

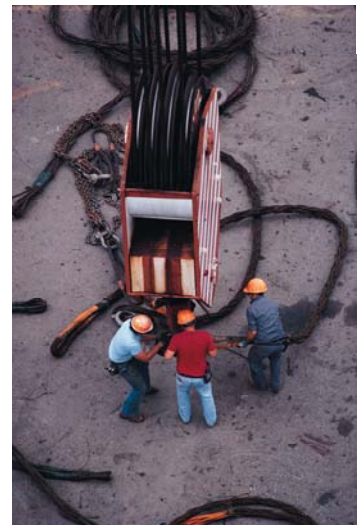
Workplace Health and Safety Bulletin



Due Diligence

Consider the following situation:

You are awakened at 4 a.m. by a call from the Operations Manager at your workplace. A piece of machinery has collapsed, killing a worker. As Maintenance Manager you are required to answer a few questions from the investigating Occupational Health and Safety Officer. Some time later the investigating officer issues her report, saying the equipment collapsed because it was poorly maintained. You and the company are charged under the *Occupational Health and Safety Act* with failing to do everything reasonably practicable to protect the health and safety of workers. What do you do?



Why care about due diligence?

Commonly referred to as the “General Duty Clause”, every province and territory in Canada has similar occupational health and safety legislation that describes the obligations of employers and workers. Alberta’s clause reads as follows:

2(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,

- (a) the health and safety of*
 - (i) workers engaged in the work of that employer, and*
 - (ii) those workers not engaged in the work of that employer but present at the work site at which that work is being carried out, and*
- (b) that the workers engaged in the work of that employer are aware of their responsibilities and duties under this Act and the regulations.*

- (2) *Every worker shall, while engaged in an occupation,*
 - (a) *take reasonable care to protect the health and safety of the worker and of other workers present while the worker is working, and*
 - (b) *co-operate with the worker's employer for the purposes of protecting the health and safety of*
 - (i) *the worker,*
 - (ii) *other workers engaged in the work of the employer, and*
 - (iii) *other workers not engaged in the work of that employer but present at the work site at which that work is being carried out.*
- (3) *Every supplier shall ensure, as far as it is reasonably practicable for the supplier to do so, that any tool, appliance or equipment that the supplier supplies is in safe operating condition.*
- (4) *Every supplier shall ensure that any tool, appliance, equipment, designated substance or hazardous material that the supplier supplies complies with this Act or the regulations.*
- (5) *Every contractor who directs the activities of an employer involved in work at a work site shall ensure, as far as it is reasonably practicable to do so, that the employer complies with this Act and the regulations in respect of that work site.*

“Due diligence is the level of judgement, care, prudence, determination, and activity that a person would reasonably be expected to do under particular circumstances”.

Source: Alberta Occupational Health and Safety Act
Revised Statutes of Alberta 2000

By including the words “reasonably practicable”, legislators make the *Occupational Health and Safety Act* “strict liability” legislation and introduce the possibility of a “due diligence defense”.

Strict liability laws give you the opportunity to make rational decisions. You have the option of deciding if you do or do not proceed with a particular action depending upon the circumstances. Instead of complying with the specific rule presented in the law, you could do everything “reasonably practicable” and demonstrate “due diligence”. Due diligence is demonstrated by your actions before an incident occurs, not after the fact.

Consider the following example. You give specific instructions to a competent worker to lock out a piece of equipment before working on it, using locks you provide for that purpose. (According to the *Occupational Health and Safety (OHS) Code* — governing occupational health and safety practices at Alberta workplaces — a competent worker is someone who is adequately qualified, suitably trained, and has sufficient experience to safely perform his or her work. A competent worker is not considered to require direct supervision.) The worker then forgets to lock out the equipment and is injured when someone incidentally turns it on. Even though the law was violated, you could still be acquitted and not be charged because you did everything “reasonably practicable”.

Absolute liability laws differ from strict liability laws in that you do not have any choice — you must do whatever an absolute liability law states. An example of this is a speeding infraction. Your only defense is to prove that the officer made a mistake, perhaps because of faulty radar equipment. You cannot get off by saying “I did everything reasonably practicable to control my speed”.

Failure to prove that you have been duly diligent in complying with occupational health and safety legislation can result in significant penalties. The penalty for a first offence in Alberta can be up to 6 months in jail or \$500,000, or both; for second or subsequent offences the penalties double. While these costs are significant, the human and economic costs can be far greater in the event of an incident.

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When an Occupational Health and Safety Officer is notified about a serious injury or incident, their first response is to immediately stop work at the workplace to protect other workers from injury. Officers will only allow work to resume if they are sure that other workers are not at risk of injury.

In a recent fatality at an Alberta meat packing company, the investigating officer required work at the plant to stop until the company developed safe work procedures to prevent a similar incident. In the meantime, hundreds of workers were left idle and the product became unfit for human consumption, costing the company considerably more than the maximum fine stated in legislation.

What does “reasonably practicable” mean?

At first glance “reasonably practicable” looks like a pretty subjective way of determining someone’s guilt or innocence. However, “reasonably practicable” is a legally defined term that is assessed using the “reasonable person test”.

What would a dozen of your peers consider reasonable in a similar set of circumstances? Your peers would likely review what you did and compare it against what they do in their own operations. Some of them might do more, others less. The result would be a balanced and wise judgement that could be defended to others.

What factors are considered in establishing a due diligence defense?

In determining whether your defense of “due diligence” is valid, a judge or jury considers three main factors:

- (1) *Foreseeability* — could a reasonable person have foreseen that something could go wrong?
- (2) *Preventability* — was there an opportunity to prevent the injury or incident?
- (3) *Control* — who was the responsible person present who could have prevented the incident or incident?

Foreseeable

In making a defense that the incident could not have been foreseen, your lawyer would have to show that the event was so unlikely that you or a group of your peers would never have expected it to occur. Reasonable employers know about their businesses and about the hazards of operating them. Ignorance is not an adequate defense if others in your industry knew about the hazard.

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Preventable

In making a defense that the incident was not preventable, your lawyer would have to show that you did everything reasonable to prevent it. This would include

- (a) identifying hazards — performing a hazard assessment is extremely important;
- (b) preparing and enforcing safe work procedures — ignoring a worker's poor compliance or non-compliance with company procedures is not an adequate defense;
- (c) training the worker, which includes training in appropriate safe work procedures;
- (d) monitoring the worker after they receive their training to verify that their performance is acceptable (or corrected if unacceptable) — reasonable employers are expected to monitor the work of their employees. Unsafe behaviour must be corrected before a worker is allowed to perform work unsupervised; and
- (e) having a progressive disciplinary policy to ensure continued compliance with company safety policies and procedures.

Your lawyer would have to show that you did everything reasonable to prevent the incident.

Each of these steps would have been documented.

Control

The last argument that your lawyer could use is that you had no control over the circumstances that resulted in the incident. If for instance you note a problem with the brakes of the car you borrowed from the company auto pool and report that to the Auto Pool Manager, you would not be expected to fix the brakes yourself. The person responsible for the car is the Auto Pool Manager. If there was an incident involving the brakes of the car, your lawyer could argue that you had no control over the circumstances related to the incident.

Reasonable alternatives

In response to each of these defenses the prosecutor would compare the practices of you and your company against:

- (1) relevant provincial, national and international standards;
- (2) current industry best practices and specifications; and
- (3) your company's programs, procedures and policies.

The prosecutor would attempt to show that you and your company did not behave reasonably. In addition, the prosecutor would attempt to point out all the reasonable alternatives that you and your company could have followed to prevent the incident. In the eyes of the law, if something is reasonably practicable, then it must be done.

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When does the government decide to prosecute?

Just because you are not in compliance with the *Occupational Health and Safety Act* does not always mean you will be prosecuted. The purpose of prosecution under occupational health and safety legislation is not to punish the offenders as in criminal law, but to deter others from committing the same infraction. In fact, only a small percentage of identified infractions are prosecuted. The decision process used when considering prosecution is shown in Figure 1.

What can you do now to show due diligence to prevent a future prosecution?

There is no general 12-step program that will convert a poor health and safety performer into a star. Due diligence is as much a culture and way of doing business as it is a legal defense. Companies with managers and workers that always ask themselves “Have I done everything reasonably practicable to make my workplace safe?” before they do their work will always outperform those that do not.

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You can go a long way towards developing this culture within your own workplace if you understand your responsibilities under the *Occupational Health and Safety Act* and implement a management system to identify, evaluate, and control hazards. The systems and procedures you choose need to be at least as good as those used within your industry and must be specific to your workplace (see Figure 2). Workers and supervisors need to understand their roles and be trained in safe work procedures.

Figure 1 Decision process for considering prosecution
 Source: Alberta Human Resources and Employment Operations Manual

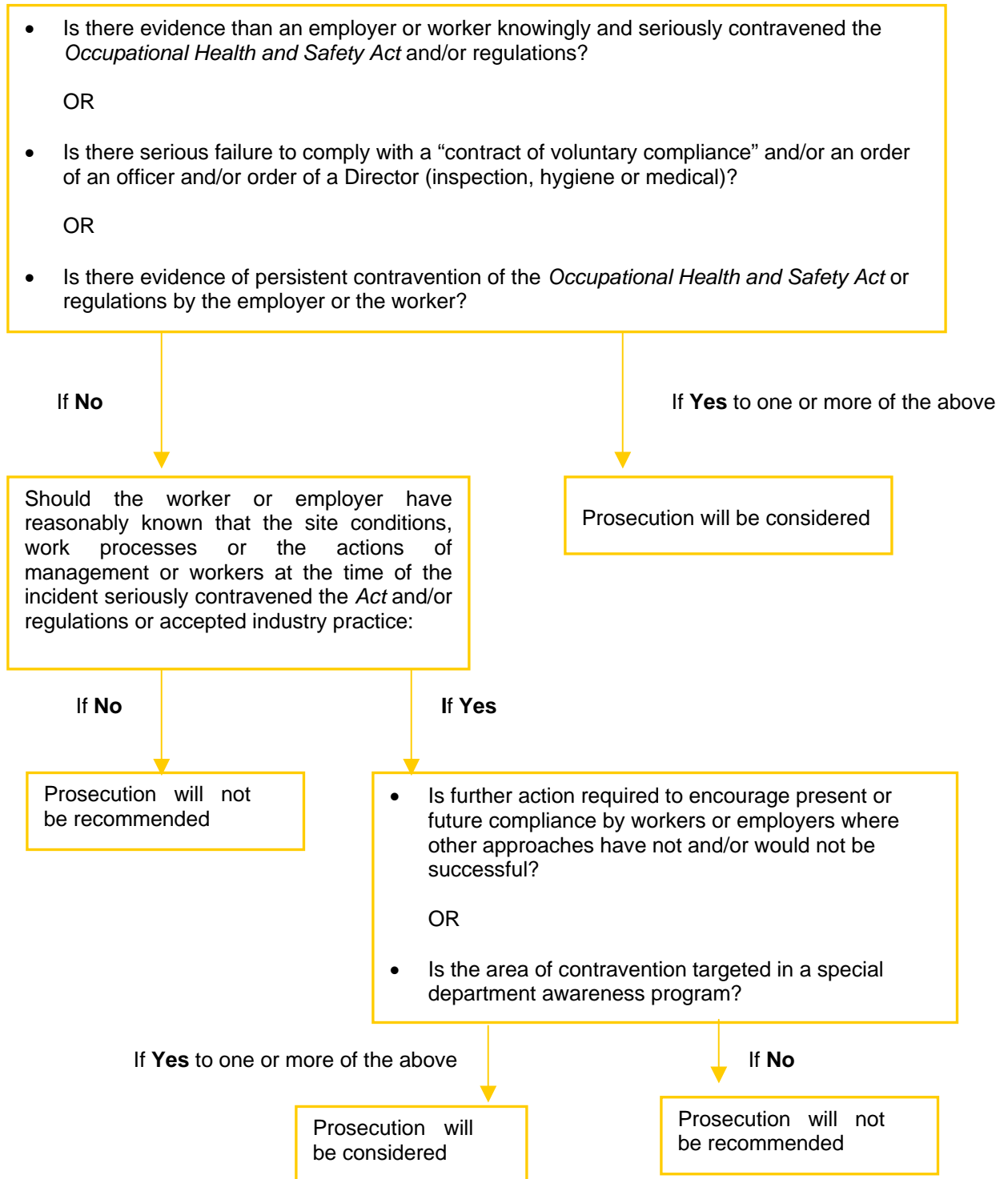


Figure 2 Health and Safety System

What are the components of a Health and Safety Management System?

The components vary depending on the nature and scope of individual businesses. To be effective, the following are considered to be essential:

- assessment of health and safety hazards at the work site
- control measures to eliminate or reduce risks from hazards
- clearly stated company policy and management commitment
- worker competency and training
- inspection program
- emergency response planning
- incident/incident investigation
- program administration

*Source: Alberta Human Resources and
Employment Partnerships Program*

The work you do to ensure the safety of workers needs to be documented. These records are needed so that you can evaluate your system to be sure it works. The records can also form the basis for a due diligence defense. To make a credible defense you need proof that you did everything reasonably practicable. Having regular audits of your health and safety management system by a third party auditor can help you identify gaps in your current program. It can also provide proof of your company's commitment to the health and safety of its workers.

Alberta Human Resources and Employment (AHRE) has developed its Partnerships Program to promote the use of health and safety management systems within Alberta workplaces. Companies work through Certifying Partners to establish a system and have it audited by an external auditor. Companies that pass the audit receive a Certificate of Recognition (COR) from a Certifying Partner that is co-signed by AHRE. In addition, the Workers' Compensation Board offers premium incentives to employers who reduce their claim costs below predicted targets and achieve a COR.

For more information on the Partnerships Program, call the AHRE Contact Centre at 1-866-415-8690 or visit the AHRE Web site at: www.whs.gov.ab.ca/partners

How does my workplace compare against the due diligence standard?

Once prosecution starts, the only way you can prove due diligence is to show that you did everything reasonably practicable to prevent the incident. The checklist shown in Figure 3 has been developed by the Canadian Centre for Occupational Health and Safety to give you an idea about your ability to make a successful due diligence defense. A negative answer to any of the questions points to a potential hole in your defense.

For more information



www.whs.gov.ab.ca/partners

Partnerships in Health and Safety Program



www.gov.ab.ca/hre/whs/prosecutions/pdf/compliance_policy.pdf

Workplace Health and Safety Compliance Policy



www.ccohs.ca/oshanswers/legisl/diligence.html

OH&S Legislation in Canada — Due Diligence


Figure 3 Due diligence checklist


| YES | NO | |
|-----|----|---|
| | | Do you know and understand your safety and health responsibilities? |
| | | Do you have definite procedures in place to identify and control hazards? |
| | | Have you integrated safety into all aspects of your work? |
| | | Do you set objectives for safety and health just as you do for quality, production, and sales? |
| | | Have you committed appropriate resources to safety and health? |
| | | Have you explained safety and health responsibilities to all employees and made sure that they understand them? |
| | | Have employees been trained to work safely and use proper protective equipment? |
| | | Is there a hazard reporting procedure in place that encourages employees to report all unsafe conditions and unsafe practices to their supervisors? |
| | | Are managers, supervisors, and workers held accountable for safety and health just as they are held accountable for quality? |
| | | Is safety a factor when acquiring new equipment or changing a process? |
| | | Do you keep records of your program activities and improvements? |
| | | Do you keep records of the training each employee receives? |
| | | Do your records show that you take disciplinary action when an employee violates safety procedures? |
| | | Do you review your OSH program at least once a year and make improvements as needed? |

Source: Canadian Centre for Occupational Health and Safety(CCOHS):
Occupational Health and Safety Legislation – Due Diligence.

Contact us:

Province-Wide Contact Centre

 Edmonton
(780) 415-8690

 Other locations
1-866-415-8690
(Toll Free)



Deaf or hearing impaired

- Edmonton (780) 427-9999
- Other locations 1-800-232-7215
(Toll Free)

Web Site



www.worksafely.org

Getting copies of OHS Act, Regulation & Code:

Queen's Printer



www.qp.gov.ab.ca



Edmonton (780) 427-4952
Calgary (403) 297-6251

Workplace Health and Safety



www.whs.gov.ab.ca/law

Call any Government of Alberta office toll-free
Dial 310-0000, then the area code and telephone number you want to reach

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