

Director Due Diligence regarding the Occupational Health and Safety Act (the “OH&S”).

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Liability

Generally a director or officer is guilty of an offence under the Occupational Health and Safety Act if he or she contravened a provision of this Act or the regulations. [ss. 66(1)]

Defence

The defence available to directors and officers has generally been described as a defence of due diligence and is as follows:

“Directors and officers will not be held to be in breach of the duty of care...if they act prudently and on a reasonably informed basis. The decision they make must be reasonable business decisions in light of all the circumstances about which the directors or officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable business decision at the time it was made.”

Establishing Due Diligence Generally

An effective health and safety system is multi-faceted and requires companies to consider a broad spectrum of issues. The key pillars of an effective system that meets stringent court developed OH&S due diligence standards include:

1. Knowledge of applicable legal standards
2. A knowledge of workplace hazards;
3. Detailed written policies and procedures;
4. Training and instruction and reminders
5. Ongoing communication and co-ordination of work activities and equipment
6. Supervision and enforcement

Establishing Due Diligence Checklists

1. Knowledge of applicable legal standards

- A Do managers and supervisors have a copy of current requirements and standards and are the trained in these?
- B Is there a process for ensuring that ever changing standards are known and incorporated into policies and practices?
- C Are applicable up to date standards for equipment known and applied?

2. Knowledge of workplace hazards

- A Have all reasonable steps been taken to determine and assess all potential hazards to workers?
 - i are there regular documented supervisory and managerial, reviews, inspections and audits of workplace areas, equipment, conditions to identify potentially hazardous conditions?
 - ii is there hazard identification training for those assigned the task of assessing the workplace for hazards?
 - iii is it appropriate to involve external consultant or auditor experts to perform audits and prepare reports and are there Joint Health & Safety Committee recommendations to assess matters that could cause harm and to ensure compliance with applicable standards (i.e. CSA and other standards for lockout and guarding)?
 - iv Is there a process for ongoing review of “near miss” or accident reports, workers compensation claims and concerns/recommendations arising from joint health and safety committee meetings, and recorded action to rectify hazards identified in these processes?
 - v are hazards discovered in inspections, audits or expert reports documented?
- B Is there an opportunity to “take a step back” to look at what could go wrong in the workplace to endanger worker safety?
- C Are all reasonable, prompt and recorded actions taken to rectify hazards identified and all steps taken to correct hazards documented?

3. *Detailed written policies and procedures*

Generally, and for each task or job that involves a safety hazard, essential written procedures include the following:

- A Detailed work procedures and safety do’s and don’ts.
- B Regular workplace inspections to identify safety hazards.
- C Detailed procedures to reduce the risk posed by identified hazards such as proper operation of equipment and safe handling of hazardous substances.
- D Emergency response plans including medical response, in the event of accidents.
- E Training and instruction requirements including who is to receive training, what training is to be provided and when.

4. *Training and Instruction Reminders*

- A Has there been personal detailed instruction to the worker undertaking the task?
- B Has there been appropriate demonstration of the proper use of equipment?
- C Have the proper procedures to follow been explained?
- D Is there supervisory follow up to confirm the procedures and equipment use were understood by the employee?

5. *Ongoing communication and co-ordination of work activities and equipment*

- A Are supervisors communicating with workers on an ongoing basis about the risks and hazards involved in the workplace generally?

- B Is there routine follow up to ensure that instructions regarding general risks and hazards involved in the workplace are being followed correctly?
- C Where the workplace area is complex, dynamic and interactive and where employees are involved in different physical areas of the workplace on a routine basis, is communication, co-ordination and follow up commensurately increased?
- D Are there regular advance meetings about complex work projects for safety issues?
- E Safety reminders should communicate the need for co-ordination of work, workers and equipment.
- F Reports of any accidents or near misses to reinforce safety messages; and
- G Feedback from workers about safety issues.

6. *Supervision and Enforcement*

- A Are supervisors and managers aware that they bear an important responsibility to engage in ongoing monitoring to ensure that workers are doing what they are supposed to do?
- B Are supervisors and managers aware that they are expected to take the lead in supervising, monitoring and ensuring safe work practices are followed?
- C Do supervisors and managers regularly monitor on the floor or conduct job observations to confirm that procedures and policies are understood and followed?
- D Does monitoring occur after a near miss or finding on non-compliance?
- E Does increased monitoring occur for high risk activities?
- F Is there proof of monitoring on forms or in notebooks including date, time, workers monitored and corrective actions recommended?
- G Are there policies providing for disciplinary action including written warnings, suspensions and termination of employment where a worker has violated a policy or procedure despite having received proper instruction.