Companies and natural persons as employers under the Work Environment Act

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Introduction

In 2004, according to Statistics Sweden (SCB), there were some 486,000 natural persons active as entrepreneurs. Of these, about 22,000 were employers. The remaining 464,000 were natural persons with enterprises not having any employees. At the same time there were about 247,000 limited companies.

This publication highlights legal issues concerning employers and employer's liability in the work environment context, with reference to limited companies and to natural persons as employers.

A description is given of corporate organisation under the Companies Act (SFS 1975:1385). The allocation of tasks and other management under the Provisions of the Work Environment Authority on Systematic Work Environment Management, AFS 2001:1, are presented, as well as public enforcement of work environment legislation. An account is also given of the legal consequences of non-compliance with the legislation.

Employers and their responsibilities under the Work Environment Act

The basic provisions in Chap. 3, Section 2 of the Work Environment Act require the employer to take all the measures necessary to prevent the employee being exposed to ill-health or accidents. The employer's main responsibility for the work enjoinment is emphasised and amplified in Section 2 a of the same chapter, which requires the employer to systematically plan, direct and control activities in such a way that the work environment of the operation will meet the requirements of work environment legislation.

AFS 2001:1 contains Provisions and General Recommendations by the Work Environment Authority on Systematic Work Environment Management. This instrument elaborates and defines more closely the employer's responsibility for the work environment. The rules apply to all employers in Sweden, whatever the type of operation involved and regardless of the number of employees. The term "employer" is dealt with in the General Recommendations accompanying Section 1 of AFS 2001:1:

"These Provisions refer to an employer in the legal sense, meaning a natural or legal person with one or more employees."

Legal persons are instanced partly with limited companies. The guidance on Section 4 of AFS 2001:1 reads:

"Everyone employed in the activity is an employee. This includes managers and supervisory personnel, e.g. the managing director of a company."

Natural persons

A natural person running a business which is not incorporated can have both assets and liabilities in the business, and is personally liable for the firm's debts if its capital will not cover them.

There are no laws saying how an operation run by a natural person is to be organised.

If a person runs a business single-handed, e.g. as the firm of John Johnston, without having any employees, then the firm will have neither employer nor employee. Under Chap. 3, Section 5 of the Work Environment Act, though, a one-person undertaking must comply with work environment prescriptions relating to machinery and dangerous substances, on the principle that even a person working on their own can be exposed to risks emanating from machinery and substances.

A natural person may be an employer in various situations. They may carry on business under a special name with employees, run a business in their own name with employees or be a private person, e.g. a house owner employing a gardener.

Just one employee is enough for there to be an employer-employee relation. This is the case with all Provisions issued by the Work Environment Authority (formerly the National Board of Occupational Safety and Health) on the employer's obligations to employees, e.g. rules on machinery, chemicals, noise lighting, work postures and working movements, minors, solitary work and violence and menaces.

The employer must also comply with the Provisions on Systematic Work Environment Management. In a small firm this means, above all, the employer carrying out investigation, risk assessment, remedial measures and follow-up of the measures taken.

Limited companies

If John Johnston's business is turned into a limited company with John as sole proprietor, working in the company, then in a purely legal sense the company will be the employer and John its employee. The purpose of making the business into a limited company is to reserve for the company capital which is segregated from John's private assets.

A limited company becomes a legal person when entered in the companies register. A legal person can have both rights and obligations. Limited companies can have assets and liabilities, can make decisions on their own behalf and enter into contracts. A company may, for example, be ordered to pay a contingent fine, a corporate fine, sanction charges and damages.

There are private and public limited companies, depending on the amount of share capital. A private company must have a share capital of at least SEK 100,000, a public one at least SEK 500,000. Otherwise there are various kinds and sizes of limited company. Fundamental to all of them is that the shareholders are not personally liable for the company's debts.

Group of companies

A company owning so many shares in another company as to control more than half the votes is called a parent company. The other company is its subsidiary. Several companies thus owning or owned by each other are collectively termed a group (of companies).

A group is not a legal person and accordingly cannot be an employer for the purposes of the Work Environment Act. Each of the various companies in the group, on the other hand, is a separate legal person and therefore an employer in its own right.

Indirectly, though, the group exerts a great deal of influence, both financially and in other respects, so that the policy and attitude of the group management concerning the work environment can make an important difference to the individual companies.

Corporate organisation under the Companies Act

Meeting of shareholders and company management

The Companies Act makes the meeting of shareholders the company's supreme policy-making body. This is where the shareholders can

- elect members of the board of directs and auditors,
- adopt the annual accounts,
- decide on measures prompted by a profit or loss and
- decide on the discharge of the members of the board of directors and the auditors from liability.

The board of directors and the managing director at the executive agents. Together they are commonly referred to as "the management", a term not used in the Companies Act.

The board of directors

The company's board of directors is the employer's ultimate representative. The board must have at least three members, though one or two is sufficient for a private company if there is at least one alternate.

A board with more than one member must have a chairperson. The chairperson's task is to direct the work of the board and ensure that it discharges its duties. The chairperson can sometimes be a working chairperson. This term does not occur in the Companies Act. A working chairperson often takes part in the conduct of day-to-day business in close collaboration with the managing director, but the chairperson's work may not encroach on the managing director's powers and duties.

The board of directors is elected by the meeting of shareholders and in its turn elects a chairperson, unless the statues of the company indicate otherwise. The company statutes are the basic "constitution" of the company, laying down rules for example on its name, activities and organisation.

The managing director

In public limited companies the board of directors has to appoint a managing directors, In private limited companies the board of directors may appoint a managing director. The managing director is employed by the company. The same goes for the deputy managing director. Accordingly, both managing director and deputy managing director, as employees, are protected by the Work Environment Act.

Sometimes a company will have a management consisting of the managing director and other officers. The term "management" is not used in the Companies Act. The members of the management are advisers to the managing director but cannot outvote him or her in a decision-making situation.

Auditors

All limited companies must have auditors. These are generally appointed by the meeting of shareholders.

The relationship between meeting of shareholders and company management

The persons making up the company management are duty bound to comply with the instructions of the meeting of shareholders, but they also have powers and obligations under the Work Environment Act. They represent the company, for example, either conjointly or as individual signatories.

The name of a company must include the word "company" (aktiebolag) or the letters AB (for "Ltd"). If the firm is declared bankrupt or goes into liquidation, it has to be signed for with an addendum pointing this out, e.g. "Aktiebolaget N i konkurs".

The relationship between meeting of shareholders and company management can vary considerably. Shareholders of large companies seldom have sufficient interest or knowledge to participate in the company's operations, while in small companies the meeting of shareholders and the management may be identical, as for example when a person is sole shareholder and also member of the board of directors.

The relationship between board of directors and managing director

As we have seen, a private company need not have a managing director, in which case the board of directors is responsible for all direction and administration. If there is also a managing director, the Companies Act indicates how tasks are to be basically allocated between the board of directors and the managing director:

"The board of directors shall be responsible for the organisation of the company and the management of its affairs."

"The board of directors shall in written instructions indicate the division of tasks between on the one hand the board of directors and on the other the managing director and the other bodies which the board of directors establishes. The responsibilities of the board of directors and its duty of supervision cannot be transferred to any other body." (Chap. 8, Section 3 of the Companies Act.)

The board of directors is superior to the managing director if manners concerning the direction and administration of the company. In practice, tasks are allocated in such a way that the managing director attends to day-to-day business, is responsible for the personnel and attends to bookkeeping and financial management. This area of responsibility naturally also includes work environment issues. The board of directors is responsible for other management and administration, e.g. it lays down guidelines for the company's activities and attends to other matters which are not of a day-to-day nature.

Measures which, having regard to "the scope and nature of the company's operations, are unusual or of great importance" (the Companies Act) are usually dealt with by the board of directors. If a measure is of such urgency that a decision by the board of directors cannot be awaited, the managing director may take the measure directly but must then notify the board of directors as soon as possible.

In large companies particular, the knowledge possessed by the managing director, coupled with his or her day-to-day work and contacts with the personnel, may also confer a great deal of influence on issues of great importance. The board of directors, which takes part in the running of operations mainly through board meetings, then acquires a more advisory, supervisory and monitoring-related role. It is always the board's duty to keep the managing director's activity under constant supervision and if necessary to issue the managing director with new or amended instructions. This also applies concerning work environment issues.

Working shareholder

A company with no employees may still be an employer. If the work is done by one or more shareholders, they are equated with employees for the purposes of the Work Environment Act. This applies whether they are board members or not. The company will then be their employer.

But a shareholder or board member can also participate in the company's activities if there are employees. This is the case, for example, with a working board chairman, who will accordingly be equated with an employee.

Board of directors and managing director – dual roles

The board of directors is the company's ultimate employer representative. Its members cannot be regarded as employees where the activities of the board are concerned, except for the working chairman, who by definition takes part in the day-to-day work of the company.

A managing director is hired and therefore has a dual role in practice. Having been hired, he or she is an employee and has individual rights and obligations under the Work Environment Act.

The personnel, on the other hand, usually regard the managing director as an employer. The same goes for other managers and supervisory staff in companies both large and small, even though, purely legally speaking, all these categories are employees.

Provisions on Systematic Work Environment Management

General

The Provisions on Systematic Work Environment Management, AFS 2001:1, require the employer to investigate, carry out and follow up activities in such a way that ill-health and accidents at work are prevented and a satisfactory working environment achieved. Work environment management shall be included as a natural part of day-to-day activities and shall comprise all physical, psychological and social conditions of importance for the work environment.

Regular investigations, risk assessments, remedial measures, action plans and verification of measures taken are part and parcel of ongoing systematic work environment management. When changes to the activity are being planned, the employer shall assess whether the changes entail risks of ill-health or accidents which may need to be remedied.

There must be routines describing how systematic work environment management is to proceed effectively. Employer and employee shall co-operate to establish a good working environment. (Chap. 3, Section 1 a of the Work Environment Act).

Section 4 of AFS 2001:1 therefore requires the employer to give the employees and safety delegates the possibility of participating in systematic work environment management.. On the other hand, responsibility for the work environment or for work environment management cannot be transferred to the safety delegates or the safety committee. They have different roles to play, namely those of initiating and monitoring work environment management.

Section 5 of AFS 2001:1 lays down that there must be a work environment policy describing how working conditions in the employer's activity shall be in order for ill-health and accidents at work to be prevented and a satisfactory working environment achieved. The intention is for this policy to serve as inspiration and guidance for work environment management. To this end it needs to be communicated to everyone involved in the operation.

Follow-up of systematic work environment management (Section 11 of AFS 2001:1) has to take place once a year. Regular follow-up has a very important bearing on the further handling of the work environment as a part of the operation, It is important that the management should consider the outcome of the follow-up and assess whether improvements are needed to the system and to the practical implementation of work environment management.

Allocation of tasks

The top management of a limited company needs to allocate the tasks of systematic work environment management in order for the company to be capable of discharging its responsibility for the work environment and work environment management. Because systematic work environment management has to be integrated with the operation, the tasks involved are entrusted to line personnel. In companies not having a line organisation, the allocation of tasks has to be otherwise resolved. This can, for example, be the situation in limited companies which include staffs or work on a project basis.

The allocation of tasks should as far as possible conform to the chain of command within the operation. At all events, work environment issues should not be handled by a separate safety organisation.

Section 6 of AFS 2001:1 provides:
"The employer shall allocate the tasks in the operation in such a way that one or more managers, supervisors or other employees are tasked with working for the prevention of risks at work and the achievement of a satisfactory working environment.

"The employer shall see to it that the persons allotted these tasks are sufficient in number and have the authority, the resources and the competence that are needed. The employer shall also see to it that they have sufficient knowledge of

- rules material to the work environment,
- physical, psychological and social conditions implying risks of accidents and ill-health,
- measures to prevent ill-health and accidents, and
- working conditions conducive to a satisfactory work environment.

The employer shall see to it that those allotted the tasks have sufficient competence for the efficient conduct of systematic work environment management."

The guidance on Section 6 of AFS 2001:1 reads:
"In larger undertakings the allocation of tasks primarily concerns managers and supervisory personnel. They carry on work environment management as a natural part of their day-today activities, e.g. in connection with decision-making and work supervision, and in their turn can often entrust tasks to other employees."

"Managers and supervisory personnel have a decisive role to play in creating satisfactory working conditions and preventing ill-health and accidents. To this end, they need to have a thorough knowledge of the work itself, the risks which it entails and measures for the prevention of injuries. It is important for them to have good insight into people's reactions in different situations and to be thoroughly apprised of the health implications of, for example, heavy workload, overtime, victimisation, violence and menaces, and substance abuse. This in turn should make it easier for them to provide necessary support to the employees."

In principle, the company's top management itself decides the manner in which these activities are to be conducted and by whom. If, for example, new hazards appear in the work environment or if the operation is reorganised or its content changed, the allocation tasks may need to be revised.

Occupational health services

When competence within the employer's own operation is insufficient for systematic work environment management or for work relating to job modification and rehabilitation, the employer must engage occupational health services or corresponding expert assistance from outside (Section 12, AFS 2001:1).

Occupational health services are engaged above all to investigate working conditions, to asses physical and mental hazards and to propose remedial action.

It is important that the employer should personally carry out tasks included in the employer's role, instead of engaging external consultants for the purpose. This applies to strategic decisions and to decisions entailing expenditure, e.g. adoption of a work environment policy, allocation of tasks and decisions prompted by the follow-up of systematic work environment management. The employer cannot outsource occupational health care and transfer responsibility for systematic work environment management to the occupational health services. Occupational health services

have no legal responsibility for the work environment. Their task is to be an independent expert resource for the work environment and rehabilitation.

Written documentation

In an undertaking with ten or more employees, the following must be put down in writing:

- Work environment policy
- Routines
- Allocation of tasks
- Instructions – if the risks are serious
- Risk assessment
- Action plan
- Conspectus of injuries and incidents
- Follow-up of systematic work environment management

Systematic work environment management in small undertakings

Systematic work environment management is essentially concerned with investigating working conditions, identifying risk sources, assessing risks and taking action so that personnel will not be injured or made ill by their work. This also has to be done in the smallest undertakings, those with only one or a few employees.

No special work environment policy is needed in a small firm with less than ten employees. Instead the action plan can then serve as policy. Where routines are concerned, a clearly proactive approach will suffice, e.g. concerning when and how the next investigation of working conditions is to be carried out.

In a small limited company the owners and the members of the board of directors are often the same people. In that case the board of directors will have an operative role, especially if there is no managing director. If the company has employees, then often one of the board members will be operative manager, even if that person has not been formally appointed managing director.

Generally speaking, the smaller the firm the greater the part which its board will usually play in the firm's practical work. In a small limited company, then, the board of directors has the importance task of ensuring that the Work Environment Act and the Provisions on the working environment are complied with.

If there is a manager – no matter when he/she is managing director – he or she will usually be entrusted by the board of directors with systematic work environment management. This manager must be given sufficient knowledge and competence and also sufficient powers and resources.

In small limited companies the annual follow-up can among other things be aimed at establishing whether the measures outlined in the action plan have been taken and whether the routines for systematic work environment management are being followed.

In small firms with fewer than ten employees, only the following need be put down in writing:

- Risk assessment
- Action plan
- Collation of injuries and incidents

Supervision of the work environment

One of the basic ideas of the Work Environment Act is for the employer personally to assume responsibility for the operation being conducted in such a way that ill-health and accidents are prevented and a satisfactory work environment achieved. Another fundamental idea is for the employer to co-operate with the employees. A general indication of how the employer is to go about this is provided in Chap. 3, Sections 2 and 2 a of the Work Environment Act and in the Provisions on Systematic Work Environment Management.

Other Provisions issued by the Work Environment Authority (formerly the National Board of Occupational Safety and Health) focus on measures which the employer must take in order to bring about improvements to the work environment.

Public supervision of compliance with work environment legislation is conducted by the Work Environment Authority, whose operations throughout the country are divided into ten districts. The Work Environment Authority inspects the work environment and work environment management at individual workplaces. Priority is given to the industries and fields of activity with the highest injury rates. The Work Environment Authority may address stipulations to an employer who is failing to meet his obligations under the Work Environment Act. The deficiencies, and the measures needed to remedy them, are entered in an inspection notice addressed to the company or to the natural person as employer.

In the inspection notice the employer is called on to meet the stipulations before a certain date and to report accordingly to the Work Environment Authority. An inspection notice is not formally binding, but it expresses the supervisory authority's assessment of what needs doing in order to improve the work environment.

If the employer does not render an acceptable account in time, the Work Environment Authority can make a binding decision. This can take the form of an order to take certain measures or a prohibition against conducting the operation unless certain conditions are met. The Work Environment Authority's decision can be appealed to the government and in certain case to a county administrative court.

When the employer's responsibility is not discharged

General

The employer's general obligations under Chap. 3, Sections 2 and 2 a of the Work Environment Act and under the Provisions on Systematic Work Environment Management do not carry direct penal sanctions. Accordingly, if the employer does not comply with the provisions this will not have any immediate legal consequences. But if the Work Environment Authority has issued an injunction or prohibition and the employer does not comply with this decision, there may still be consequences of various kinds. These are described in the sections which now follow.

Contingent fine, sanction charge, corporate fine and damages

In its decision the Work Environment Authority can set a contingent fine, the amount of which will depend on the cost of taking the measures concerned and the level needed to "persuade" the

employer to take them. If the decision has acquired force of law and the employer has not taken the measures stipulated, a court can impose the full amount of the fine or part of it. There is no requirement of negligence: it is sufficient for the injunction or prohibition not have been complied with by the deadline indicated in the decision.

Where pressure vessels are involved, the employer can be made to pay a special sanction charge if the inspection provisions are not complied with. Charges of up to SEK 100,000 can be payable. Here again, there is no requirement of negligence.

A corporate fine can be imposed on a party carrying on business activity.

Damages seldom figure in work environment cases. Usually the employer will have taken out insurance, e.g. some form of labour market insurance, which takes the place of general damages under the Damages Act.

Contingent fines, sanction charges, corporate fines and damages are all awarded against the company as a legal person or the natural person carrying on the business.

Penal sanctions

Chap. 3, Section 10 of the Penal Code contains provisions on penalties in the form of fines or imprisonment for one or more individual persons in the undertaking. These apply when the Work Environment Act has not been complied with and a person has died, been injured, fallen ill or been exposed to serious danger as a result. There always has to be intent or negligence. Negligence usually consists in a person or persons having failed to take the measures which could have prevented the injury from happening.

Penal sanctions may also come into play if the Work Environment Authority has issued an injunction or prohibition and this has not been complied with. No such penalty can be imposed, however, if the Work Environment Authority has set a contingent fine in its injunction or prohibition.

There are also direct penal provisions in the Work Environment Act, the Work Environment Ordinance and the Provisions of the Work Environment Authority (formerly the National Board of Occupational Safety and Health). Infringement of a provision of this kind is sufficient for a penalty to be imposed, but there must be intent or negligence. On the other hand there does not have to be an injunction or prohibition previously issued by the Work Environment Authority. This applies, for example, to rules concerning the employment of minors, the testing and inspection of technical devices, conditions for the handling of dangerous substances, removal of safety devices and the duty of reporting serious accidents. Various persons in companies and other undertakings can incur penalties, e.g.:

- members of partnerships,
- the proprietor of a business,
- shopkeepers,
- the board chairman of a company,
- a member of the board of directors of a company,
- a managing director,
- the proxy for a limited company,
- the proxy for a co-operative economic association or non-profit association,
- a works manager,
- a production manager
- a plant manager and
- supervisory staff.

Allocation of tasks and responsibilities

The employer needs all the time to be certain that the allocation of tasks is working properly and to reallocate tasks when the need arises. Ultimate blame for any uncertainty with regard to the allocation of tasks will rest with the senior management.

The allocation of tasks does not mean that a person allotted tasks will automatically be punished in the event of a work accident. Thus it does not mean that he employer can decide in advance who is to be punished if there is an accident. That responsibility is decided by the court post facto.

If the accident leads to prosecution and court proceedings, the question of whether the accused had sufficient knowledge, competence, powers and resources for the tasks will weigh heavily in the court's assessment of the matter.

Conclusion

The management of an undertaking has the important task of guiding systematic work environment management through the clarification and proper allocation of tasks, coupled with adequate resources, powers and knowledge and annual, proactive follow-ups of systematic work environment management.