

The Ontario Recreation Facilities Association Inc. (ORFA) regularly researches and writes about issues that could affect our members. These documents provide an opinion on key risk management issues but are not meant to provide any form of legal opinion or official interpretation. No one should act on such information without appropriate professional advice after a thorough examination of the particular situation. All rights reserved. ©2014 Ontario Recreation Facilities Association Inc.

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Introduction

The changing landscape for accountability and responsibility for breaches of legislation, Codes and Acts is seeing more frontline staff being held accountable for their action or lack of action while at work.

Fines for workplace breaches can range from \$250 to incarceration. Such personal legal events will significantly impact future employment opportunities.

The maximum penalties for a contravention of Occupational Health and Safety Act or its regulations are set out in Section 66 of the Act. A successful prosecution could, for each conviction, result in:

- A fine of up to \$25,000 for an individual person and/or up to 12 months imprisonment;
- A fine of up to \$500,000 for a corporation.

<http://www.labour.gov.on.ca/english/hs/faqs/ohsa.php#what4>

As of this date, the following examples are seen as standard for fines for breaches by Supervisory staff – fines are predicted to continue to grow. Courts are often clear that these are to be personal fines not to be paid by the employer while some employers may be permitted to support the employee but chose not to. There is no legal obligation for them to do so.

Supervisor Jailed, Company Fined \$50,000 after Worker Dies

<http://news.ontario.ca/mol/en/2013/11/supervisor-jailed-roofing-company-fined-50000-after-worker-dies.html>

Company and Supervisor Fined \$59,000 After Co-op Student Injured

<http://news.ontario.ca/mol/en/2013/04/crs-specialties-inc-and-supervisor-fined-59000-after-co-op-student-injured.html>

Appreciating that there may be a variety of circumstances that could impact the decision of an employer in whether or not to provide staff with legal counsel for breaches under law, there are however, some basic guiding principles that will normally be considered in each case.

This document should not be considered legal advice, but awareness to better understanding your current relationship with your employer when it comes to legal counsel support.

It is reasonable to assume that workers may be exposed to a variety of legal risks in the course of carrying out their job responsibilities. Employees are often shielded from many of these risks by the employer's insurance policy or through legislation. There may be other risks, however, that are not covered by insurance or addressed in legislation. Further, pressures being placed upon insurance providers may result in changes in insurance coverage. It would be diligent of all involved to seek out current policy to understand their employer's guidelines on such matters.

Vicarious Liability

The Tort doctrine that imposes responsibility upon one person for the failure of another, with whom the person has a special relationship (employer and employee, or owner of vehicle and driver), to exercise such care as a reasonably prudent person would use under similar circumstances.

Vicarious liability is a legal doctrine that assigns liability for an injury to a person who did not cause the injury but who has a particular legal relationship to the person who did act negligently. It is also referred to as imputed negligence. Legal relationships that can lead to imputed negligence include the relationship between the owner of a vehicle and driver, and employer and employee.

Relationship of Trust

Insurance is provided in a relationship of trust (some might say blind trust) between the carrier and the client. With this relationship it is expected that all who are covered under a policy will do what is reasonable on any given day and follow all policies and procedures set by the employer; including all legal duties and responsibilities. However, when a worker knowingly disregards policy and procedure, or fails to take corrective action, or acts in a manner that is unsafe and places others at risk, this action may result in personal legal accountability.

Moral Hazard

Moral hazard occurs when a person is willing to take a risk knowing that the potential costs or burdens of taking such risk will be borne in whole or in part by others. Such action often results in higher premiums being paid by those who were not involved in the breach of moral hazard.

Errors and Omissions Insurance Coverage

This coverage is designed to protect individuals or companies from bearing the full cost of defending against negligence claims and awarded damages in civil lawsuits. Criminal prosecutions are not immediately covered.

Civil Matters

Workers are most often protected by their employer's insurance coverage against claims alleging unintentional acts such as negligence. However, coverage is often not provided for alleging intentional wrongdoings such as defamation or, assault/battery. Where a civil action or proceeding is not covered by the employer's insurance policy, an employer may choose to review the matter and consider paying damages or costs awarded as well as legal costs incurred if the worker is acquitted.

Criminal Matters

Failing to meet obligations under policy or legislation (eg. Highway Traffic Act or the Occupational Health and Safety Act) that is the direct responsibility of the worker, may have an employer require a worker to first obtain and be responsible for his/her own defence including the retaining of legal counsel or a paralegal. If acquitted, some employers will allow the worker to seek reimbursement for legal expenses. Some Union's also provide support to their members on legal matters.

Indemnification Policy

Municipalities will have specific policy that is set out under by-law that describes what legal indemnifications of payments of costs or damages will be provided for employees while employed and acting under legitimate instruction or while attempting to perform their duties in good faith. Often payment amounts are capped at specific levels. This cap may vary based on position within the operation.

Worker Personal Workplace Insurance Coverage

Depending on the level of responsibility at work the discussing of additional insurance coverage with your personal insurance broker may be warranted.

Worker Vehicle Insurance Coverage

Some employers are now requiring workers who operate company vehicles to have and maintain personal vehicle insurance coverage to be permitted access to workplace vehicles. If the worker is deemed to be irresponsible (speeding, talking on a phone) that results in an accident the personal insurance coverage may be the first coverage used for damages.

Avoiding Legal Grief

A frontline worker can significantly reduce their legal exposure by merely working within set policy and procedure. It is most often workers who choose to interpret employers set obligations or disregard set directives that are at highest risk. **Maintaining up to date, detailed, accurate log books or operational records are always positive support in any legal matter.** Middle and senior management must remain legally aware and comply with their legislative obligations while ensuring those under their watch are conforming to set workplace and governmental obligations.

Worker Legal Counsel

Depending on the level of responsibility at work the researching of respected legal counsel who deal with workplace litigation and having this information on file may be proactive.

Conclusion

As litigation continues to drive our behavior and hold those who breach set obligations accountable, insurance carriers will continue to work with clients to reduce their exposure and control premiums. Employers will be forced to continually review policy and procedures on such support. These shifts may see more accountability on all workplace parties. It is important that all stakeholders remain in tune with the ever-shifting workplace landscape.

As Bob Dylan sang many years ago... *"Gather 'round people wherever you roam and admit that the waters around you have grown and accept it that soon you'll be drenched to the bone and if your time to you is worth savin' then you better start swimmin' or you'll sink like a stone... for the times they are a-changin'"*

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