

3 keys to avoid and manage workplace health and safety issues

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Even the safest and most successful business can experience a workplace accident. While the well-being of the worker is always of first concern, rarely is it the only concern. A workplace accident can hurt a business' reputation, brand and ofcourse, its pocketbook. The Ontario Workplace Safety and Insurance Board (WSIB) and Ministry of Labour also each have their own, overlapping and independent, interests in a workplace accident.

Against this daunting backdrop, here are some ways to manage the potential for costly liability.

1. Get educated – Know what you're up against

The most common occupational health and safety costs are associated with the following:

- **An order.** A Ministry of Labour inspector can issue a range of orders causing the workplace to stop working, either in whole or in part, and to incur costs associated with lost productivity and compliance. An order may include a stop-work order, an order that prevents certain equipment from being used, an order to correct an alleged safety hazard and an order that prevents workers from accessing certain parts of the workplace. Business as usual cannot resume until the inspector's order is complied with and the order is lifted.
- **A charge.** Even in the case of a routine inspection, an employer can be charged with an alleged violation of the Occupational Health and Safety Act and its associated regulations. Each charge carries a maximum penalty of \$500,000 for an employer and \$25,000 (or a 12-month jail term) for an owner, director and even a supervisor.
- **Settlement or trial.** A trial will almost always be a costly endeavour financially, emotionally and physically. Unlike in a civil trial between private parties, the defendant in an occupational health and safety trial has no opportunity to ask for reimbursement of costs in the event of a favourable finding. Even a settlement or sentencing agreement can be costly, particularly when the accident is considered serious. The appropriate sentence will depend on the size of the organization, scope of the organization's economic activity, actual and potential harm to the public, and deterrence. However, in the case of a first offence resulting in a critical injury, it is not unusual for the sentence to be more than \$50,000. A fatality can be well over \$100,000. The most common workers' compensation costs are associated with the following:
 - **A penalty for failing to meet all reporting requirements.** In the event of a workplace accident, a Form 7 must be filed within three days if the worker requires health care or is unable to earn full wages. If the worker requires modified duties but has not suffered a wage loss, the Form 7 must be filed within seven days. An employer that fails to file a Form 7 in a timely manner may face a maximum penalty of \$100,000.00, and

\$25,000 (or a 12-month jail term) for an owner or director. Similar to Occupational Health and Safety Act charges, this is a regulatory offence and the ultimate fine will vary depending on the specific circumstances.

- ***WSIB benefits such as loss of earnings, healthcare and an award for permanent impairment.*** When a worker is off of work due to an injury, the worker will generally receive 85 per cent of his or her take home salary to compensate the worker for loss of earnings during recovery. For example, if a worker took home \$1000 a week, he or she would receive \$850 a week in compensation.

The worker's healthcare costs are also paid for by the WSIB (not the provincial government through what is commonly referred to as OHIP). This can include the costs of an MRI, x-ray and physiotherapy.

Finally, the worker will be compensated if his or her injury causes a permanent disability or impairment. A permanent impairment award is calculated by determining what percentage of the worker's physical, functional or psychological abilities are permanently impaired. An award can range from a few hundred dollars to tens of thousands of dollars depending on the nature of the injury.

As the WSIB is an insurance fund, a payment made to the worker will be transferred to an employer's yearly cost statement. This system is similar to home or car insurance. If there is a claim, insurance costs are adjusted appropriately. In the case of a workplace accident where there is prolonged recovery and a permanent disability, it is not unusual for a WSIB claim to cost an employer tens of thousands of dollars. In addition, just like home or car insurance, a WSIB claim will continue to impact an employer's yearly cost statement and related experience rating for three to five years (depending on the experience rating program).

- ***A breach of the re-employment obligation.*** In many circumstances, an employer has an obligation to re-employ an injured worker for up to two years following a workplace injury. This obligation includes providing modified work that meets the worker's limitations (if required) and ultimately returning the worker to his or her pre-injury duties.

An employer must exercise extreme caution and seek legal advice if terminating or laying off a worker before the re-employment period is up. A breach of the re-employment obligation can lead to a monetary penalty equivalent to the worker's annual salary.

2. Get active – It's the employer's responsibility.

Employers are not helpless. The following are everyday practices that will help keep workers safe and at the same time protect an employer's bottom-line should an accident occur.

Training

A robust health and safety training program is an ongoing responsibility. Ensuring a worker has the requisite training certificates is important but not sufficient to demonstrate the worker is appropriately trained.

An employer must provide training specific to the hazards associated with the workplace, and must do so regardless whether the employer hires employees directly or through a subcontractor. In addition, the employer must ensure all workers undergo a comprehensive orientation program, including a review of the employer's occupational health and safety policy. Training sessions, toolbox talks and quick safety tune-ups should be frequent. Finally, employers should retrain all workers when there has been a safety violation or accident.

For example, in one case an electrician was injured when he failed to shut down the power breaker panel before starting work. The electrician admitted he had not followed proper safety procedures. Regardless, the employer was charged under the Occupational Health and Safety Act for failing to ensure the worker was appropriately trained. The employer argued the worker had a training certificate, experience and had been

trained on safety procedures during his apprenticeship. Nevertheless, the employer was found guilty because it did not take steps to provide ongoing safety training and ensure compliance with safety procedures.

Due diligence

Similar to traffic offence, a charge under the Occupational Health and Safety Act is a strict liability offence. This means once charged, innocence is not assumed — it must be proven. The most common type of defence is known as ‘due diligence’ — proof the employer took all reasonable precautions in the circumstances. However, within the scheme of occupational health and safety, there is an added twist. Because an Occupational Health and Safety Act charge is quasi-criminal, the defence of due diligence must be proven beyond a reasonable doubt. This is a very high standard.

For example, in one case a supervisor was charged with failing to take every precaution reasonable to ensure compliance with fall protection requirements. The court found while a supervisor was not expected to “stand around all day watching workers,” general, unplanned and coincidental surveillance of workers on his way to lunch was not sufficient for a successful due diligence defence. The supervision should be planned and deliberate.

Back to work

In the event of a workplace accident, getting a worker back to work is the quickest way to reduce liability. Once back to work, the worker is no longer entitled to receive loss of earning benefits from the WSIB. As well, studies have found once a worker returns to work the chances the injury will result in a long-term disability decrease substantially. And, of course, ending loss of earning benefits and avoiding a permanent impairment award will reduce the impact of a workplace accident on an employer’s cost statement and experience rating.

Should it be necessary to accommodate a worker upon return to work, the process must be a joint effort between the employer, worker and union (if applicable). The employer has the right, and obligation, to ask for information regarding the worker’s limitations, and the worker has the obligation to actively participate in the process. If the proposed accommodation meets the worker’s limitations, the worker must return to work.

Documentation

The best way to demonstrate training, due diligence and efforts to put the employee back to work is through documentation. This should include:

- An occupational health and safety policy reviewed and updated on a regular basis.
- Records of all orientation, training and toolbox talks. Keep binders on site or fax information to a central location to stay organized.
- Checklists of daily safety checks for workers and supervisors to use at the start of their shift. These will help make safety precautions routine, and can be useful evidence if needed.
- Records of regular maintenance and safety inspections for all tools and equipment.
- Records from the joint health and safety committee’s monthly inspections, and copies of the company’s own notes and checklists from regular workplace inspections.
- Records of every interaction with the Ministry of Labour.
- Records of the organization’s own investigation after a workplace accident.

Always record the good and the bad — it’s all relevant and can be used in the event of a WSIB appeal or occupational health and safety charge to demonstrate a strong health and safety culture. However, if you record a health and safety violation, be sure to also record all remedial steps taken, including improvements made and discipline issued.

3. Stay positive

Interactions with the WSIB and Ministry of Labour can be time-consuming, costly and stressful. However, if an organization has made a sincere and thoughtful effort to properly train its workers and prepare its workplace, it will have put itself in the best possible position to respond to an unfortunate accident.

So stay positive and keep focused. A safe workplace is in your hands.

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