
Guidance on Asbestos Licensing and Employment Status

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GUIDANCE ON ASBESTOS LICENSING AND EMPLOYMENT STATUS

This guidance has been produced with reference to a previous ALC memo, which was withdrawn shortly after being issued in 2012 because it overlapped with more general HSE Construction industry guidance being developed at that time. ARCA understands that the ALC memo's interpretation of employment issues was correct, but re-publication has proved difficult due to strict government guidelines on the role of government agencies in publishing 'new' guidance material. This government-wide policy continues to delay the publication of new material and places greater reliance on industry creating and publishing its own guidance. As this is recognised as an important issue for members, ARCA has decided to publish the following as a Guidance Note.

1. BACKGROUND

- 1.1 This guidance note is intended for members engaged in notified, licensable work carried out under the terms of a licence granted by the Health & Safety Executive; it is intended to clarify legal and organisational constraints.
- 1.2 All licence holders will already be aware that asbestos licensing is a permissioning regime, one of only a very few that operate in the United Kingdom. The Health and Safety Commission's (HSC) Policy Statement 'Our approach to permissioning regimes' is available from the Health and Safety Executive's (HSE) [website](#). Licensing is an addition to the general framework of health and safety law. It is expected to be relatively resource intensive for both duty holders and the enforcing authorities and it is therefore reserved for situations of particular hazard and public concern, where a high degree of regulatory control is appropriate.
- 1.3 Regulation 8 of the Control of Asbestos Regulations 2012 requires an employer to hold a licence, granted by HSE, in order to undertake "licensable work with asbestos" (as defined in regulation 2). It follows that those workers carrying out the work will be employees of that employer.
- 1.4 Health and Safety law is most likely to consider a notifying licence holder to be the employer for the following reasons (see links below for references and sources of further information):
 - 1.4.1 The licence holder has direct and immediate control over the way the work is done i.e. the work follows a "suitable and sufficient" plan of work, prepared by the licence holders' senior management prior to notification;
 - 1.4.2 The licence holder has the power to select and appoint workers;
 - 1.4.3 The licence holder provides equipment for the work;
 - 1.4.4 The licence holder controls the time/location of the work.

Genuinely self-employed persons would be working under their own control and direction; in such cases, those individuals would need their own personal licence to undertake the work with asbestos and would notify their work in accordance with standard licence conditions.

- 1.5 Tax matters are enforced by HM Revenue and Customs (HMRC) and are not an area HSE is likely to explore. However, HMRC tests of employment status appear to be very similar to those used by HSE when considering duties under health and safety law.

- [HMRC website](#)
- [Construction Industry Scheme \(CIS\)](#)

This guidance suggests that anyone working under the control of a licence holder on a notified asbestos job is extremely unlikely to be eligible for CIS as they could not be described as genuinely self-employed. If licence holders have any doubt about the employment status of staff working on licensed jobs, clarification should be sought from HMRC. Breaches of legislation enforced by HMRC may be “reputational issues” relevant when HSE is considering licence action.

2. LICENCE HOLDER DUTIES (PRIOR TO AND DURING EMPLOYMENT)

- 2.1 The Asbestos Licensing Unit (ALU)/HSE seek evidence of effective management control from licence holders. This will mean licence holders need to (a) establish the competency of **any** staff working under the terms of their licence, (b) have effective arrangements for worker involvement, (c) ensure that all staff are provided with relevant equipment, information, instruction and training and (d) monitor their actual performance on site.
- 2.2 Employees on permanent contracts are more likely to have an affinity with the long term interests of an employer. Permanent staff are more likely to be fully aware of company's expectations and policies/procedures: reliable management control and real worker engagement will be more easily achieved. Effective arrangements for worker consultation and engagement may be difficult to demonstrate where the employer-employee relationship is temporary. Where employers choose to employ staff on temporary contracts, HSE/ALU may seek a high degree of reassurance about company systems for establishing and monitoring competence.
- 2.3 Where the use of temporary staff is required, it is strongly advisable to use labour supply organisations who can demonstrate a good working knowledge of the licensed asbestos industry: it is crucial that the labour supplier and licence holder communicate clearly with each other to ensure risks and responsibilities are well defined. Labour supplier and licence holder will need to work together to enable appropriate competency checks, equipment checks and record keeping are done. The main responsibility for staff is likely to rest with the notifying licence holder but a knowledgeable, well-organised labour supplier should save time and provide a degree of confidence and reassurance via pre-qualification checks and an understanding of licence holders' TNA and competency requirements. In addition to the comments above (paragraph 1.6 on HMRC and tax status), legitimate labour supply organisations will work with client licence holders to ensure that operatives are not contracted on a 'false' self-employed status.

As a condition of membership, ARCA Labour Supply members have committed to ensure that each operative supplied has been checked for their right to work in the UK and their correct employment status, and verification of their medical, training and face fit certification.

- 2.4 In general terms, the notifying licence holder must:
- 2.4.1 Ensure the competence of staff.
 - 2.4.2 Provide appropriate health and safety equipment, instruction, training and supervision.
 - 2.4.3 Ensure that the operative is subject to appropriate medical surveillance and that appropriate exposure records are maintained.
 - 2.4.4 Ensure the operative has been inducted and trained in company procedures and policies.
 - 2.4.5 Provide a suitable method of work and effective supervision to ensure that general procedures and site specific methods are followed.
 - 2.4.6 ALU has been encouraging inspectors to seek evidence (such as invoices) that the applicant is providing training/medicals/RPE for all staff.
- 2.5 The following table provides further guidance.

Checks prior to and during employment

Check paperwork is valid, in date and relevant for the proposed role (training certification, medicals, face fits etc.).

Provide RPE and other necessary equipment

Employers have a basic duty to provide all necessary safety equipment (PPE and RPE) and ensure face fits etc. are carried out and subject to a defined, effective maintenance regime.

If a member of staff has their own RPE and insists on using it, the licence holder will need to carry out their own thorough maintenance and examination tests to ensure that the RPE meets the licence holder's standards. Given the importance of RPE, it is reasonable for this to be a thorough visual examination by the licence holders' own competent staff.

Establish competence

Competence does NOT simply mean that the operative/supervisor/manager has a current training certificate. A competent individual has the experience, training and personal characteristics appropriate for the job at hand. Asbestos specific training will have been delivered in accordance with a training needs analysis: this means that the employer will have monitored an individual's actual performance and identified what training is required. This may be more difficult to demonstrate where the licence holder chooses to employ staff on a casual or temporary basis.

Staff should only be employed in situations appropriate to their experience, skills and training. In practice, new staff (or temporary staff) are likely to require a higher degree of monitoring and supervision in addition to pre-start competency checks. The notifying licence holder will always need to verify competence by on-site performance monitoring (see below).

Monitor and measure performance

All licence holders are expected to have well-defined policies, procedures and arrangements for monitoring and measuring the work of site teams. This will cover the entire range of the licence holder's work. For example, it will encompass the performance of contracts managers who plan work and oversee site teams. The level of supervision and monitoring will vary greatly depending on the competency of staff. This will be reflected in job planning, resourcing and assignment of supervisors.

Where staff are new to the organisation, senior managers/directors/contracts managers should have very close oversight of the work until the company can be satisfied about basic competencies, compliance with company procedures and the standards of work being achieved on site.

Enforcing authorities are likely to expect to see evidence of such a system and evidence that, in practice, it is working. For example the system will be described in company procedures and policies and there will be records showing how it is working in practice (in site files, personnel files, audit documentation etc.).

Worker consultation

Worker consultation and involvement means the full participation of the workforce in the management of health and safety. All employers are required to work together with employees to develop, maintain and promote effective measures that ensure health and safety at work. Effective consultation will result in an open and blame-free culture, which positively encourages and uses employees' input. If licence holders choose to employ staff on a casual or temporary basis this may be more difficult to demonstrate. Enforcing authorities are likely to look for evidence that consultation is working in practice.

3. EMPLOYMENT STATUS AND SUPERVISORS – ADDITIONAL COMMENTS

- 3.1 There is no special legal status for the employment status of supervisors, but members should refer to the existing ALC memo on supervision (see section 4 for references). This describes the crucial importance of the supervisor role. The issues of competence and management oversight are particularly significant.

4. REFERENCES AND SOURCES OF FURTHER INFORMATION

- Control of Asbestos Regulations 2012
- Health and Safety at Work etc. Act 1974
- The Safety Representatives and Safety Committees Regulations 1977
- The Health and Safety (Consultation with Employees) Regulations 1996
- The Approved Code of Practice to the Regulations (HSE publication L143)
 - [Asbestos Network on the CONIAC website](#)
 - [HSE web pages on asbestos licensing](#)
 - [HSE web pages on worker involvement](#)
 - [HSE web pages on contracts of employment](#)
 - [HMRC web pages on the CIS scheme](#)