of the nature, substance or quality which consumers would expect
- The food is labelled, advertised and presented in a way that is not false or misleading.\(^1\)

A major concern of food safety law is necessarily that of food hygiene as food businesses such as restaurants and cafes must ensure that the food they produce and serve is safe for consumers to eat. Food hygiene requirements for businesses in the UK are made under powers given by the Food Safety Act 1990 and the European Communities Act 1972 and are contained under the Food Hygiene Regulations 2006 (the ‘Regulations’).\(^2\) These Regulations came into force on 1 January 2006 with the intention of consolidating and simplifying EU legislation on food hygiene.\(^3\)

EU and UK food hygiene regulations apply to ‘food businesses’ and ‘food business operators’ which are defined as follows:

1. A ‘food business’ is any undertaking, whether for profit or not and whether public or private, carrying out any stage of production, processing and distribution of food. The concept of an ‘undertaking’ implies ‘a certain continuity of activities and a certain degree of organisation’\(^4\) and excludes various activities such as the preparation of food for charitable events.\(^5\)

2. A ‘food business operator’ is the legal or natural person responsible for ensuring that the requirements of food law are met within the food business under their control\(^6\) and could include not only the manager of a restaurant but also the owner/ director of the business.

Hygiene Requirements and Food Safety Management

The general and specific hygiene requirements that food business operators must comply with are set out in EC Regulations 852/2004 and 853/2004 and the UK Regulations (all fall under the title ‘the

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\(^2\) There are separate versions of the Food Hygiene Regulations 2006 in England (No.14), Scotland (No.3) and Wales (Welsh S.I. No.31 (W.5)).


\(^4\) Recital 9 of Regulation 852/2004.

\(^5\) Annexes C, D and G of the ‘FSA Guidance on the Requirements of Food Hygiene Legislation’ provide guidance on the application of the EU regulations to different food businesses.

\(^6\) Article 3.2 and 3.3 of Regulation 178/2002.
Hygiene Regulations”). These requirements encompass all aspects of food hygiene from the cleaning and maintenance of premises to the hygienic handling, storage and temperature control of food.

In addition, food business operators are required to put in to place procedures which manage food safety within their establishment and ensure ongoing compliance with the food hygiene legislation.

Article 5 of Regulation 852/2004 requires food safety management procedures to be based on the Hazard Analysis and Critical Control Point Principles (the ‘HACCP principles’). These principles are an internationally recognised and recommended system of food safety management which seek to identify the ‘critical points’ in a process where food safety problems (also called hazards) could arise and then to put in to place the steps which will prevent these problems from occurring. There are seven HACCP principles as follows:

1. Identify any hazards that must be prevented, eliminated, or reduced to acceptable levels.
2. Identify the critical control points at the step or steps at which control is essential to prevent or eliminate a hazard or to reduce it to acceptable levels.
3. Establish critical limits at critical control points which separate acceptability from unacceptability for the prevention, elimination or reduction of identified hazards.
4. Establish and implement effective monitoring procedures at critical control points.
5. Establish corrective actions when monitoring indicates that a critical control point is not under control.
6. Establish procedures, which shall be carried out regularly, to verify that the above measures are working effectively.
7. Establish documents and records commensurate with the nature and size of the food business to demonstrate the effective application of the above measures.

It is important to note that Article 5 does not require food businesses to implement the HACCP principles, only that the procedures which are put in place should be based around them.

Articles 7 to 9 of Regulation 852/2004 provide for the development of ‘guides to good practice’ for hygiene and the application of the HACCP principles. The Food Standards Agency has published criteria for the development and recognition of these guides for individual food sectors. Food business operators are encouraged to use the recognised ‘guides to good practice’ as a voluntary aid to food hygiene compliance but they are not compelled to do so and may demonstrate their compliance in other ways. It is however important to note that when assessing compliance with the Regulations, a Local Authority must take into account any evidence that the food business was following guidance from a recognised ‘guide to good practice’. This evidence will also be crucial in establishing a defence of due diligence if the matter proceeds to prosecution (see below for further details).

**Enforcement of the Hygiene Requirements**

All food businesses are subject to regular food hygiene and standards inspections and audits by a suitably qualified environmental health officer (who will usually belong to the Local Authority). Inspections are always unannounced and are triggered by the lapse of time from the last inspection or by a complaint from a consumer.

An inspection is intended to ensure compliance with the legal requirements as set out in the legislation referred to above. Should the inspection reveal breaches of the legislation the Local Authority has a number of enforcement options open to it. Importantly in deciding what enforcement action to take a Local Authority must have regard to the relevant provisions of the

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7 The FSA website contains the recognised guides to good practice (http://www.food.gov.uk/foodindustry/regulation/hygleg/hyglegresources/goodpractice)
Code of Practice ("the Code") and each Authority should have a documented Food Law Enforcement Policy which is easily accessible to a food business operator. If this Code is not followed then any decision or action taken by the Authority may be successfully challenged and any evidence gathered ruled as inadmissible.

The types of formal enforcement available are as follows:

1. **A hygiene improvement notice** or **improvement notice**. This notice should specify what breaches have occurred and clearly set out what the recipient is required to do. The notice must be served on the food business operator/proprietor in person or to the last known residence by a postal or courier service. Such a notice must specify the time limit for the improvement take place and must be for a minimum of 14 days. The time limit is open to challenge if it is “not realistic, justifiable and have regard to the extent and complexity of the measures required”. Importantly any failure to comply with the notice is a criminal offence (as referred to below). Interestingly, there is no statutory time frame for officers to check that the improvements have been satisfactorily completed. This can lead to complacency amongst food business operators but if by the time of the next inspection the improvements remain outstanding a prosecution for failure to comply (at the very least) is inevitable.

2. **A hygiene emergency prohibition order**. These orders can only be granted by a Magistrates’ Court and are used if there is evidence of an imminent risk of injury to health and hence an improvement notice would be ineffective (for example, an infestation of rats, very poor structural conditions, serious contravention of the legislation together with an outbreak of food poisoning). In the first instance the officer will issue a hygiene emergency prohibition notice as an interim measure followed by an application (within three days of the notice) to the Magistrates’ Court for a hygiene emergency prohibition order (NB. these powers cannot be used against an individual). The effect of a notice will be to close down the business or prevent the use of certain equipment or processes. It is a criminal offence to breach the notice or any subsequent order.

3. **Prosecution** – this is the last resort and the most serious. In deciding whether or not to prosecute, the Local Authority will consider many matters including the seriousness of the offence and the alleged offender’s history (including any previous convictions or cautions). Details of sentencing ranges are set out below. If an individual is convicted of an offence, then the court can order that he or she cannot work as a food operator/proprietor in the future. Such an order would remain in place until an application to the court is successfully made by that individual concerned.

Officers also have the power to enter any food business premises in order to ascertain if there has been any breach of the Hygiene Regulations and to perform any of the functions which fall under the Regulations.

Once on the premises the officer has the power to take food samples and then submit them for analysis. He/ she may also inspect any records relating to the food business including electronic

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8 Issued under s40 of the Food Safety Act and Regulation 24 of the Food Hygiene (England) Regulations 2006.
9 Para 3.1.4 to the Code.
10 Regulation 6
11 S10 Food Safety Act 1990
12 Para 3.2.3 of the Practice Guidance.
13 Para 3.2.5 of the Practice Guidance
14 Regulation 8
15 Regulation 7
16 Regulation 14(1).
17 Regulations 12 and 13.
records held on computers and can then seize and detain any such records as he/ she considers may be used as evidence in any proceedings.

The only limit to this significant power to enter food business premises is that it must be used within reasonable hours and that the officer must provide documentation asserting his authority if requested. A person on the premises can refuse the officer entry but the officer can then make a written application to the Magistrates’ Court for a warrant. A warrant can also be applied for in circumstances where the officer considers the matter to be urgent or the premises are unoccupied. Once a warrant is granted then the officer may enter the food business premises using reasonable force if necessary.

The Criminal Offences

As referred to above, under the Regulations, there are a myriad of criminal offence for contravening or failing to comply with the hygiene requirements set out in the Hygiene Regulations (the UK and EU legislation). Any prosecution of a food business operator or the food business itself must be brought within three years of the commission of the alleged offence or within one year from its discovery by the prosecutor.

It is also an offence to:

1. Fail to comply with any of the notices or orders which may be issued under the Regulations (whether it is a hygiene improvement, remedial action or detention notice issued by a Local Authority or a hygiene prohibition order made by a court).

2. Intentionally obstruct any person acting in the execution of the Hygiene Regulations or to fail, without reasonable cause, to assist or provide any information reasonably required of him/ her.

3. Knowingly or recklessly provide false information to any person acting in the execution of the Hygiene Regulations.

Where a food business is found to have committed an offence, an officer of the business may also be guilty of an offence if it can be proved that the offence was committed with their consent/ connivance or attributable to their neglect. An officer includes any director, manager, secretary or other similar officer or any person who purported to act in any such capacity.

There is a defence of due diligence for any criminal proceedings brought under these Regulations. In order to avail himself/ herself of this defence the food business operator must prove that he/ she took all reasonable precautions and exercised all due diligence to avoid the commission of the offence by himself or a person under his control. The burden is on the defence to prove that on the balance of probabilities the due diligence was undertaken. This alone should provide strong motivation to ensure that food businesses have proper procedures in place to comply with food hygiene regulations. When considering whether the precautions taken by a business were reasonable the court will take in to account all the facts of the case including the size of the business.

In raising a defence of due diligence, the food business operator may allege that the offence was committed as a consequence of the act/ default of another person within the business. The food

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18 Regulation 17 of the Food Hygiene (England) Regulations 2006.
19 Regulations 6 to 9.
20 Regulation 15(1).
21 Regulation 15(2).
22 Regulation 18.
23 Regulation 11.
business operator will only be able to rely on this defence is he/she properly identifies the other person in question. The court may then choose to proceed against the other person rather than the food business operator and employees of food businesses could find themselves at risk of prosecution even where they did not consider themselves to be in a position of sufficient responsibility.

An individual convicted in the Magistrates’ Court of an offence contrary to the Regulations is liable to a fine not exceeding the statutory maximum (currently £5,000). If the matter proceeds to the Crown Court (because it is considered sufficiently serious that the Magistrates’ Court cannot deal with it) then the maximum sentence is that of two years imprisonment and/or a fine (the amount of which is unlimited).

**Conclusion**

All food businesses, no matter the size or type need to invest time and money to ensure ongoing compliance with the relevant legislation. As revealed in this article there is a high price to pay if they do not.

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24 Regulation 10.

25 Regulation 17. Please note that the offences of obstruction and the provision of false information attract a maximum sentence of three months imprisonment and/or £5,000 fine.