

INTERNAL REVIEW**“EXTENSION APPLICATIONS” – DECIDING WHETHER TO EXTEND THE COMPLIANCE DATE ON AN IMPROVEMENT NOTICE**

1. Purpose

The purpose of this guidance principle is to:

- a) identify the process used by the Authority when deciding whether or not to extend the date by which compliance on an Improvement Notice must be achieved, and
- b) Where it is decided to extend that compliance date, to identify the process used by the Internal Review Officer (“IRO”) to determine a new compliance date.

2. Background

Section 128 of the *Occupational Health and Safety Act 2004* (“the Act”)¹ enables an eligible person to apply to the Authority for internal review of a reviewable decision. The Table in section 127 of the Act sets out those decisions which are internally “reviewable decisions” by reference to the type of inspector’s decision. A decision of an inspector to issue an Improvement notice under section 111(1) is a reviewable decision.

An application for review of the decision to issue an Improvement notice can challenge the underlying decision to issue the notice itself, or may be confined to one or other of the particulars of the notice, including the compliance date specified in the notice.

A significant percentage of applications for internal review received by the Authority are from duty holders (usually employers) seeking only a change to the compliance date on an Improvement Notice. Such applications do not challenge the decision of the inspector to issue the notice or the requirements of the notice, but simply seek further time within which to comply. These applications are referred to as “extension applications”, and require the IRO to exercise discretion as to whether to vary the inspector’s decision (and notice) by extending the compliance date on the notice.

3. Policy

Whilst that discretion is to be exercised by an IRO on the basis of relevant material, the Authority as part of its commitment to being a consistent, accountable and transparent decision maker, seeks to provide guidance as to the manner in which an IRO will exercise that discretion.

This Guidance Principle should be read in conjunction with other Guidance Principles relating to Internal Review, including:

- IRU Guidance Principle 01- “Decision making- Considering and deciding internal review applications”.
- IRU Guidance Principle 02- “Late applications” (Dealing with Applications made more than 14 days after the decision came to the notice of the person seeking review) and
- IRU Guidance Principle 03 -“Requests for stay of the operation of notices pending review outcome”
- IRU Guidance Principle 05 “Reasons for decision“

4. Process

Like other internal review applications, extension applications can be received either within the 14 day statutory time period or outside that time frame. Whilst extension applications are a specific type of review application, they remain subject to the same general considerations applicable to all review applications. These include:

- The requirement an applicant is an “eligible person” as defined in the legislation, and

¹ See also similar provisions in the *Dangerous Goods Act 1985* (section 20A) and the *Equipment (Public Safety) Act 1994* (section 24A)

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- Where an eligible person applies for review outside the 14 day time frame, whether it is appropriate to accept late lodgement of that application. This aspect is covered by IRU Guidance Principle 02- “Late applications”.

Where an extension application is received from an eligible person and the application is within the 14 day time period (or where the Authority has allowed further time within which to make the application), the IRO must determine the merits of the extension application. That determination will be reached on the basis of all available relevant information at the time the IRO considers the application. This will also include information which may not have been available to the inspector at the time the notice was issued.

The Act does not specify the criteria upon which the IRO must determine the merits of an application for review generally, or an extension application in particular. Whilst not meant to be exhaustive, the following factors may be relevant when deciding whether to vary the compliance date specified in an Improvement notice:

- The explanation provided as to why the applicant is unable to meet the existing compliance date.
- Whether the initial compliance date specified in the notice was reasonable at the time it was established, and whether that compliance date was discussed with the applicant in terms of ability to achieve compliance.
- Whether an extension of time would create an unacceptable risk to health and safety.
- Whether the applicant proposes to institute any interim measures to control risk if an extension was granted, and the suitability of such measures.
- Whether the applicant had taken appropriate steps to attempt to comply within the time period specified in the notice.
- Whether the applicant is genuinely seeking to comply with the requirements of the notice, or whether it is delaying compliance with the notice.
- Whether the application for extension was made promptly once it was apparent that compliance would not be achieved by the specified date.
- Whether the application for extension of time was made prior to the compliance date shown on the notice.
- The existence of supporting material, including material from third parties (contractors, suppliers etc) relevant to the application.
- Where the applicant nominates an alternative compliance date, the material on which that alternative date was selected and its suitability.
- Whether granting an extension will provide an appropriate incentive for the applicant to achieve compliance.
- Whether there would be any adverse impact on health and safety in refusing an extension of time on the notice.

In deciding an extension application, the IRO will take into account the view of the inspector who issued the notice. Whilst not conclusive, that view is an important consideration as to whether an extension will be granted, and if so, the duration of any such extension.

Where the IRO considers it appropriate, the view of any other relevant workplace party affected by a possible extension (for example, a health and safety representative) may also be taken into account.

5. Reasons for Decision

Once a decision on an extension application is made, the IRO is required to notify the applicant in writing within 14 days of the date on which the application for review was received. That written notification should conform to the general requirements for written reasons, which are set out in IRU Guidance Principle 05 “Reasons for decision”