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# Work environment liability with respect to the principle of legality and acquisitions

*The question of liability for the work environment is increasingly in focus as are the demands on those parties who are responsible for knowing what applies and for taking action in accordance with these demands.*

*Below, we address two aspects of the work environment issue and the importance of both investigating and being aware of the applicable provisions.*

## I. The principle of legality and liability for the work environment

In a ruling from March this year, the Supreme Court held[1], as opposed to the lower courts, that the principle of legality did not constitute an obstacle to finding a contractor guilty of work environment violations. A contractor had been charged with carrying out construction work on the roof of its property without preparing a health and safety plan. The construction work was carried out during 2008 by a sub-contractor and involved work at a height of over two metres without protective barriers being erected. The prosecutor claimed that the defendant was guilty of work environment violations and should be fined. The prosecutor referred to provisions in the statutory rules of the Workers' Safety Board. The provisions in question were issued by the Board in 1999 and state, amongst other things, that a health and safety plan must be prepared in respect of construction work involving the risk of a fall to a lower level where the height difference is two or more metres. The district court found that the construction work has been carried out in the manner alleged by the prosecutor and that there was no health and safety plan. Sanctions for work environment violations are regulated in the Work Environment Act. By reference to the work environment ordinances, the Work Environment Act states that the government, or the public authority authorised by it, may issue regulations concerning the obligation to prepare documents of significance from a safety perspective. When the ordinances in question were issued, the Workers' Safety Board had been authorised in this respect. However, when charges were brought and at the present time, the provisions no longer refer to the Workers' Safety Board but to the Swedish Work Environment Authority.

The question in this case was thus whether the defendant could be found liable under applicable rules despite the fact that the Workers' Safety Board was no longer authorised to issue documents and regulations?

[1]Ruling of the Supreme Court, Stockholm 23 March 2012, case no. B 3361-10.

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The district court found that the sanctions contained in the Work Environment Act comprise regulations issued by The Swedish Work Environment Authority but not regulations issued by the Workers' Safety Board.

On this ground, the charges were dismissed.

With reference to the principle of legality, the court of appeal found that the sanctions provided no scope to punish a person who violated regulations issued by the Workers' Safety Board as it lacked the requisite authority. The charges in respect of corporate fines were, therefore, dismissed.

After the Prosecutor-General appealed against the judgment of the court of appeal, the Supreme Court gave leave to appeal in the matter of whether a crime in the actual case could be deemed to be at hand under the Work Environment Act. The principle of legality under criminal law means, insofar as it currently applies, partly a prohibition against the analogous application of criminal law and partly a requirement for written law and sufficient clarity and precision.

The Supreme Court found that the case concerned interpretation of the sanctions of the Work Environment Act and the expression, "regulations which have been issued under Chapter 4, Sections 1-8". The Supreme Court found that the expression did not merely comprise regulations issued under the sections stated in accordance with their actual wording, but also regulations which have been issued in accordance with the previous wording of the sections. The Supreme Court was of the opinion that an interpretation of sanctions which concern violation of such previous wording does not entail such an analogous interpretation as would violate the principle of legality. Furthermore, the Supreme Court noted that the principle of legality did not for that matter constitute an obstacle to open-ended prohibitions, i.e. sanctions which are complemented by reference to rules in other statutory laws. The fact that investigation and consideration of what is required may be necessary does not mean that the requirement for clarity and precision has been neglected. The Supreme Court held in conclusion that the sanctions in the Work Environment Act were applicable to the contractor's actions and thus granted leave to appeal in the matter. Because the question of liability had not been tried in the court of appeal on the basis of the provisions on sanctions, the case was referred back to the court of appeal for retrial.

This ruling of course relates mainly to the principle of legality, which has been subject to much discussion recently in respect of, inter alia, the exceeding of speed limits. On the basis of the rationale of the Supreme Court above, it can be concluded, however, that even higher demands can be imposed on contractors and others with responsibility for the work environment in respect of health and safety

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policies for the operation of business. According to the Swedish Work Environment Authority, accidents and occupational illness are twice as common for construction workers as for the average employee. Some of the most common causes are falls to lower levels, inappropriate working positions and heavy lifting. The person ordering the construction work, i.e. the contractor, has the fundamental responsibility for taking into consideration at the planning stage, amongst other things, the work environment during construction. As a contractor, one must therefore investigate extremely thoroughly what applies concerning work environment rules – something which has become even clearer under the ruling reported above.

### II. Responsiblity for work environment on acquisition

On the same theme, there is reason to reflect over the ruling of the district court of Ystad from December 2011.

The company in the case at hand had been taken over by new owners and a new managing director had been appointed. The company was in financial difficulty and the new management took several measures to get the finances under control in order to be able to continue the business, which consisted of the manufacture of foodstuffs. A couple of months after the acquisition, an accident occurred in the workplace in which an employee had part of his index finger injured and later amputated. At the inspection conducted by the work environment inspector following the accident, it transpired that there was no systematic health and safety policy nor any regular risk assessment. The prosecutor chose after a preliminary enquiry to bring charges and to press for a corporate fine. The crime was of violation of the work environment by way of causing bodily harm. As a ground for the charge, it was claimed that the managing director, either intentionally or negligently, had failed to do what was incumbent upon him to prevent accidents, which had caused the injury in question. It was not claimed, however, that the managing director had personal liability.

Because it could be concluded in retrospect that the health and safety measures did not meet all applicable requirements, the company chose to admit liability for a work environment violation. The company accepted a company fine of SEK 150 000 in contrast to the SEK 300 000 asked for by the prosecutor.
The company claimed mitigating circumstances in the case at hand. These were partly that the company had changed ownership and management and partly that nothing had come to light during the acquisition to indicate shortcomings in responsibility for the work environment. Furthermore, during the short period that preceded the accident, it had been necessary to focus on getting a functioning organization and financial management just to be able to continue running the business. On these grounds, the company requested that the fine be set at the lower end of the scale and that it should be subject to adjustment.

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The district court held that the corporate fine could be set at the lower end of the scale and imposed a fine of SEK 200 000. No grounds for adjustment with regard to the acquisition were deemed to exist.

The case has been appealed to the court of appeal.

In the case reported, it was a matter of a relatively modest fine and no liability for the managing director. Corporate fines can be payable at a maximum amount of SEK 10 million and in the sanction scale for gross violation of work environment provisions, custodial sentences are available as a sanction. In the event of a more serious accident than the one in the case reported, the consequences of not also reviewing and ensuring, in conjunction with an acquisition, that work environment demands are met could be devastating. On the basis of this judgment (which has, of course, yet to be heard by the court of appeal) it can once again be concluded that considerable demands are imposed on the investigation of, and compliance with, work environment rules. This applies regardless of whether an accident occurs, for example, a short time after a change of ownership has taken place.

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