

safety compliance insider





Your Plain Language Guide to C-45, OHS & Due Diligence

www.SafetyComplianceInsider.com

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SAFETY OUTSIDE THE WORKPLACE

How Do OHS Laws Apply to Workers Who Work from Home?

The Internet and other technology have made "telecommuting"—that is, working from home rather than at the company's facility either full- or part-time—a viable option for many workers. The desire to cut greenhouse gas emissions and protect the planet has made it an attractive one as well. In fact, according to Statistics Canada, there were an estimated 1,322,000 telecommuters in Canada in 2005.

But the rise of the telecommuter also represents a conundrum for safety coordinators. The current OHS laws weren't written with the telecommuter in mind. They were designed to protect individuals who work in factories, construction sites, mines and other industrial workplaces that employers control. But although an employer's duty to protect workers in workplaces that it controls is clear, how does that duty translate to workers who work from home, in a setting beyond its control?

This article will answer that question. We'll explain what, if anything, the OHS laws say about protecting telecommuters and where within the laws a duty to protect such workers may be implied. We'll also explain how your company can comply with its legal obligations to telecommuters and ensure that they work safely from home. And there's a chart at the end of the article that tells you what language in the OHS law in each jurisdiction might apply to telecommuters.

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DEALING WITH INSPECTORS

How Do You Appeal an Order from a Safety Official?

If a government safety official issues an order to your company requiring it to take certain action, such as halt operations or install guards on a piece of machinery, it should promptly comply if it thinks the order's valid. But safety officials aren't perfect and not every order they issue is justified or reasonable. If your company disagrees with safety orders, the OHS laws allow it to challenge them. However, it can't take the law into its own hands and unilaterally decide that orders are invalid and thus can be ignored. Deliberately disobeying or ignoring a safety order is itself an OHS violation—and a very serious one. The government often goes out of its way to punish defiance harshly.

So what option does a company have when a safety official issues an order it thinks is unreasonable or unnecessary? The company may appeal the order to get an official ruling that it doesn't have to comply with the order. We'll explain what the OHS laws say about appealing safety orders and what you need to know to navigate the appeals process. There's also a chart at the end of the article that tells you who's allowed to appeal a safety order under the OHS laws of each jurisdiction.

Defining Our Terms

The OHS laws use various terms to describe actions by safety officials that are subject to appeal, including "orders," "decisions," "determinations" and "directions." For simplicity's sake, we'll use the term "safety order" to describe these actions.

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ONLINE RESOURCE: At www.SafetyComplianceInsider.com, you'll find a home office safety checklist created by Alberta Employment and Immigration that you can adapt to conduct a hazard assessment of a telecommuter's home office.

Defining Our Terms

When workers work from home, it's usually called "telework" or "telecommuting." We'll use the term "telecommuting" and its variations throughout this article.

WHAT THE LAW SAYS

The goal of the OHS laws is to protect workers' health and safety. The specific measures that employers are required to take are set out in the OHS regulations and are generally based on particular types of hazards, such as fire or machines, or activities, such as excavation and work in confined spaces. Because many of these hazards and activities aren't an issue for workers who work from home, the regulations covering them are irrelevant to telecommuters. Thus, for example, measures employers must take to protect workers from fall hazards when using scaffolding typically won't apply to telecommuters.

On the other hand, although a home office is less hazardous than a factory or construction site, it's not totally devoid of dangers. Some of the hazards covered by the OHS regulations are also present at a telecommuter's home, including fire, electricity, ergonomics hazards, etc. Do the OHS laws require employers to protect their telecommuters from these hazards?

Unfortunately, the OHS laws don't specifically answer this question. You won't find the word "telecommute" or any of its variations in any jurisdiction's OHS acts or regulations. But if you know where to look, you can find clues within the law or other guidance on how the requirements in the OHS laws apply to individuals who work from home. In fact, with one notable exception—Alberta—a case can be made that Canadian employers do, in fact, have an obligation to protect telecommuters from workplace hazards. How you'd make that case depends on where in Canada your company is located.

The 2 Provinces that Directly Address the Question

AB and NS are the only two jurisdictions that have directly tackled the issue by publishing guidance explaining whether the OHS laws apply to telecommuters. The provinces take opposite sides of this issue.

In Alberta, the OHS laws don't apply to telecommuters. *Explanation:* Alberta's *OHS Act* requires employers to protect "workers," defined as persons engaged in an "occupation." It also requires employers to take certain steps with regard to a "work site," which is defined as a location where a worker is or is likely to be engaged in any occupation [Sec. 1(cc)]. The definition of "occupation" specifically excludes work in, to or around a private dwelling performed by the dwelling's owner or occupant [Sec. 1(s)(ii)]. The *OHS Code 2006 Explanation Guide* confirms that the OHS Code and regulation don't apply to "workers working in their private dwellings." Additional confirmation was issued in July 2008 in the form of a bulletin from Alberta Employment and Immigration saying that "Alberta's OHS legislation does *not* apply" to workers working from their homes (emphasis in original) [http://employment.alberta.ca/documents/WHS/WHS-PUB_li028.pdf].

Nova Scotia has also issued guidance indicating whether its OHS laws apply to telecommuters. The *Reference Guide to the Occupational Safety General Regulations* states that "employers are held responsible for health and safety at all places where their employees work. This includes the employees' homes" [www.gov.ns.ca/lwd/healthandsafety/docs/OccupSafetyGenRegRefGuide.pdf]. So in Nova Scotia, the OHS laws do apply to telecommuters.

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The 12 Jurisdictions that Don't Directly Address the Question

In the other 12 jurisdictions, the question of whether OHS laws apply to telecommuters isn't addressed in either the laws or government guidance. In other words, nothing says the laws do apply to telecommuters and nothing says they don't. So where does that leave employers in these jurisdictions? When laws don't include provisions that expressly deal with an issue, you need to check the provisions that they do include and try to interpret how they apply to that issue—in this case, the question of whether OHS laws cover telecommuters. Or if you don't feel like undertaking this chore, read on.

The OHS laws don't explicitly say that employers have a duty to protect telecommuters but they may imply it. The source of an implied duty to protect telecommuters can come from a number of provisions within the OHS law:

Definition of "workplace." OHS laws generally require employers to protect workers from hazards found at the workplace (or worksite or place of employment). The definitions of these terms are typically broad enough to include a worker's home office. For example, BC defines "workplace" as any place where a worker is or is likely to be engaged in any work [*Workers' Compensation Act*, Sec. 106]. And NL defines "workplace" as a place where a worker is engaged in an occupation [*OHS Act*, Sec. 2(n)]. If a worker works from home, then his home—or at least his home office—would likely be considered a workplace under OHS law.

In addition, in some jurisdictions, such as BC, MB and PEI, the OHS laws acknowledge that a home *can be* a workplace. This acknowledgement is contained in the section of the OHS law that restricts the authority of safety officials to enter and inspect private residences that are used as workplaces. So the argument could be made that the legislators who drafted these laws understood that workplaces could include a residence and that they intended workplace health and safety requirements to apply to such residences, including a telecommuter's home office.

Duty to Protect Telecommuters in the US

In the US, the answer is pretty clear. OSHA stated in a February 2000 policy directive that it wouldn't inspect home offices, require employers to inspect home offices or hold employers liable for safety in home offices. But OSHA will conduct inspections of other home-based worksites, such as home manufacturing operations, when it receives a complaint or referral that indicates that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, including reports of a work-related fatality. In addition, OSHA stated that employers are responsible in home worksites for hazards caused by materials, equipment or work processes that the employer provides or requires to be used in a worker's home. Thus, in the US, a distinction is drawn between home offices and other kinds of home-based workplaces.

This Story Will Help You:


Ensure that your company complies with its OHS duty to protect workers who work from home

Definition of "worker." The OHS laws cover "workers," typically defined as including a person who performs a service for an employer for pay. Clearly, telecommuters would qualify as workers under this definition and consequently may be entitled to protection under the OHS laws, particularly if they're exposed to hazards addressed by those laws. For example, the requirement to train workers in fire evacuation procedures could cover a telecommuter who works from home, depending on how the regulation is worded.

Duty to protect workers who work alone. The OHS laws of nine jurisdictions—AB, BC, MB, NB, NT, NU, PEI, QC and SK—impose a specific duty on employers to take steps to protect workers who work alone or in isolation. "Working alone" is generally defined to mean that the worker is the only worker at that workplace in circumstances where assistance isn't readily available to the worker in case of injury, sickness or other emergency. Many workers who telecommute work by themselves. Thus, the working alone requirements would likely apply to them, especially if they work in an isolated setting where emergency assistance isn't readily available.


General duty. Every jurisdiction's OHS law includes a "general duty clause" requiring employers to provide a reasonably safe workplace and protect workers from foreseeable hazards that can cause injury or death. This language presumably applies to all workers—regardless of where they work. So it should apply to workers who work from home.


Other provisions that may apply to telecommuters. The sources of an implied duty to protect telecommuters discussed above appear in all or most OHS laws. For example, all jurisdictions include a general duty clause in their OHS law and most define "workplace" and "worker" elastically enough to include a telecommuter. But some OHS laws also include particular provisions that seemingly could have bearing on whether OHS duties apply to telecommuters:

 The federal *Canada Labour Code* imposes different duties on employers based on control. Employers have one set of duties for workplaces they control and another for work activities they control that are carried out by a worker in a workplace they don't control. This approach of basing duties on control over work activities and not just control over worksites suggests that an employer has certain duties with regard to home offices, at least to the extent that it controls the worker's work at home;

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SAFETY OUTSIDE THE WORKPLACE CONTINUED FROM PAGE 3

 NB's *OHS Act* states that the law doesn't apply to a place of employment that's a private home unless the work done there has been contracted to the employer of one or more people employed at the home. In the latter case, the OHS laws *do* apply. This language suggests that the OHS laws apply to telecommuters who work from home for outside employers; and





 In ON and YT, the *OHS Act* doesn't apply to work performed by the owner or occupant in or about a private residence. This language would suggest that employers don't have a duty to protect telecommuters. However, the only government guidance interpreting this provision in Ontario (Sec. 3(1) of the Act) deals with responsibility for construction work done on a residence by the owner and occupant [www.labour.gov.on.ca/english/hs/guidelines/constructor/cons_3.html]. Thus, the MOL hasn't given any indication of whether Sec. 3(1) exempts employers from protecting telecommuters from the hazards of their home office.

Workers' Compensation

Even if your jurisdiction doesn't apply its OHS laws to telecommuters, employers have an incentive to ensure the safety of such workers. Why? Because workers' compensation provides benefits for workers who suffer injuries that "arise out of" or "in the course of" their employment. So coverage of injuries is generally a question of what the worker was doing when he was injured—not *where he was located* when he was hurt (although location may be a factor in determining if the injury was work-related.) Thus, an injury suffered by a telecommuter while working from home would likely be considered work-related and covered by worker's comp. As a result, your company can reduce its workers' comp costs by taking steps to ensure the health and safety of telecommuters.

Poll Results**Poll on Duty to Protect Telecommuters**

The *Insider* recently asked readers who they thought was responsible for the health and safety of telecommuters. Here are the results:

-  54.5% said both the employer and worker
-  27.3% said just the employer
-  9.1% said just the worker
-  9.1% said neither the employer nor the worker.

HOW TO COMPLY

The upshot of the analysis so far is that, in most jurisdictions, it's likely that your company has a duty to protect telecommuters. Your company also has a financial incentive to ensure the safety of such workers even it doesn't have an express or implied duty to do so. In general, to comply with this duty, you should do the following:








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Conduct a Hazard Assessment

The hazard assessment is a core safety tool. So the first thing you should do to protect telecommuters is conduct a hazard assessment. That is, you should inspect the worker's residence and determine if there are any hazards to his health or safety. Nova Scotia's *Reference Guide to the Occupational Safety General Regulations* offers helpful guidelines on how to do so.

According to the Guide, employers should inspect the telecommuter's work area and identify health and safety hazards with exactly the same degree of comprehensiveness as it assesses hazards in the work areas of its own facilities. But it adds that the employer is only responsible for the work area and those aspects of health and safety that arise out of the job. In other words, you don't have to inspect rooms the telecommuter doesn't work in, such as bedrooms. The Guide also clarifies that employers aren't responsible for hazards arising from activities outside of the work relationship, such as unsafe lawnmowers and child safety issues.

Hazards to look for or examine include:

-  Ergonomics hazards, such as improperly positioned computer keyboards or desk chairs;
-  Fire hazards, such as lack of smoke detectors or fire extinguishers;
-  Trip-and-fall hazards, such as extension cords, area rugs and items strewn across the floor;
-  Electrical hazards, such as overloaded outlets or lack of surge protectors;
-  Condition of equipment and furniture, such as broken desks or poorly hung shelves;
-  Emergency preparedness, such as the presence of a first aid kit; and
-  Any unsafe practices, such as piling of supplies.

ONLINE RESOURCE: At www.SafetyComplianceInsider.com, you'll find a home office safety checklist created by Alberta Employment and Immigration that you can use to conduct a hazard assessment of a telecommuter's home office.

Set Up a Communication Protocol

Although telecommuters generally aren't at high risk of an injury or workplace violence, the fact that they work alone makes them more vulnerable than workers who work alongside co-workers who can come to their aid if they get into trouble. So set up a communication protocol that requires telecommuters to maintain regular contact with their supervisors.


Apply Company Safety Policies to Home Workplaces

Make sure that telecommuters understand that even though they're working from home, the company's OHS policies still apply. For example, state that telecommuters must comply with all safety rules and report any workplace injuries or illnesses.

Insider Says: For additional information on telecommuting, see www.ivc.ca, a website shared by InnoVisions Canada, telework and flex-work consultants, and the Canadian Telework Association, a non-profit association dedicated to promoting telework.

Conclusion

As safety coordinator, your job is to ensure that all workers are

protected when performing their jobs. Ensuring the safety of workers in the workplace is hard enough; ensuring the safety of workers who work from home is more challenging. The good news is that home offices generally pose fewer hazards than, say, factories or construction sites. So although the company does have to take certain steps to ensure the health and safety of telecommuters, doing so shouldn't be an arduous task. 

KNOW THE LAWS OF YOUR PROVINCE



DUTY TO PROTECT TELECOMMUTERS

OHS laws don't mention telecommuters but do contain language that could be interpreted as addressing them indirectly. Here are the parts of the OHS law in your province or territory that could apply to telecommuters:

FEDERAL: Imposes specific duties on employers with regard to workplaces controlled by the employer and, with respect to work activity carried out by a worker in a workplace *not* controlled by the employer, to the extent that the employer controls the activity [*Canada Labour Code*, Sec. 125(1)].

ALBERTA: Defines "occupation" to *exclude* work in, to or around a private dwelling performed by the dwelling's owner or occupant [*OHS Act*, Sec. 1(s)(ii)] and "work site" as a location where a worker is or is likely to be engaged in any occupation [Sec. 1(cc)]. Bulletin from Alberta Employment and Immigration confirms that Alberta OHS laws do *not* apply to telecommuters and their home workplaces [*Application of Alberta's OHS Legislation to Workers Working from Home*, http://employment.alberta.ca/documents/WHS/WHS-PUB_li028.pdf].

BRITISH COLUMBIA: Doesn't directly address telecommuters in OHS laws. But definitions of "worker" (a person who has entered into or works under a contract of service or apprenticeship, written or oral, express or implied, whether by way of manual labour or otherwise [*Workers' Compensation Act*, Sec. 1]) and "workplace" (any place where a worker is or is likely to be engaged in any work and includes any vessel, vehicle or mobile equipment used by a worker in work [Sec. 106]) could apply to telecommuters and their home offices.

MANITOBA: Doesn't directly address telecommuters in OHS laws. But definitions of "worker" (any person who is employed by an employer to perform a service whether for gain or reward, or hope of gain or reward or not [*Workplace Safety and Health Act*, Sec. 1]) and "workplace" (any building, site, workshop, structure, mine, mobile vehicle, or any other premises or location whether indoors or outdoors in which one or more workers, or self-employed persons, are engaged in work or have worked [Sec. 1]) could apply to telecommuters and their home offices.

NEW BRUNSWICK: Says that the *OHS Act* doesn't apply to a place of employment that's a private home unless the work that's carried on has been contracted to the employer of one or more persons employed at that home [*OHS Act*, Sec. 3(1)].

NEWFOUNDLAND/LABRADOR: Doesn't directly address telecommuters in OHS laws. But definitions of "worker" (a person engaged in an occupation [*OHS Act*, Sec. 2(m)]) and "workplace" (a place where a worker or self-employed person is engaged in an occupation and includes a vehicle or mobile equipment used by a worker in an occupation (Sec. 2(n))) could apply to telecommuters and their home offices.

NORTHWEST TERRITORIES/NUNAVUT: Doesn't directly address telecommuters in OHS laws. But definitions of "worker" (a person engaged in work for an employer, whether working with or without remuneration [*Safety Act*, Sec. 1]) and "work site" (a location where a worker is, or is likely

to be, engaged in work, or a thing at, on, in or near which a worker is, or is likely to be, engaged in work [Sec. 1]) could apply to telecommuters and their home offices.

NOVA SCOTIA: Guide to OHS laws states that "employers are held responsible for health and safety at all places where their employees work. This includes the employees' homes" [*Reference Guide to the Occupational Safety General Regulations*, www.gov.ns.ca/lwd/healthandsafety/docs/OccupSafetyGenRegRefGuide.pdf].

ONTARIO: Says that the *OHS Act* doesn't apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith [*OHS Act*, Sec. 3(1)]. Only MOL guidance on Sec. 3(1) addresses construction work and not telecommuting arrangements [*MOL FAQ*, www.labour.gov.on.ca/english/hs/guidelines/constructor/cons_3.html].

PRINCE EDWARD ISLAND: Doesn't directly address telecommuters in OHS laws. But definitions of "worker" (a person employed in a workplace [*OHS Act*, Sec. 1(x)(i)]) and "workplace" (a place where a worker is or is likely to be engaged in an occupation and includes a vehicle, fishing vessel or mobile equipment used or likely to be used by a worker in an occupation [Sec. 1(y)]) could apply to telecommuters and their home offices.

QUÉBEC: Doesn't directly address telecommuters in OHS laws. But definitions of "worker" (a person, including a student in the cases determined by regulation, who, under a contract of employment or a contract of apprenticeship, even without remuneration, carries out work for an employer [*An Act Respecting Occupational Health and Safety*, Sec. 1]) and "workplace" (any place in or at which a person is required to be present out of or in the course of work, including an establishment and a construction site [Sec. 1]) could apply to telecommuters and their home offices.

SASKATCHEWAN: Doesn't directly address telecommuters in OHS laws. But definitions of "worker" (a person who is engaged in an occupation in the service of an employer [*OHS Act*, Sec. 2(ff)]), "worksites" (an area at a place of employment where a worker works or is required or permitted to be present [Sec. 2(gg)]) and "place of employment" (any plant—that is, any premises, site, land, mine, water, structure, fixture or equipment employed or used in the carrying on of an occupation—in or on which one or more workers or self-employed persons work, usually work or have worked [Sec. 2(w)]) could apply to telecommuters and their home offices.

YUKON: Says that the *OHS Act* doesn't apply to work performed by the owner or occupant in or about a private residence or the lands and appurtenances used in connection therewith [*OHS Act*, Sec. 2(2)].

TEST YOUR OHS I.Q.

Do Deliberate Safety Infractions By Mentally Disabled Worker Warrant Termination?

SITUATION

A company investigates several incidents at its brewery and finds that one worker is responsible for them. The company interviews the worker, who eventually admits to breaking the arm of a chair, jamming bottle caps into the stop buttons on machinery, deliberately smashing air pressure valves on equipment, hiding a bottle opener in an expensive bottle washing machine and removing light bulbs from emergency stop lights on equipment. These actions endanger expensive equipment and co-workers and violate company rules and, in some cases, OHS law. Two psychologists examine and test the worker and conclude that although he isn't "mentally retarded" and doesn't have any mental illness or personality disorder, he does have limited intellectual abilities and is a "slow learner." The union argues that this condition makes the worker mentally disabled under human rights law and that terminating him would violate the company's duty to accommodate the worker to the point of "undue hardship."

QUESTION

Can the company fire the worker?

- A. No, because the worker is mentally disabled.**
- B. Yes, because given the safety concerns the worker's conduct raises, retaining him would be an undue hardship for the company.**
- C. No, but it can discipline him short of termination.**
- D. Yes, because the worker isn't mentally disabled and so the company has no duty to accommodate him.**

ANSWER

B. The company can fire the worker because tolerating intentional safety violations in the workplace is an undue hardship.

EXPLANATION

This fact pattern is based on a case from Alberta. A 44-year-old worker who'd worked for a brewery for 19 years was fired after several incidents in which he deliberately destroyed company property and created safety hazards. During the company's investigation, the worker said he'd done some of these things because he was bored; for others, he offered no explanation at all. The company fired him for endangering co-workers by violating company rules as well as OHS law. The union filed a grievance on his behalf, arguing that the worker was disabled and needed accommodations.

The Alberta arbitrator ruled that the termination was justified. The arbitrator agreed that the worker's intellectual limitations are disabilities and thus the company had to accommodate him to the point of undue hardship. But tolerating the intentional and senseless destruction of company property and the creation of

safety hazards would impose undue hardship on the company. By pure luck, no one was hurt and no expensive equipment was seriously damaged. However, there was nothing in the worker's explanations for his behaviour indicating that he wouldn't commit another violation or that he'd be more reliable and trustworthy in the future. The arbitrator concluded that the company's safety needs were too pressing and the nature of the harm done too serious to justify setting aside the termination.

WHY WRONG ANSWERS ARE WRONG

A is wrong because being mentally disabled doesn't make workers immune from discipline. It just requires their employer to accommodate them to the point of undue hardship. So even if the worker is considered disabled based on his limited intellectual abilities, he can still be fired if his conduct warrants termination. And here, tolerating the worker's conduct would be an undue hardship for the company. Thus, it may fire him.

C is wrong because termination is warranted in this situation. The worker wilfully damaged company property. More significantly, he damaged safety devices on equipment, including the stop buttons and emergency stop lights, thus creating safety hazards for himself and his co-workers. And based on such behaviour, the company may reasonably believe that it can't trust the worker any longer. Thus, it's proper for the company to fire him.

D is wrong for two reasons. First, the worker is disabled. Although he doesn't suffer from a mental or personality disorder in psychiatric terms, his limited intellectual abilities constitute a disability under the law. Second, whether termination is justified doesn't turn on whether the worker is disabled; it turns on whether his conduct so undermined the employer-worker relationship that the company is entitled to terminate him as opposed to, say, suspending him. And because the safety and property concerns the worker's conduct creates do, in fact, undermine that relationship, termination is warranted.

SHOW YOUR LAWYER

Labatt Breweries Alberta v. Brewery Workers, Local 250 (Jerowski Grievance), [2005] A.G.A.A. No. 23, March 14, 2005



OHS MONTH IN REVIEW

A roundup of important new legislation, regulations, government announcements, court cases and arbitration rulings.

LAW OF THE MONTH

Ontario Proposes New Workplace Violence Requirements

All employers in Canada have a duty to prevent and protect workers from violence at work. The OHS laws impose this obligation in one of two ways. In seven jurisdictions—Fed, AB, BC, MB, NS, PEI and SK—the OHS laws specifically say employers must take steps to address workplace violence. (Québec requires employers to prevent “workplace psychological harassment,” including physical violence.) In the remaining jurisdictions, this duty is implied by the OHS law’s “general duty clause.” Ontario currently falls in the latter group—but its status is likely to change soon. The government recently introduced a bill that would add new language to the *OHS Act* specifically requiring employers to take certain steps to prevent workplace violence and harassment. Here’s a look at Bill 168 (To download a copy of the bill, see www.ontla.on.ca/bills/bills-files/39_Parliament/Session1/b168.pdf).

THE BILL





Who It Applies to: Bill 168, which was introduced in the Assembly on April 20, 2009, applies to all employers in Ontario covered by the *OHS Act*.

Key Components: In addition to defining “workplace violence” and “workplace harassment,” the Bill has seven key components:

1. Policies. Employers must prepare policies on workplace violence and harassment and review those policies at least annually. If an employer has five or more workers, the policies must be in writing and posted conspicuously in the workplace.

2. Risk assessment. Employers must conduct an assessment of the risk of workplace violence and report the findings to the JHSC, safety representative or the workers (if there’s no JHSC or safety representative).

3. Violence program. Employers must develop a program to implement the workplace violence policy. That program must include measures:

-  To controls risks of workplace violence identified in the assessment;
-  To summon immediate assistance when workplace violence occurs;
-  For workers to report incidents or threats of workplace violence; and
-  For employers to deal with incidents, complaints and threats of workplace violence.

4. Domestic violence. If an employer is aware or ought to be aware that domestic violence that’s likely to physically injure a worker may occur in the workplace, the employer must take every reasonable precaution to protect the worker.

5. Duties. The Bill clarifies the duties of employers, supervisors and workers with respect to workplace violence and requires employers to train workers on the workplace violence policy and program.


6. Harassment program. Employers must also develop a program to implement the workplace harassment policy. That program must include measures for workers to report incidents of workplace harassment and spell out how the employer will deal with incidents and complaints of workplace harassment. In addition, the employer must train workers on the workplace harassment policy and program.

7. Right to refuse. The Bill would extend the worker’s right to refuse dangerous work to include the right to refuse work if workplace violence is likely to endanger the worker.

ANALYSIS

Given the high priority and attention that workplace violence and prevention is attracting across Canada in general and in Ontario specifically, Ontario employers should expect Bill 168 to become law sometime this year. The elements of the violence and harassment prevention programs required by the Bill are similar to the requirements in most Canadian jurisdictions that impose specific violence and harassment duties on employers. There are two notable exceptions, however:

Refusal rights. Bill 168 specifically extends workers’ right to refuse dangerous work to include refusals based on the risk of workplace violence. It’s likely that the right of workers in other jurisdictions to refuse work based on threats of violence is implied under the general refusal right. But if and when the Bill is passed, Ontario workers will very clearly have the right to refuse work where the risk of workplace violence is likely to endanger them.

Domestic violence. Bill 168’s domestic violence duty is unique in Canada. This language appears to be a response to the Nov. 2005 murder of nurse Lori Dupont by her ex-boyfriend, a doctor at the hospital where she worked. Her killer later committed suicide. Senior hospital administrators knew about the ex-boyfriend’s unstable behaviour and that he’d made threats to Dupont. But on the day she was murdered, the nurse and doctor were scheduled to work together. If the Bill is passed, employers in Ontario will no longer be able to turn a blind eye to domestic violence, at least to the extent that they can protect workers from such violence in the workplace. 

LAWS & ANNOUNCEMENTS

Mental Health

April 28: The Great-West Life Centre for Mental Health in the Workplace released a new evidence-based tool for employers looking to improve mental health and safety in their workplaces. *Guarding Minds @ Work* gives employers free tools to assess the psychological well-being of their workplaces, implement changes and evaluate their programs. See, www.guardingmindsatwork.ca.

Fire Safety

May 12: According to the Auditor General of Canada, many federal departments aren’t complying with key fire safety requirements. For example, the audit found that in 18 of 54 federal office buildings audited, departments couldn’t show that they’d held fire drills as they’re required to do every year.



LAWS & ANNOUNCEMENTS**Workers' Compensation**

May 7: The WSIB released its unaudited financial report for the fourth quarter of 2008. Findings: The costs of running Ontario's workers' comp system have been impacted by increases to benefit costs. In addition, the WSIB's investment returns have been disappointing given the current state of the world's economy.

Skilled Trades

May 13: Ontario took steps to establish the Ontario College of Trades. Along with regulating its members, the College would:

- Encourage more people to work in the trades
- Help the system better serve employers, skilled tradespeople, apprentices and consumers
- Give industry a greater role in recruitment, governance, certification and apprenticeship training.

Drunk Driving

May 1: The penalties for drunk driving are now stiffer. If you're found with a blood alcohol concentration from 0.05 to 0.08 (the "warn" range) while driving, you'll have your driver's licence suspended for

- First offence: Three days
- Second offence: Seven days and you'll have to attend an alcohol education program
- Third offence: 30 days and you'll have to complete a remedial alcohol treatment program and have an ignition interlock for six months.

Cell Phones

April 22: A bill banning the use of handheld cell phones and other electronic devices while driving passed its third reading and received Royal Assent. The bill amends the *Highway Traffic Act* to ban driving while holding or using a handheld wireless communication device or electronic entertainment device or with the display screen of a TV, computer or other device visible to the driver. However, use of devices in hands-free mode is permitted. The date the ban takes effect has yet to be announced.

Traffic Safety

April 21: The legislature passed the *Road Safety Act*. Most measures will take effect by the summer of 2010. Highlights:

- A zero blood alcohol concentration required for all drivers age 21 and younger
- Higher fines for serious *Highway Traffic Act* offences, such as running a red light
- Immediate seven-day impoundment of vehicles driven by drunk or suspended drivers
- Proposed increase in the time that new drivers spend in the Graduated Licensing System to 36 months.

CASES**Two Supervisors & Two Companies Fined \$297,000 in Young Worker's Death**

A young worker was clearing snow and ice from roof canopies when he fell over 42 metres. He died from his injuries. Although the worker was wearing a full body harness, he wasn't connected to any anchor or fixed support. The constructor for the project pleaded guilty to a safety offence and was fined \$150,000. The worker's employer and two supervisors had previously pleaded guilty and were fined \$115,000, \$20,000 and \$12,000 respectively [*Brook Restoration Ltd., Ontario Roofing & General Contracting Services, Luis Gomes and Carlos Laranjeira*, Govt. News Release, April 28, 2009].

Employer's Handling of Worker's Safety Concerns Wasn't Discriminatory

A black worker reported a near miss on a machine. In response, the employer held a meeting on the incident and created an action plan to prevent future incidents. The worker had another incident with this machine. The worker angrily reported the incident to his supervisor, breaking a piece of trim and throwing it in a box by the supervisor. The employer reported the worker's safety concerns to the MOL, which concluded that the machine was safe. The employer suspended the worker for three days and ordered him to get counselling for his inappropriate behaviour. The worker refused counselling and was fired. He filed a racial discrimination complaint. The Human Rights Tribunal dismissed the complaint. The employer took the worker's safety concerns seriously and there was no evidence that its actions were based in any way on his race [*Barfi-Kwabena v. Knoll North America Corp.*, [2009] HRTO 619 (CanLII), May 12, 2009].

CASES (cont)**Supervisor's Death Didn't Require Dismissal of OHS Charges**

A worker was injured using a table saw that didn't have a guard. Eight months later, the MOL charged the company with three OHS violations. About a month later, the worker's primary supervisor died of cancer. The company asked the court to dismiss the charges because the delay in the filing of the charges resulted in the loss of the supervisor's testimony and irremediably prejudiced its defence. The appeals court disagreed. The company had to prove that it suffered *actual* prejudice by the loss of the supervisor's testimony. But the supervisor was on vacation when the incident occurred. And the company couldn't show what specific evidence he would have provided that hindered its ability to prove due diligence [*Ontario (Ministry of Labour) v. Lee Valley Tools Ltd.*, [2009] ONCA 387 (CanLII), May 8, 2009].

Board Suspends Order Requiring Engineer Certification of Crane Procedures

An MOL inspector ordered a company to have an engineer certify that the tower crane's raising/lifting procedures are "not likely to endanger a worker." The company appealed, claiming that its procedures were developed and approved by the JHSC in consultation with the Ontario Formwork Association and had been reviewed and approved by a professional engineer. The company had tried to comply with the order, but no engineers would provide the required certification on the grounds that it went beyond the scope of their professional opinion. The Board suspended the order pending appeal, noting that the suspension was unlikely to endanger workers and wasn't challenged by the MOL [*Consolidated 2000 Inc. v. Form Work Council of Ontario*, [2009] CanLII 17338 (ON L.R.B.), April 16, 2009].

Company and Director Fined \$44,000 for Ignoring Safety Orders

During an inspection, an MOL inspector saw unguarded rollers on an edging machine. He issued an order requiring the company to guard the device by a set deadline. Before this inspection, the inspector had issued 44 other orders to this company. When he returned to the workplace, the inspector found that 24 of the orders hadn't been complied with, including the most recent guarding order. The company and a director pleaded guilty to failing to comply with safety orders. The court fined the company \$40,000 and the director \$4,000 [*Royal Edge Inc. and Peter Boussoulas*, Govt. News Release, May 15, 2009].

Company Fined \$120,000 after Worker Is Crushed to Death

While a worker was repairing a valve stem on the rear tire of a recycling truck, a side bin released and trapped him between the bin and the tire. By the time he was freed, he'd sustained fatal injuries and died en route to the hospital. The MOL concluded that the side bin hadn't been blocked or braced to prevent movement. The company pleaded guilty to a safety offence. The court fined it \$120,000 [*TDL Spring & Suspension Specialists Inc.*, Govt. News Release, May 11, 2009].

Worker Hit in Head when Device Exploded off of Water Main

A worker capped off a water main with a coupling device. The main was shut off but a leaky gate valve caused water and air to build up behind the cap and device. The device exploded off of the main, hitting the worker in the head. Although he was wearing a hard hat, he suffered serious injuries. The construction company pleaded guilty to two safety offences, including not having a supervisor supervise work at all times, and was fined \$90,000 [*Fer-Pal Construction Ltd.*, Govt. News Release, May 13, 2009].

Mechanic Crushed to Death by Truck

A mechanic was working alone in the garage on a roll-off truck. He was crushed to death between the rails and frame of the truck. The MOL concluded that although the company had written rules for blocking the hoist rails of this type of truck when they're in the raised position, the worker hadn't blocked the rails. The employer pleaded guilty to a safety violation and was fined \$85,000 [*Southern Sanitation Inc.*, Govt. News Release, April 20, 2009].

Company Fined \$87,000 after Electrician Is Injured by Arc Flash

An electrician doing maintenance work on a machine was testing the voltage in an electrical panel when an arc flash burned his hand and face. The electrician wasn't wearing rubber gloves or a shield. The company pleaded guilty to failing to ensure the electrician used protective equipment and procedures to adequately protect against electrical shock and burns. The court fined it \$87,000 [*Domtar Inc.*, Govt. News Release, April 20, 2009].

Clothing Store Fined \$50,000 for Worker's Fall from Ladder

A clothing store worker was standing on a ladder in a storeroom attempting to replace a box on a top shelf. The ladder gave way and the worker fell to the floor, sustaining back injuries and losing consciousness. The MOL determined that the ladder was too wide for the storeroom and so couldn't be fully opened and locked in place. The store pleaded guilty to a safety violation and was fined \$50,000 [*Guess? Canada Corp.*, Govt. News Release, May 15, 2009].


ONTARIO

CASES (cont)

Worker's Leg Amputation Costs Company \$110,000

A worker was using a lift truck to move steel coils from a cradle. While he was outside the truck getting safety upright bars, a coil weighing 2.708 metric tons fell onto his leg. Because of the injuries, his leg was amputated below the knee. The company pleaded guilty to a safety offence and was fined \$110,000 [ArcelorMittal Tubular Products Canada Inc., Govt. News Release, April 20, 2009].

Construction Company Fined for Exposing Workers to Asbestos

Workers started construction work in a building when material containing asbestos was discovered. The MOL determined that the construction company had failed to check for the presence of asbestos before work began. The company pleaded guilty to a safety offence. It's fine: \$52,000 [David J. Capudo Construction Ltd., Govt. News Release, April 21, 2009].

Forklift Incident Costs Company \$50,000



A worker at a beer distribution centre was using a forklift to remove a pallet containing cases of beer from a storage rack. The pallet knocked into the rack. The worker tried to stabilize the rack but couldn't. Several cases of beer fell onto the forklift. The worker jumped to safety and was unharmed. The company pleaded guilty to failing to ensure that materials removed from a storage rack were removed safely. The court fined it \$50,000 [Brewers Retail Inc., Govt. News Release, May 8, 2009].


NL

LAWS & ANNOUNCEMENTS



Workers' Compensation—WHSCC

April 30: The government introduced a bill that will amend the *Workplace Health, Safety and Compensation Act* to:

-  Change the composition of the WHSCC board of directors to include a minimum of one member recommended by employers, one recommended by workers and one representing injured workers
-  Clarify that employers are required to re-employ workers for two years from the date of disability (not the date of injury).

Workers' Compensation—Forms

April 27: As part of the campaign to cut red tape, the WHSCC has simplified two of its key forms. You can still use the old forms but the new ones are easier to fill out:

-  Request for Internal Review: You no longer have to list the address of an authorized representative
-  Form 13: Authorized Representative: The term "assessment file" has been changed to "employer file" to ensure that employer representatives have access to the information the WHSCC has about the company's health and safety record.


ALBERTA

LAWS & ANNOUNCEMENTS

Safety Statistics

April 24: The government released the workplace safety statistics for 2008. Good news: There were fewer workplace injuries in Alberta last year. Bad news: There were more fatalities. Highlights:




-  165 occupational fatalities (up from 154 in 2007), including 50 from motor vehicle incidents, 51 from workplace incidents and 64 from occupational diseases
-  Disabling injury rate decreased to 3.48 injuries per 100 fulltime jobs (from 3.88 in 2007)
-  Lost-time claim rate was 1.80 per 100 fulltime jobs (down from 2.12 in 2007).

Workers' Compensation

April 22: The 7,814 employers enrolled in Alberta's Partnership in Injury Reduction (PIR) program earned \$70 million in workers' comp rebates in 2008. To participate in PIR, employers must comply with stringent safety standards, earn and maintain a Certificate of Recognition and improve their safety performance or maintain industry leadership.

Pandemic Planning

May 13: The government released a guide to help employers plan ahead for future pandemics. (See, www.employment.alberta.ca/pandemic.) In addition to explaining how pandemic influenza differs from seasonal flu, the *Best Practice Guideline for Workplace Health & Safety During Pandemic Influenza* provides information on how to:

-  Assess pandemic influenza exposure in the workplace
-  Develop a workplace emergency response plan for pandemic influenza
-  Implement workplace controls.

CASES

Charges Finally Laid in Deaths of Two Chinese Workers

Almost exactly two years after the deaths of two Chinese workers at an oil sands project, charges have finally been laid against three companies. The two workers died and five others were injured when the roof of a steel oil storage tank collapsed. The government filed 53 charges against the three companies, including several counts of failing to ensure the health and safety of workers as well as more specific charges, such as failing to ensure that a professional engineer prepared and certified the drawings and procedures [Canadian Natural Resources Ltd., Sinopec Shanghai Engineering Co. Ltd. and SSEC Canada Ltd., Govt. News Release, April 21, 2009].

Court Upholds Company's Sentence for Safety Violation

A company was convicted of violating the *OHS Act* and ordered to pay a \$5,000 fine and \$95,000 to the Shock Trauma Air Rescue Society. It appealed, arguing that the overall penalty was too high. The appeals court disagreed. The company didn't prove that the trial judge made any error of principle in sentencing it. The trial judge weighed the mitigating and aggravating factors, took into account all relevant factors and didn't overemphasize any factors. In addition, the sentence imposed was within the range of sentences for similar offenders in similar circumstances, added the appeals court [R. v. Rose's Well Services Ltd., [2009] A.J. No. 499, May 11, 2009].


MANITOBA

LAWS & ANNOUNCEMENTS

Security Staff

April 29: Proposed amendments to the *Private Investigators and Security Guards Act* are designed to improve oversight of the security industry and create a streamlined licensing process. For example, individuals would be licensed for one, two or three years and those licences would remain in effect if the individuals change employers. Employers would also be required to hire only licensed security guards and private investigators. And there would be a public registry of licensed security personnel.

Traffic Safety





May 11: The WCB kicked off its fourth annual SAFE Roads campaign, an initiative designed to raise awareness of the safety of workers on Manitoba's roads. It encourages workers to slow down and use caution when driving past road construction projects and when sharing the road with emergency workers, such as firefighters, paramedics and police officers.


PEI

LAWS & ANNOUNCEMENTS

Indoor Smoking

April 24: The Health Minister introduced amendments to the *Smoke Free Places Act* that would eliminate some of the existing exceptions to the Act. Highlights:

-  Elimination of designated smoking rooms and areas in public places, workplaces and on hospital grounds
-  Ban on smoking in vehicles with minors under 19 present
-  Ban on smoking on patios/decks of bars and restaurants during certain hours
-  Exemption for designated smoking rooms in long-term care facilities and shelters for victims of domestic violence.


SK

LAWS & ANNOUNCEMENTS

Workers' Compensation

April 20: The WCB released its 2008 Annual Report. The WCB accepted 13,429 time-loss claims, over 1,700 fewer than six years ago. In addition, the workplace injury rate was 3.7%—a 2.6% drop from 2007 and a 25.3% decline from 2002.

Safety Association

May 4: The WCB recently approved Enform as the province's Petroleum Industry Safety Association. To maximize its effectiveness, Enform opened an office in Regina this spring. For more information about Enform or the company's official Saskatchewan launch, see www.enform.ca/.








QUÉBEC

LAWS & ANNOUNCEMENTS**Fishing Vessel Safety**

April 20: To reduce the number of injuries at commercial fisheries, the CSST is offering workers and employers a guide to health and safety on board fishing vessels. Developed in collaboration with employer and worker representatives, the guide is designed to reinforce safe practices on board vessels and offers practical and detailed ways to prevent incidents. The guide is available for free at www.csst.qc.ca.

Workers' Compensation

April 23: A bill was proposed that would make major changes to the industrial accidents and occupational disease act. Highlights:

-  Increased fines to be phased in gradually between 2010 and 2012
-  Allow employers to use a simplified formula to pay CSST insurance premiums
-  Higher benefits for parents of workers who die of occupational illnesses
-  Higher benefits to cover funeral expenses
-  Clarification of incidents employers must report to CSST.

Traffic Safety

April 24: In Québec, 360 accidents involving a vehicle tire occurred over a period of 10 years, including 10 fatalities directly attributable to heavy vehicle tire blowout or explosion. So the IRSST released a study on these phenomena that includes prevention recommendations. See, www.irsst.qc.ca/files/documents/PubIRSST/R-590.pdf.



NOVA SCOTIA

LAWS & ANNOUNCEMENTS**Young Workers**

May 8: The WCB launched a new ad campaign aimed at young workers. The theme: When you don't talk about workplace safety, people can get hurt. The central character of the campaign is a mime, the quintessential symbol of silence. Recent research shows that only 27% of parents regularly talk to their kids about safety in their part-time or summer jobs. And only slightly more than half of young workers say they heard about safety from their employers when they started work.

Lab Safety

May 14: The Labour Department's investigation into the death of a pharmaceutical worker in a lab has concluded that the fume hoods were turned off because of construction on the roof. As a result, the worker was exposed to Trimethylsilyl Diazomethane, a toxic substance. The worker was the second chemist in a year to die from exposure to the chemical.

Apprentices










April 24: The government encouraged employers to hire more apprentices. Its ammunition: The return on investment for hiring apprentices continues to rise, according to a national study on apprenticeship. The Canadian Apprenticeship Forum study indicates that for every dollar an employer invests in an apprentice, it gets a net return of up to \$1.47, a nine-cent increase from 2006.



BC

LAWS & ANNOUNCEMENTS**OHS Guidelines**

April 21: The WCB added or revised guidelines in the following areas:

-  Leaded surface coating materials
-  Emergency escape systems for snubbing units
-  Diving supervisor qualifications
-  Minimum dive crew
-  Acceptable standards for hyperbaric chambers
-  Certification of installation of a laboratory fume hood
-  Fall protection during stunt work
-  Electrical safety
-  Radiation.

Traffic Safety

May 9: WorkSafeBC and the city of Vancouver unveiled signs encouraging drivers to slow down near public worksites. The signs show photos of city workers and their children and say, "Slow down – our parents work here." The "Slow Down" campaign was launched in July 2007 and is aimed at protecting workers who work near roads and drivers.



NU

LAWS & ANNOUNCEMENTS**Workers' Compensation**

May 1: The WSCC revised the forms employers and workers must use to report serious workplace incidents to the government (specifically, the Chief Safety Officer). Reports must be submitted within 24 hours of a serious incident, even if there are no injuries. To download the new forms, see www.wcb.nt.ca/your_wcb/publications/forms.html.



NB

LAWS & ANNOUNCEMENTS**Truck Safety**

April 30: NB is considering joining ON and QC in requiring heavy-duty trucks to be equipped with electronic speed limiters. The limiters would cap how fast trucks could travel in the province. In addition to making the roads safer, speed limiters also help reduce greenhouse gas emissions.



NT

LAWS & ANNOUNCEMENTS**Child Safety**

May 8: The government introduced a new activity book to promote transportation safety to young children. The colouring book, "The Super Safety Squad," reinforces safety messages such as wearing bike helmets, seat belts and life jackets.

CASES**15-Year-Old Worker Dies in Building Collapse**

A foreman ordered a truck crane to deliver materials to the floor of the attic of a building under construction. The building collapsed under the weight of the materials when a temporary support pole failed. Six workers fell. A 15-year-old worker died from his injuries. The CSST issued a stop work order and ordered the employer to train its supervisors in the management of health and safety [*Constructions Larry*, Govt. News Release, May 5, 2009].

Worker Killed when Garage Door Opened

Two workers were replacing a cable on the ceiling of a garage when the garage door opened, pushing one worker off an elevated platform. He died from his injuries. The CSST concluded that the garage door wasn't locked out and the two companies involved hadn't conducted an analysis of the hazards of working on a platform lift near a functioning garage door. The CSST required one company to develop written guidelines on working at heights and the other company to develop a specific lockout procedure for all maintenance work performed on the garage door or in its workplace [*Lanconnect Technology Inc. and Metro Richelieu Inc.*, Govt. News Release, May 13, 2009].

CASES**Farm Owner Penalized \$25,000 after Worker Drowns in Manure Pit**

A barricade to a manure pit on a farm was damaged. The farm owner removed it but didn't secure the pit until the new barricade arrived. A 19-year-old farm worker, who showed up for work after a night of drinking and no sleep, fell into the manure pit and drowned. The farm owner pleaded guilty to a safety violation. The court sentenced him to pay a \$10,000 fine and \$15,000 to the Canadian Farmers' Disability Registry and to perform 160 hours of farm safety related community service [*R. v. Sutherland*, [2009] NSPC 21 (CanLII), May 4, 2009].

CASES**City Could Fire Alcoholic Manager Who Refused Additional Monitoring**





The manager of a city's fleet services, a safety-sensitive position, drank alcohol during lunch and was suspended for a week. He returned to a non-safety-sensitive position and was diagnosed as having a disorder that made him unfit for safety-sensitive duties. He signed recovery and RTW agreements in which he agreed to provide random urine, blood or breath samples and to monitoring. On three dates, he failed to submit to random alcohol tests as requested by his monitor. The city required the manager to agree to another year of monitoring as recommended by his doctor. The manager refused. The city fired him. The BC Human Rights Tribunal dismissed the manager's grievance. The city had reasonably accommodated the manager, who was fired not because he had a disability but because he refused to agree to additional monitoring as medically recommended [*Taylor v. City of New Westminster*, [2009] BCHRT 139 (CanLII), April 14, 2009].

Five Safety Orders Issued to Hospital Cleaning Contractor

Workers for a hospital cleaning contractor used a corrosive cleaning agent that caused respiratory irritation and skin problems for hospital workers, including rhinitis, fatigue and hair loss. WorkSafeBC issued the contractor five safety orders, which require the contractor to, among other things, conduct a full investigation into the use of the substance and provide training for members of the onsite JHSC [*Compass Group Canada Ltd.*, Canadian OH&S News, April 28, 2009].







WHAT THE LAW SAYS

The Canadian OHS laws address the consequences of endangering workers' health and safety. For example, they state that companies can be prosecuted and fined for safety violations. These laws also give safety officials the power to compel companies to take specific steps to address potential threats to workers' health and safety. For example, safety officials may:

-  Require companies to correct any violations of the OHS law, such as install guards on machinery;
-  Order companies to take measures to address a hazard or condition in the workplace that could endanger workers, such as excessive heat;
-  Conduct tests of equipment or conditions, such as noise levels; and
-  Stop work at a workplace until the company takes certain steps to correct a serious health and safety problem.

Officials exercise these powers by issuing safety orders—that is, written documents that typically identify the perceived violation or hazard, the steps the company must take to address the violation or hazard and the deadline by which it must do so.

Safety orders can be extremely disruptive and complying with them can be expensive. So the basic legal principles of fairness apply to safety orders. That is, it would be unfair to let safety officials order companies to take certain actions without giving those companies some mechanism to challenge the orders. Thus, every jurisdiction's OHS law allows for appeals of safety orders. Although there are some variations between jurisdictions, the section of the OHS law that addresses appeals generally covers the following areas:

-  Who may appeal a safety order;
-  The deadline for filing an appeal;
-  Who's empowered to hear the appeal;
-  The various elements of the appeals proceeding, such as calling of witnesses and production of documents;
-  The status of the safety order during appeal; and
-  Whether the side that loses the appeal can file another appeal.

We'll discuss each of these areas in detail below.

HOW TO APPEAL

Why might your company want to appeal a safety order? There are several reasons. For example, you might believe that the order is unnecessary because your current safety measures adequately protect workers from that hazard. Or complying with the order's requirements might be so expensive that the company can't afford to do so. Regardless of the reasons, once your company makes the decision to appeal a safety order, you need to navigate the appeals requirements set out in your jurisdiction's OHS laws. Here are the key questions you need to answer to do so effectively:

1. Who May Appeal a Safety Order?







With the exception of NL, every jurisdiction specifies who has the right to appeal a safety order. (NL simply states which orders may be appealed without stating who has the right to initiate the appeal). The jurisdictions take two basic approaches:

This Story Will Help You:

Legally challenge stop work and other OHS orders your company thinks are invalid

General approach. Seven jurisdictions—AB, MB, NT, NU, QC, SK and YT—simply state that any person who's "aggrieved," directly affected by or the subject of an order may appeal it.







Specific approach. Six jurisdictions—Fed, BC, NB, NS, ON and PEI—spell out the specific individuals or organizations that may appeal a safety order, such as:

-  Employers;
-  Workers;
-  Unions;
-  Contractors;
-  Sub-contractors; and
-  Constructors.

Nova Scotia's approach is a sort of hybrid. Its OHS law says that "an aggrieved person" may appeal an order. But it also defines "aggrieved person" to include a specific list of individuals, including employers, constructors, contractors, workers, self-employed persons, owners, suppliers, architects, engineers and unions.

2. When Must the Appeal Be Initiated?

To appeal a safety order, you must generally file a written request for an appeal. The OHS laws spell out strict—and fairly tight—deadlines for such filings. In general, you must appeal a safety order within a set number of days from the issuance of that order:

-  Seven days (NL);
-  10 days (QC);
-  14 days (MB, NB and NS);
-  21 days (SK and YT);
-  30 days (Fed, AB, NT, NU, ON and PEI); and
-  90 days (BC).

3. Who Will Hear the Appeal?

The person or body that hears appeals of safety orders varies by jurisdiction. Appeals of safety orders are initially heard by a designated *individual*, such as a government official or adjudicator, in Fed, BC, MB, NB, NL, NS, NT, NU and SK. For example, the director of workplace safety hears appeals in MB and NS, while a review officer hears appeals in BC. In contrast, a designated *body* hears appeals of safety orders in AB, ON, PEI, QC and YT. For example, in ON, the Labour Relations Board hears appeals of safety orders, while the workers' comp board hears such appeals in PEI, QC and YT.





4. What Happens in an Appeal?

The OHS laws generally give the individual or body that hear appeals of safety orders broad powers to handle such appeals.

CONTINUED ON PAGE 12

DEALING WITH INSPECTORS CONTINUED FROM PAGE 11

For example, such powers typically include the authority to:

-  Conduct investigations;
-  Summon witnesses and compel them to testify or produce documents;
-  Examine documents and records; and
-  Decide the appeal without conducting a hearing.

The decision maker typically must issue a written decision on the appeal, confirming the safety order, revoking it or changing its terms. In addition, they may have the power to issue new orders.

4. Can the Losing Side File an Additional Appeal?

What if your company loses the appeal? Is the process over? In many jurisdictions, the company gets one and only one shot at appealing a safety order. The OHS laws in three jurisdictions—Fed, ON and YT—specifically state that appeals of safety orders are final and can't be further appealed. For example, the *Canada Labour Code* says that an "appeals officer's decision is final and shall not be questioned or reviewed in any court" [Sec. 146.3].

But the OHS laws in the other 11 jurisdictions—AB, BC, MB, NB, NL, NS, NT, NU, PEI, QC and SK—permit further appeals of safety orders. For example, in BC, the decision of a review officer may be appealed to the Workers' Compensation Appeal Tribunal. But there may be limits on the scope of further appeals. For instance, in SK, decisions of an adjudicator may be appealed to a Court of Queen's Bench on a question of law or jurisdiction only.

Insider Says: The government can also appeal the adjudicator's decision if a safety order is revoked or changed.


5. Status of Safety Orders During Appeal

Don't be lulled into thinking that your company doesn't have to comply with the challenged order while the appeal is pending.

In fact, the OHS laws of most jurisdictions (Fed, AB, BC, MB, NB, NL, NT, NS, NU, SK and YT) specifically state that appealing a safety order *does not* automatically "stay," cancel or suspend it. In other words, your company has to comply with the order until the appeal is decided.

However, the OHS law does give the individuals or bodies that hear appeals of safety orders the power to suspend such orders while an appeal is pending, either on the company's request or by their own initiative. So if your company doesn't want to comply with the order until the appeal is done, it can ask the appeals individual or body to suspend the order. For example, if your company is appealing a safety order demanding the production of certain documents, producing the documents while the appeal is ongoing defeats the purpose of the appeal, making it moot. In such situations, it makes sense to ask for a suspension of the order—and you're likely to get it. But your company is unlikely to get a suspension of a safety order pending appeal if there's a chance that suspending it would endanger workers. For example, the individual or body hearing the appeal may not suspend an order requiring your company to install machine guards or institute safe work procedures for a certain job.

Conclusion

When a company is hit with a safety order, it's likely to look to its safety coordinator to decide how to respond. If the company opts to appeal the order, the safety coordinator will play a key role in the appeals process. So it's crucial for you to be up-to-speed on the law in your jurisdiction on appealing safety orders. Armed with the knowledge in this article, you should be able to help your company successfully navigate the appeals process. 

KNOW THE LAWS OF YOUR PROVINCE



WHO MAY APPEAL SAFETY ORDERS

Here's what the OHS law in your province or territory says about who may appeal orders from safety officials:

FEDERAL: An employer, worker or trade union that feels aggrieved by a health and safety officer's direction [*Canada Labour Code*, Sec. 146(1)].

ALBERTA: A person to whom an order is issued or whose licence has been cancelled or suspended [*OHS Act*, Sec. 16(1)].

BRITISH COLUMBIA: A worker, employer, owner, supplier, union or member of a deceased worker's family directly affected by a decision or order [*Workers' Compensation Act*, Sec. 96.3(3)].

MANITOBA: A person directly affected by a safety and health officer's decision or order [*Workplace Safety and Health Act*, Sec. 37(1)].

NEW BRUNSWICK: An owner, employer, contracting employer, contractor, sub-contractor, worker or supplier named in an order [*OHS Act*, Sec. 37(1)].

NEWFOUNDLAND/LABRADOR: *OHS Act* doesn't specify who may appeal orders.

NORTHWEST TERRITORIES/NUNAVUT: Any person who's aggrieved by a safety officer's direction or decision [*Safety Act*, 16(1)].

NOVA SCOTIA: An aggrieved person may appeal an officer's decision or

order [*OHS Act*, Sec. 67(1)]. "Aggrieved person" is defined as an employer, constructor, contractor, worker, self-employed person, owner, supplier, architect, engineer or union who's directly affected by an order or decision [Sec. 3(a)].

ONTARIO: An employer, constructor, licensee, owner, worker or trade union which considers himself, herself or itself aggrieved by an inspector's order [*OHS Act*, Sec. 61(1)].

PRINCE EDWARD ISLAND: Any owner, constructor, contractor, employer, supervisor or person in charge of the workplace or worker affected by an officer's order [*OHS Act*, Sec. 10(1)].

QUÉBEC: Any person who believes he has been wronged by an inspector's order or decision [*An Act respecting occupational health and safety*, Sec. 191.1].

SASKATCHEWAN: A person who's directly affected by an occupational health officer's decision [*OHS Act*, Sec. 49(1)].

YUKON: Any person aggrieved or any trade union representing a worker aggrieved by a decision or order [*OHS Act*, Sec. 26(1)].

MAKING THE BUSINESS CASE FOR SAFETY

Why Companies Shouldn't Cut Corners on PPE

Companies are always looking to cut costs, especially now. And unfortunately, the safety budget is often one of the first things they look to trim. One of the line items that draws the most scrutiny are the considerable dollars spent on fall arrest systems, respirators and other personal protective equipment for workers. Senior management may be tempted to, say, buy cheaper—and perhaps inferior quality—PPE or eliminate PPE training. Although it might save some money in the short run, this strategy is likely to result in higher costs in the long run. In addition to increasing workers' risk of injuries and illnesses, cutting corners on PPE can increase the company's risk of liability for violating the PPE requirements in the OHS laws.

Unfortunately, although the business case for not cutting PPE expenditures just to save money may be logically sound, it's also hard to document. In fact, we know next to nothing about how the amount of money companies spend on PPE affects their illness and injury rates and the performance of their OHS programs. But we do know *some* things about the economics of PPE. One source of insight comes from a new report commissioned by 3M. The independent report examines the perceptions and use of PPE in the construction industry in Great Britain and the impact the recession is having on PPE. We'll discuss the report in detail and the financial lessons that can be learned from it.

The British Construction Industry

As in many countries, the construction industry in Great Britain is one of the country's most dangerous. In the past 25 years, more than 2,800 British workers died from injuries suffered as a result of construction work and many more were injured or made ill. The most recent data shows that the rate of work-related musculoskeletal disorders was higher in construction than in other industries. In addition, construction's rates for asbestos, mesothelioma and diffuse pleural thickening exceed all other industry averages—and hearing problems in construction workers are roughly twice the national rate.

However, the quality, variety and availability of PPE for construction workers has improved substantially. And there's more workplace health and safety legislation in place now in Great Britain to protect workers. In theory, better PPE and stronger regulations should have *reduced* the number of incidents, injuries and illnesses in the construction industry. But the latest statistics show that construction still has the largest number of fatal injuries of the main industry groups. For example, in 2007-8, there were 72 construction-related fatalities. And the combined estimate of the number of work days lost in that period due to workplace injury and illness was 2.8 million—an average annual loss of 1.2 days per construction worker.

The 3M Report

3M commissioned an independent survey to find out exactly what workers and safety managers think of PPE in the construction industry. The researchers interviewed 226 workers and 127 safety coordinators who work on large construction sites in England,

Scotland and Wales. The researchers questioned the workers and safety coordinators about the following topics:

Problems with PPE. Safety coordinators said they found it difficult to select the correct PPE, often because they faced unknown or unexpected hazards or didn't understand what specifications different products met. More disturbing, one in four said the main issue in selecting PPE was knowing which level of PPE to use for which hazard—a lack of knowledge that could endanger workers. Workers' main complaint about PPE was that it was uncomfortable.

Actual PPE use. PPE is only effective when workers use it. But most safety coordinators (70%) thought that workers occasionally didn't use PPE when they should have. In contrast, 78% of workers said they always use PPE and only 20% said they occasionally didn't do so. Why the very different responses? Safety coordinators may have been being cautious in their estimates and allowing for mistakes and the occasional oversight. Also, workers may have been unwilling to admit that they don't use PPE all of the time.

PPE training. The vast majority of safety coordinators (87%) said that training is the best method for ensuring that workers use PPE. Yet only 56% of workers said they get regular PPE training. In addition, 55% said they were told what to use by the safety coordinator when they started work while 30% said they just use what they think is best.

Impact of economy. The telephone and on-site interviews took place during late November and early December 2008 when the global recession was in its early stages. But the impact of the economy's decline on workplace safety may have already started to show. Some workers (8%) said they had been given cheaper PPE; 11% in the South and a whopping 20% in Scotland said their PPE had been replaced with less expensive alternatives. In addition, workers said they found it hard to get a hold of PPE when they needed it, possibly indicating that companies are buying less PPE.

Safety culture. Many safety coordinators (48%) felt that the image of workplace health and safety should be improved to increase PPE compliance. The strength of this response suggests that safety coordinators aren't getting the support they need from senior management when it comes to ensuring that PPE use is enforced.

Lessons from the Report

The report's conclusions about the perception and use of PPE in the British construction industry provide lessons about the importance of PPE that apply to other industries and countries:

Lesson #1: PPE training is critical. PPE training is the best way to ensure that workers understand *why* they need to use PPE and *how* to use it properly. But workers may not be getting the PPE training they need. So companies shouldn't cut corners when it comes to PPE training. In fact, they should actually ramp

BUSINESS CASE CONTINUED FROM PAGE 13

up their PPE training efforts with the understanding that dollars spent on such efforts in the short term will likely cut costs in the long term by reducing illnesses and injuries.

Lesson #2: Economy could undercut safety efforts. The survey results show that the danger that the economic downturn could cause safety standards to start slipping is very real. In fact, it indicates that the undercutting of safety measures in an effort to save money is already happening. Buying less PPE or cheaper PPE that doesn't protect workers as well isn't an acceptable way for companies to save money. So safety coordinators need to step up their efforts to convince senior management that, if anything, *more* money needs to be spent on workplace safety—not less.

Lesson #3: Support from senior management is needed. Safety coordinators can't do all the heavy lifting. They need support from senior management to be taken seriously by workers and be seen as more than bureaucratic clipboard carriers. A safety culture needs to be embedded at the heart of the company to ensure that workplace safety is taken seriously by all stakeholders at all levels of the company. And that culture needs to start at the very top of the company.

Conclusion

PPE is a key component of an OHS program. In general, the preference under the OHS laws is to try to eliminate hazards first. If a hazard can't be completely eliminated, the next step is to use engineering or mechanical controls, such as machine guards, to protect workers from that hazard. But engineering controls aren't always possible. In that case, PPE can be used to protect workers from the hazard. In other words, use of PPE is the *last resort*. So if your company eliminates or cuts corners on PPE, there may be nothing left standing between workers and a hazard.

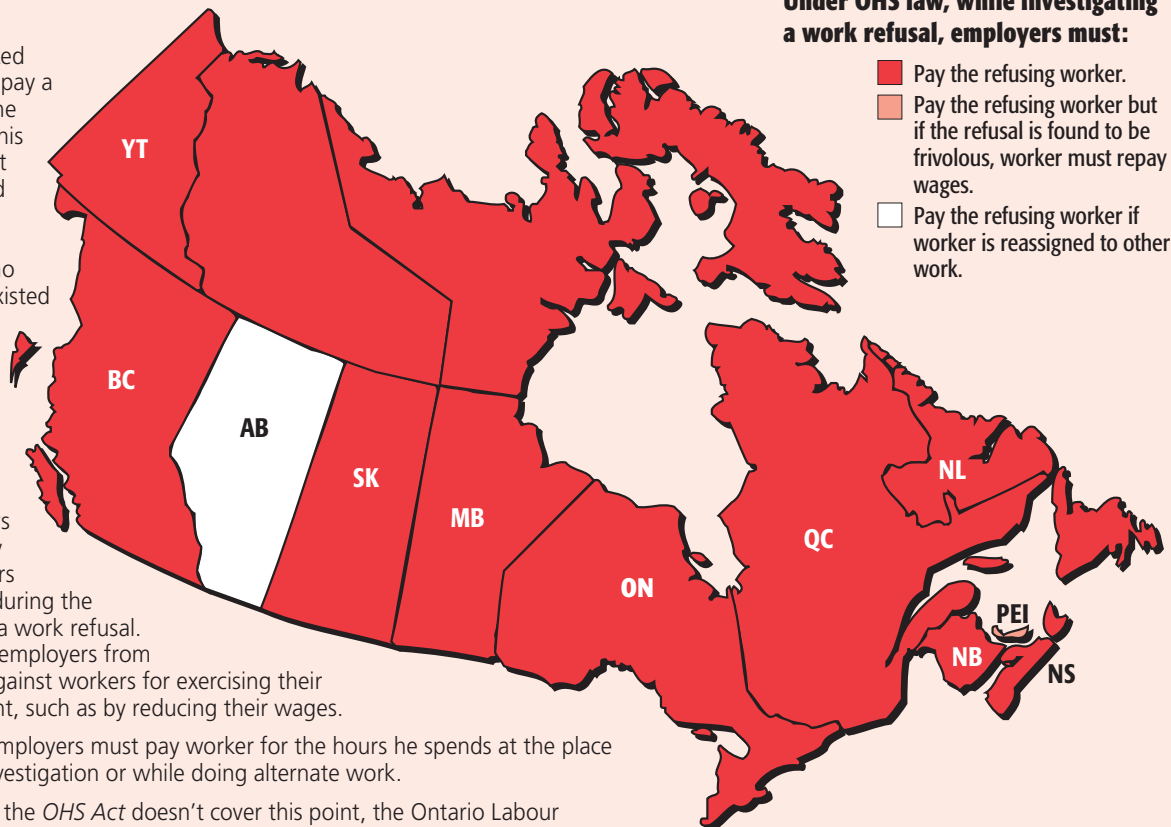
The 3M report is significant because it sheds light on the link between PPE expenditures and workplace illnesses and injuries. In addition, the report suggests that when it comes to getting the best safety result from PPE dollars, training workers to use the equipment is just as important as choosing which equipment to buy. 🍁

INSIDER SOURCE

"PPE matters: A report on attitudes towards Personal Protective Equipment in the construction industry," 3M, February 2009, http://solutions.3m.com/3MContentRetrievalAPI/BlobServlet?loc=ale=en_GB&univid=1180609729108&fallback=true&assetType=MMM_Image&blobAttribute=ImageFile&placeld=7BC6E48B1800BAE180A88EBDDE34DE24&version=current.

LAWSCAPE: PAYING WORKERS DURING WORK REFUSAL**NOTES :**

- 🍁 Federally regulated employers must pay a worker during the investigation of his work refusal. But if it's determined that the worker refused to work "knowing that no circumstances existed that would warrant it," he must repay the wages and benefits he received.
- 🍁 In BC, QC and SK, the OHS laws don't specifically require employers to pay workers during the investigation of a work refusal. But they do bar employers from discriminating against workers for exercising their work refusal right, such as by reducing their wages.
- 🍁 In NT and NU, employers must pay worker for the hours he spends at the place of the refusal investigation or while doing alternate work.
- 🍁 In ON, although the *OHS Act* doesn't cover this point, the Ontario Labour Relations Board has ruled that a refusing worker is considered to be at work during the first stage of a work refusal and is entitled to be paid at his appropriate rate.



INSIDER ONLINE

A roundup of the new Model Forms, Working TOOLS, Legal Updates, Case Summaries, Practical Guidance and other Compliance Resources you can get for FREE only on the INSIDER website



WHAT DO YOU THINK?

Workplace Violence

The issue of workplace violence is attracting a lot of attention across Canada. Just look at Ontario's proposed workplace violence and harassment requirements on p. 7. But is the media blowing this issue out of proportion? Are highly publicized violent episodes isolated incidents or indications of a troubling trend? Is violence really a concern for most workplaces? Take our one-question poll at www.SafetyComplianceInsider.com and tell us how concerned you are about violence in your workplace.

TOOL OF THE MONTH

Home Office Safety Checklist

As safety coordinator, your job is to ensure that *all* workers are protected when performing their jobs. Ensuring the safety of workers in the workplace is hard enough; ensuring the safety of workers who work from home is more challenging. The good news is that home offices generally pose fewer hazards than, say, factories or construction sites. But you should still assess the hazards in a telecommuter's home office. At www.SafetyComplianceInsider.com, you'll find a home office safety checklist created by Alberta Employment and Immigration that you can adapt to conduct a hazard assessment of a telecommuter's home office.

And remember: Like all of the other material on www.SafetyComplianceInsider.com, this tool is a **FREE** part of your *Insider* subscription!

RESOURCE OF THE MONTH

Pandemic Resources

When outbreaks of an infectious disease occur, the risk of contracting and spreading that disease becomes a foreseeable risk and is thus covered by the general duty clause in every OHS law. In fact, government authorities in several jurisdictions have issued guidelines confirming this view in response to the SARS, avian and swine influenza crises. Go to www.SafetyComplianceInsider.com for links to these government guidelines.

AROUND THE PROVINCES

Officers' & Directors' Personal Liability for Environmental Violations

A corporation is a legal entity that's separate and distinct from its individual officers and directors and responsible for its own liabilities. As a result, officers and directors aren't generally responsible for violations committed by the corporation they serve. But protection from personal liability is subject to limitations. For example, most environmental laws specifically hold officers and directors personally liable for corporate violations under certain circumstances—even if the corporation itself isn't prosecuted or convicted. At www.SafetyComplianceInsider.com, there's a chart showing whether the main environmental law, often called the *Environmental Protection Act* or some variation, in each jurisdiction imposes personal liability on officers and directors for environmental violations committed by their corporations.

DID YOU KNOW?

DID YOU KNOW that you can download all of the *Insider's* model tools at www.SafetyComplianceInsider.com? You may have noticed that our checklists, policies, forms and other model tools no longer appear in the newsletter itself. But rest assured—you still have access to these model tools. We opted to move the model tools to www.SafetyComplianceInsider.com to make them more useful for you. Instead of, say, photocopying a form or retyping model language into your company policy, you can now simply download the model tool as either a PDF or a Word document. Then adapting the model tool for use in your workplace is a snap!

HR COMPLIANCE

Responding to Pandemics

The swine flu pandemic is receding. But don't let down your guard. You can bet that a new international health crisis will emerge at some point in the near future. Protecting your workers from the risk of infection is obviously important for business. But is it required by law? In fact, employers *do* have a legal obligation to guard against the risk of infectious illnesses in their workplaces. This duty stems from the OHS laws. And ensuring that the company fulfills that duty will likely involve both its safety coordinator and HR director. A **FREE** article from our sister publication, the *HR Compliance Insider*, posted on www.SafetyComplianceInsider.com explains the law of infectious disease response measures and how to comply with them. It also explains the HR legal issues that can arise in the midst of your preparation for or response to a health crisis.

WINNERS & LOSERS

When Are Individuals ‘Supervisors’ With Safety Duties under OHS Laws?

Canada’s OHS laws are based on the internal responsibility system in which all workplace stakeholders—from company owners to floor workers—must play a role in ensuring a healthy and safe workplace. It’s no surprise that supervisors are included in this group. In fact, the role of the supervisor is so important that seven jurisdictions—BC, MB, NT, NU, ON, SK and YT—assign specific health and safety duties to supervisors in their OHS laws. (Supervisors in the remaining jurisdictions also have health and safety duties but those duties are as “workers” or “employers.”) So what makes an individual a “supervisor” with safety duties under OHS laws? To answer this question, courts look not only at job titles or even whether an individual thinks of himself as a supervisor but also whether he has hands-on authority and control over the work. Here are two cases in which two individuals were found liable as “supervisors.” Although both cases are from Ontario, the same principles apply in the other six jurisdictions whose OHS laws impose specific safety duties on supervisors.

LEAD HAND = SUPERVISOR


FACTS

A landscaping crew of four workers and a lead hand used a mower that had a “dead man’s bar,” a safety device that controls the blades. To activate the blades, a worker must squeeze both the steering bar and the dead man’s bar simultaneously. If the worker releases his grip on the bars, the blades automatically stop. To speed up the work, the lead hand disabled the dead man’s bar by taping it to the steering bar so the blades will keep spinning even if the worker lets go of one of the bars. The mower got stuck in a corner. A worker got his foot caught in the mower while trying to free it and was seriously injured. If the dead man’s bar hadn’t been disabled, the incident wouldn’t have happened. The lead hand was convicted as a “supervisor” under Ontario OHS law. He appealed, arguing that he wasn’t a supervisor.

DECISION

The Ontario Superior Court ruled that the lead hand was a supervisor.

EXPLANATION

The court noted that the Ontario *OHS Act* imposes safety obligations on supervisors and defines a “supervisor” as a person who’s in charge of a workplace or who has authority over a worker. The test to determine if someone has such authority is based on the individual’s actual powers and responsibilities—not his title, the court explained. Here, there was “ample evidence” of the lead hand’s authority over workers: He was in charge of the crew, assigned work, answered questions and had influence over who was assigned to him. Also, his crew did what he told them to do. So the lead hand was a supervisor under the law, the court reasoned. 

Ontario (Ministry of Labour) v. Walters, [2004] CanLII 55057 (ON S.C.), Dec. 6, 2004

SUPERINTENDENT = SUPERVISOR


FACTS

Crew members for the Toronto Transit Commission (TTC) began a work refusal over ventilation and air quality issues. To resolve the dispute, the TTC provided and required the use of portable fans with hoses to remove the exhaust gases at a safe distance. Some time later, two crews were working in adjacent subway tunnels. Because one crew was removing asbestos, the ventilation system was turned off. As a result, the second crew, which was in the TTC’s Track and Structure Department, was overcome by carbon monoxide, with three workers suffering critical injuries. The MOL charged the general superintendent of the department as a “supervisor” with three safety violations.

DECISION

The Ontario Court of Justice ruled that the superintendent was a supervisor.

EXPLANATION

The court rejected the superintendent’s argument that because he didn’t have a “hands-on” relationship with the workers and there were two other levels of management separating him from the crew’s acting foreperson, he wasn’t a supervisor under the Ontario *OHS Act*. OHS and other “regulatory” laws must be broadly and liberally interpreted, it explained. Although the superintendent didn’t give orders directly to the workers, he was responsible for those who did. He was also ultimately responsible for the selection of equipment and condition of the workplace. “Clearly, there is no one person in the department with more charge over the workplace or authority over the workers than [the superintendent],” noted the court. In addition, the superintendent wasn’t an employer, owner, supplier, officer or director under the OHS law. So if he wasn’t a supervisor, “the anomalous result would be that superintendents with the greatest power and authority over workers and the workplace would be subject to no responsibilities under the OHSA,” added the court. (Note that the court acquitted the superintendent on unrelated grounds.) 

Ontario (Ministry of Labour) v. Bartram, [2009] ONCJ 29 (CanLII), Jan. 29, 2009

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