

# **Derbyshire County Council enforcement policy in relation to relevant food legislation**

## **Introduction**

Derbyshire County Council Trading Standards has set out this policy to determine when to issue a fixed monetary penalty for failure to comply with an improvement notice as an alternative to prosecution under the relevant food legislation. The council is required to publish guidance on our use of the fines, notices and other penalties contained in the relevant food legislation below.

It applies in relation to any decision made by the Council in its capacity as Food Authority under section 5 Food Safety Act 1990.

For clarity, “relevant food legislation” means: -

- Calorie Labelling (Out of Home Sector) (England) Regulations 2021 (“The Calorie Regulations”).
- Food (Promotion and Placement) (England) Regulations 2021 (“The Food Regulations”).

This guidance should be read in conjunction with the Regulations and with Derbyshire County Council Trading Standards compliance policy.

As stated in our enforcement policy Derbyshire County Council Trading Standards may take the following actions or civil sanctions while enforcing restrictions set out in the above legislation.

## **Sanctions**

The relevant food legislation provides that food authorities may impose fixed financial penalties of £2,500 for failure to comply with an improvement notice as an alternative to criminal prosecution.

The Council will determine what is the most appropriate and effective sanction and whether it is appropriate to impose a financial penalty or prosecute having due regard to the Derbyshire County Council Trading Standards Compliance Policy.

## **Other Types of Enforcement Action that may be taken**

In appropriate circumstances consideration will be given to less formal action such as warning letters or advice, in an effort to secure compliance, and will be done so in accordance with the relevant Enforcement Policy.

## **Government Guidance**

The Department of Health and Social Care has published guidance for enforcement authorities in respect of the Calorie Labelling (Out of Home Sector) (England) Regulations 2021–

[Calorie labelling in the out of home sector: implementation guidance - GOV.UK \(www.gov.uk\)](https://www.gov.uk/guidance/calorie-labelling-in-the-out-of-home-sector-implementation-guidance)

This guidance document has been developed to help illustrate how the provisions of [The Calorie Labelling \(Out of Home Sector\) \(England\) Regulations 2021 \(the Regulations\)](#) work and to provide assistance to those affected by the Regulations in understanding and applying them.

These guidance notes have been produced to illustrate the legal requirements of the Regulations and are aimed primarily at those affected by the Regulations and the enforcement authorities enforcing them, as well as providing some examples of their practical application and recommendations businesses could implement. These guidance notes should be read in conjunction with the Regulations themselves. The text should not be taken as an authoritative statement or interpretation of the law, as only the courts have this power

## **Circumstances in which a Fixed Monetary Penalty is likely to be imposed under the relevant Food Legislation**

Below is a non-exhaustive list of some, but not all factual elements that the Council will take into consideration on when it is appropriate to impose a fixed monetary penalty. The Council will identify whether any combination of these, or other relevant factors, should result in a fixed monetary penalty being imposed. If there are relevant recent convictions then this will also be considered, alongside the Council's Enforcement Policy, as to whether prosecution would be appropriate.

- Previous breaches of relevant food legislation or the Food Safety Act 1990
- Previous convictions, having regard to the nature of the offence to which the conviction relates and its relevance to the current breach; and the time that has elapsed since the conviction.
- Motivated by financial gain
- Deliberate concealment of illegal nature of activity
- Established evidence of wider / community impact
- Obstruction of the investigation
- Record of poor compliance

## **Circumstances in which a Fixed Monetary Penalty is unlikely to be imposed under the relevant Food Legislation**

- No previous or no relevant/recent breaches
- No previous convictions or no relevant/recent convictions
- Steps voluntarily taken to remedy problem
- High level of co-operation with the investigation, beyond that which will always be expected
- Good record of compliance
- Self-reporting, co-operation and acceptance of responsibility
- Good character and/or exemplary conduct
- Mental disorder or learning disability, where linked to the commission of the breach
- Serious medical conditions requiring urgent, intensive or long-term treatment and supported by medical evidence

## **Notice of Intent**

Where an authorised officer proposes to impose a fixed monetary penalty under the relevant food legislation on a person, that officer must serve on that person a notice of what is proposed (“a notice of intent”). The notice must include the following:

- a. The grounds for the proposal to impose the fixed monetary penalty
- b. The amount of the penalty
- c. A statement that liability for the penalty can be discharged by paying 50% of the penalty within 28 days beginning with the day on which the notice was received; and
- d. Information as to
  - a. the effect of that discharge payment
  - b. the right to make representations and objections within 28 days beginning with the day on which the notice of intent was received; and
  - c. the circumstances in which an authorised officer may not impose the fixed monetary penalty (including any defences relating to the offence in relation to which the notice is served)

## **Making Representations and Objections**

A person on whom a notice of intent is served may, within 28 days beginning with the day on which the notice was received, make written representations and objections to the enforcement authority in relation to the proposed imposition of the fixed monetary penalty. The Council will review the penalty in light of any representations received.

## **Contents and Service of Final Notice**

If the person who has received the notice of intent does not discharge liability within 28 days, the food authority may serve a final notice imposing a fixed monetary penalty. The food authority may not serve a final notice on a person where it is satisfied that the person would not, by reason of any defence, be liable to be convicted of the offence to which the notice relates. If a food authority serves a final notice, it may not serve any other notice under the relevant food legislation in relation to the offence.

The final notice must include the following information:

- a. The Amount of the fixed monetary penalty
- b. The grounds for imposing the penalty
- c. How payment can be made
- d. The period of 28 days within which payment must be made
- e. The early payment discounts and late payment penalties
- f. Rights of appeal
- g. The consequences of non-payment

If a person who was served with a notice of intent, then makes representations or objections concerning that notice within the 28 day time limit, that person may discharge the final notice by paying 50% of the penalty within 14 days beginning with the day on which the final notice was received

## **Appeals**

The person receiving the final notice may appeal against it on any of the following grounds:

- a. That the decision was based on an error of fact
- b. That the decision was wrong in law
- c. That the decision was unreasonable
- d. That the decision was wrong for any other reason

Appeals are made to the First-tier Tribunal and the final notice is effectively suspended pending the determination or withdrawal of the appeal. The Tribunal have the power to withdraw, confirm or vary the final notice.

## **Non-payment of fixed monetary penalty and recovery of payments**

The penalty must be paid within 28 days of receipt of the final notice. If the penalty is not paid within 56 days then the amount payable will be increased by 50%. In the case of an appeal, the penalty (whether varied or confirmed by the First-tier Tribunal) is payable within 14 days of the determination of the appeal, and if it is not paid within 14 days, the amount of the penalty is increased by 50%. The Council can recover any penalty imposed as if it is payable under a Court Order.

## **Criminal Proceedings**

If a notice of intent for a fixed monetary penalty is served on any person, then no criminal proceedings for the offence may be instituted against that person in respect of the act or omission to which the notice related before 28 days from the date on which the notice of intent is received and if that person discharges liability, that person may not at any time be convicted of the offence in relation to that offence to which the notice was served. The appropriate action in relation to non-payment of any fixed monetary penalty will not be to institute criminal proceedings, but instead, would be to recover the penalty as if it is payable under a court order.