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The Use of Volunteers in Recreational at Work Diving Projects

The involvement of unpaid “volunteers” in recreational at work diving projects has been causing problems for both the recreational diving industry and HSE for some time. This is far from being a black and white issue and it has proved difficult to provide clear and unambiguous interpretation of the law in this area.

The Diving at Work Regulations 1997 (DWR97) Regulation 2 states that:

“diver” means a person at work who dives: and

“diving project” means any activity, made up of one or more diving operations, in which at least one person takes part or will take part as a diver

To date, HSE’s interpretation and subsequent advice to industry has focused on whether an individual person taking part in a diving project is “at work” or “not at work”. Broadly, the advice has been that a person who is receiving any kind of remuneration for their diving services falls into the category of being “at work”. The term “favour or reward” has also been used to emphasise that a person does not have to receive monetary payment to be considered “at work” and that other benefits such as the provision of free air or the use of diving equipment need to be considered.

This approach has led to difficulties in establishing the status of unpaid volunteers who are effectively essential members of staff whose involvement is required to enable a diving at work project to go ahead in compliance with DWR97. Current legal advice is that consideration should be given to factors other than payment or direct benefits when considering the status of volunteers who dive as part of an “undertaking”. These factors include:

- The possibility of profit/loss for the undertaking.
- The provision of equipment, resources and facilities by the undertaking.
- Insurance cover for the diving project.
- The degree of direction or control over those taking part.

A definition of "undertaking" with respect to recreational diving is:

Where a trade, business or profession is set up and has as one of its aims the provision of the service of diver training or guiding it is an "undertaking" within the intent of section 3 of the Health and Safety at Work etc. Act 1974 (HSWA).

In general terms, any person taking part in a diving project who is **either** being paid (or in receipt of favour or reward) **or** whose involvement in a diving project is required for that project to be carried out in accordance with DWR97 should be considered to be at work (and therefore a "diver" under DWR97 Reg 2). Consequently, the provisions of DWR 97 – including the requirement for divers to be sufficiently competent and have a valid certificate of medical fitness to dive (issued by a medical examiner of divers who has been approved by HSE), would apply to such persons.

However, there may be situations when an unpaid volunteer taking part in a recreational at work diving project would **not** be considered to be at work themselves. Take, for example, a diving training course being run with at least the minimum number of staff required for the number of students and their abilities. If a suitably qualified diver (e.g. Divemaster) offered to join the dive either to "tag along" or to provide additional back up to the "at work" instructional staff (and they received no payment, favour or reward) they would not necessarily be considered to be diving at work.

Another situation where a professional level diver may not be considered to be at work is when they are in training, as a paying customer (e.g. Divemaster course), provided that that their role directly meets the objectives of their training. It should be borne in mind that, in the event of an investigation by the HSE, all such trainee candidates involved in the operational dive team will be investigated to ensure that their training is legitimate and that the law is being complied with.

However, the use of any volunteers by an undertaking places duties on that undertaking under Section 3 of the Health & Safety at Work Act. This requires that the undertaking be conducted in such a way as to ensure, so far as is reasonably practicable, that:

- a. the volunteer is not exposed to risks to their health and safety; and
- b. the actions or omissions of the volunteer when acting on behalf of the undertaking does not expose other persons to risks to their health and safety.

Divers who are neither at work nor under instruction but have "tagged on" to such a group would still be part of the diving project. They would be considered to be "persons engaged in a diving project" under DWR97 Regulation 13 and subject to the duties imposed upon them by this regulation:

Reg 13. - (1) No person shall dive in a diving project -

- (a) unless he is competent to carry out safely and without risk to health any activity he may reasonably expect to carry out while taking part in the diving project; or

(b) if he knows of anything (including any illness or medical condition) which makes him unfit to dive.

(2) Every person engaged in a diving project shall comply with -

(a) any directions given to him by a supervisor under regulation 11; and

(b) where they would not conflict with those directions, any instructions applicable to him in the diving project plan.

Additionally, the divers would effectively be “guided” by the supervisor who would therefore have responsibility for their safety under DWR97 Regulation 10.

“Tagging” divers may interact with the divers under instruction and/or the working divers and should therefore be considered to be a part of the overall dive team, although they do not require an HSE medical or approved qualification. Any such divers should be included in the risk assessment, dive project plan and the dive briefing.

In general, the same health and safety standards should be applied to volunteers taking part in a diving project as they would to employees exposed to the same risks. If the risk assessment shows that the risks to the volunteers are different, the preventative and protective measures should reflect the different risks.

The most common question put to HSE on this issue is: "Do I need an HSE medical?". As a rule of thumb, if a diver's involvement in a recreational at work diving project (other than as a fee paying member of the public) is required for that project to go ahead, then they need to have a medical certificate issued by an HSE Approved Medical Examiner of Divers.

As previously mentioned, this is not a straightforward issue and ultimately each case can only be decided on its own merits by a court of law. A diving contractor using volunteers during a diving at work project should consider seeking legal advice.

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