

Is Following an Industry Standard Enough to Show Due Diligence?



OHS violations can happen even when you try hard to comply. But at least the [due diligence](#) defence is there to bail you out. As long as you exercise due diligence, that is, take all steps reasonable in the circumstances to follow OHS laws and avoid infractions, you won't be held liable for the violations you do commit.

It sounds so simple. There's just one problem: The OHS laws don't explain what 'reasonable steps' are. Industry standards is one of the key factors investigators, prosecutors and courts use to judge which steps are and aren't reasonable in a particular situation. Thus, following an industry standard can bolster a company's [case for due diligence](#), while failing to do so can harm it. Even so, industry standards aren't the same thing as legal requirements. How much bearing compliance or noncompliance with industry standards has on reasonable steps due diligence depends on 5 factors:

.1. Whether the Standard Is Really a Standard and Not Just a Practice

It's not enough to claim that a safety practice reflects industry standards. You must be prepared to prove that

such a standard really exists. You'll need industry experts to testify that the standard is universally followed by people in the industry and explain why. In addition, at least one court (the Alberta court in the *General Scrap Iron* case) has distinguished between an industry **standard** and an industry **practice**. The latter is just something that people in the industry do and isn't necessarily commendable. For example, as one court pointed out, in 19th century England it was industry practice in the mining industry to have children pull coal carts out of dangerous shafts. A standard, by contrast, is consciously adopted and followed for reasons beneficial to the industry. In terms of due diligence, following an industry standard counts for much more than following an industry practice.

• 2. Whether the Standard Promotes Safety

An industry might adopt standards to serve efficiency instead of or even at the expense of safety. Thus, courts will consider whether the standard is good safety, that is, whether it furthers safety in the workplace.

For example, in the *MDF* case, a fibreboard manufacturer claimed that it exercised due diligence because its practice of stacking boards was consistent with industry standards. The Alberta court disagreed, saying that even if such a standard existed it was unsafe because it didn't provide for metal uprights to secure stacked material. In the other Alberta case (*General Scrap Iron*), the court said that the industry standard of stacking bales of scrap metal four-high was designed to make efficient use of space and had nothing to do with safety.

.3. How Effective the Standard Actually Is in Promoting Safety

Even if an industry standard does constitute a standard for safety, following it won't cut much ice with judges where the standard has been shown to be ineffective in ensuring safety. In fact, following a safety standard that you know doesn't bolster safety will hurt rather than help your due diligence case. For example, in the *MDF* case, the court noted that there had been two previous incidents at the site in which fibreboards stacked in accordance with industry standards had collapsed. So, the employer should have realized that it was dangerous to keep following the standard.

.4. Standard's Consistency with Existing Law

The law says employers must meet a standard of reasonable care. Industry standards help employers and judges interpret what reasonable care means in specific situations. However, an industry standard is relevant only to the extent that the law doesn't already answer the question of whether a practice is reasonable. In other words, industry standards don't supplant legal standards, especially when the former are less rigorous than the latter. Thus, an industry practice of stacking scrap metal 4-bales-high isn't reasonable if OHS regulations specifically limit such stacks to 3 bales in height. Example: The Ontario court in the *Seamless* case ruled that a company couldn't rely on an industry standard that allowed workers not to use harnesses and safety belts because it contradicted a regulation specifically requiring the use of such equipment.

5. Worker's Awareness of the Standard and Capacity to Follow It

Industry standards may become an issue when [employers seek to blame OHS violations on workers'](#) failure to follow them. The effectiveness of this argument depends on how clearly those standards are communicated.

Example: The oil company in the *Rose's Well Services* case had a perfectly fine safety rule, one that not only met but actually exceeded industry standards. The reason the Alberta court rejected its due diligence defence is that its workers weren't fully aware of the rule because the company didn't clearly communicate it to them.

Moreover, even a clearly communicated and otherwise legally sound safety rule based on industry standards won't set you up for a due diligence defence if the worker who disobeys it doesn't have the training and supervision necessary to carry it out.

6. Company's Overall OHS Program

Keep in mind that in deciding due diligence, courts look at the big picture and consider the company's overall OHS program. All things being equal, a company with fully developed and effectively implemented OHS policies and procedures stands a much better chance of getting a court to accept the defence than does a company with a spotty safety program and record.

Example: In the *Modern Niagara* case upholding an employer's due diligence defence, the Ontario court went out of its way to point out that the company had regular health and safety meetings for workers, written health and safety policies and state-of-the-art safety equipment. By contrast, the Alberta court that ruled against the employer in *General Scrap Iron* faulted the company for its lack of 'an overall policy dealing with

safety.’ The company had ‘no safety or procedure manuals’ identifying risks and explaining how to avoid them. ‘What little there was in written form consisted of safety bulletins and such from institutes or agencies’ in the recycling industry.

Takeaway

Resources: See the [Scorecard](#) on the OHS Insider website for a summary of key cases in which industry standards played a major role in determining whether a company exercised due diligence to prevent an OHS violation.