

# Are OHS Programs Really Required by Law?



**Making the business case for your OHS program starts with the law.**

Every company has to have an OHS program.

Few OHS coordinators would argue with this statement. And, as a statement of values, it's hard to refute. After all, to anybody who places a premium on safety the importance of 'having an OHS program' is self-evident. But in the business world where OHS coordinators operate, having the right values doesn't always translate into having the corporate support necessary to translate safety initiatives into action.

Avoiding liability risk is one motivation for adopting an OHS program. But does the law really require companies to do this? In fact, it does.

## What Is an 'OHS Program'

Whether you're trying to make the legal case for adopting a new program or justify an existing one, you first need to understand what an OHS program is. More precisely, you need to understand the difference between an 'OHS program' and an 'OHS policy.' Safety professionals tend to use the terms interchangeably; but while they might sound the same, there are important differences:

**OHS Policy:** An OHS policy is a written statement by senior management expressing the company's commitment to protect the health and safety of its workers and listing the OHS responsibilities of management, supervisors and workers.

**OHS Program:** While it often includes an OHS policy statement, an OHS program is a more extensive undertaking that provides for the carrying out of key functions essential to protect workers' health and safety and ensure compliance, including systems and processes for:

- Hazard identification and assessment;
- Supervision, safety training and education of workers;
- Work procedures for carrying out potentially hazardous operations safely;
- Establishing and maintaining a joint health and safety committee (JHSC) or safety representative;

- Incident reporting and investigation;
- Maintaining safety records and statistics; and
- Regular monitoring and auditing of program effectiveness.

**Compliance Pointer:** Several provinces, including BC, MB, ON and PE, say that an OHS program must also include an OHS policy statement that's posted or available at the workplace.

## The 3 Laws that Require You to Have an OHS Program

A company's duty to create and implement a written OHS program at the workplace comes from 3 different laws.

### 1. The OHS Laws

OHS laws expressly require employers to have OHS programs. But rules vary slightly by jurisdiction. There are 4 basic approaches:

**All Workplaces:** Under Federal and Ontario law, the duty to establish an OHS program applies to all employers.

**Number of Workers:** In most jurisdictions, the number of workers regularly employed at the workplace determines whether an OHS program is required. In AB, MB, NB, NS, NT, NU and PEI, programs are required if there are 20 or more workers; in NL and SK, the threshold is 10 or more workers. (In NL, companies that fall below the 10-workers' cutoff must have an OHS policy instead of an OHS program.)

**Industry Type:** In Qu bec, the obligation to have an OHS program applies to 'establishments,' which is defined as including specific industries involving moderate to high risk.

**Combination:** BC and YK follow a hybrid approach that considers both numbers of workers and hazards posed by the particular workplace. Thus, in BC, OHS programs are required at: i. workplaces with 20 or more workers that are also classified as 'moderate' or 'high risk' under the first aid regulations, and ii. all workplaces with 50 or more workers. In Yukon, employers must have an OHS program if they have 20 or more regularly employed workers and are classified as an 'A' or 'B' hazard under the OHS Regs.

### 2. Court Cases & the Due Diligence Factor

There's another more subtle but no less significant body of law that requires companies to have OHS programs: court cases interpreting the OHS laws. Simply stated, you can't prove due diligence if you don't have an OHS program.

**Explanation:** If you're ever prosecuted for an OHS violation, your liability may turn on whether you can prove you exercised due diligence—that is, took all reasonable steps to follow the law and prevent the violation. Having an OHS program is essential to due diligence. Who says? The Canadian Supreme Court says—in *R. v. Sault Ste. Marie (City)*, (1978) D.L.R. (3d) 161 (S.C.C.), the famous case that first established the due diligence defence. According to the Court, one of the most important factors in due diligence is whether the accused developed 'a proper system to prevent commission of the offence.'

Later cases have made it crystal clear that by 'proper system,' the Court meant the kinds of policies and procedures to identify and eliminate risks that form the essence of a formal OHS program. Consider the following 2 examples:

**Company with OHS Program Wins:** A worker reaching into a grinding machine to remove debris got his arm caught, resulting in amputation at the shoulder. The prosecutor showed that the company violated machine guarding regulations, but the Saskatchewan court found the company not liable because it exercised due diligence, citing the company's extensive OHS program [*R. v. James Metals, Inc.*, (1999) 43 W.C.B. (2d) 20 (Sask. Prov. Ct.)].

**Company without OHS Program Loses:** An Ontario worker loses 3 fingers after getting his hand caught in the chain drive of a steel roller carrying wafer boards off a conveyor belt. The prosecution showed that the company didn't properly guard the drive mechanism of the belt and the company claimed it showed due diligence. But this time the defence didn't work because the company didn't develop written safety procedures, provide full training and carry out other functions essential to an OHS program [*R. v. Grant Forest Products Inc.*, (2002) 98 C.R.R. (2d) 149 (Ont. C. J.)].

### **3. Criminal Law & the C-45 Factor**

Implementing an OHS program will also protect you if you're ever prosecuted under the law holding persons 'in control of work' criminally liable for failing to take reasonable steps to protect health and safety of those affected by the work (the law still referred to as 'C-45' after its bill number). **Explanation:** C-45 doesn't expressly say that a company needs an OHS program. But it does require that the person in control of work act with wanton or reckless disregard of safety. The rule targets egregious violations, not slip-ups by companies that truly care about safety. Thus, having and diligently implementing an OHS program makes it almost impossible for a prosecutor to prove wanton or reckless disregard of safety.

## **Bottom Line**

Now you understand and can explain to your C-Suite why having an OHS program isn't just an ethical but a legal obligation.