

HSE improvement and prohibition notices: what do they tell us about CDM 2015 and construction health and safety?

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Key Points

- The improvement and prohibition notice data provided on the Health and Safety Executive's (HSE) web site have been analysed to establish where HSE identified potential breaches on construction projects. These analyses were carried for 2016/17 – the first full year where CDM 2015 was the primary construction regulation in its own right.
- These analyses showed that, in 2016/17, HSE inspectors issued 3,155 notices to construction duty holders. Of the 3,155 notices, 1,362 were improvement notices, whilst 1,793 were prohibition notices. Within these notices, 7,993 potential breaches of acts or regulations were identified.
- The potential breaches identified most frequently in 2016/17 were of the Health and Safety at Work Act (3,391 potential breaches). The Work at Height Regulations followed with 1,790 potential breaches, whilst CDM 2015 had the third largest number of potential breaches with 1,669.
- Of the 1,669 potential breaches of CDM 2015, Principal Contractor (489) and Contractor duties (278) were by far the most frequent. There were 99 potential breaches of Client duties, but only 5 potential breaches of Principal Designer duties and 2 of Designer duties.
- For Principal Contractors, the potential breaches most frequently identified were of Regulation 13(1), the duty to plan, manage, monitor and coordinate the work.
- For Contractors, three duties account for the majority of the potential breaches identified. As with Principal Contractors, potential breaches of the planning, managing and monitoring duties (Regulation 15(2)) were identified frequently. However, similar numbers of potential breaches were observed in relation to skills, knowledge, experience and training (primarily of site managers and site supervisors) (Regulation 15(7)) and for the provision of welfare facilities (Regulation 15(11)).
- Potential breaches of the CDM 2015 Part 4 duties were identified more frequently (646) than the Principal Contractor or Contractor duties. In particular, issues with excavations (86), fire (58) and stability of structures (54) featured most often. The specific duties in Part 4 of CDM 2015 can apply to both Principal Contractors and Contractors depending on who is carrying out the work.

1. Introduction

1.1 HSE's Enforcement Policy Statement⁽¹⁾ indicates that the following options are available to its inspectors:

- Providing published information and verbal advice
- Providing written information regarding breaches of law
- Requiring improvements in the way risks are managed
- Stopping certain activities where they create serious risks
- Recommending and bringing, prosecutions where there has been a serious breach of law

1.2 The third and fourth options are better known as enforcement notices, specifically improvement and prohibition notices. HSE's Enforcement Policy notes that:

*An **improvement notice** can be served when an inspector is of the opinion that there is a breach of the law which needs to be remedied within a certain period of time.*

*A **prohibition notice** can be served when an inspector is of the opinion that there is a risk of serious personal injury associated with a particular work activity or process or, if a serious deficiency in measures is identified, to prevent or mitigate the effects of major hazards. There does not need to be a breach of the law. Such a notice can take immediate effect or be deferred for safety reasons.*

1.3 With an improvement notice, the recipient is required to take action within a specified period of time. With a prohibition notice, the recipient is required to stop activity until remedial steps have been taken.

1.4 In both cases, the notices are registered on HSE's website, and failure to comply with them is a criminal offence that can result in prosecution. Indeed, a Contractor has recently been given a 26-week suspended jail sentence along with £11k costs for failing to comply with a prohibition notice for unsafe scaffolding⁽²⁾.

1.5 Both types of notice will also attract a charge from HSE under its Fee for Intervention scheme to recover the costs incurred by HSE in issuing the notices (currently charged at £129 per hour⁽³⁾).

1.6 It is possible to appeal to an Employment Tribunal within 21 days of receipt of a notice. Improvement notices are suspended until the appeal has been concluded, whilst prohibition notices are not suspended automatically. The Tribunal may confirm, cancel or modify the notices.

1.7 The approach to appeals varies between England/Wales and Scotland (a presentation by Peter Gray QC⁽⁴⁾ provides an overview of the issues). In England and Wales, Tribunals consider the information which was available to the inspector, or ought reasonably to have been available following the inspection. In Scotland, appellants can use whatever relevant information is available at the time of the Tribunal's hearing to prove that the factual content of the notice was wrong and that, however reasonable the inspector's opinion was at the time, had the true facts been known, he would not have reached it. These regional differences are due to be resolved in the Supreme Court later in 2017.

2. HSE's notice data

2.1 HSE provides details of improvement and prohibition on its web site⁽⁵⁾. This contains information on the notice type, the regulations that have potentially been breached and details of the notice text issued to the recipient. Whilst it provides relatively detailed information, this data has the following limitations:

- It does not identify whether notices have been appealed, overturned or modified
- It does not include those notices issued by local authorities or the Office for Road and Rail

2.2 HSE issues notices to companies and individuals. On each notice, the inspector may identify one or more instances where the recipient has potentially failed to comply with health and safety law. Each one of these is called a breach. As such, there are more breaches than notices in the data set.

3. Overview of the notices served

3.1 The total number of notices issued to construction duty holders varied between 3,000 and 3,500 over the period 2013/14 to 2016/17 (see Figure 3-1). In 2016/17, HSE issued 3,155 notices. The number of prohibition notices issued reduced from 2,180 in 2013/14 to 1,793 in 2016/17. Over that period, the number of improvement notices varied between 1,150 and 1,362, with the larger value corresponding to 2016/17.

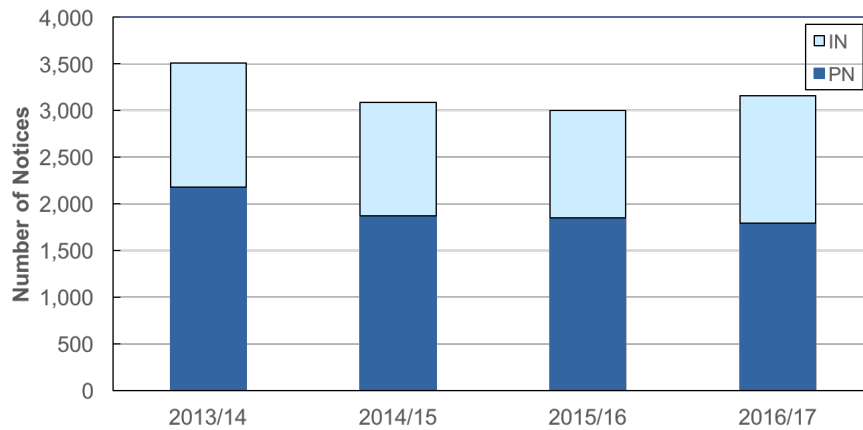


Figure 3-1: Notices issued by HSE to construction duty holders

3.2 Over the four-year period, three areas of London (Hammersmith, Wandsworth and Kensington & Chelsea) were among the ten areas in which HSE served the most notices to construction duty holders, with between 150 and 200 notices served (see Figure 3-2).

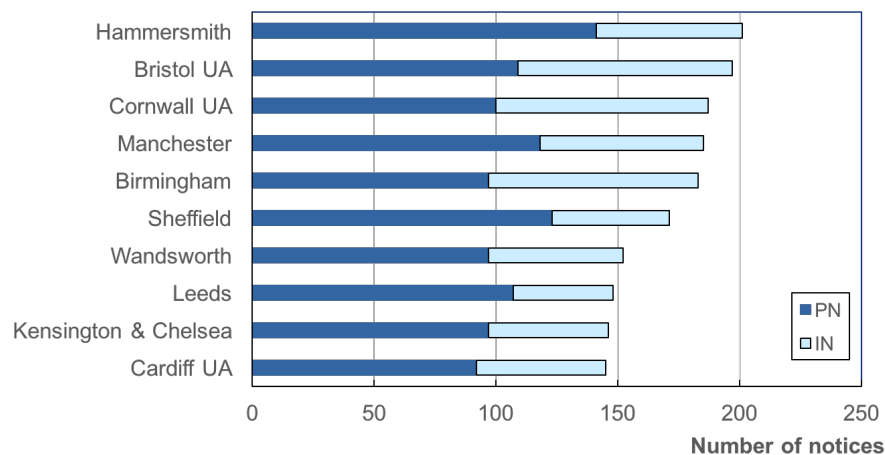


Figure 3-2: The ten areas of GB with the most frequent potential breaches of CDM 2015 identified by HSE in notices issued to construction duty holders (2013/14 to 2016/17)

3.3 Two of the country's largest cities (Birmingham and Manchester) also featured in the list along with Bristol, Sheffield, Leeds and Cardiff.

3.4 At the other end of the scale, there were some areas of the country where no notices were served. Of the 407 local authority areas in England, Scotland and Wales, 381 are present in HSE's data set, whilst 26 are absent as a result of no notices being issued to construction duty holders. In other areas including Nuneaton, Western Isles, North Norfolk, North Warwickshire and Barrow-in-Furness only one notice was issued over the four-year period.

4. Overview of the potential breaches identified by HSE in 2016/17

4.1 As discussed in Paragraph 2.2, each notice may identify several potential breaches of regulations or acts. In 2016/17, 7,993 potential breaches were identified in the 3,155 notices.

4.2 Analysis of these potential breaches provides greater insight than the analysis of the notices, as it shows which specific parts of regulations or acts, duty holders were alleged to have breached.

4.3 The figures quoted in the remainder of this article thus relate to potential breaches rather than notices. They also relate to 2016/17 only, as this was the first year that CDM 2015 was in place in its own right – there was a 6-month transition period in 2015/16 where CDM 2007 still applied to existing projects, whilst CDM 2015 applied to new projects.

4.4 The three acts or regulations that HSE identified most potential breaches of were the Health and Safety at Work etc. Act (HSWA) (with 3,391 potential breaches in 2016/17), the Work at Height Regulations (1,790) and CDM 2015 (1,669) (Figure 3-1).

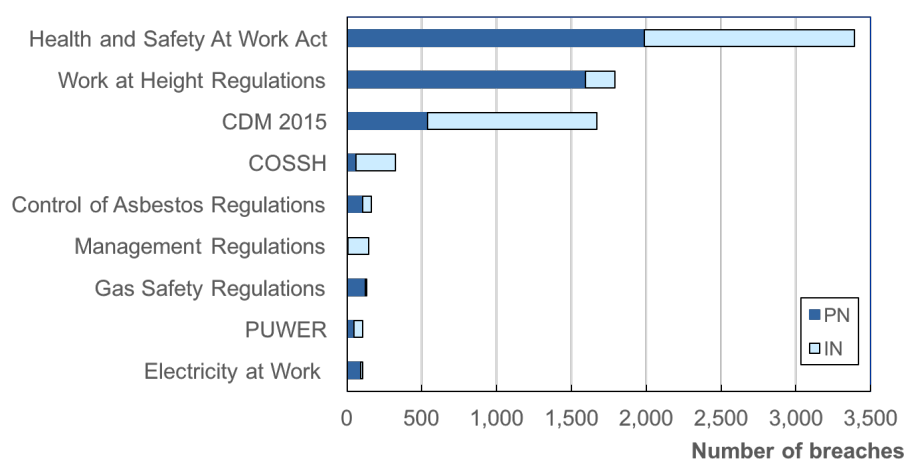


Figure 4-1: Potential breaches of regulations identified by HSE in notices issued to construction duty holders in 2016/17

4.5 The proportion of potential breaches that resulted in prohibition notices varied considerably between the various acts and regulations.

- 4.6 Around 90% of the potential breaches of the Work at Height, Gas Safety and Electrical Regulations resulted in prohibition notices; presumably reflecting the seriousness of the risks associated with these regulations.
- 4.7 Potential breaches of CDM 2015 resulted in prohibition notices in 32% of the instances. For the HSWA, the figure was 59%.
- 4.8 If we delve a little deeper into the data, we can see that the figures are dominated by potential breaches of HSWA Sections 2(1) and 3(1) (see Figure 4-2). Section 2(1) states that: *'It shall be the duty of every employer to ensure, so far as is reasonably practicable, the health, safety and welfare at work of all his employees'*. Section 3(1) states that: *'It shall be the duty of every employer to conduct his undertaking in such a way as to ensure, so far as is reasonably practicable, that persons not in his employment who may be affected thereby are not thereby exposed to risks to their health or safety.'*
- 4.9 Figure 4-2 indicates that 1,719 potential breaches related to risks to employees (Section 2 plus 2(1)), whilst 1,517 related to non-employees (Section 3 plus 3(1)).

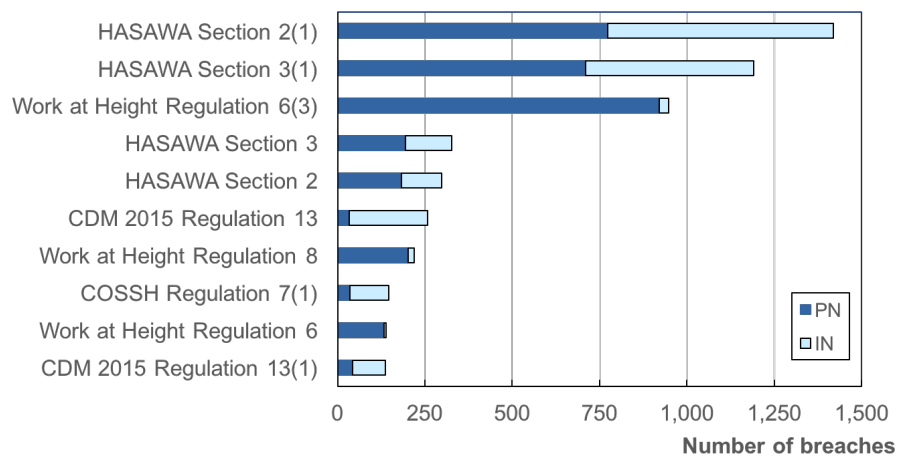


Figure 4-2: Ten most frequent potential breaches of regulations identified by HSE in notices issued to construction duty holders in 2016/17

- 4.10 Potential breaches of Regulation 6(3) of the Work at Height Regulations accounted for the third largest number, with 947 breaches. Regulation 13 (relating to the Principal Contractor's duties) was the CDM 2015 regulation that featured most frequently, with 257 potential breaches.
- 4.11 Potential breaches of the Work at Height and CDM 2015 Regulations are discussed in detail in the following sections.

5. Potential breaches of the Work at Height Regulations in 2016/17

5.1 Figure 5-1 shows that potential breaches of Regulation 6(3) of the Work at Height Regulations were identified most frequently (947) by HSE inspectors.

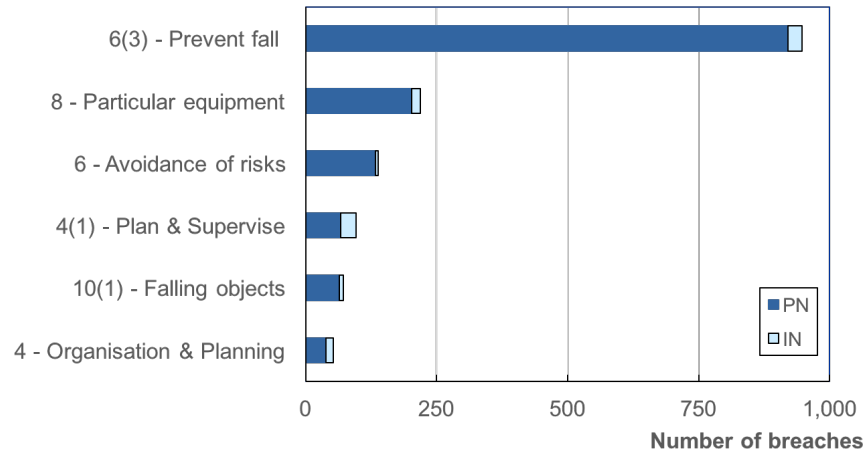


Figure 5-1: Most frequent potential breaches of the Work at Height Regulations identified by HSE in notices issued to construction duty holders in 2016/17

5.2 Regulation 6(3) states that: 'Where work is carried out at height, every employer shall take suitable and sufficient measures to prevent, so far as is reasonably practicable, any person falling a distance liable to cause personal injury.' As HSE inspectors served 921 of the 947 potential breaches with probation notices, this suggests that inspectors considered there to be a serious risk of people falling.

5.3 Potential breaches of other Work at Height Regulations were identified far less frequently.

5.4 Potential breaches of Regulation 8 were observed on 219 occasions. These referred to requirements for specific equipment particularly guard rails and toe boards.

6. Potential breaches of CDM 2015 in 2016/17

Breaches by regulation

6.1 Potential breaches of Principal Contractor-related regulations (Regulation 13) were identified most frequently by HSE inspectors, followed by those for Contractors (Regulation 15) (see Figure 6-1).

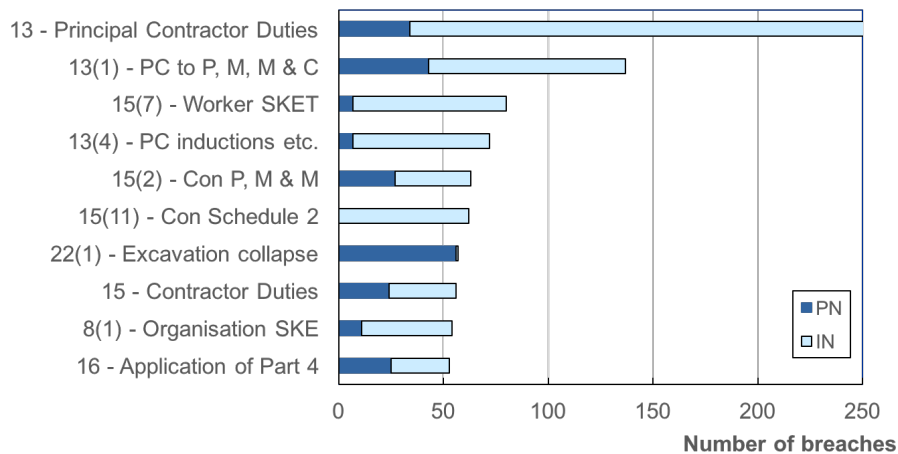


Figure 6-1: Ten most frequent potential breaches of CDM 2015 identified by HSE in notices issued to construction duty holders in 2016/17

6.2 The most frequent potential breaches for non-Contractor or Principal Contractor duties were for Regulation 22(1) relating to excavation collapses. These were identified by HSE inspectors on 57 occasions, and 56 of those were considered serious enough to result in a prohibition notice.

6.3 Concerns regarding the skills, knowledge and experience of an organisation (Regulation 8(1)) were identified on 54 occasions, with 11 resulting in a prohibition notice.

Potential breaches by duty holder

6.4 Where individual CDM 2015 regulations relate specifically to individual duty holders, they have been assigned to that duty holder for these analyses. The distribution of potential breaches by duty holder is shown in Figure 6-2.

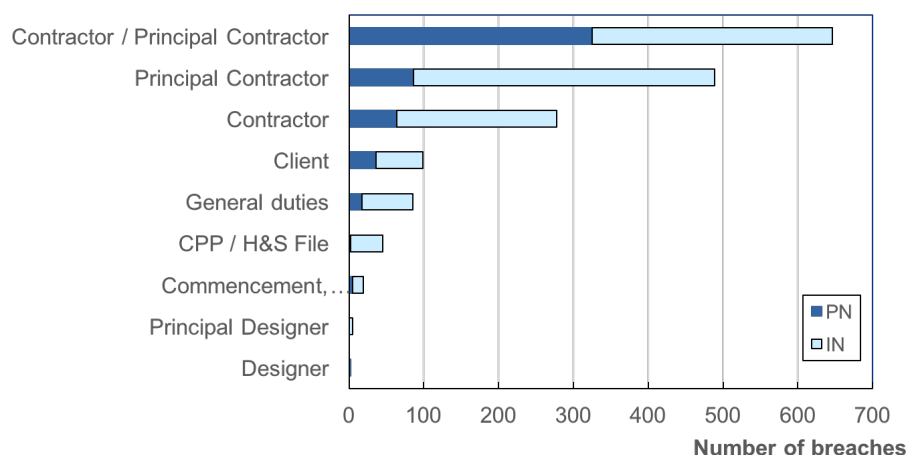


Figure 6-2: Potential breaches of CDM 2015 identified by HSE in notices issued to construction duty holders in 2016/17 categorised by duty holder role

- 6.5 The duties in Part 4 of CDM 2015 relate to specific hazards that Contractors or Principal Contractors will encounter when undertaking particular activities. As it is not clear from HSE's data set whether the organisation being served a notice was a Contractor or a Principal Contractor, all potential breaches of Part 4 Regulations have been grouped together as 'Contractor / Principal Contractor' duties in Figure 6-2.
- 6.6 Potential breaches of the Part 4 duties were identified most frequently (on 646 occasions). Just over half (325) of these resulted in prohibition notices. Of the Part 4 duties, excavations (86), fire (58) and stability of structures (54) featured most often.
- 6.7 Leaving aside the Part 4 duties, potential breaches of Principal Contractor duties were identified on 489 occasions, whilst Contractor duties were identified on 278 occasions.
- 6.8 Around 18% (86) of the potential breaches of Principal Contractor duties resulted in prohibition notices, whilst 23% (64) did for Contractor duties.
- 6.9 Potential breaches of Client duties were identified on 99 occasions, of which 36% resulted in prohibition notices (somewhat higher than for potential breaches of either Principal Contractor or Contractor duties).
- 6.10 Only five potential breaches of Principal Designer duties were identified by HSE inspectors. All of these were improvement notices.
- 6.11 Even less potential breaches of Designer duties were identified – only two. Both of these resulted in prohibition notices.

Client duties

6.12 The Client duty where HSE inspectors identified potential breaches most frequently was the duty for managing projects in Regulation 4 (see Figure 6-3). Potential breaches were identified on 41 occasions, of which 15 resulted in prohibition notices. These breaches typically related to not arranging asbestos surveys or not having arrangements in place to ensure that the construction work was being carried out without risk to health or safety.

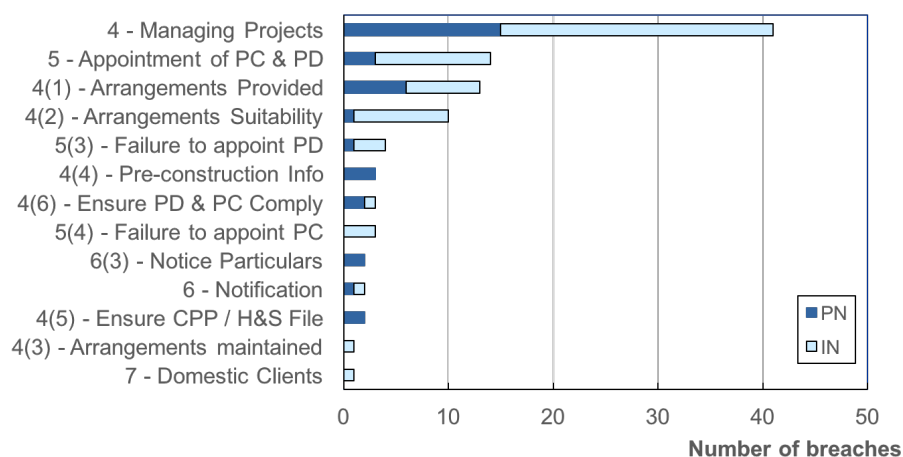


Figure 6-3: Potential breaches of CDM 2015 Client duties identified by HSE in notices issued to construction duty holders in 2016/17

- 6.13 Potential breaches resulting from a failure to appoint a Principal Contractor and/or Principal Designer (Regulations 5, 5(3) and 5(4)) were identified on 14, 4 and 3 occasions respectively. These typically resulted in improvement notices (17 of 21).
- 6.14 Not making suitable arrangements for managing a project (Regulation 4(1)) was identified on 13 occasions, whilst the suitability of those arrangements (Regulation 4(2)) was identified on 10 occasions. Failing to maintain those arrangements was only identified on one occasion.
- 6.15 Almost half (6 of 13) of the breaches identified in relation to making arrangements resulted in prohibition notices. These included breaches for not undertaking an asbestos survey.

Principal Contractor duties

6.16 Figure 6-4 shows that the potential breaches identified most frequently by HSE inspectors relate to the overall set of Principal Contractor duties (Regulation 13). These were identified on 257 occasions, of which 34 resulted in prohibition notices. Many of the potential breaches within the overall Regulation 13 duties related to planning, managing, monitoring and coordinating (Regulation 13(1)) or to the provision of welfare facilities (Regulation 13(4)(c)).

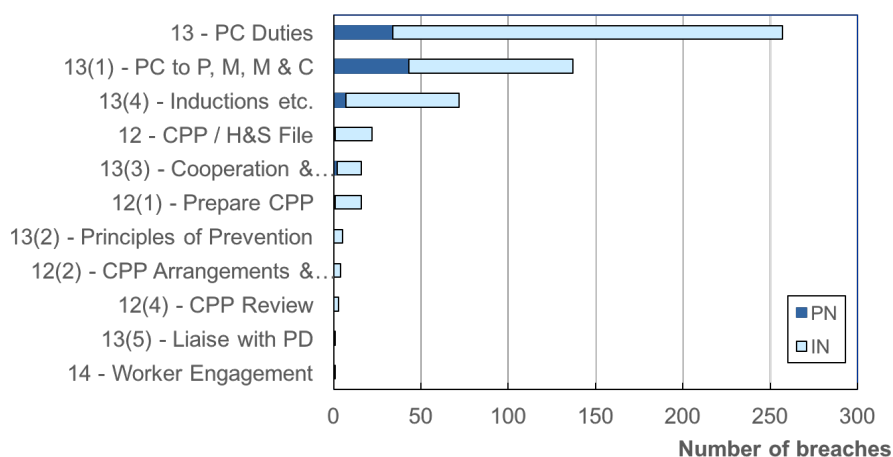


Figure 6-4: Potential breaches of CDM 2015 Principal Contractor duties identified by HSE in notices issued to construction duty holders in 2016/17

- 6.17 This approach to categorising potential breaches resulted in underestimates of the number of potential breaches relating to specific Regulation 13 duties.
- 6.18 Of the specific Regulation 13 duties, potential breaches of the duty to plan, manage, monitor and coordinate the work (Regulation 13(1)) was identified most frequently (137 occasions). Of these, around one-third (43) resulted in prohibition notices.
- 6.19 Potential breaches involving the provision of inductions, preventing access and providing welfare facilities (Regulation 13(4)) were identified on 72 occasions, with 7 resulting in prohibition notices. The majority of these related to the provision of welfare facilities.
- 6.20 Regulation 12 requires Principal Contractors to prepare both construction phase plans and health and safety files. However, the majority of the 22 potential breaches identified in relation to Regulation 12 relate to construction phase plans not being provided or not being sufficient. Of the 22, only one resulted in a prohibition notice.
- 6.21 Regulation 12(1) applies to the construction phase plan specifically, and 16 potential breaches were identified. Of these, only one resulted in a prohibition notice. These potential breaches were typically identified in addition to other potential failures to manage specific risks.

6.22 The only other Regulation where a larger number of potential breaches (16) was identified by HSE inspectors was Regulation 13(3). This regulation covers three issues: cooperation between Contractors, coordination and ensuring that employers apply the principles of prevention and follow the construction phase plan. However, many of these notices referred to exposure to dust.

Contractor duties

6.23 Figure 6-5 shows that the potential breaches of Contractor duties identified most frequently by HSE inspectors related to the skills, knowledge, experience and training of workers (Regulation 15(7)). These were identified on 80 occasions, of which 7 resulted in prohibition notices. The potential breaches typically related to the people responsible for managing or supervising the work on site (typically, the site manager) not having the necessary skills, knowledge, education or training to do so.

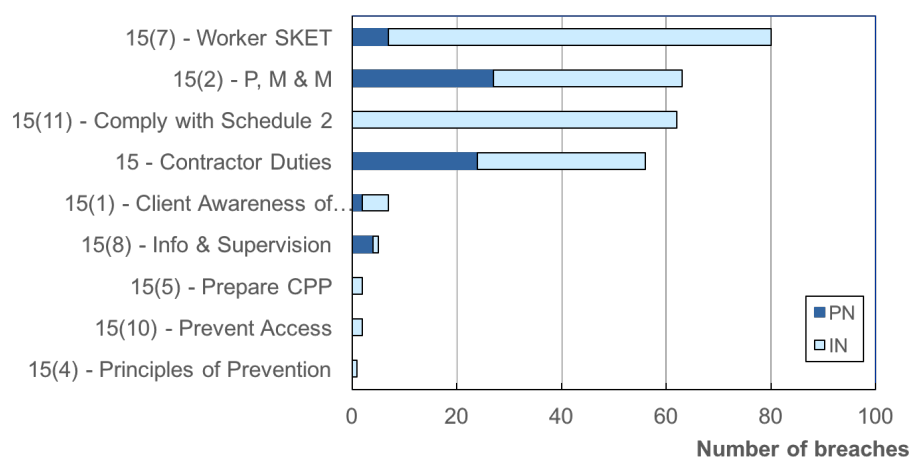


Figure 6-5: Breaches of CDM 2015 Contractor duties identified by HSE in notices issued to construction duty holders in 2016/17

6.24 Potential breaches of the Contractor's duty to plan, manage and monitor the work (Regulation 13(2)) were identified on 63 occasions. Of these, 27 resulted in prohibition notices.

6.25 Potential breaches of the Contractor's duty to provide welfare facilities in accordance with Schedule 2 (Regulation 13(2)) were identified on 62 occasions. All of these resulted in improvement notices.

6.26 The overall set of Contractor duties are contained in Regulation 15. These were identified on 56 occasions, of which 24 resulted in prohibition notices. Many of these potential breaches related to planning, managing or monitoring (Regulation 15(2)) followed by the skills, experience, education and training of those appointed to do the managing and monitoring (Regulation 15(7)).

Principal Designer duties

- 6.27 Only five potential breaches of the Principal Designer duties were identified by HSE inspectors in 2016/17. Of these, three related to the failure to appoint a Principal Designer (and, presumably, the Client taking on the Principal Designer's duties by default in accordance with Regulation 5(3)).
- 6.28 Another potential breach related to *'ineffective arrangements for planning and managing health & safety the during pre-construction and construction phases'*. It is not clear if the organisation that had been served this notice was acting as Client.
- 6.29 No details were provided in HSE's data set for the fifth potential breach. However, the four other breaches contained in the notice issued to this duty holder related to Sections 2(1) and 3(1) of the HSWA and Regulations 4 and 5 of CDM 2015. As such, it would seem reasonable to suggest that this duty holder was fulfilling the Client role and did not appoint a Principal Designer.
- 6.30 This leads to the conclusion that no breaches were identified or notices issued in 2016/17 to those acting as Principal Designer.

Designer duties

- 6.31 Only two potential breaches of Designer duties were identified by HSE inspectors in 2016/17. Of these, one related to Regulation 9(1) and the other to Regulation 10.
- 6.32 No details are contained in HSE's online data set about the potential breach of Regulation 9(1). However, the notice served identified three other potential breaches of duties including: Client duties (Regulation 4), notification duties (Regulation 6(3)) and the duty to prepare a construction phase plan (Regulation 12(1)) – that is, Client and Contractor / Principal Contractor duties.
- 6.33 The potential breach of Regulation 10 (designs prepared or modified outside Great Britain) related to a lack of temporary works to prevent collapse of an existing building. It seems reasonable to infer that that notice was issued to the person who commissioned the design rather than the Designer.
- 6.34 This leads to the conclusion that, potentially, no breaches were identified or notices issued in 2016/17 to those acting as a Designer.

7. Summary of the findings

- 7.1 In 2016/17, HSE inspectors issued 3,155 notices to construction duty holders. Within these notices, 7,993 potential breaches of acts or regulations were identified.
- 7.2 Of the 3,155 notices, 1,362 were improvement notices, whilst 1,793 were prohibition notices.

- 7.3 The potential breaches identified most frequently in 2016/17 were of the Health and Safety at Work Act (3,391 potential breaches). The Work at Height Regulations followed with 1,790 potential breaches, whilst CDM 2015 had the third largest number of potential breaches with 1,669.
- 7.4 Potential breaches of CDM 2015 resulted in prohibition notices in 32% of the instances. For the HSWA and the Work at height regulations, the figures were 59% and 89% respectively. The difference in proportions is likely to reflect inspectors' concerns about the serious risks of falls from height.
- 7.5 Potential breaches of the specific duties in Part 4 of CDM 2015 were identified most frequently (646). Of the Part 4 duties, excavations (86), fire (58) and stability of structures (54) featured most often.
- 7.6 Considering the duties assigned to individual duty holders, potential breaches of Principal Contractor duties (489) and Contractor duties (278) were by far the most frequent. There were 99 potential breaches of Client duties, but only 5 potential breaches of Principal Designer duties and 2 for Designer duties.
- 7.7 The Client duty where potential breaches were most frequently identified related to the Regulation 4 duties for managing projects in (73 of 99). These typically related to not arranging asbestos surveys, not having management arrangements in place or concerns about the suitability of those arrangements.
- 7.8 Potential breaches resulting from a Client's failure to appoint a Principal Contractor and/or Principal Designer (Regulations 5, 5(3) and 5(4)) were identified on 14, 4 and 3 occasions respectively. These typically resulted in improvement notices (17 of 21).
- 7.9 For Principal Contractors, the potential breaches identified most frequently by HSE inspectors (257 occasions) related to the overall set of Principal Contractor duties (Regulation 13). However, many of the potential breaches within the overall Regulation 13 duties related to planning, managing, monitoring and coordinating (Regulation 13(1)) or to the provision of welfare facilities (Regulation 13(4)(c)).
- 7.10 Of the specific Regulation 13 duties, potential breaches of the duty to plan, manage, monitor and coordinate the work (Regulation 13(1)) were identified most frequently (137 occasions). This is an underestimate of the number of potential breaches of this duty, as many of the potential breaches of the overall Regulation 13 duties related to planning, managing, monitoring and coordinating the work. Combining the two sources together indicates that potential breaches of the planning, managing, monitoring and coordinating duties were most frequently identified by HSE inspectors.
- 7.11 For Contractors, three duties account for the majority of the potential breaches. As with Principal Contractors, potential breaches of the planning, managing and monitoring duties were identified frequently (>63). However, similar numbers of potential breaches were observed in relation to skills, knowledge, experience and

training (primarily of site managers and site supervisors) and for the provision of welfare facilities.

- 7.12 Although five potential breaches of the Principal Designer duties were identified, detailed examination of HSE's notice data led to the conclusion that no breaches were identified or notices issued in 2016/17 to those acting as Principal Designer.
- 7.13 The same conclusion was reached for the two potential breaches of Designer duties.

8. References

- 1 Health and Safety Executive: *Enforcement Policy Statement*, October 2015 (<http://www.hse.gov.uk/pubns/hse41.pdf>)
- 2 PP Construction Safety: *Price rises for those ignoring HSE notices*, 22 November 2017 (<http://www.ppconstructionsafety.com/newsdesk/2017/11/22/price-rises-for-ignoring-hse-notices/>)
- 3 Health and Safety Executive: *Fee for intervention*, (<http://www.hse.gov.uk/fee-for-intervention/index.htm>)
- 4 Peter Gray QC: *Appeals against improvement and prohibition notices*, Compass Chambers (<http://www.compasschambers.com/seminar-pdf/Appeals%20against%20Prohibition%20Notices.pdf>)
- 5 Health and Safety Executive: *HSE Public register of enforcement notices*, (<http://www.hse.gov.uk/notices/>)

About the author:

Mike Webster is a chartered civil and structural engineer with over 30 years' experience. He specialises in construction and structural safety, CDM and risk, and founded MPW R&R to provide Consulting, Forensic and Expert Witness services in those areas.

Mike has worked on the design, appraisal and site supervision of building and bridge structures. He has developed guidance for assessing the safety of existing structures. Mike led an independent review of CDM 1994 and the independent evaluation of CDM 2007. He also led the review of the use of CDM 2007 in the construction of London 2012.

Mike has been instructed as an expert witness by both defence and prosecution teams in cases involving allegations of gross negligence manslaughter, breaches of the Health and Safety at Work Act and the CDM Regulations and the appeal of enforcement notices.

Mike is the author of around 20 published reports and papers on construction health and safety and the CDM Regulations. He is a member of Structural-Safety and the Institution of Structural Engineers Health and Safety Panel.