

# The Glenn Commandments: The Art of Using Discipline to Enforce OHS Rules



My safety colleagues tell me that running an OHS program is a lot like being a parent. “We protect our workers the way we would our own children,” notes a veteran Ontario OHS coordinator. “And sometimes that requires disciplining them for their own good.” Fair enough. But there are also some key differences. After all, our kids don’t have unions and trial lawyers ready to hail us into court when we discipline them. There’s also the regulatory factor to consider and how we OHS coordinators and their companies face risk of liability if they **don’t** use discipline to enforce safety rules. As OHS coordinators, you play a central role in properly integrating discipline into your OHS program. Here are 8 takeaways that can help you achieve that objective.

## 1. Recognize How Discipline Affects Liability & Due Diligence

While discipline is typically associated with the HR function, it also has major ramifications for workplace health and safety. Discipline or the threat thereof ensures that OHS policies are not only in place but actually carried out. Discipline also plays a key role if and when things do go wrong. Under OHS law, companies aren’t automatically liable just because they violate an OHS law and an incident or injury

occurs. They can still avoid liability by showing that they exercised what's called "[due diligence](#)," which in most instances means that they took all reasonable steps under the circumstances to ensure comply with the law and prevent the offence and its aftermath. Using discipline to enforce company OHS policies and procedures is one of the reasonable steps a company must take. Conversely, **not** disciplining workers for safety infractions suggests that the company isn't seriously committed to safety and that its elaborate OHS policies are just a façade.

## 2. Be Prepared to Discipline Workers Who Disobey Safety Rules

I've been compiling the OHS Insider [Annual Due Diligence Scorecard](#) since 2005. And in those 2 decades of analyzing cases, failure to impose discipline is perhaps the most common factor that courts cite in rejecting a company's due diligence defence. Even if you don't get cited or prosecuted, lax enforcement conveys the message that safety rules are optional and that workers can violate them without consequence. No one wants to be seen as a rigid drill sergeant who jumps all over workers for the slightest infraction. But if you're aware that workers aren't complying with safety rules, you must discipline them appropriately. And that is the perfect recipe for OHS violations, incidents, injuries, and penalties.

**Example:** A worker at an Ontario trucking company was crushed to death between a truck and a concrete loading dock. The worker had apparently been trying to fix a broken iron plate by himself in violation of company policy requiring a lookout. The company was convicted of failing to take reasonable precautions to protect workers from the hazard of moving trucks in the loading dock area.

The company had safety procedures. But a dock supervisor admitted that no worker had ever received a written warning,

suspension, or dismissal for not following those procedures. The court characterized the company's procedures and other safety measures as "sloppy" and the atmosphere as "very laissez faire." The court explained that the company needed to have a firm set of guidelines that were "rigidly enforced" [*R. v. Wilson's Truck Lines Ltd.*, [1998] O.J. No. 3219].

### **3. Use Progressive Discipline to Enforce Safety Rules**

In general, you should follow a [progressive discipline policy](#) to enforce OHS rules in the hopes of getting workers who commit infractions to clean up their act while setting the stage for more severe punishment if they don't. Progressive discipline is typically mandatory in union workplaces and highly recommended in others. While rules vary from company to company, [progressive discipline](#) typically follows this pattern:

- [Verbal warning or counseling](#);
- [Written warning](#);
- [Suspension](#); and
- Termination.

### **4. Don't Discipline Workers for Exercising Their OHS Rights**

You can discipline workers for violating a safety rule or OHS law; you can't discipline them in reprisal or [retaliation](#) for exercising a safety right granted by the OHS law, such as [refusing dangerous work](#) or becoming a member of the workplace JHSC. What makes discipline retaliatory? To answer that question, courts and labour boards typically look at whether there's a "nexus," or connection, between the protected act and discipline, focusing especially on the timing of the events. The closer in time the discipline follows the protected act, the more likely a court is to find a nexus

between them.

**Example:** A lead hand at a steel mill defied a foreman's orders to put an actual load on the crane he was training a new worker to use out of concerns for safety. "I'm tired of your insubordination," the foreman hollered at the lead hand. The next day, the lead hand was refused his meal ticket. Four days later, he was temporarily moved to another office. So, he filed a retaliation complaint. The Ontario Labour Relations Board ruled that the closeness in timing between the lead hand's safety refusal and the meal ticket denial and relocation suggested "a causal connection" and allowed the retaliation complaint to proceed [[United Steelworkers of America, Local 8794 v. Ivaco Rolling Mills Inc.](#), [2002] CanLII 30291 (ON LRB)].

## 5. Be Prepared to Make Reasonable Accommodations

In imposing discipline, you need to account for worker protections under human rights laws, specifically the requirement to make "[reasonable accommodations](#)" for workers with disabilities. Thus, for example, a worker who tests positive for drugs or alcohol may have a [dependency or addiction](#), which is deemed a disability requiring accommodations. Human rights laws also require [reasonable accommodations for workers who can't obey safety rules due to legitimate religious beliefs](#). For example, a worker of the Sikh faith may disobey a mandatory hardhat rule because removing his turban would violate his religion.

A key point OHS coordinators need to understand is that the duty to make reasonable accommodations doesn't require accommodations that would impose "undue hardship" on an employer. **Rule of Thumb:** Accommodations aren't reasonable if they would endanger other workers or persons at the workplace. The question of whether exempting a worker from PPE or other

safety rules is a reasonable accommodation or undue hardship is a complicated subject that often requires legal proceedings to resolve. The one thing that is clear is that when company managers and supervisors act as judge and jury and impose discipline on the spot, they're likely to expose the company to liability for discrimination. So, it's crucial to ensure that there's a process for workers to make and the company to process reasonable accommodations requests.

## **6. Don't Forgo Discipline because Violations Cause Near Miss Rather than Actual Injury**

The need for discipline is triggered by the act of committing the violation, not its ultimate consequences. Serious violations warrant serious discipline even if they result in a "[near miss](#)" without injury. The fact that the worker lucked out and nobody got hurt isn't an excuse and doesn't mean the worker shouldn't be disciplined. You can factor the consequences of the violation in deciding the level of punishment but not in the need to impose discipline in the first place. If the worker or union challenges the company's imposition of discipline for near misses, the court is likely to uphold the company's decision.

**Example:** A forklift operator received a verbal warning after causing a near-miss incident. After another near miss and an incident in which the forklift operator moved a box with his forklift when a person was inside it, he was removed from that position. The Alberta court upheld the company's decision to reassign the worker, ruling that the forklift operator deserved to be removed from the position [[Holwen v. Alberta Plywood Ltd.](#), 2005 ABQB 464 (CanLII)].

## **7. Consider Aggravating & Mitigating**

# Factors in Deciding on Level of Discipline

Upon determining that discipline is in order, you must decide on the appropriate punishment. **Rule of Thumb:** Discipline must be proportionate to the offence, in line with your progressive discipline policy and [consistent with penalties you've imposed on workers who committed similar infractions in the past](#). You must also consider both “mitigating factors” dictating for leniency and “aggravating factors” calling for sterner discipline. Such factors include:

- The seriousness of the infraction.
- Whether the worker has been disciplined or warned for previous violations.
- The harm the infraction caused.
- Whether the worker accepted responsibility for the infraction.
- Whether the worker was honest about the infraction.
- Whether the worker expressed sincere remorse for the infraction.
- Whether the worker was provoked to commit the infraction.
- The worker's mental condition when the infraction was committed.
- Whether there was justification for committing the infraction, such as a legitimate work refusal.

**Example:** A paper mill fired a worker for using a pin to deliberately render a machine bypass button inoperable. The Ontario arbitrator reduced the penalty to a 4-month suspension citing mitigating factors like the worker's clean disciplinary record, membership in the workplace JHSC, remorse and the fact that other workers routinely disabled the same safety device without being disciplined [*Goodyear Canada Inc. v. United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied, Industrial and Service Workers Industrial Union, Local*

189L (*Cummins Grievance*), [2008] O.L.A.A. No. 22].

## 8. Document All Safety Infractions & Disciplinary Actions

When you [discipline](#) a worker for violating a safety rule or for any other infraction, make sure to document it. Note the circumstances of the infraction, when and where it occurred, the results of any investigation, the nature of the discipline imposed, and the possible consequences for future infractions. Proper documentation puts you in the position to withstand grievances and legal challenges and make your disciplinary actions stick. It puts workers on notice that their conduct is unacceptable and subject to more potential disciplinary consequences if it recurs.

**Example:** Over the course of 28 months, a company that manufactures auto body components disciplined a co-extrusion worker for 9 different safety infractions, finally resulting in termination. The worker sued for wrongful dismissal but the Ontario court dismissed the case. These incidents weren't minor or "trifling transgressions," the court reasoned. Each incident was documented with a written record that clearly spelled out what the worker did wrong, referred to prior warnings and warned what the company would do next in response to further violations. Together, these documents were the bricks in what formed "a just-cause wall" [[Daley v. Depco International Inc.](#), [2004] CanLII 11310 (ON SC)].

Such documentation also bolsters a company's chances of making out a due diligence defence by furnishing evidence of its commitment to enforce safety policies and ensure a safe and compliant workplace.

## Takeaway

Disciplining workers for safety violations is like walking a

tightrope without a net. You need to impose discipline when workers violate safety rules but not when they exercise safety rights. The discipline must be effective and discourage future violations without being excessive. And discipline must be consistent with similar violations resulting in similar discipline. Following the 8 steps above will give you a better chance of effectively performing what is probably one of the least pleasant but most important of your responsibilities as an OHS coordinator.

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