A Managerial Guide For Understanding Occupational Health And Safety Legislation

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Abstract

This paper is a descriptive attempt to provide managerial understanding of occupational health and safety legislation. As such it takes a comparative approach dealing with statutes in Canada, USA, the EU, and Australia. The substantive content of this legislation is divided into eight areas with examples and commentary. The paper also argues that substantively there is a great deal of similarity across jurisdictions. Furthermore, the claim is made that knowledge of the legislative requirements is needed not only for effective managerial compliance strategies, but that the legislation does provide a set of best practices.

Keywords: Occupational health and safety, legislation, management

Introduction

Comprehensive occupational health and safety legislation was first passed in Canada, USA, the EU and Australia in the late 1970's and early 1980s. One could argue that for management, understanding this legislation is critical not only for creating a safe and productive work place but also for putting in place effective compliance structures.

Whereas understanding this legislation is critical for management, unpacking this legislation for its substantive content is not an easy task, even for someone trained in law.

Nonetheless the following is an attempt to achieve just this. Health and safety legislation has been divided into eight substantive areas with a brief commentary and examples.

OSH legislation-- Canada, United States, EU and Australia

Jurisdictional issues

Canada

In Canada the responsibility for occupational health and safety regulation is fragmented among ten provinces, three territories, and the

federal government sector. Although there is a common approach, each of these jurisdictions has separate statutes and compliance mechanisms.

The North American Free Trade Agreement (NAFTA) creates a common market and free trade zone for Canada, the United States and Mexico. Among the key labour principles of NAFTA is the prevention of occupational accidents. However NAFTA has had little impact on the regulatory approach to occupational health and safety. Within NAFTA a member country is only required to enforce its own existing legislation, and even this requirement is rarely enforced.

United States

In the United States it is the federal government that has jurisdiction for occupational health and safety through the Occupational Safety and Health Administration of the Department of Labour. OSHA administers the Occupational Health and Safety Act of 1970 directly, and indirectly.

In the latter instances Section 18 of the Act encourages individual States to develop and administer their own programs that are approved and monitored by OSHA and are deemed to be of similar quality to the federal program. Currently there are 22 States and jurisdictions that have their own operating plans in accordance with OSHA standards.

European Union

For Member States of the European Union the ultimate authority for occupational safety resides with the EU itself. Based on Art 137 of the EC Treaty a wide variety of Directives in occupational health and safety have been adopted.

Council Directive 89/391 of 12 June 1989 also known as the "Framework Directive" is the legal act that outlines the fundamental importance and general principles of health and safety at work. Subsequently numerous other Directives have been adopted that expand upon this outline. Directives provide the substantive content of the legislation that must in turn be transposed into law by each of the Member Countries.

Australia

South Australia in 1972 was the first jurisdiction to introduce comprehensive legislation governing occupational health and safety. Like Canada in Australia each jurisdiction whether it is state, territory, or federal government enacts and enforces its own legislation. However since the early 1990s there has been an attempt to standardize regulations with the establishment of the National Occupational Health and Safety Commission.

2. The content and structure of the legislation

Whereas there is some variation among national and international communities, the content of the legislation tends to include the following:

- who is covered
- the rights and obligations of employers and workers
- codes of practice such as accident investigation and consultative structures in the workplace
- the role and investigatory powers of the inspectorate
- offences and penalties for non-compliance
- regulations governing particular work processes and hazards

General purpose clause

Each jurisdiction has enacted a general purpose clause. What does this mean for management? First the general purpose clause states clearly the overall intent of the legislation-- management must take all steps reasonably possible given the circumstances to ensure a healthy and safe work place.

Furthermore the legislation cannot foresee all possible instances of workplace hazards. Given this the general purpose clause fills in such gaps and makes management responsible whether the hazard is specifically noted in the legislation or not.

Due diligence

In Canada and Australia the general purpose clause also constitutes "due diligence". It is the legal standard of occupational health and safety practice an employer must meet for acquittal if charges in health and safety have been laid. This is made explicit in both the Canadian and Australian legislation.

An example from Canada reads: "It shall be a defence for the accused to prove that every precaution reasonable in the circumstance was taken".

The due diligence test is a very difficult test to make—the standard has been set very high, and has been considered as elusive. In order to meet the due diligence test at the very least management has to have an exemplary occupational health and safety program in place. This would include the following: knowledge of legal obligations; a risk assessment with a hazard control program in place; written policies and procedures; training; supervisory monitoring; documentation; and evidence of employee discipline and corrective measures.

Obligations of the workplace parties

Aside from the general purpose clause, legislation in each jurisdiction provides for more specific obligations for the workplace parties. The

legislation makes explicit what are the expectations for management as is the case with the European Union (1989):

The employer shall:

- *evaluate all the risks to the safety and health of workers, inter alia in the choice of work equipment, the chemical substances or preparations used, and the fitting-out of workplaces*
- *implement measures which assure an improvement in the level of protection afforded to workers and are integrated into all the activities of the undertaking and/or establishment at all hierarchical levels*
- *take into consideration the worker's capabilities as regards health and safety when he entrusts tasks to workers;*

- *consult workers on the introduction of new technologies; designate workers to carry out activities related to the protection and prevention of occupational risks.*
- *take the necessary measures for first aid, fire-fighting, evacuation of workers and action required in the event of serious and imminent danger*
- *keep a list of occupational accidents and draw up and draw up, for the responsible authorities reports on occupational accidents suffered by his workers*
- *inform and consult workers and allow them to take part discussions on all questions relating to safety and health at work;*
- *ensure that each worker receives adequate safety and health training*

Whereas the ultimate responsibility for a health and safety program rests with management, workers also have obligations. In short, workers have the obligation to become familiar with the employer's health and safety program, adhere to it, and to cooperate with management in its implementation. Again to use the European Union as an example:

*The worker shall**:***

- *make correct use of machinery, apparatus, tools, dangerous substances, transport equipment, other means of production and personal protective equipment*
- *inform the employer of any work situation presenting a serious and immediate danger and of any shortcomings in the protection arrangements*
- *cooperate with the employer in fulfilling any requirements imposed for the protection of health and safety and in enabling him to ensure that the working environment and working conditions are safe and pose no risks.*

Regulations

In addition to statute what are commonly referred to as Regulations form a major component to occupational health and safety law. The term Regulation is used in Canada, the US, and Australia. In the EU the same function is carried out by additional Directives.

Regulations can be very useful for managing occupational health and safety and tend to be of three types as follows: best practices and requirements for specific sectors; guidelines for working with specific and very dangerous hazards or processes; finally, a regulation may further expand or limit the specific requirements of the legislation. As is the case with the actual defining statutes, failing to obey a Regulation could result in a workplace accident and/or additional costs as fines in cases of prosecution.

The right to know, the right to participate, the right to refuse unsafe work

These three fundamental worker rights define the Canadian model of health and safety known as the Internal Responsibility System (IRS) which was proposed by James Ham in his *Report of the Royal Commission on the Health and Safety of Workers in Mines* (1976). These rights are also found to varying degrees in American, EU, and Australian jurisdictions.

Table X - Examples of types of Regulations from various jurisdictions

Sector specific (United States) Safety and Health Regulations for Long shoring
Hazardous substance/work process (EU and Australia) Ionizing radiation Confined Space
Limiting/expanding/defining the legislation Safety and Health Committees and Representatives Regulation

Ham was influenced by the findings of Robens Commission (1972) in the UK, as was legislation in Australia and via the UK, the EU. The Robens' approach provides for a shared responsibility between management and labour safety aimed at minimalizing government scrutiny.

The right to know

With respect to workplace chemicals it is impossible to implement effective hazard control without knowing the specific toxicity and physical properties. In Canada such information is provided through WHMIS or the Workplace Hazardous Materials Information System.

Looking at requirements in other jurisdictions, the US Occupational Safety and Health Administration requires that MSDS be available to employees for potentially harmful substances handled in the workplace under the Hazard Communication Regulation. The European Union (EU) requires that Risk and Safety Statements (R- and S-phrases) and a symbol appear on each label and safety data sheet for hazardous chemicals. Finally, Australia has legislated a program very similar to the Canadian model.

Joint Health and Safety Committees (JHSCs) and the Right to Participate

Legislation in all jurisdictions in Canada and Australia provides for joint health and safety committees composed of equal representatives from management and from labour. The EU provides for extensive worker information and consultation mechanisms which often takes place through a joint labour management committee known as a works council. In the US worker participation is less well defined.

In Canada JHSCs are at the core of the internal responsibility system as it is thought that both management and labour should be internally responsible for health and safety than relying solely on the external guardianship of government inspectorates. At least in theory, such committees are to be co-operative mechanisms through which management and labour can resolve common workplace problems.

Whereas each jurisdiction outlines the specific duties of JHSCs in different ways, four key functions are common:

- the development and monitoring of a health and safety program
- workplace inspections
- dealing with complaints
- providing information and training

When effective JHSCs are in place, they can play an important role for management as a mechanism for engaging employees as a team and showing management commitment for a health and safety program.

The right to refuse unsafe work

In a fundamental sense, every worker in Canada, the US, the EU, and Australia can exercise a statutory right to refuse work when his or her health and safety is at stake. There are some differences among jurisdictions as to the type of danger that must be present and what kind of belief is required.

Legislation provides for the procedures governing the exercise of such rights, and for the resolving of disputes if there is a difference of opinion between the worker and management regarding the nature of the danger. In such cases, the worker cannot be asked to return to return to work if he or she believes such work is dangerous. If such a dispute is not

resolved internally, provisions provide for the investigation by a government inspector.

When the right to refuse legislation was being introduced in Canada, employers feared that this right would be abused and could affect production. However there is no evidence to date to suggest that this fear has materialized. To the contrary there is evidence to suggest that this right is underutilized in non-unionized sectors.

The role of the Inspectorate

Inspectors are public servants trained in occupational health and safety whose primary role is to enter the workplace and investigate an employer's compliance with occupational health and safety legislation and regulation. The inspector's right to enter a particular workplace and his/her investigative powers are well defined in the legislation of each jurisdiction.

Depending upon jurisdiction, an inspector may enter the workplace as part of: a random site visit; a selected site visit as a result of a poor accident record for a particular employer or sector; or, as a result of request by a concerned party.

In general upon entering a workplace, and finding issues of non-compliance, inspectors have two choices. In instances of serious threat to health and safety the inspector can close a particular work process down until the immediate threat is eliminated. In more minor instances of non-compliance and inspector may issue a compliance order requiring changes to be made within a specified time frame. There are also provisions for appealing an inspector's order.

It is recommended that an employer co-operate with the inspectorate by providing ready access to the workplace and the opportunity to interview workers should it be necessary. In advance of an inspector's visit, it is in the interest of management to have a wide range of documentation available in advance that includes:

- the health and safety policy of the workplace
- the health and safety committee minutes
- first aid records
- accident reports
- training materials
- test results for noise and toxic substances
- MSDSs for the chemicals used in the workplace.

Objective evidence with concrete and updated documentation is what is needed.

Given jurisdictional fragmentation, and definitional differences, it is difficult to provide comparative data on the extent of the inspectorate in the

countries under investigation. O'Grady(1999) provides Canadian data that shows a positive correlation between more inspections and fewer workplace accidents. He argues that law and regulation are an essential component in accident prevention, but are not the whole story.

Concluding Comments

Legislative compliance remains a critical component of occupational health and safety management. This descriptive study attempts to unpack eight substantive areas within occupational health and safety legislation.

One can readily argue that the legislation is not just about following rules, but does contain some best practices—particularly with regard to worker rights and regulations.

The law however can only go so far. Without overall management commitment to health and safety, compliance will only go so far. Effective health and safety management must adhere not only to the letter of the law, but also to the spirit of the law.

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It is up to management to have the proof ready for an inspector to show that it is in compliance. Clear and up to date objective evidence is required. Anecdotal evidence is unlikely to meet the test.