

Global Themes in Workplace Safety and Health Law

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In May, I had the good fortune to attend an international mining law conference. One of the featured panels dealt with occupational health and safety law and the potential liability of mining companies and their officers, directors, managers, and employees. The panelists were from Canada, the US, Argentina, and France.



Notwithstanding the different jurisdictions and different legal systems (i.e., British common law as compared to French civil law traditions), the general trends, issues, and advice to clients was surprisingly consistent. This is a summary of some of the key themes.

Safety is everyone's legal responsibility:

Where there is the potential for workplace injury, responsibility rests with every level of the organization. The responsibility runs through the entire organization, from the line personnel, through supervisors, management, the CEO, and the Board of Directors. The way that the duty to maintain a safe workplace is discharged varies to some degree from level to level, but the personal liability and responsibility are the same.

There are many forms of legal consequence for noncompliance:

Another common theme is that potential liability for workplace safety offences can take several forms.

First, there is regulatory liability under the workplace safety and health legislation of the jurisdiction. This can result in regulatory safety orders, administrative penalties, fines, and, in some cases, imprisonment. With regulatory liability, the regulator is not usually required to prove anything other than the occurrence of the workplace incident and the violation of the applicable standard set out in law. Intent to commit the events is not a necessary ingredient. Defences are limited. In the US, for instance, these are considered to be "strict liability" offences, meaning that there are very few available defences. In Canada, strict liability offences may be successfully defended where the accused corporation or individual can establish that they exercised "due diligence". This is not an easy feat; it means showing that

you did everything reasonably possible to prevent the occurrence of the offence (in this case, the workplace incident).

Second, each jurisdiction had provision for some form of criminal liability. In each country, criminal responsibility could apply to all levels of an organization. Typically, criminal responsibility requires the prosecutor to prove some element of intent or recklessness. In Canada, what is referred to as the *Westray Law* created criminal responsibility for workplace safety incidents in response to the death of 26 miners in the 1992 Westray Mine disaster. Section 217.1 of the *Criminal Code* codifies a legal duty for those who oversee, direct, or supervise the work of others to take all reasonable steps to prevent bodily harm to the person performing the work, or to any other person. These provisions apply to organizations and their representatives.

Third, some jurisdictions impose civil liability. What we heard was that in Argentina, for instance, a corporation and its officers could have liability for damages suffered by workers or their families in the case of a workplace injury or fatality. In Canada, this civil liability has been largely displaced by workers' compensation regimes, which preclude court actions for damages in favour of a no-fault workplace injury compensation system.

Trends in enforcement:

There was also commonality among jurisdictions when it came to enforcement trends. One common theme was increasingly larger fines. In Canada, these can easily reach into the hundreds of thousands of dollars in the case of a serious incident. Another trend which is especially troubling to large organizations is legislation that provides for automatic increases in fines where there are repeat offences. What might otherwise be relatively minor infractions can result in very steep penalties the next time around. This is especially burdensome for inherently hazardous industries with large workforces, where the opportunity for and likelihood of workplace incidents is greater, despite the best systems and precautions. Keep in mind that most Canadian workplace safety legislation now includes a requirement to make the workplace safe from harassment, as well as potential physical harms. Where directors are subject to fines, corporate indemnification is generally prohibited, and regulatory fines and the defence of regulatory charges are often not included under directors and officers' liability insurance.

All panelists agreed that the cost of responding to workplace safety charges can be very significant. Because the corporation and the individuals (i.e., employees and officers) might be taking different positions, it is very often the case that each will be represented by separate legal counsel, typically paid for by the corporation. Both US and French counsel cited examples in which 15 different lawyers had to be hired to represent the different interests.

Creating a culture of compliance:

Saying that safety is everyone's responsibility is one thing, but the only way to avoid legal liability for workplace safety and health offences is to create and rigorously maintain a culture of compliance at all levels of the organization. Responsibilities and establishing due diligence will vary between the shop floor and the C suite.

The responsibility of officers and directors was expressed as the obligation to "check, and then check who checks the checkers". Can you say that the workers are compliant and competent, and can you say that those who ensure compliance are equally compliant and competent? How can you prove that if you are asked to do so?

What was emphasized was the flow of information both upwards and downwards in the organization, and how that information is recorded. As a corporate director, what questions did you ask? What answers did you receive? What did you do about it? Raising an issue is not the end of the story; due diligence requires that the issue is raised, something is done about it, and there is reporting as to what was done. Find the issues, assess solutions, assign responsibility, get reports, and follow-up on those reports. Document all the steps in case you must later prove that they were taken, and that appropriate results were obtained.

Common justifications that do not hold water:

There was also unanimity as to the defences to workplace safety charges that just do not cut it. It is not an "out" for a corporate director to say, "I do not even live in the jurisdiction.", or "There is another committee that looks after that.", or "That is outside of my expertise, I am a financial director." Everyone has an individual responsibility to ensure compliance, and when things go wrong, everyone must be able to show that they did everything necessary to ensure compliance.

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