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Last Call for WHMIS 2015

The 10 Things OHS Directors Must Know to Comply with WHMIS Training Rules

It's last call for WHMIS compliance. On Dec. 1, 2018, employers that use, handle, store or dispose of hazardous products in the workplace must be done revising their WHMIS programs to comply with the new WHMIS 2015/GHS rules. The first order of business: Ensuring that workers have the necessary training. Here are the 10 things OHS directors need to know to achieve that objective.

1. Which Workers Need WHMIS Training

There's a common misconception that WHMIS training must be provided to all workers. The truth is that workers need WHMIS training only if they are or may be exposed to a hazardous product at work, i.e., they:

- Work with a hazardous product(s);

- Work near a hazardous product(s);
- Are involved in the manufacture of a hazardous product.

2. When Initial Training Is Required

Training must be provided before the worker is exposed. That may be a new worker's first day of work or a current worker's 1,000th day if he's assigned to a new position or location involving exposure, e.g., an office maintenance worker is assigned to perform cleaning duties in a chemical storage area.

3. The Difference between WHMIS & GHS Training

The GHS changes that were adopted in 2015 and take effect on Dec. 1 affect essential elements of the WHMIS program covered in WHMIS training, including supplier and

...continued on page 2

Immigration & the OHS Program Does Safety Training Have to Be Multilingual?

Canada's workforce is becoming increasingly diverse. According to 2016 census data, 23% of Canadians (7.6 million people) speak a language other than English or French—and 25% of these people use that other language at work. And with waves of new immigrants pouring into Canada, those percentages will steadily grow in the years ahead. How will all of this affect your OHS program—especially its fundamental objective of providing effective safety training?

Foreign Workers Are More Vulnerable to Work Injury

Foreign born workers are twice as likely to suffer work-related injuries as Canadian-born workers, according to an Institute for Work and Health study. In the US, Hispanics consistently suffer fatal and serious work injuries at significantly higher rates than

their American counterparts. (While Canada doesn't keep such statistics, anecdotal evidence suggests that Hispanic workers in Canada are also abnormally susceptible to work injury.)

Statistics are all well and good but it's the real-life incidents that resonate like the one that happened at an Alberta oilsands project in April 2007, when two Chinese workers were killed after the roof of the oil storage tank they were constructing collapsed on top of them. Four other Chinese workers were also injured. The workers who had only been in Canada for a year and didn't speak English were asked to carry out a makeshift erection procedure aimed at assembling the tank wall and roof structure at the same time, instead of erecting the walls first. They received no formal training, only verbal instructions

...continued on page 4

workplace labels and Material Safety Data Sheets (MSDS) (which are now Safety Data Sheets (SDS)). Accordingly, all workers exposed to hazardous products (which used to be called “controlled products”) and who have presumably already received WHMIS training will need training in the GHS changes by the Dec. 1 deadline.

4. How to Verify Training Effectiveness

Simply delivering WHMIS (and GHS) training isn’t enough. Before exposing them to a hazardous product, you must also verify that workers understand their training and are capable of applying it to protect their health and safety. Methods of verification include making workers pass a written test and/or demonstrate what they learned. Periodic evaluation of workers’ knowledge via written tests, practical demonstrations and other “suitable means” is also a specific regulatory requirement in BC, New Brunswick, Newfoundland, Prince Edward Island and Saskatchewan and a recommended best practice in all other jurisdictions.

5. When New or Refresher WHMIS Training Is Required

The phrase “annual WHMIS training” is a misnomer. OHS rules don’t say that says that WHMIS training is required every year. In fact, WHMIS training has no pre-determined shelf life. It lasts as long as the training remains timely and reflective of current conditions and hazards. New training is required only when and if:

- Work conditions change in a way that alters the exposure risks covered in the previous training;
- New and significant hazard information about the hazardous product becomes available after training takes place;
- Periodic evaluations indicate that workers don’t have adequate knowledge to apply their training; and/or
- There are other indications that the previous training isn’t effective and needs refreshing.

6. The Difference between Annual WHMIS Training & Annual WHMIS Review

There is one thing WHMIS laws say you must do at least once a year: Review your entire WHMIS program, including worker training and education. During this review, you must determine whether the most recent WHMIS training workers received is appropriate and suitable to current conditions or, conversely, whether work conditions, new information or other changes make refresher or retraining necessary.

7. Who Must Be Involved in Annual WHMIS Review

Annual WHMIS review must be done in consultation with the workplace joint health and safety committee (JHSC) or health and safety representative. Although not specifically defined in OHS regulations, government guidance from Alberta, BC and other jurisdictions clarify that “consultation”

means giving the JHSC or representative a chance to review and comment on the effectiveness, content, structure and means of delivering WHMIS training.

Other Issues to Cover During Annual WHMIS Review

In addition to training and education, annual WHMIS review should include verification that:

- The company’s procedures for safe use, storage, handling and disposal of hazardous products are timely and effective
- Effective spill and emergency response procedures are in place
- There’s an up-to-date list of all hazardous products used or stored in the workplace
 - There’s an up-to-date SDS for each of these products
 - Chemical containers have proper and legible WHMIS labels

8. The Difference between WHMIS Training and Hazard Information

OHS rules require employers to ensure workers receive both WHMIS training and hazard information about the specific hazardous product(s) to which they’re exposed. OHS directors can get into trouble if they confuse these things.

9. What WHMIS Training Covers

WHMIS training is general in scope. Its aim is to teach workers how the WHMIS system works and how to use it to ensure their health and safety, as well as about the general policies and procedures in place to protect them from exposure to hazardous products and substances. Required elements:

- Information that must be on an SDS and the significance of that information;
- How to access the workplace SDS binder or system;
- Information that must be on a WHMIS supplier or workplace label and the significance of that information;
- Placards or other alternative methods used to communicate required safety information about hazardous products;
- Procedures for safe storage, handling, use and disposal (and, if applicable, manufacture) of hazardous products; and
- Procedures for hazardous product emergencies and exposure to so-called fugitive emissions.

9. What Hazard Information Covers

“Hazard information” means information about the safe use, storage, handling and disposal of a *particular hazardous product* to which the worker is exposed, including information about its health and physical hazards and how to deal with emergencies involving the product. The source of that information is the company that supplies the hazardous product and you’ll need to let workers know if and when the supplier provides you new or updated hazard information about the product.

TOOL

WHMIS Training Review Program Checklist

The WHMIS laws don't require annual training, they require annual review of WHMIS training programs. (They also require more frequent review in response to significant changes in work conditions and available hazard information.) Use this Checklist during your WHMIS training program review to determine whether workers' WHMIS training was effective and identify necessary follow-up actions to correct deficiencies.

Model WHMIS Training Program Review Checklist

Question	Yes/No	Comment/Follow Up Action
Do workers know what hazardous products are present?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Are they aware of the WHMIS requirements and requirements of their jurisdiction's OHS laws?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Can they demonstrate that they know the procedures to safely use, handle, store and dispose of the hazardous products they work with?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Are they aware of the potential physical and health hazards of the hazardous products they're exposed to?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Can they demonstrate that they know the emergency and first aid procedures required for the hazardous product?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Can they demonstrate that they know the fugitive emissions procedures required for the hazardous product?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Can they demonstrate understanding of the use and purpose of control systems, including ventilation and PPE?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Can they demonstrate that they have adequate education in the WHMIS labeling systems?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Can they show they know how to interpret a WHMIS supplier or workplace label and what it means in terms of doing their jobs safely?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Do they know where and how they can get a copy of an SDS?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Can they show they know how to interpret the information on an SDS and how to use it to carry out their jobs safely?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Can they show they know how to interpret the information on placards or other alternative methods of displaying hazard information and how to use it to carry out their jobs safely??	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Are they aware of their responsibility to use the information they've learned to work safely with hazardous products?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Do they accept personal responsibility for using hazardous products safely?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Have they completed job-specific WHMIS training?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Are they able to understand the information delivered to them during training, i.e., are they conversant in the language used during training?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Is their literacy level sufficient enable them to read and understand written training material, SDSs and WHMIS labels?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Are provisions made for training new, part-time and casual workers on WHMIS?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Is there evidence that the objectives of an effective training program have been met, i.e., are the workers "informed workers"?	<input type="checkbox"/> Yes <input type="checkbox"/> No	
Is there a system for initiating safe work procedures from SDS information and for training in safe work procedures?	<input type="checkbox"/> Yes <input type="checkbox"/> No	



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which might not have even been in Chinese. The result was a \$1.5 million fine against SSEC Canada Ltd., at the time the highest OHS fine ever imposed on an employer in Alberta.

The Language of Safety Training

While immigrants tend to be disproportionately represented in hazardous jobs, lack of English and French language skills also add to their vulnerability by interfering with their ability to absorb their safety training (and communicate with co-workers). Deliberately hanging non-English- or French-speakers out to dry by providing them safety training in English or French is the kind of reckless offence that invites criminal negligence under C-45. Thankfully, such cases are few and far between. The more common scenario involves the well-intentioned employer who thinks the English/French safety training and information it's providing to foreign workers is clear and comprehensible because workers speak those languages.

The problem is that English or French isn't the first language for many of these workers. And while they may be able to converse in English or French, they can't process information at a conversational or technical level. Or, a worker that may be able speak but not read English may be capable of absorbing oral but not written safety training.

What the Law Says

So far at least, the new demographics haven't induced a single jurisdiction to add multilingual training requirements to its OHS laws. As before, the laws just say employers must provide workers appropriate safety training and information but don't specify in which language. Although there are a few language-specific safety requirements sprinkled in, they apply only to limited positions and situations.

Language-Specific Safety Requirements Contained in OHS Laws

Jurisdiction	Language-Specific Safety Rule
Federal	SDS must be in both French and English (<i>OHS Regs.</i> , Sec. 10.34(1))
Ontario	<p>*Employer must post Act and workers' rights, responsibilities and duties materials in English and "majority language" of workplace [<i>OHS Act</i>, Sec. 25(2)(i)]</p> <p>*Hazardous material identifications, SDSs and notices of hazardous physical agents must be in English and such other language(s) as may be prescribed [<i>Act</i>, Secs. 37(1)(c) and 41.(4)]</p> <p>*Employers must provide adequate written and oral instructions and/or training in language that worker understands to workers who set up or remove certain measures on or by roadways, who direct vehicular traffic and who serve as signalers [<i>Const. Projects</i>, respectively, Secs. 67(6)(c), 69(4)(d) and 106(1.5)]</p> <p>*Supervisors, deck attendants, shaft conveyance attendants and mine hoist operators must be capable of communicating effectively in English [<i>Mines & Mining Plants</i>, Sec. 10].</p>

Jurisdiction	Language-Specific Safety Rule
Québec	Safety information about a remote control system must be kept on mine site available to users in French language [<i>OHS Regs. for Mines</i> , Sec. 213.1]
Saskatchewan	<p>* Employer or contractor must ensure all work done underground or in open pit mine is supervised by direct supervisor with adequate knowledge of language normally used at mine [<i>Mines Regs.</i>, Sec. 14(2)(c)]</p> <p>*Employer or contractor may issue a written temporary authorization to blast to a worker who, in its opinion has adequate knowledge of the language normally used at mine [<i>Mines Regs.</i>, Sec. 246(1)]</p>
Yukon	Every person employed as a supervisor and every person supervising the work of other workers at a mine must be able to give orders in the language commonly used in the mine [<i>Mines Safety Regs.</i> , Sec. 14(2)].

What the Law Implies

But don't kid yourself. What counts is not what the OHS laws say (or in this case, don't say) but what they mean. When you look closely at how the laws are written, the purpose they serve and how they're applied to actual workplace situations, it's abundantly clear that employers do have an implied obligation to provide safety training and information in the language their workers speak and understand. Conversely, providing safety training and information to workers in a language they don't understand is a clear violation of OHS laws. There are at least 3 sources of an implied duty to provide training in a language other than French or English if that's what's needed to ensure its effectiveness.

Training Requirements. The requirement under OHS laws is not to provide safety training but "adequate" or "appropriate" safety training that's both comprehensible and suited to the particular hazards or circumstances of the workplace. To meet this requirement, employers must not only simply deliver safety training but also verify its effectiveness. In fact, the OHS laws of at least 4 jurisdictions—Alberta, Saskatchewan, Northwest Territories and Nunavut—define "training" as both:

- Providing information and explanation about a subject matter; and
- Requiring a "practical demonstration" that the worker actually acquired the knowledge or skill the information and explanation was meant to convey.

Safety Information Requirements. OHS laws also require employers to give workers certain health and safety information, e.g., the WHMIS obligation to furnish an SDS listing important health and safety information about hazardous products to which workers are exposed. As with safety training, required safety information must be clear and comprehensible.

Due Diligence. In case you're ever prosecuted for an

OHS violation, failure to ensure that your safety training and information is comprehensible and comprehended undermines any shot at a due diligence defence, i.e., proving that you took all reasonable steps to comply and prevent the violation. **Example:** Simply handing safety manuals to new workers and telling them to read the materials was inadequate and relied too much on workers' experience said an Alberta court in ruling against an oil company's due diligence defence [*R v. Dial Oilfield Services*, 2007 ABPC 16 (CanLII)].

4 Steps to Take

As OHS director, your primary responsibility is to ensure that all workers get safety training and information that they can readily understand. Here are 4 ways to fulfill that mission:

Step 1: Determine Languages Used in Workplace First, determine the languages your workers understand so you can tailor your training efforts accordingly. Thus, while English and French should work for most workers, if a worker speaks only Mandarin, you better deliver the training in Mandarin or in some other format the worker can comprehend before sending him off to do the job.

Step 2: Use Pictograms Where Possible One way to cross language barriers is to do it visually by using pictograms to provide safety information. A pictogram is a graphic symbol or picture that represents an idea. Effective pictograms are simple and easily understood by workers. WHMIS warning labels are good examples of pictogram use. Be aware that pictograms may have to accommodate cultural

differences. Thus, for example, non-Western countries use the red crescent moon rather than a red cross as the symbol for first aid.

Step 3: Have Translators Provide Information Verbally

There's some information that simply can't be provided using pictograms, e.g., the workers' right to refuse dangerous work. For such information, you may need translators who are fluent in the applicable languages verbally translate that information for workers. You can either use outside translators or in-house workers or supervisors who are fluent in the relevant languages.

Step 4: Provide Written Information in Relevant Languages

Using pictograms and verbal translations are good first steps. But there's some information that's so important that workers should have it in writing. Also, the OHS laws may require you to provide certain safety information in writing, whether its handed out to workers or posted in the workplace. So, you'll have to provide such information in the language used in the workplace. You may be able to get some written safety material in languages other than English and French from your jurisdiction's workers' comp board or OHS agency. For example, the Ontario WSIB has safety fact sheets in languages such as Chinese, Italian, Korean, Polish, Portuguese, Punjabi, Russian, Spanish and Vietnamese. And WorkSafeBC offers written materials in Chinese, Punjabi, Spanish and Vietnamese. Non-government safety organizations like the Construction Safety Association and the Industrial Accident Prevention Association are also a potential source of multilingual safety materials.

ASK THE EXPERT

Which Workers Must Get WHMIS Training?

QUESTION: Under Ontario law, which workers must take the new GHS/WHMIS 2015 training? Is it required if we are simply an importer of a European product and distributor but not a retail store?

ANSWER: WHMIS training is required for workers who work with or may be exposed in the course of their work to hazardous products (aka "controlled products" under the old pre-GHS laws)

Explanation: The above rule applies regardless of whether the hazardous product is produced in the workplace or obtained from an outside supplier. Basically, if the hazardous product is in the workplace and the worker is exposed to it during work, WHMIS/GHS training is required regardless of how the product got there. This is the case in not only Ontario but all jurisdictions.

Inspection of Portable Fire Extinguishers

QUESTION: Is it mandatory for our plant to do monthly visual inspections to ensure fire extinguishers are in working condition? Would you please point out the specific Ontario OHS regulation saying that?

ANSWER: Yes, monthly inspection is required under the OHS Regulation for Industrial Establishments (Reg. 851), which covers manufacturing plants.

- Section 123(1) of Reg. 851) says Ontario Fire Code requirements for fire extinguishers apply at industrial establishments.
- Fire Code Section 6.2.7.2. says portable extinguishers must be inspected monthly.
- Additionally, Section 6.2.7.1.(1) of the Fire Code says that maintenance and testing of portable extinguishers must comply with NFPA 10, "Portable Fire Extinguishers," and regular monthly inspection is part of NFPA 10.

OHS fire extinguisher inspection requirements in each jurisdiction.

Month In Review

A roundup of new legislation, regulations, government announcements, court cases and arbitration rulings.

Visit OHSInsider.com for the complete Month-In-Review.

WHMIS

YT

Sept. 25: The YWCHSB posted some [new WHMIS 2015 guidance](#) on its website. The deadline for employers to comply with new SDS, WHMIS label and other workplace requirements is Dec. 1.

Concrete Formwork

BC

Oct. 17: Comments end on WorkSafeBC's [proposed revisions](#) of OHS requirements to prevent the collapse of concrete formwork, falsework and reshoring (under Sections 20.17 to 20.26 of the OHS Regulation). Key new requirements:

- Plans for formwork must be worksite-specific
- Employer duty to ensure professional engineer certifies worksite plan, reshoring, erection, use and dismantling comply with plan, and protruding objects are removed
- Changes to plan must be made available at site before pouring begins
- Clarification of how pre-pour inspection carried out and what it must address.

Accessibility

NT

Sept. 6: The NWT Human Rights Commission published a 10-page draft Accessibility, Inclusion and Accommodation Checklist to help property owners and employers identify and remove barriers that may be excluding disabled persons.

Public Health

Sept. 17: The Nunavut Health Department joined a nationwide warning of the danger by food products of raw chicken, infected with the bacteria that causes salmonella. Since Sept. 1, 419 Canadians have died with laboratory-confirmed salmonella, including in Nunavut.

Cyberbullying

SK

Sept.: New privacy laws give victims of "revenge porn" and other acts in which a third party publishes naked or intimate images of them without consent the right to sue for money damages.

Canada

Sept. 2: Regulations under the Communications Privacy Act and the Wireless Privacy Act will require service providers to protect people's use of their mobile devices in public places.

OHS Funding

AB

Oct. 15: That's the deadline for non-profit and public sector organizations to apply for Innovation and Engagement grants to support projects to promote OHS knowledge and awareness in the following priority areas:

- Workplace impairment
- Workplace violence and mental health
- Vulnerable workers
- Small business compliance
- Occupational disease.

Green Energy

Sept. 20: Keeping the government table, the Energy Act. The 2018 Act are the fees on electricity prices and of municipalities to energy development.

Workplace Harassment

FED

Oct. 5: Comments ended on Canada's most innovative workplace violence and harassment bill since Ontario Bill 168. Highlights of [Bill C-65](#):

- Stronger privacy and reprisal protections for employees who complain of harassment
- New employee right to have complaints investigated by neutral third parties and resolved via informal resolution
- Employee right to sue employer for not protecting them from violence/harassment for up to 3 months after employment ends

Health

NU

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Workplace Harassment

QC

Oct. 5: That's the deadline for employer and worker associations to apply for up to \$90,000 in CNESTT funding for projects designed to prevent workplace psychological and sexual harassment. There are 2 funding streams:

- Stream 1: Workplace Harassment Standards Assistance Program for sectoral employer associations
- Stream 2: Program for workers' sensitization at sectoral associations of employees and self-employed persons.

Ammonia

NL

Aug. 6: New OHS [guidelines](#) on changing oil in ammonia refrigeration systems call on employers to ensure that:

- Workers carrying out procedure get WHMIS training and use respiratory, eye and skin protection
- A second person is posted nearby to observe and provide help if needed
- The procedure is scheduled for times when the facility isn't occupied or in use
- Oil isn't drained while the system is running
- Records of oil drained and added are kept
- Written procedures are posted in the machine room
- An emergency response plan is in place and emergency instructions and contacts are posted in a conspicuous location.

Cannabis

MB

5: New
tions give
unity safety officers,
ation safety officers
innipeg Police
e cadets to arrest
who violate bans on
ge possession and
cannabis in public

Fatalities

PE

Sept. 24: It was not the outcome everyone was hoping for. The bodies of two fishermen who went missing after their boat capsized in heavy seas off PEI's north shore have been found. The only good news is that a third fisherman was able to swim to shore and call for help.

Mental Stress

NS

Oct. 26: New workers' comp rules establishing the presumption that post-traumatic stress disorder (PTSD) is work-related when suffered by frontline and emergency response workers officially take effect.

Energy

ON

a campaign promise, the
d a bill to repeal the Green
2 things the Ford regime hates about
ed-in tariff, which it claims drove up
and the elimination of the powers
o block windfarm and other clean
ent projects within their boundaries.

Toilet Access

NB

Aug. 17: WorkSafeNB issued a [new interpretation](#) explaining what "within easy access" means.

Does Government Agency Have a 'Duty of Care' to Victims of Environmental Harm?

Like companies and individuals, government agencies can be liable for the environmental harm caused by their negligence but *only* when they have a duty of care to the victims of their actions. In a 1984 case called *Kamloops v. Nielson*, the Supreme Court of Canada spelled out a two-part test for courts to use to determine whether a government agency has such a duty:

1. Is there a sufficiently close relationship between the parties so that in the agency's "reasonable contemplation," carelessness on its part might cause damage to that person? In other words, was the harm reasonably foreseeable?
2. If a duty existed, are there are considerations that ought to negate or limit the scope of this duty, the class of people to whom the duty is owed or the damages for a breach of this duty?

Here are two cases in which courts applied this test with different results.

DUTY OF CARE

FACTS In the mid 1960s, the Ontario Ministry of Transportation (MTO) undertook roadwork on two highways. During the work, truckloads of road waste consisting of concrete and asphalt were buried beside a creek on a nearby farm. In 1981, a couple bought the property to operate as a dairy farm. But the cows refused to drink from the creek, started getting sick and died. Chickens and rabbits also died. Even family members began suffering from unexplained health problems. The couple was ultimately forced to move their dairy operations to another farm. Because they couldn't sell the farm near the creek, they left it vacant and abandoned. The couple sued the Ontario government for negligence, claiming that the buried road waste had contaminated the farm's water supply.

RULING An Ontario Superior Court found the government liable, ordering it to pay the couple \$1,732,400 in damages.

EXPLANATION The threshold question was whether the government owed the couple a duty of care. In applying the *Kamloops* test, the court concluded that it was or ought to have been in the reasonable contemplation of the MTO that the careless disposal of waste road material on private farmland might harm the occupiers of that land. The waste material likely contained various car fluids absorbed over years of use. Large amounts of this potentially toxic waste were buried on a farm by a creek and close to the farmhouse and its well. Under these circumstances, it was reasonably foreseeable that harm could result to the people using the farm—at that time or in the future—and their livelihood.

Thus, the government owed a duty of care to the couple, concluded the court. Applying the second prong of the *Kamloops* test, the court found that there were no considerations that would negate or reduce the scope of this duty, the class of people to whom it was owed or the damages from violating it. *Berendsen v. Ontario*, [2008] O.J. No. 179, Jan. 18, 2008

NO DUTY OF CARE

FACTS Two brothers started a nursery operation on property that backed onto the Memramcook River. They'd grown up in the area and knew that, across the river, there was a causeway with gates that were opened to release excess water when the river rose too high or to "flush" silt that had built up in front of the gates. The brothers set up a water supply system to irrigate the plants with river water. The New Brunswick Department of Transportation (DOT) controlled the causeway, determined that a flushing was needed and ordered the gates opened. As a result, salt tidal water went upstream beyond the nursery's location. The nursery irrigated the plants with the salty river water, which turned the leaves brown. Eventually, the nursery stock died and the brothers had to close the business. They sued the government for negligence, claiming that the contamination of the fresh water river with salt had killed their plants.

RULING A New Brunswick Court of Queen's Bench dismissed the lawsuit.

EXPLANATION Did the DOT owe a duty of care to the brothers? The DOT knew that during flushing, salt tidal water could go some distance upstream. But the practice of flushing the river by opening the causeway gates had been going on without incident for 21 years.

The causeway operators had no reason to advise or warn anyone upstream when a flushing was going to occur. More importantly, no one at the DOT knew or had reason to know that the brothers were using the river water to irrigate their plants. So the harm to the plants caused by the salty river water wasn't reasonably foreseeable to the DOT. Thus, the DOT didn't owe a duty of care to the brothers. And because there was no duty, the court didn't have to address the second prong of the *Kamloops* test. *Octa Evergreens Ltd. v. New Brunswick*, [2002] NBQB 195 (CanLII), June 10, 2002

AT A GLANCE

A Visual Comparison of WHMIS Training Program Rules Across Canada

WHMIS is a national system that imposes uniform workplace safety rules to protect workers exposed to hazardous products. And while the employer’s duty to ensure exposed workers get proper training and education in the hazards they face, specific rules for creating, implementing and reviewing WHMIS training vary by jurisdiction with regard to:

- Whether WHMIS training programs must be tailored for a particular workplace;
- Whether WHMIS training must be integrated into the larger OHS program for the workplace;
- What, if anything employers must do to verify workers understand their WHMIS training; and
- Whether periodic evaluation is necessary to ensure workers have retained their WHMIS training and knowledge.

The Chart below displays these differences visually.

A COMPARISON OF WHMIS TRAINING PROGRAM RULES BY JURISDICTION

Jurisdiction	Program Must Be Tailored to Workplace	Program Must Be Part of Workplace OHS Program	Employer Must Consult JHSC or Safety Rep	Employer Must Do Annual Training Program Review ⁽¹⁾	Employer Must Verify Worker Ability to Apply	Periodic Evaluation of Worker Knowledge Required	Other Requirements
FED			✓	✓			
AB			✓	✓			
BC			✓	✓		✓	
MB	✓	✓	✓	✓	✓	✓	
NB	✓	✓	✓	✓	✓	✓	
NL	✓	✓	✓	✓		✓	
NS	✓	✓	✓ ⁽²⁾	✓	✓		
ON	✓	✓	✓	✓	✓		JHSC or health & safety rep can advise employer to review WHMIS training program before scheduled annual review
PEI	✓	✓	✓	✓	✓	✓	
QC	✓		✓	✓			JHSC establishes WHMIS training program and employer implements it
SK	✓		✓ ⁽³⁾	✓	✓	✓	
NWT & NU	✓		✓	✓	✓	✓	
YK			✓	✓	✓		

Notes

(1) In addition to regular annual review, more frequent review is required after changes in work conditions that affect exposure risks and/or new hazard information about a hazardous product becomes available

(2) Nova Scotia requires employers to consult the workplace JHSC but not the health and safety representative

(3) In Saskatchewan, the employer must consult the JHSC while developing the initial training program and thereafter must consult either the JHSC or health and safety representative in subsequent program reviews

WHMIS QUIZ



Which SDS Is Out Of Date?

Situation

Assume that GHS/WHMIS 2015 is now in full effect. While reviewing your SDS binder, you come upon the following 4 SDSs:

- SDS-A is 7-years-old but all the listed information remains accurate and up to date;
- SDS-B is 4-years-old and the chemical classification listed is out of date;
- SDS-C is less than 1-year-old and lists out of date handling and usage information;
- SDS-D is brand new and lists timely and accurate information but follows the old MSDS format.

The Question

Which SDS does NOT have to updated?

- | | |
|-----------------|-----------------|
| A. SDS-A | C. SDS-C |
| B. SDS-B | D. SDS-D |

Answer

SDS-A is still valid; but the other 3 are out of date and need to be revised or replaced.

Explanation

The point of this scenario is to illustrate how the new GHS/WHMIS 2015 rules for updating an MSDS—now called SDS—work. Under the old rule, an MSDS had to be updated in response to significant changes in information about the product and at least once every 3 years. Under the new rules, an SDS need only be revised in response to “significant new data” affecting the product’s classification or safe handling and usage. In other words, the regular triennial update requirement has been eliminated. And because the information in SDS-A is still timely, the document itself is also still good even though it’s the oldest one in the batch.

Why Wrong Answers Are Wrong

B is wrong. SDS-B does need updating, not because it’s over 3-years-old but because its product classification is out of date.

C is wrong because changes in safe handling and usage information is “significant new data” requiring an update.

D is wrong because effective December 1, 2015, the old MSDS format is invalid and all SDSs must follow the new WHMIS 2015 SDS format.

Preserving Workplace Safety in the Legal Cannabis Era: 10 Practical Pointers

On October 17, 2018, Canada became only the second country to legalize recreational cannabis. FYI, Uruguay is the other. The impairing qualities of cannabis on workers have made it a perennial headache for employers. Keeping workers off the weed is bound to become even tougher in the era of legalization. Over the past months, OHSI has tried to help OHS directors prepare by explaining the key problems and outlining solutions.

This summary is an attempt to boil it all down to 10 key takeaways and link you to the relevant OHSI resources.

1. The Basis for Regulating Drug Use Is Impairment Not Zero Tolerance

While the morality and prudence of legalizing cannabis is subject to debate, the one thing everybody agrees on is that cannabis use impairs workers and endangers workplace safety. Accordingly, the legal basis for banning drugs and alcohol at work, legal or illegal, should be impairment and fitness for duty rather than legality, morality or zero tolerance. (OHSI Resources: [How to Create Fitness for Duty Policy](#); [Model Policy](#))

2. Proactive Assistance Works Better than Reactive Discipline

The traditional strategy for dealing with workplace drug use is discipline. While discipline can still work, it's highly contentious and tricky to justify on legal grounds. That's why some employers take the approach of treating drug use not as a rules infraction but a personal problem calling for assistance and support. They call on workers to disclose their substance problems voluntarily and on a non-disciplinary basis. In addition to proving effective, this approach was recently upheld by the Canadian Supreme Court. (OHSI Resources: [Discussion of Elk Valley case](#))

3. Drug Testing Is the Pivot Point

Testing remains the most effective means of enforcing anti-drug policies. Unfortunately, it's also a lightning rod for legal challenge because it's so invasive of workers' privacy rights. Accordingly, drug testing litigation has served as the breeding ground for most of the rules governing the balance between an employer's interest in ensuring a safe workplace and workers' interest in keeping their bodily fluids and personal secrets away from the boss. (OHSI Resources: [8 Things OHS Directors Need to Know about Drug Testing](#); [Drug Testing Scorecard](#))

4. Random Testing Is Almost Never Allowed

Random testing is the most intrusive because it's done without suspicion. As a result, it's also the toughest to justify as a safety measure. Recent cases have made it clear that the mere fact that a workplace is dangerous isn't enough; the employer must also prove that the safety problem stems specifically from workers' use of drugs in the workplace. And even that may not be enough if, as some courts have, a court finds that privacy outweighs safety. (OHSI Resources: [How to Create Drug Testing Policy](#); [Model Policy](#))

5. Post-Incident Testing Is Easier to Justify but Still No Slam Dunk

Unions and courts have looked more favorably on testing workers after they've been involved in a workplace accident, especially if their job is safety-sensitive. Even so, post-incident testing can be shot down if employers abuse it by testing after any and all incidents even if there's no indication that the worker's drug use caused or contributed to the incident. (OHSI Resources: [Analysis of Post-Incident Testing](#); [Post-Incident Testing Procedures](#))

6. Pre-Assignment/Employment Testing Is the Easiest to Justify

It's generally OK to test workers before hiring or assigning them to a safety-sensitive position, e.g., promoting a maintenance worker to a heavy machine operator. (OHSI Resources: [How to Create Drug Testing Policy](#); [Model Policy](#))

7. Recreational Cannabis Isn't the Same Thing as Medical Cannabis

The Oct. 17 legalization applies to recreational cannabis; medical cannabis for treatment of specific conditions with a doctor's authorization has been legal for about a decade. While it may be the same product, the legal rules are vastly different for medical uses. (OHSI Resources: [6 Things OHS Directors Need to Know about Recreational Cannabis Legalization](#))

8. You May Have to Accommodate Medical Cannabis

Medical cannabis use is protected by human rights laws. Explanation: Under human rights laws, employers can't discriminate and must make accommodations for disabled workers and job applicants to the point of undue hardship.

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Compliance Briefing cont...

Because medical cannabis is used to treat conditions deemed disabilities under the law, tolerating a worker's use may be one of the accommodations you have to make. The good news is that letting a worker use or be impaired by medical pot at work is universally recognized as an undue hardship that no employer need accept. (OHSI Resources: [How to Create Accommodation Provisions in Drug Testing Policies](#); [6 Things OHS Directors Need to Know about Recreational Cannabis Legalization](#))

9. You Don't Have to Accommodate Recreational Cannabis

Drug addiction or dependency is a disability subject to accommodations; recreational use is not. (OHSI Resources: [No Duty to Accommodate Recreational Cannabis](#));

10. The 2 Questions to Ask before Dishing Out Discipline

If a worker tests positive for marijuana, you need to determine if accommodations are required before deciding what to do. Specifically, you shouldn't impose discipline unless and until you verify that the use was purely recreational and that the worker:

- Doesn't have a drug addiction or dependency; or
- Didn't use the medically to treat a disabling illness or condition.

(OHSI Resources: [How to Create Accommodation Provisions in Drug Testing Policies](#); [6 Things OHS Directors Need to Know about Recreational Cannabis Legalization](#))