

EH&S Due Diligence, Internal Responsibility and Bill C-45

Strategies for Senior & Middle Management

Topics

- Overview Occupational Health & Safety (OH&S) Legislation (Act and regulations)
- Internal Responsibility Systems for OH&S
- Due Diligence
- Bill C-45
- Memorial's new OH&S Management System. . . Internal impacts

Occupational Health & Safety Legislation

- Two types of law in Canada:
 - Federal --- Canada Labour Code Part II
 - applying to federal employees and undertakings, such as banks, the Broadcasting industry, Air and Rail
 - Provincial and Territorial
 - governing OH&S within their
 - respective boundaries

OH&S Regulations and Guidelines

Statute or Act...

- Sets out broad and general duties of workplace participants
- Establishes legal standards for safety
- Grants authority to government officers and sets out penalties for non-compliance
- Enables regulations to be passed, dealing with the specifics of implementation or a work situation

OH&S Statutes, Regulations and Guidelines

Regulations...

- Provide specific rules and procedures for many circumstances
- Cannot exceed the authority of the Act; cannot exist without a “parent” Act
- Some are sector specific, relating to the industry, occupation, activity or hazard
- May be many different regulations made pursuant to one Act

OH&S Statutes, Regulations and Guidelines

■ Examples:

- Definition of “Serious Injury”
- Accident/injury reporting requirements
- Designated Substances such as Asbestos
- Workplace Hazardous Materials Information System (WHMIS)
- Construction Projects & OH&S Committees
- Structured Safety Program Requirements
- OH&S Committee mandate & training

OH&S Statutes, Regulations and Guidelines

Guidelines are...

- Very detailed
- Not legally enforceable on their own, but may be adopted by reference into a regulation or an Act (rare) and are often used as evidence for a standard expressed in an Act or regulation
- Often originate with a non-governmental body
- Example: CSA (fall protection/eye protection), ACGIH chemical exposure limits

Occupational Health & Safety Act

- The Occupational Health and Safety Act came into force on 1978
- Its purpose is to protect workers against health and safety risks and hazards on the job
- The main features of the Act are manifested in select aspects of the "Internal Responsibility System".

Workplace Partnership

– Internal Responsibility System –

■ The Workplace Partnership

- Workers and Employers MUST share the responsibility for occupational health & safety
- The concept of the *internal responsibility system* is based on the principle that the workplace parties themselves are in the best position to identify health and safety problems and to develop solutions

Internal Responsibility System

- Ideally, the internal responsibility system involves everyone, from the top the bottom
- How well the system works depends upon whether there is a complete, unbroken chain of responsibility and accountability for health and safety (not a labour relations approach)
- The IRS requires a sound and cogent management system, structure, policies and procedures

Internal Responsibility System

- Several provisions of the Act are aimed at fostering the internal responsibility system
 - (1) the requirement for employers to have a health and safety policy and program
 - (2) the direct responsibility that the employer has for health and safety
 - (3) the role employees play in helping the employer achieve their safety responsibilities

The Joint Health & Safety Committee

- The joint health and safety committee role in monitoring the internal responsibility system (contributive role)
 - The Act and regulations set out the basic rules of operation for both joint committees and health and safety representatives.
 - Committees are mandated to be trained
 - They have some very specific duties

Participants in Internal Responsibility System

DIRECT Participants

- Members of Board of Directors/Regents
- Executive
- Managers/Directors
- Supervisors
- Workers

CONTRIBUTIVE Participants

Internal

- OH&S committee
- Health & Safety Staff
- Engineers
- Other staff
- Union(s)

External

- WHSCC
- Occupational Health & Safety Branch
- Suppliers
- Unions

The Rights of Workers

- The Rights of Workers

- To balance the employer's general right to direct the work force and control the production process in the workplace, the Act gives *three basic rights to workers*.

- *The Right to Participate*
- *The Right to Know*
- *The Right to Refuse Work*

Employer Duties (OH&S Act)

- Provide and maintain a workplace and the necessary equipment, systems and tools that are safe and without risk to the health of workers
- Provide information, instruction, training and supervision and facilities that are necessary to ensure the health, safety and welfare of workers
- Ensure workers, and particularly supervisors, are made familiar with health or safety hazards that may be met by them in the workplace
- Conduct the affairs of the University so that persons not employed by the University are not exposed to health or safety hazards (**students & visitors**)

Employer Duties

- Ensure workers are given operating instruction in the use of devices and equipment provided for their protection
- Consult and co-operate with the occupational health and safety committee on all matters respecting occupational health and safety
- Respond in writing within 30 days to a recommendation of the occupational health and safety committee

Employer duties. . .

- Provide periodic written updates to the occupational health and safety committee on the implementation of a recommendation accepted by the employer until the implementation is complete
- Consult with the occupational health and safety committee about the scheduling of workplace inspections that are required by the regulations
- Ensure that the committee participates in inspections required to be undertaken by the employer

Competent Supervisor Defined

- **"Supervisor"** includes a superintendent, foreman or other worker authorized or delegated to exercise direction and control over workers of an employer.

"Competent Person" means a person who,

- is qualified because of knowledge, training and experience to organize the work and its performance
- is familiar with this Act and the regulations that apply to the work, and
- has knowledge of any potential or actual danger to health & safety in the workplace

Supervisor Duties

- Take every precaution reasonable to protect workers, students and the public
- Ensure workers use the proper procedures and wear the proper protective equipment
- Inform workers about hazards or risk in the workplace
- Investigate situations believed dangerous by a worker or JOHSC member

Supervisor Duties

- Ensure workers use machines with the required guards in place
- Provide written instruction, if prescribed, explaining safety procedures
- Co-operate with the inspectors from the Occupational Health & Safety Branch
- Ensure that parts of the physical workplace is inspected at regularly, and employees are observing safe work practices.

Supervisor Duties

- Verify that contractors comply with the employer's health and safety policy
- Act immediately on any danger the supervisor is aware of in the workplace

Worker Duties

- Workers have the general duty to take reasonable care to protect themselves, co-workers and the public
- Comply with regulations, policy and procedures
- Use protective equipment and devices
- Report defects or absence of protective equipment

Worker Duties

- Not remove or damage protective equipment or devices
- Cooperate with the employer and JOH&S committees

Shared Duties of Everyone

All have

- The responsibility for identifying workplace hazards
- For communicating these hazards to one another
- For actively participating in the control of these hazards
- To protect the public, and those in proximity to the work place

Criminal Law & Occupational Health & Safety Considerations

Principles of Criminal Law

- Presumption of innocence
- Burden of proof rests with the Crown
- Proof of guilt beyond a reasonable doubt
- Proof is made at a fair and impartial hearing
- These principles must be met for a conviction

Statutory or Regulatory Law

- OH&S falls into this category of Federal, Provincial and Territorial Law.
- Three categories of offences:
 - Mens rea – Court must prove guilt beyond a reasonable doubt
 - Absolute Liability Offences – Court need only prove the accused committed the offence, not that they acted to prevent it. No due diligence defense.
 - Strict Liability Offences – Court proves beyond reasonable doubt, accused proves due diligence

Examples of Legislation Applicable to MUN

- Occupational Health & Safety Act
- Bill C-45
- Environmental Protection Act (2002)
- Building Code & Fire Code
- Dangerous Goods Transportation Act
- Nuclear Safety & Control Act
- Workplace Health, Safety and Compensation Commission Act (WHSCC)

Legislation Applicable to MUN

- All the regulations under these Acts
- Other pieces of legislation that apply to such areas as infectious agents and the health of laboratory animals
- Industrial Standards, Guidelines & Industry Best Practices

MUN EHS Policies, Procedures, Guidelines & Programs

- Environmental Health and Safety System
EHS Policy Statement and Supporting
Programs
- Evacuation of University Buildings in the
Event of Fire or Other Emergency
- The Workplace Hazardous Materials
Information System (W.H.M.I.S)

MUN EHS Policies, Procedures, Guidelines & Programs

- Radiation Specific Procedures
- Leadership and Organization
- Planning and Implementation
- Management review
- Measurement, Monitoring and Corrective Action
- Recognition, Evaluation and Control of Hazards

MUN EHS Policies, Procedures, Guidelines & Programs

- Safe Work Practices and Procedures
- Contractor Safety
- Radiation Safety
- Bio Safety
- Lab safety
- Emergency preparedness and response
- Disability Management/early and Safe return to Work

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- WHMIS
 - TDG
 - Fleet Safety
 - Environmental Management
 - Diving, Boating and Water Safety
 - Ergonomics Student & Public Safety

Due Diligence

What is Due Diligence?

- The classic definition of due diligence in essence is taking all reasonable steps as part of due care, to prevent the occurrence of an accident or mishap and having contingency plans in place to control an accident, should it occur, and limit consequential damage.
- Implies that a Risk or Hazard Assessment has been conducted on the work that is being performed – otherwise, how would you know?

What is Due Diligence?

- The burden of proof rests with the Crown in due diligence cases until it proves, beyond a reasonable doubt that the accused committed the prohibited act. It then rests on the accused to prove that it was duly diligent in efforts to prevent the offence.

What is Reasonable?

- In order to take reasonable steps, the courts have defined a reasonable person as one who is:
 - Logical
 - Intelligent
 - Rational
 - Sensible
 - Who plans and takes actions in accordance with general and approved practices

Standard of Due Care

- Courts have decided that a standard of care exists, or reasonable care has been shown when an organization or individual takes all reasonable measures to prevent an incident.
- Standard of care looks at, existence of industry standards/practices, knowledge and skill of person, cause out of the locus of control of the accused, potential harm, frequency and severity, and available control alternatives.

Proving Reasonable Care and Due Diligence

- Written Occupational Health & Safety & Environment Policies & Program
- Audits, inspections and performance measurement of the workplace
- Investigation and analysis of incidents
- Rules for work and safety procedures
- Education and training programs
- Meetings/communication forums to review safety issues

Proving Reasonable Care and Due Diligence

- Enforcing regulations and applying discipline if required
- Emergency response plans and equipment in place
- Communicating policy and procedures to employees
- Having a strategy for continuous improvement

Proving Reasonable Care and Due Diligence

Courts Accept That...

- Mistakes can be made (the mistake of fact defense).
- That accidents and incidents happen, and may be beyond the control of the individual or organization to deal with.
- Due diligence cannot be at a minimum or just barely met the requirements of law.
- 10 out of 10 steps is reasonable, 9 out of 10 is

Hazard & Risk

- Hazard – potential to cause harm
- Risk – the probability, or chance that it actually will harm someone

Dealing with Workplace Hazards

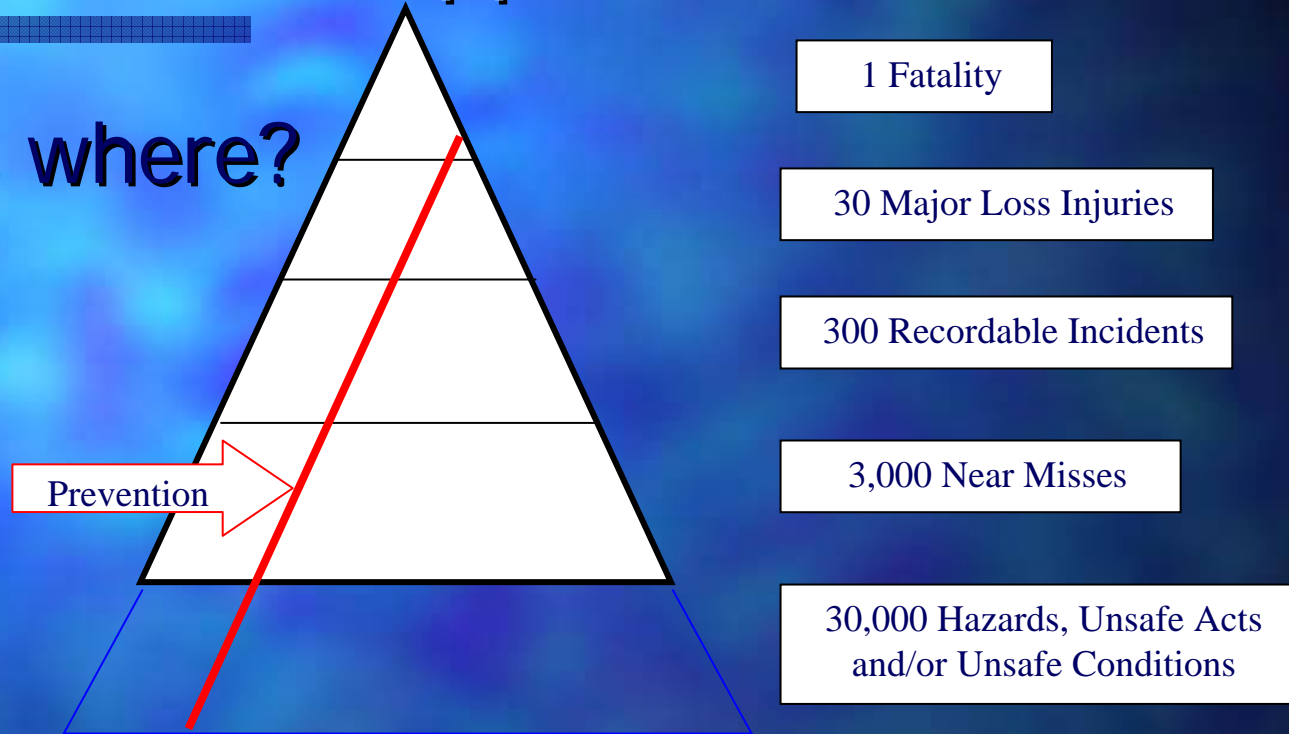
- Recognition of Hazard
 - Identifying the hazard and assessing the exposure potential
- Assessment of Hazard
 - Is it significant?
- Control of Hazard
 - At the source, along the path between the source and the worker, or at the worker

Best Management Practices

- In establishing due diligence, Courts look at industry standards and accepted best practices like:
 - Good Housekeeping
 - Preventative Maintenance
 - Inspections and Records
 - Security
 - Hiring and training
 - Accident/Incident reporting and response
 - Risk identification and control
 - Safety Auditing
 - OH&S Committees

Prevention Opportunities

■ Focus where?



Examples of Lack of Due Diligence in a Supervisor's Duties

- You should have known about a hazard, but you did nothing to find out about the hazard
- You knew about a hazard but took no steps to correct it where you had the ability to do so
- You knew about a hazard, but took no steps to refer it to someone who could correct it where you did not have the ability to correct that hazard

Examples of Lack of Due Diligence in a Supervisor's Duties

- You knew about a hazard, or you should have known about it, and you did not warn or advise your workers about the hazard
- There was a rule or procedure, but you did not follow it, or did not require those in your charge to follow the rule or procedure
- You believed a worker was entitled to “assume the risk” (follow the rules if you wish), and so you did not engage in rule enforcement

Examples of Lack of Due Diligence in a Supervisor's Duties

- You did not engage in any safety talks, safety communication activities or job observation
- You discouraged reports of hazards by your workers

Due Diligence

■ Summary

- Not just an attitude
- Set of observable, measurable actions
- Application of best or recommended practices & not just minimum standards
- Must be documented
- Must be able to “prove” that you took all reasonable precautions in the circumstances

Bill C-45

The Reason for Establishing an Occupational Health and Safety Duty in the Criminal Code.

- Westray Mine Disaster – Nova Scotia
- To encourage improved workplace safety
- To modernize the law re: Criminal Liability of Corporations and their Sentencing
- Addresses Health and Safety negligence
- Bill C – 45 transforms these principles into law in The Criminal Code under Criminal Negligence provisions.

What is Criminal Negligence?

- Section 219(1) of the Criminal Code states that criminal negligence is committed when a person performing any duty or omitting to perform any duty required by law, shows wanton or reckless disregard for the safety of others.

Bill C 45 Introduces New Section 217.1

- It states “Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”

Essential Elements of Bill C - 45

- Holds corporate decision makers legally responsible for Health and Safety (directing minds)
- They must take reasonable measures to ensure safety
- Establishes a higher standard of care for employees and the public.
- Lowers the threshold for a corporation to be charged and convicted.
- Extends the responsibility to individuals who direct work.

The Six Major Changes

- 1. Creates a legal duty to ensure safety and elevates the stigma and penalty (The fine for a “summary conviction” has been increased from \$25,000 to \$100,000)
- There is no ceiling on fines for indictable or serious offences

2.

- Expands legal duty to more workplace parties. Bill C 45 now extends this potentially to foreperson, lead hands, co-workers.

3.

- Requirement to prevent bodily harm.
- Casts a larger net to cover all persons that may be affected by work done (i.e. the public.)
- Higher expectation regarding prevention

4.

- Broader definitions - a company "representative" can be director, partner, employee, member, agent, contractor.
- If the representative commits a serious Occupational Health and Safety offense...the organization can be charged with Criminal Negligence.
- "Corporation" replaced by the term "organization" – this adds firm, partnership, trade union, and municipality to the definition.

5.

- More 'creative' sentencing considerations such as review of company assets, cost of the investigation and prosecution can be assigned and preventative measures taken by the company.

6.

- Special Probation Powers to the courts
- Courts can set the terms of probation i.e. restitution, publication, require establishment of policies and procedures to reduce risks and reduce the likelihood of further criminal acts, and communication of these policies to employees.
- Identify a senior officer to be responsible for compliance with probation orders.
- Require progress reports.

Advice to Memorial

- Review your EH&S programs NOW (and ongoing)
- Ensure clear Health and Safety accountability within the organization is established.
- Have the Office of Safety and Environmental Services assist with health and safety evaluations, management and JHSC consultations, training in Due Diligence, OH&S, WHMIS, Safety program requirements, Investigations, Accident Investigation, etc.
- Ensure management 'manages' the OH&S system. . .
Don't simply react to problems

The Bottom Line

- Government is emphasizing improved corporate governance. (ie: US -Sarbanes Oxley, Enron emphasis on prudent financial practice and corporate governance), Westray, recent A. Harvey & Company case, etc.)
- Illustrates the publics increased intolerance for neglect of workplace Health and Safety
- Memorial can be held criminally responsible for actions or inaction that result in serious harm to an employee, student or the general public.