Answers to 6 Frequently Asked Questions about Due Diligence

When it comes to ensuring compliance with the OHS laws, due diligence is one of the most important concepts for safety coordinators to understand. But it's also a vague and somewhat slippery concept that can be hard to pin down.

However, there are some basic aspects of the due diligence defence that are pretty straightforward'and which all safety coordinators should know. So here are answers to six frequently asked questions about this important safety compliance topic.

6 DUE DILIGENCE FAQs

Q What Is 'Due Diligence"

A There are actually two types of due diligence:

Reasonable steps. One type of due diligence requires a defendant to prove that it took all reasonable steps to protect workers' health and safety, ensure compliance with OHS laws and prevent violations. Because this type of due diligence is the easiest to prove, it's the most common form of the defence used.

Reasonable mistake of fact. When arguing the second type of due diligence, a defendant must prove that it reasonably relied on facts that turned out to be untrue. However, if those facts *had* been true, what it did'or failed to do'would've been legal. The so-called 'reasonable mistake of fact' defence is harder to prove than the reasonable steps form of due diligence and thus isn't raised as often.

Q Who Must Prove Due Diligence'

A Due diligence is a defence. That is, the prosecution must first prove 'beyond a reasonable doubt' that the defendant committed a violation of the OHS law. If the Crown succeeds, then the burden switches to the defendant to prove that it exercised due diligence. The standard of proof that the defendant must meet is an easier one than the prosecution's. A defendant must prove that it exercised due diligence only on a balance of probabilities. If the defendant is successful, it'll avoid liability for the OHS violation.

Q Who Can Use This Defence’

A Either form of the due diligence defence can be raised by *anyone* charged with an OHS violation, including organizations, such as companies, and individuals, such as presidents, owners, corporate officers, supervisors and workers.

Q To What Types of Violations Does Due Diligence Apply’

A The due diligence defence generally applies to violations of so-called ‘regulatory’ laws, such as OHS, environmental, transportation of dangerous goods and highway safety laws.

Q Is Due Diligence a Defence to C-45 Charges’

A Technically, due diligence isn’t a defence to criminal negligence’or ‘C-45”charges in the same way that it’s a defence to OHS violations. But as a practical matter, proving that you exercised due diligence makes it impossible to be convicted of criminal negligence.

Explanation: To prove criminal negligence, the Crown must show that the defendant:

1. Violated the duty to take ‘reasonable steps’ to prevent bodily harm; and
2. Showed wanton or reckless disregard for the safety of others.

If a defendant can prove that it exercised due diligence’that is, *took* all reasonable steps to prevent the incident and the injury or fatality’then it can create reasonable doubt as to either or both of these elements of the crime. For example, if a company implemented measures to keep the incident from happening, it’ll be hard for the Crown to prove that it acted wantonly or recklessly. Thus, due diligence is, in effect, a defence to C-45 charges.

Q What Factors Do Courts Consider as to Due Diligence’

A Due diligence cases are very fact specific. But when determining whether a company proved that it exercised due diligence, courts do tend to look at the same key factors, including:

Foreseeability. Many due diligence defences are won or lost based on whether a company adequately addressed *foreseeable* hazards. Companies must take all reasonable steps to address both general hazards and hazards specific to their particular industry, equipment and materials. The due diligence defence will fail if a reasonable person in the company’s position would have foreseen that something could go wrong and acted accordingly. But the defence will succeed if the incident was so unusual or strange that the company couldn’t have reasonably expected it to occur. *Bottom line*: A hazard is foreseeable if the company knows or should reasonably know about it. And if it’s foreseeable, the company *must* take reasonable steps to protect workers from it.

Preventability. If a company has an opportunity to prevent a violation or safety incident, then it must make all reasonable efforts to do so, such as by identifying hazards, implementing engineering controls, creating safe work policies and properly training workers and supervisors. Companies that don’t take steps to avoid preventable incidents or violations won’t be able to prove due diligence.

Control. Courts look at whether someone had control over the situation that resulted in the incident or violation and failed to act. In other words, was someone there who could've prevented what happened'

Degree of harm. All hazards aren't created equal. That is, if a hazard could potentially cause a great deal of harm, such as a fatality, a company is expected to make more of an effort to address it. So courts expect a company to protect workers from even rare hazards if they pose the risk of serious harm, such as death.