

Brief Your CEO: What Due Diligence Is All About



Here's a briefing you can give or orally deliver to your company executives that explains how the OHS program you implement affects not only the company but them personally.

WHAT'S AT STAKE

Two workers in Ontario were killed when the trench they were working in suddenly collapsed. Investigators found that the two-metre-deep (6'5') trench wasn't properly shored and that the victims weren't properly trained in excavation work safety. The construction company that dug the trench was charged with not using 'all reasonable care' to comply with Ontario OHS laws. The president of the company was also charged even though he worked in a corporate office miles from the workplace. The Crown dropped the charges against the company but not the president. He was personally fined \$50,000 [*R. v. Kenneth Burns*].

OFFICERS' & DIRECTORS' OHS LIABILITY RISKS

The *Burns* case shows how you and your fellow officers and directors can be personally liable for OHS offences that occur on a distant workplace. And while such fines aren't an everyday occurrence, they're becoming more common. Witness the infamous Metron Construction case where a pair of corporate officers were fined for violations leading to the death of 4 workers in a Toronto swing stage scaffold collapse.

In addition to big fines and accompanying damage to personal reputation, egregious OHS offences can also land you in jail. Under the law still known by its bill number, C-45, any person who directs or has authority to direct how a job is done can be criminally liable for not taking 'reasonable steps' to protect a worker or other person against injuries or illnesses arising out of how that job is done. A person who violates the C-45 duty to protect—including a corporate officer or director—faces criminal fines up to \$100,000 (or more if the violation is deliberate), lifetime imprisonment and a criminal record.

SHOWING 'DUE DILIGENCE' IS THE KEY TO AVOIDING LIABILITY

The point is that officers and directors have a responsibility to ensure that their company obeys OHS laws. To meet that responsibility, you must ensure the company exercises 'due diligence.' This is a legal term from a famous 1978 Canadian Supreme Court case called *R. v. Sault Ste. Marie* finding that companies or individuals who commit an OHS violation can still avoid liability by showing that they exercised due diligence, that is, took every reasonable precaution under the circumstances to see that the laws were followed and the violation prevented.

WHAT EXERCISING 'DUE DILIGENCE' MEANS

Exercising due diligence isn't a one-time or sporadic thing. It requires consistent and ongoing effort. More precisely, as the *Sault Ste. Marie* Court explains, there 'must be a proper system to prevent' violations and ensure compliance. This is one reason every company needs OHS policies and procedures.

Simply having an OHS system isn't enough. The officers and directors have a duty to ensure that the company implements it. You can, of course, delegate the day-to-day details to OHS directors, facility managers and supervisors. But while you don't have to don a helmet, go to the worksite and make sure all the company's safety policies and procedures are carried out, you do have to make sure *somebody* does.

Due diligence also means being proactive. You're expected to monitor company safety efforts, legal developments, and industry practice and seek improvement. A 'call-me-when-an-incident-happens' approach isn't good enough.

8 QUESTIONS TO ASK YOURSELF

How can you tell if you're being duly diligent? There's no specific formula. But there are 8 questions officers and directors can ask themselves to figure out if they're doing enough:

1. Do You Know the OHS Laws'

You don't have to memorize the laws but you should be familiar with what they require, especially regarding the liability of officers and directors as well as the particular standards and requirements that apply to the company and its operations. There should also be a copy of the OHS Act and Regulations either posted or kept readily available at each workplace.

2. Do You Monitor Legal Developments'

You don't need to know about every fine, but you need to make sure you get told

about and review important OHS regulatory changes and cases and how they affect the company.

3. Do You Know Company OHS Policies & Procedures'

Ideally, you should be involved in creating policies and procedures and making appropriate changes in accordance with experience, new cases, etc. At a minimum, you should know what the policies and procedures say and how they're being enforced.

4. Do You Know What's Going in the Workplace'

You should be getting and reviewing regular reports about injuries, complaints, and the overall effectiveness of the company's OHS program. You should also make sure that significant new developments, like serious accidents, get reported to you.

5. Do You Know What OHS Managers & Supervisors Are Doing'

You should ensure that the company's safety managers and supervisors are competent and appropriately trained and that they're making all necessary workplace assessments and audits.

6. Do You Make Sure Proper Training Is Being Provided'

You should be familiar with what your company is doing to train workers, forepersons, line supervisors, etc. and whether it's working.

7. Do You Know What Our Contractors Are Doing'

You should ensure that contractors working at company sites get a full health and safety screening and are notified and required to follow company OHS policies and while carrying out the work.

8. Are You Keeping Records'

Last but not least, you should document all your efforts so you can prove you were duly diligent in case you're ever charged with an OHS violation. As the lawyers like to say: If it isn't documented, it didn't happen.