

Are Employers Liable for Workers' OHS Violations?



Scenario: A piece of machinery gets jammed. The worker operating the machine sticks his hand into the machine to clear the jam. His hand gets caught and the worker is seriously injured. Your company has rules requiring workers to turn off and lock out machines when clearing jams. In fact, there's a sign to that effect posted right *on* the machine. The worker knew the rules but deliberately disobeyed them.

So if the company is charged with a safety violation as a result of this incident, the fact that the worker deliberate flouted the rules should get the company off the hook.

Right?

Maybe, maybe not.

The Safety Liability Conundrum

Employer liability for safety violations in connection with incidents caused by workers is a complicated issue—and an emotionally sensitive one. When a company points the finger at a worker, it looks like it's dismissing its own responsibility and searching for a scapegoat. And if the worker being blamed also happens to be the victim, it makes the company look insensitive. By the same token, many safety incidents *are* the worker's fault. And the fact that an OHS violation was caused by the worker's actions (or omissions) *is* actually a defence employers can use if they're charged for the offence.

However, using workers' misconduct as a defence isn't as easy as some employers might believe. The defence is available only under certain strict conditions. This article will explain what an employer must prove to use a worker's misconduct to avoid liability for an OHS violation.

Defining Our Terms

The OHS laws of each province and territory impose safety-related duties on not only employers but also workers. A worker who deliberately disobeys a company safety policy or fails to meet his other duties under OHS laws runs the risk of prosecution and fines.

But this article isn't about *workers'* liability for an OHS offence; it's about an *employer's* liability for an OHS offence caused by a worker's safety violation.

What the Law Says

The OHS laws require employers to implement safe work policies and procedures to protect their workers. But what happens if the employer puts adequate safety policies in place and a worker still gets hurt or killed because he (or a co-worker) didn't obey the rules? Is the incident all the worker's fault? Or should the employer share some of the blame? Unfortunately, there's nothing in the OHS statutes or regulations that directly addresses this question.

The place to turn for guidance is to the case law. Borrowing from U.S. OSHA laws, courts and arbitrators allow employers to use something called the "unpreventable employee misconduct" defence to avoid liability for an OHS violation committed by a worker. To use the defence, employers must prove they did 4 things:

- Set workplace rules to prevent safety violations;
- Adequately informed workers of the rules;
- Diligently tried to discover violations; and
- Effectively enforced the rules upon discovering a violation.

Technically, Canada doesn't use the term "unpreventable employee misconduct" defence. But effectively, proving these 4 things enables employers to demonstrate that they showed due diligence to comply with the OHS law.

Let's take a closer look at what each of the four steps involves by examining actual cases.

Step #1: Establish Safety Rules & Policies

There must be written rules that are thorough and clearly expressed and thorough.

Example: A SK meat packing company worker decided to wear her engagement ring even though the company had a clear rule banning ensnaring jewelry while operating machines. Sure enough, her hand got caught in the belt and she lost two fingers. The court ruled that the plant wasn't responsible. The plant had taken all reasonable steps to ensure machine safety and the worker "was the author of her own misfortune" [*R. v. CIC Foods Inc.*, [2004] SKPC 77 (CanLII), July 14, 2004].

Step #2: Notify & Train Workers on the Rules

Having adequate safety policies, rules and procedures in place is worthless if workers don't know about or understand them. So ensure that the company communicates its safety protocols to workers through safety manuals, memos, tool talks, etc. The operative word is "communicate." Simply handing out some brochures, posting signs and even holding cursory safety meetings isn't enough. You must also make sure the company adequately trains workers on such policies so they understand exactly what they're required to do—and barred from doing.

Example: When a roller in a sawmill got stuck, a worker climbed onto a "dump table" to manually push a board through a machine. He fell into the machine and lost three fingers. The employer was charged with several OHS violations. The employer argued due diligence. But the Ontario court found the employer guilty on all counts. The worker had gotten training on generic workplace hazards but was only given "brief, cursory and incomplete" training on the use of the machine in question, the court noted [*R. v. Grant Forest Products Inc.*, [2002] O.J. No. 3374, July 26, 2002].

Step #3: Monitor Workers' Compliance with Policies

Employers can't simply assume that if they establish and communicate appropriate safety rules and policies, workers will follow them. They must monitor to ensure that workers are actually adhering to them. As the Ontario Ministry of Labour argued in one case, OHS law doesn't "rely on competent workers to take care of themselves, but exists to protect negligent, stupid or reckless workers from potential harm at the workplace" [*MOL v. Ontario Food Terminal Board (No. 2)*, [2006] ONCJ 433 (CanLII), Nov. 14, 2006].

Step #4: Effectively Enforce the Rules upon Discovering Violations

The fourth reasonable step is the most difficult: Disciplining workers who violate the company's safety rules. Tolerating safety violations destroys any hopes for a due diligence defence. If the company blames workers for violations after it has turned a blind eye to their past misconduct, it's no better than Louis from *Casablanca* who expressed "shock, shock to discover the existence of gambling at this establishment" when naturally he'd known about the gambling all along.

Example: An Ontario employer knew that workers were disobeying the rules to tie off their fall protection equipment but chose to look the other way. After tolerating this "culture of discretion," the employer couldn't blame the workers for the safety violations committed, the court ruled [*R. v. Moran Mining*, [2006] CanLII 19042 (ON S.C.), May 12, 2006].

Conclusion

Workers aren't robots. They're human beings and human beings make mistakes. Human beings also disobey rules that are meant for their own protection. Sometimes those mistakes and deliberate infractions result in OHS violations. The simple fact that a worker violated a safety rule—whether by mistake or deliberately—isn't enough to excuse an employer for liability for any resulting violations. The courts have made it clear that employers must anticipate that workers may break the rules and take steps to see that they don't. The failure to take such steps is enough to hold the employer liable.