

# OHS OFFENCES: Answers to FAQs about Administrative Monetary Penalties



When a company or individual violates the OHS law, the government often lays charges and pursues a full-blown prosecution. But even if the defendant ultimately pleads guilty, the process can take months' or even years' to be resolved. In addition, minor violations may not be prosecuted at all because of the high costs of prosecution. So some jurisdictions now allow OHS regulatory agencies to impose administrative monetary penalties (AMPs) for certain types of offences. AMPs let the government fine violators quickly and promptly respond to violations. As AMPs for OHS violations are becoming more common, it's important for safety professionals to understand them. So here are answers to nine frequently asked questions (FAQs) about this approach to penalizing safety offenders.

## 9 FAQs

The OHS laws in five jurisdictions currently authorize AMPs, but some of the others are considering permitting such penalties. For example, one of the recommendations in the Dean Report on health and safety reform in Ontario was that the Ministry of Labour get the power to impose AMPs. Although that recommendation has not yet been implemented, it may be in the future. (See this chart to see where your jurisdiction stands on AMPs.) You should review the law in your jurisdiction for the details on its particular AMPs system. But here are general answers to nine frequently asked questions about these penalties:

### **Q What's the Difference Between an AMP and a Ticket'**

**A** Some jurisdictions, such as Alberta, let government officials, such as OHS inspectors or enforcement officers, issue on-the-spot tickets similar to traffic tickets for minor, straightforward OHS offences, such as a worker not wearing a hardhat at a construction site. The fines that can be imposed via ticket are usually much smaller than those that can be imposed as an AMP or pursuant to a prosecution for a safety violation. For example, in Alberta, the fines that can be imposed through a ticket are limited to \$100-\$500. (Note that although tickets are technically a form of administrative penalty, this article focuses on AMPs issued for more serious offences.)

### **Q To Which Violations Do AMPs Apply'**

**A** In general, AMPs can be imposed only for designated OHS violations, although some jurisdictions, such as Nova Scotia, permit them for *any* violations. In some cases, the list of designated types of violations is quite long and may cover a wide range of offences, including both violations of OHS law and of any orders issued under such law. For example, in Manitoba, AMPs may be imposed for violations related to:

- Guardrails;
- Fall protection systems;
- Fall protection at an open pit or quarry;
- Notice to the electrical authority regarding work near overhead electrical lines;
- Notice to the branch of an excavation;
- Notice to owners of underground facilities of an excavation;
- Support structures in open excavations and trenches;
- Support for structures adjacent to excavations;
- Immediate support structure when earth exposed;
- Support structure for deep foundation excavations, shafts or tunnels;
- Notice to the branch regarding suspended work platform use;
- Alteration, renovation or demolition re asbestos-containing material; and
- Notice to the branch regarding alteration, renovation or demolition that may release asbestos-containing material.

#### **Q What's the Standard for Imposing an AMP'**

**A** To prevail in a prosecution for a safety offence, the government must prove beyond a reasonable doubt that you violated OHS law and must do so in court. 'Beyond a reasonable doubt' is a fairly high standard to meet. But to impose an AMP, a designated government official must meet a lesser burden. For example, under Yukon's OHS law, if a safety officer simply believes on 'reasonable grounds' that a person has committed a designated offence, then the officer may levy an administrative penalty.

#### **Q How Are AMPs Imposed'**

**A** If a designated government official has met the appropriate standard and opts to impose an AMP, it must give the company or individual written notice that an AMP is being imposed. The law usually spells out the information that must be included in that notice, such as:

- The date on which the administrative penalty was imposed;
- The name of the person or company on whom the penalty is imposed;
- The safety order or provision of the OHS laws that was violated;
- The substance of the violation;
- The amount of the administrative penalty;
- How and when the penalty must be paid; and
- The process for filing an appeal of the penalty.

#### **Q Who May Be Issued an AMP'**

**A** In general, an AMP may be imposed on any legal 'person' that commits a designated violation. That means, both individuals *and* organizations, such as corporations, employers, contractors, suppliers, site owners, professional engineers, supervisors and workers can be forced to pay an AMP.

### **Q How Much Can an AMP Cost'**

**A** The maximum amount of an AMP is generally limited under OHS law and is usually much less than the top fines that can be imposed for standard safety prosecutions'but it can still be substantial. The penalty can be a one-time fixed amount or an amount for each day that the violation continues. For example, in Alberta, the maximum amount for an administrative penalty is \$10,000; in the case of a violation that continues for more than one day, the maximum is \$10,000 for each day or part of a day on which the violation occurs or continues. In addition, there may be different limits depending on other factors, such as whether the violation for which the AMP was issued was a first or second offence.

Some jurisdictions specify the factors the official issuing the AMP must consider when setting the amount of the penalty. For example, in setting the amount of an administrative penalty, a safety officer in Alberta *must* consider the seriousness of the violation or failure to comply and the risk of harm resulting from the violation or failure to comply. The officer may also consider any other factor he or she considers relevant.

### **Q Can You Be Issued an AMP and Prosecuted for the Same Violation'**

**A** The short answer is no. After all, if your company pays an AMP for a safety violation, it wouldn't be fair for it to also be subjected to a standard prosecution for the same violation. In fact, the jurisdictions that permit AMPs specifically bar prosecution for the same offence if the person or company has paid an administrative penalty for that violation. For example, if an administrative penalty is imposed on an employer in BC, the employer may not be prosecuted under the OHS laws with respect to the same facts and circumstances upon which the Board based the administrative penalty. Conversely, if the government has prosecuted you for an OHS offence, it can't also impose an AMP for the same underlying violation.

### **Q Can You Challenge an AMP'**

**A** Most jurisdictions provide some process for individuals or companies issued AMPs to challenge or appeal the violation or the amount of the penalty. In fact, the written notice of the AMP must typically explain that appeals process. But the deadline for appealing an AMP may be quite short, such as within 14 days of being served with the notice.

### **Q Is Due Diligence a Defence to an AMP'**

**A** It depends. In BC, the OHS law specifies that an administrative penalty must not be imposed on an employer if the employer establishes that it exercised due diligence. But the other jurisdictions that permit AMPs don't specifically address whether a violator can argue due diligence in defence to an AMP. Such jurisdictions may treat the violations subject to AMPs as 'absolute liability' offences, meaning that as long as the violation occurs, you can be penalized for it regardless of your intent or attempts to comply with the law. And because trying to comply is irrelevant for such offences, due diligence isn't a defence.

However, even if due diligence isn't a defence to an AMP in these jurisdictions, your efforts to comply with the law and prevent the underlying violation may still be relevant in terms of the amount of the penalty imposed. So the fact

that you tried to comply with the law may weigh in favor of a lesser penalty.

**Insider Says:** There are other defences you can raise to an AMP, such as arguing that the violation didn't occur.

#### **BOTTOM LINE**

AMPs are very common for violations of environmental law and are becoming more common for safety violations. For example, a warehouse company in Manitoba was issued an administrative penalty of \$2,500 for failing to comply with an Improvement Order issued because it hadn't provided machine guards suitable to prevent injury [*Anco Wholesale Warehouse Inc.*, Govt. News Release, Jan. 18, 2013]. And don't forget that if you commit a violation for which an AMP could be imposed, the fact you took all reasonable steps to comply may not help you avoid liability. Thus, the threat of an AMP is just one more reason why your company should ensure it exercises due diligence and takes the necessary steps to prevent safety violations and incidents in the first place.