Who’s Liable for Safety Violations at Sites with More than One Employer?



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There are hazards at every workplace. The OHS laws impose duties on persons in the position to control those hazards including the owner of the site, the contractors who work there and the workers themselves. But primary responsibility for health and safety at the site falls on the employer. Carrying out the employer’s many responsibilities under the OHS laws is simple enough when all the workers on a site work for the same employer. But some workplaces contain a mix of workers who work for different employers.

Typically, the mix includes the employer that owns the workplace and one or more contractors hired by the employer to do specialized work, such as installing or servicing machinery. Even though it will be done at the employer’s workplace, the contractor may control the work. So who’s legally responsible for ensuring that the work is done safely and in accordance with OHS requirements—the contractor or the employer? This complicated question turns on not one but three sets of factors:

- The province where the work is being done;
- The kind of work involved; and
- Whether liability is based on OHS or criminal law.

This article will explain what safety coordinators need to know about the law of multi-employer site liability so they can evaluate their company’s liability risks when using contractors. In Part 2, we’ll explain how to manage those risks.

What the OHS Laws Say

To figure out who’s responsible for health and safety at a workplace that includes multiple employers, you need to look at the OHS laws of the province or territory where the work is done. The rules are different in each place. But as a general matter, the OHS laws all start at the same point: Responsibility for the health and safety of the employer’s and contractor’s workers falls ultimately to the employer that owns the workplace (which, for the sake of simplicity, we’ll refer to throughout as the “employer”).

Where does this liability come from?

Wyssen & the Definition of “Employer”

The OHS laws require “employers” to take measures to safeguard the health and safety of the people who work for them. In many provinces, the definition of “employer” goes beyond just workers on your payroll; it includes other individuals that work for you, such as the workers of the contractors you hire.

The concept of extending the liability of an employer to cover the workers of a contractor on the site comes from a 1992 court case called R. v. Wyssen. In that case, an Ontario court ruled that a window cleaning company was responsible for a subcontract worker’s fatal fall from an improperly secured boatswain’s chair, even though the subcontractor possessed expertise on window cleaning and supervised the work.

The Wyssen doctrine applies in other provinces, including BC and AB (assuming there’s no prime contractor arrangement, which we’ll explain later) and SK. Example: A SK mining company hires a contractor to repair a vat containing a potash/water mixture heated to 90 degrees C. Three of the contractor’s workers fall through a section of the vat cover. Two of them are killed; the third suffers severe burns. The company had warned its own workers of the danger but not the contractor’s workers. As a result, the company was fined $300,000 [R. v. Potash Corporation of Saskatchewan].

Other provinces impose the same obligation but in a slightly different way. Instead of using an extended concept of “employer,” they say that the owner must protect anybody at their workplace against hazards-not just the workers on their payroll. For example:

- Federal law requires employers to take specific safety measures to protect “every person granted access to the work place” (Canada Labour Code, Sec. 125(l), (w), (x) and (z.14));
- NL requires employers to conduct their business “so that persons not in their employ are not exposed to health and safety hazards” (OHS Act, Sec.5(d)); and
- NT and NU require employers to maintain their “establishment so as not to endanger the health and safety of any person in the establishment” (OHS Act, Sec. 4(1)(a)).

Delegating Liability to Contractors

Remember, the rule making the employer who owns the site liable for safety when there are multiple employers on the site is just the starting point. It’s the default rule that applies unless the employer who owns the site specifically and expressly delegates responsibility for safety and risk of OHS liability to the contractor.

Delegation makes sense when the contractor is more qualified to control the work and manage the risks. The contractor’s qualifications are often the very reason the employer decided to use the contractor in the first place.

But delegating responsibility for safety to the contractor raises major legal issues. The first thing the employer must do is make sure it’s even legal to make such an arrangement. The good news: Every province allows employers to delegate responsibility for safety if the work involves construction. The bad news: If the contract doesn’t involve construction, the employer might be out of luck. More bad news: Even an employer that is allowed to enter into such an arrangement might not get as much protection from liability as it thinks.

The 3 Kinds of Delegation Rules

The OHS laws define how much leeway the employer has to delegate safety-related responsibilities to a contractor. Although the rules differ from province to

province, there are three general approaches:

The 3 Non-Construction-Specific Provinces: Let's start with the easiest one to understand. Three provinces-AB, BC and NB-give employers the right to delegate responsibility to the contractor. More precisely, employers may designate a contractor as the "prime contractor" (in AB and BC) or "contracting employer" (in NB) responsible for controlling the work and ensuring compliance with the OHS laws. These arrangements can be made for construction and other kinds of work. If the contract doesn't designate a contractor as "prime contractor," then Wyssen applies and the employer remains on the hook.

Caveat: Making a prime contractor arrangement doesn't completely absolve an employer of all safety responsibilities. For example, you're still obligated to provide hazard information under WHMIS laws. And, as we'll see below, you can't contract away your criminal liability risks under C-45 to the prime contractor.

The 5 Construction-Only Provinces: Five provinces-MB, NS, PE, QC and YT-allow employers to appoint a "prime contractor" (in MB), "principal contractor" (in QC) or "constructor" (in NS, PE and YT) to control the work and assume responsibility for compliance with OHS laws. The catch: They can do this only for "construction" projects. Consequently, legal authority to delegate depends on whether the work falls within the legal definition of "construction." The definition of "construction" varies from province to province. But in all cases, if the work isn't considered construction, you're back to Wyssen and the employer who owns the site remains liable for safety.

The 6 Hybrid Provinces: In five provinces and territories-NL, NT, NU, ON and SK—and the federal jurisdiction, liability is shared by both the employer and the contractor. **Explanation:** Employers may designate the contractor as "principal contractor" (in NL, NT and NU), "contractor"(in SK, federal) with control over the work and responsibility for compliance with the OHS laws. In ON, employers can make a "constructor" responsible for safety at a construction project. The kicker: The employer still has certain safety-related obligations and can't contract out of them. The employer, in other words, is stuck with these residual duties no matter what the contract says.

Example: As noted above, Section 125 of the Canada Labour Code requires employers to take steps to protect "every person granted access to the work place" including workers of contractors. Such steps include:

- Providing them prescribed safety materials, equipment, devices and clothing (Sec. 125(l)); and
- Informing them of "every known or foreseeable" hazard to which they might be exposed (Sec. 125(z.14)).

Even if the contractor controls the work and assumes responsibility for compliance, the employer remains subject to these duties. Needless to say, this system of concurrent responsibility raises all kinds of confusing and frustrating practical problems.

Example: In Ontario, employers may assign primary responsibility for OHS compliance to "constructors" of construction projects. However, "project owners," that is, owners of a workplace where "construction" is taking place, must furnish the constructor a list of all hazardous substances at the site (OHS Act, Sec. 30).

Contractors & Criminal Liability under C-45

So far, we've only talked about responsibility for compliance with the OHS laws. But there's another important issue that arises when an employer hires a contractor to perform work at its workplace: If criminal negligence is committed in connection with the work, which party would be liable under Bill C-45?

What C-45 Says

C-45 adds a new section to the Criminal Code (Section 217.1) requiring "everyone who undertakes, or has the authority, to direct how another person does work " to "take reasonable steps" to protect the person doing the work or another person against death or bodily injury arising out of the work.

Section 219(1)(b) of the Criminal Code says that persons are guilty of criminal negligence if they do anything the law forbids or omit to do anything the law requires and the act or omission shows "wanton or reckless disregard" for life and safety. So, failing to take reasonable steps to protect under Section 217.1 could be criminal negligence under Section 219(1)(b) if it's based on "wanton or reckless disregard."

Impact on Contracting

C-45 covers two kinds of "person": An individual and a company. A company can be liable if one of its "representatives" commits criminal negligence. A company's representative includes not only its officers, directors and employees but also its outside agents and contractors.

Result: If a contractor commits criminal negligence, the company that hired it can be held liable.

Contracting Out of Liability under C-45

How can companies manage this risk? The obvious answer is to delegate responsibility for complying with C-45 to the prime contractor. This option would seem especially attractive in AB, BC and NB where employers can make prime contractor arrangements for construction and non-construction work. It would also seemingly work in "construction-only" provinces for construction projects.

But guess what? You can't delegate responsibility to comply with C-45 to a primary contractor no matter what province you're in or what the work involves. Criminal laws aren't the same as OHS obligations. You can't contract out of them.

Conclusion

All employers that use contractors to perform work at their sites have some degree of liability exposure. So, as a safety coordinator, it's essential that you figure out ways to manage these risks. In Part 2, we'll show you how.

Multi-Employer Site Rules

ALBERTA: a. There must be a prime contractor responsible for safety and OHS compliance at all sites with 2 or more employers; b. Unless contract specifies otherwise, owner of worksite is prime contractor; and c. Prime contractor can meet responsibility by doing "everything reasonably practicable" to establish and maintain a compliance system or process (OHS Act, Sec. 3).

BRITISH COLUMBIA: a. There must be a prime contractor responsible for safety and OHS compliance at all sites with 2 or more employers; b. Unless contract specifies otherwise, owner of worksite is prime contractor; c. Other employers must give prime

contractor the name of a designated supervisor for that employer's workers; and d. Prime contractor must: i. ensure coordination of health and safety; and ii. do "everything practicable" to establish and maintain a compliance system or process (Workers Comp. Act, Sec. 118).

MANITOBA: a. There must be a prime contractor for construction projects with more than one employer; b. Unless contract specifies otherwise, owner of worksite is prime contractor; and c. Prime contractor must: i. ensure insofar as "reasonably practicable" compliance by all persons at site; ii. coordinate, organize and oversee performance of work at site; and iii. cooperate with any other person exercising an OHS duty (Workplace Health & Safety Act, Sec. 7).

NEW BRUNSWICK: a. There must be a contracting employer to direct activities of site with one or more employers; and b. Contracting employer must ensure that work complies with all applicable OHS requirements (OHS Act, Sec. 10).

NEWFOUNDLAND/LABRADOR: a. Principal contractor primarily responsible for carrying out the project and "includes" the site owner; and b. Principal contractor must ensure where "reasonably practicable" that all persons working at site comply with OHS requirements (OHS Act, Secs. 2(j) & 10).

NORTHWEST TERRITORIES/NUNAVUT: If two or more employers "have charge" of an establishment, the principal contractor or, if there is none, the owner of the establishment must coordinate activities to ensure health and safety of persons in the establishment (Safety Act, Sec. 4(2)).

NOVA SCOTIA: a. If there's more than one employer at the site with overlapping OHS duties, primary responsibility falls on the employer with "the greatest degree of control over the matters subject to the duty"; b. If the person with the greatest degree of control doesn't comply, other persons still must; and c. At construction sites, the owner of the worksite is presumed to be the person with greatest control (OHS Act Sec. 23; Occupational Safety General Regs., Sec. 4).

ONTARIO: a. At construction sites, the constructor is in charge of safety, ensuring compliance with OHS laws and filing a notice of project with the MOL; b. The constructor can be the owner of the site or a contractor hired by the owner; and c. Regardless of whether it's the constructor, the owner of the site must prepare a list of hazardous substances at the site (OHS Act, Secs. 1, 23 & 30).

PRINCE EDWARD ISLAND: a. At construction sites, the constructor is in charge of safety, compliance, coordination and communication; and b. Constructor can be either the owner of the site or a contractor (OHS Act, Secs. 1(d) & 13).

QUEBEC: a. At construction sites, the principal contractor is responsible for the carrying out of all work; and b. Principal contractor can be either the owner of the site or a contractor; and c. Principal contractor must notify CSST of opening of construction site (OHS Act, Sec. 1; Safety Code for Const. Ind., Sec. 2.4).

SASKATCHEWAN: a. Contractors must ensure insofar as "reasonably practicable" that place of employment and work processes are safe and compliant if the employer doesn't have "direct and complete control"; b. OHS laws impose overlapping duties on employers and contractors; c. If more than one person has a duty, it is "imposed primarily" on person "with greatest degree of control" over matters duty addresses; and d. Even so, person with lesser degree of control must still comply (OHS Act., Sec. 6; OHS Regs., Sec. 5(5) to 5(7)).

YUKON: a. At construction sites with more than one employer, the principal contractor

is in charge of safety; and b. If there’s no principal contractor, the owner of the site is in charge (OHS Act, Sec.5).

LAWSCAPE: Assigning Responsibility for OHS Compliance to Contractors
AB: Red
BC: Red
MB: Pink
NB: Red
NL: White
NW: White
NU: White
NS: Pink
ON: Pink
PEI: Pink
QC: Pink
SK: White
YT: Pink

Red Square: Employer may assign control of the work and responsibility for compliance to a prime contractor
Pink Square: Employers may assign control and compliance responsibility to prime contractor but only for construction work
White Square: Employers may use prime contractor arrangements but remain responsible for complying with certain OHS duties

NOTES

- Federal law allows for prime contractor arrangements but still makes employers responsible for meeting certain safety obligations
- ON law requires “project owners” of sites where construction is being done to furnish the constructor a list of hazardous substances at the site
- If the contract doesn’t specify otherwise, the employer that owns the workplace is primarily responsible for complying with the OHS laws
- It’s never legal to assign responsibility for complying with C-45 or other criminal laws to a prime contractor.