

**EDITORIAL**

The Public Health Agency of Canada confirmed, effective May 25, 2009, a total of 921 laboratory confirmed cases of H1N1 flu virus had been reported in nine provinces and one territory in Canada. One death has been reported in Alberta, and one possible death caused by the H1N1 virus has been identified in Ontario. This edition of OHS Law Report provides an overview of the issue, how employers may respond and Gowlings' availability to assist employers in developing appropriate H1N1 risk.

We live in a very interconnected world. The H1N1 virus not only reinforces that fact, but also reaffirms the importance that employers have not only in protecting the health and safety of their workers, but also their families, friends and society generally. Gowlings strongly encourages all of our readers to take the H1N1 virus seriously and read Cathy Chandler's article on how to reduce workplace risk. Feel free to contact Cathy or myself if you wish any assistance in preparing your H1N1 policy, training program and follow up measures to ensure the health and safety of your workers and their families.

Norm Keith, B.A., LL.B., CRSP
Partner, Gowlings

Pandemic Readiness: Is Your Business Prepared for Pandemic Influenza?

BY: CATHY CHANDLER, B.A. SC., CRSP, CHSC, OHS CONSULTANT

Responding to the growing fear of an H1N1 flu pandemic, governments, health care authorities and businesses need to develop a pandemic preparedness plan. The current outbreak of influenza A (H1N1) is testing pandemic preparedness strategies at the national, provincial and local level.

Businesses play a key role in protecting employee's health and safety as well as limiting the negative impact of a pandemic to the economy and society. This article will discuss the key steps employers can take to ensure they continue to meet their paramount OHS duty — "to take every precaution reasonable in the circumstances for the protection of a worker."

Consider the following when planning for pandemic influenza:

Plan for the impact of a pandemic on your business

- Identify a pandemic coordinator and/or team with defined roles and responsibilities for preparedness and response planning.
- Identify essential employees and other critical inputs (e.g. raw materials, suppliers, products) required to maintain business

operations by location and function during a pandemic.

- Train and prepare ancillary work force (e.g. contractors, employees in other job titles/descriptions, retirees).
- Establish an emergency communications plan and review and revise as necessary.
- Implement an exercise/drill to test your plan and revise periodically.

Plan for the impact of a pandemic on your employees and clients

- Implement guidelines to modify the frequency and type of face to face contact (e.g. hand shaking, seating in meetings, office layout) among employees and between employees and clients.
- Encourage and track annual influenza vaccination for employees.
- Forecast and allow for employee absences during a pandemic due to factors such as personal illness, family member illness, public transportation closures, school and/or business closures.

Establish policies to be implemented during a pandemic

- Establish policies for employees who
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have been exposed to pandemic influenza, are suspected to be ill, or become ill at the workplace.

- Establish policies for preventing influenza spread at the workplace (e.g. hand washing protocols, promoting respiratory hygiene, cough etiquette).
- Establish policies for flexible work hours (e.g. staggered shifts).

Allocate resources to protect your employees and customers during a pandemic

- Provide sufficient and accessible infection control supplies (e.g. hand hygiene products) in all business locations.

Communicate to and educate your employees

- Provide training to employees on your pandemic preparedness and response plan.
- Develop platforms (e.g. hot lines, dedicated web sites) for communicating pandemic status and actions to employees, vendors, suppliers, and clients.
- Ensure that communications are culturally and linguistically appropriate.
- Develop and disseminate programs and materials covering pandemic fundamentals (e.g. signs and symptoms of influenza, modes of transmission).

Coordinate with external organizations and help your community

- Share best practices with other businesses in your communities to improve community response efforts.
- Collaborate with local and/or provincial public health agencies and/or emergency responders about the assets and/or services your business could contribute to the community.

For more information on how your organization can develop, implement and maintain an effective and sustainable pandemic plan contact Cathy Chandler at cathy.chandler@gowlings.com.

Are You Ready For a Visit From an Alberta OHS Officer?

BY: CHRIS SABAT, LL.B., ASSOCIATE

Fines under Alberta's *Occupational Health and Safety Act (OHS Act)* hit an unprecedented high in 2008. The Upstream Oil and Gas (UOG) industry was one of the industries targeted. Moreover, a recent court decision against a well services company may have eased the task of the Crown in securing convictions in cases where a worker has been injured.

According to Alberta Workplace Health and Safety (WHS), the provincial ministry responsible for enforcing Alberta's *OHS Act*, 2008 was the third consecutive year that record penalties have been imposed.

In 2007 there were only 12 completed prosecutions under the *OHS Act*, with fines totalling \$1,720,000. In 2008 this number almost doubled to 22 completed prosecutions. But the more formidable statistic is the amount of total fines levied in 2008 - a whopping \$5,073,000 - an increase of 294% from the previous year. Also worth noting is the increase in the average fine per completed prosecution, which went from \$143,000 in 2007 to \$230,590 in 2008.

These numbers are a product of several factors. First of all, there have been more OHS officers enforcing Alberta's OHS laws and more crown prosecutors handling OHS files. Further, "creative

sentencing" provisions under the *OHS Act* allow judges to direct portions of fines to organizations that will improve health and safety standards for Albertans. Judges have been taking advantage of this opportunity. In 2008, 88% of all fines went to organizations like STARS (air ambulance service), Red Deer College, Northern Alberta Institute of Technology, and the University of Alberta. Perhaps most importantly, Alberta's work-related fatality rate has not seen a significant improvement since 2003. This has garnered a great deal of public concern and media attention, especially in both of Alberta's major newspapers, the *Calgary Herald* and the *Edmonton Journal*. As a result, WHS may be feeling increased pressure to ensure that employers are deterred from unsafe practices. Whatever the reasons, the latest prosecution statistics are eye-opening to say the least.

There is no end in sight to this trend. WHS' Targeted Employer Program, which has been in place and has been successful since 2002, will be continuing in 2009. This program identifies employers who have injury frequency and severity rates higher than the provincial average and subjects them to a certain number of proactive inspections by an OHS officer within a 12-month period. Orders are the likely result of these inspections if any contraventions of Alberta's OHS laws are identified. In 2007/2008 the Targeted Employer Program resulted in more than 5,000 inspections and the issuance of more than 3,000 orders. Of these, 1,357 inspections and 644 orders related to employers in the UOG industry. The UOG industry continues to be targeted in 2009.

Because the UOG industry is being closely monitored by WHS, it is more important than ever for employers in this sector to ensure that supervisors

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and workers, who will likely have contact with an OHS Officer, are properly equipped to handle an inspection or an investigation. It is these supervisors and workers who may unnecessarily incriminate their employers, or the contractors and prime contractors that have hired them. Providing this training is a new focus of Gowlings OHS Practice Group in Calgary.

Not only has the likelihood of a visit by an OHS Officer increased, along with the likelihood of orders being issued as a result of these visits, but a recent Court of Queen's Bench decision may have increased the ease with which WHS is able to obtain convictions under the "general duty clause" of the *OHS/A*. The general duty clause requires employers "to ensure, as far as it is reasonably practicable to do so, the health and safety of workers".

Prosecutions under the *OHS/A* commonly include allegations of a "specific" nature, such as the failure to provide fall protection equipment, along with an allegation that the general duty clause has been contravened. This can lead to suspicions that the general duty is being used as a "catch all" or as insurance, in case the Crown is unable to prove the "specific" offences beyond a reasonable doubt, or if the employer is able to establish due diligence in relation to the specific offences.

The general duty clause was considered in the decision of *R. v. Rose's Well Services Ltd.*, issued in January 2009. In *Rose*, the defence argued that, based on the wording of the general duty clause, the Crown must establish the failure to take all reasonable steps, a standard equivalent to negligence. Generally, this would involve specific allegations by the Crown as to the manner in which the defendant's OHS Management System was inadequate. The Crown would then be obligated to establish this inadequacy beyond a reasonable doubt. The Crown argued that the accident itself established the offence, requiring the onus of proof to shift to the defendant to establish due diligence. The Court of Queen's Bench endorsed the notion that "the Crown may stop at the facts of the incident" as proof of the offence.

Rose represents the first appellate decision to endorse the notion that the accident itself establishes an offence under the general duty clause and that the Crown must establish no specific failure or act on the part of the employer to ensure, as far as it was reasonable and practicable to do so, the health and safety of a worker. This may result in more difficult and time-consuming defences to these charges and increase the expense and uncertainty for employers.

All of this recent OHS activity in Alberta raises a very important question

that all employers should be asking themselves: "Are we in compliance with Alberta's OHS laws?"

Complying with Alberta's OHS laws minimizes the risk of having work-related incidents, which significantly decreases the likelihood of being targeted by WHS. This further decreases the likelihood that orders will be issued or a prosecution will be commenced. It has become more important than ever to invest in OHS proactively, in order to prevent the human, economic and legal costs associated with work-related incidents, rather than deal with the uncertainty of a prosecution and the skyrocketing fines under Alberta's *OHS/A*. The Gowlings OHS Practice Group in Calgary is committed to assisting clients in this endeavour.

Morneau Sobeco Report Recommends Changes to Experience Rating System

BY: STEPHEN C. ROBERTS,
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In 2008, the Workplace Safety and Insurance Board (WSIB) retained the services of consulting firm Morneau

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Editor, Occupational Safety

Sobeco to review the WSIB's experience rating programs. On February 27, 2009 these recommendations were released by the WSIB's Board of Directors. The recommendations have some very serious implications and costs for employers.

In its report, Morneau Sobeco makes the following short-term recommendations:

1. Employers should be required to make mandatory disclosure of workplace practices, including an annual declaration of compliance to be made by senior executives of registered employers. Refunds would only be paid if compliance is confirmed.
2. OHS convictions should result in an audit by the Validation Unit, with corrective action required. Employers eligible for refunds may then be required to use a portion or all of the refund to finance the costs of corrective actions, while employers in surcharge positions may face increased penalties.
3. Amendments to the Second Injury Enhancement Fund policy to eliminate cost relief where there is a pre-existing condition but no pre-existing disability, and limiting cost relief in all cases to 50%. Additionally, cost relief from SIEF would no longer be available for a pre-existing disability resulting from an injury with the same employer.
4. The practice of advancing wages to injured workers who are participating in graduated return to work programs (to avoid triggering loss of earnings benefits and reduce experience rating costs) should be limited only to situations when the worker is attending a medical appointment.
5. Reduce the weight applied to the frequency component in the CAD-7 formula below the current level of 33%.

6. Implement a time limit for adjustments to the experience rating after the window has closed. Morneau Sobeco also made a long term recommendation that the Board should consider increasing the length of the experience rating window. This would have a devastating effect on employers as the costs of claims would then stay with employers beyond the current three year period for a longer period.

Undoubtedly, the most significant of the short term recommendations is the reduction of SIEF, both in terms of eligibility and quantum. If these recommendations are implemented the ability of employers to be eligible for cost relief from SIEF will be substantially reduced.

From our substantial experience in pursuing cost relief on behalf of employers many claims involve workers with asymptomatic conditions and involve obtaining cost relief in amounts greater than 50%. Therefore employers should be mindful of these recommendations and should be taking immediate action to pursue cost relief in all of their claims where warranted before the WSIB implements these recommendations.

These recommendations if implemented will have the effect of making it more expensive to conduct business in Ontario. This is definitely not needed at this time given the current state of the economy. However, on a positive note, this report did not recommend the complete elimination of the current experience rating program (which was being requested by the labour movement) unless it could be replaced by a more effective program.

The Honorable Steven W. Mahoney, WSIB Chair, has invited stakeholders across Ontario, to provide feedback on Morneau Sobeco's recommendations during a wide reaching consultation process he is currently conducting. This consultation will allow for open discus-

sion on all WSIB programs and services and is not just related to the experience rating programs. We would encourage employers to participate in this process and vocalize their concerns.

Ontario Government Introduces Legislation Mandating Employer Action for the Prevention and Management of Workplace Violence

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ASSOCIATE

On April 20, 2009, the Minister of Labour for Ontario introduced Bill 168, An Act to amend the *Occupational Health and Safety Act* with respect to violence and harassment in the workplace. The Bill passed first reading and is expected to receive Royal Assent later this year. When the Bill becomes law, all employers operating in Ontario will be responsible for the prevention of violence and harassment in the workplace, as similar amendments to the Occupational Health and Safety Regulations under Part II of the *Canada Labour Code* came into effect in May 2008.

The proposed amendments under Bill 168 explicitly set out a positive duty for every employer to take specific steps to proactively prevent and manage workplace harassment and violence. The internal responsibility system and supervisor and worker duties will continue to apply, as appropriate, to workplace violence. Here is a brief overview of the key requirements.

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Definitions

The Bill defines workplace violence and harassment, as follows:

“workplace harassment” means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome

“workplace violence” means, (a) the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker, (b) an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker

In comparison to some other jurisdictions, Ontario has proposed fairly expansive definitions of workplace violence and harassment that include both the exercise and attempt to

exercise physical force against another persona as well as unwelcome comment or conduct. However, unlike the Federal legislation, proposed definition of violence does not include threats of violence.

Policy and Program

The proposed amendments require every employer that regularly employs more than five workers to develop and post a policy addressing workplace violence and harassment. The employer must also develop a program to implement that policy. The program must include measures to control risk of workplace violence and harassment, emergency response procedures, reporting procedures to be followed by workers, and procedures for the investigation of incidents and worker complaints.

Under the Bill, an inspector may order an employer with five or less regularly employed workers to also develop a pol-

icy and program respecting workplace violence and harassment.

Assessment of Risk

Once all contributing factors are identified, the employer is obligated to assess the potential for violence at its workplace and implement appropriate controls to prevent and manage the risk for violence. The risk assessment must consider conditions of work at the employer’s own workplace and those common to similar workplaces. The employer must share the results of the risk assessment with the Joint Health and Safety Committee or the workplace health and safety representative.

The employer must reassess the risk of workplace violence so as to ensure its effectiveness in addressing the problem and any related issues that may arise at the workplace.

Seminar on the “New” Workplace Violence Legislation Bill 168: An Act to amend the *Occupational Health and Safety Act*

This half-day seminar will provide a thorough review of the requirements under Bill 168 to prevent and manage workplace violence and harassment.

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Domestic Violence

The Bill also places a duty on an employer to take every reasonable precaution for the protection of a worker, if the employer knows or ought to reasonably know that there is a likelihood that the safety of a worker may be endangered at the workplace by an act of domestic violence.

Provision of Information and Instruction

The employer will be required to provide information and instruction to its workers on its workplace violence and harassment policy and program. In particular, the employer will be required to disclose to its workers the risk of violence from a person with a history of violent behaviour who they may encounter in the course of employment. This disclosure obligation appears to apply only to a risk of physical violence and not harassment.

Notification and Investigation

As with other serious incidents, the proposed amendments require the employer to notify the Ministry of Labour of an incident of violence as per section 52 of the Act.

Right to Refuse Work

Bill 168 also proposes to amend the work refusal provisions of the Act to include workplace violence. The existing work refusal process under the Act would apply with the exception that the endangered employee is required to stay only “as near as reasonably possible” to his or her work station. The proposed amendments do not alter the limitation on essential public sector employees, such as firefighters and police officers, to refuse unsafe work that is inherent to their profession.

Summary

In summary, the proposed amendments will require employers to establish a workplace prevention violence policy and a comprehensive program aimed at preventing and managing workplace violence. More specifically, employers will be required to take steps in identifying, assessing, and controlling hazards relating to workplace and violence harassment. The human, legal, and economic costs of workplace violence can be profound, and therefore, risk management is key. For more information on Bill 168 or Gowlings’ Seminars on the Prevention and Management of Violence in the Workplace, please contact Norm Keith (norm.keith@gowlings.com) or Goldie Bassi (goldie.bassi@gowlings.com)

Hearing Loss Prevention

BY: ANTHONY DI GIANNI, CHSC,
OHS CONSULTANT

Exposure to high noise levels in the workplace is one of the most common causes of permanent hearing loss, otherwise known as Noise Induced Hearing Loss (NIHL). NIHL is a result of overexposure to high frequency sound levels in the workplace. Over time these high frequency sound levels damage the hair cells of the inner ear (cochlea). The damage usually develops slowly and without pain or other symptoms and is usually detected when it is too late to prevent hearing loss. Initially, the noise exposure may cause a temporary threshold shift, which means that there is a decrease in hearing sensitivity that usually returns to normal after exposure to

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the noise is eliminated or significantly reduced. Repeated or extended exposure may eventually lead to NIHL, which is irreversible and untreatable. Other conditions related to occupational hearing loss are a result of a traumatic event or ototoxicity. An example of a traumatic event is a worker who is near an unexpected loud noise and suffers hearing loss, such as a 12-gauge shotgun being fired. Ototoxicity occurs when a worker is exposed to high levels of noise and solvents at the same time, the solvent may speed up the hearing loss process.

The phrase Hearing Loss Prevention is used to describe the activities and programs designed to eliminate or reduce NIHL. The United States National Institute for Occupational Safety and Health (NIOSH) Revised Criteria (1998) for Occupational Noise Exposure describes the damage caused by workplace noise. NIOSH suggests that 23 to 32% of 60 year old workers will have significant problems hearing in a quiet room if they were exposed to occupational noise at 90dB over an 8 hour shift for 40 years. Also 8 to 14% of the workers will be affected when exposed to

85dB and 1 to 5% will be affected when exposed to 80 dB. NIOSH recommends that exposure should not exceed 85 dB over 8 hours. For each increase of 3dB, the exposure time should be decreased by half. In addition to the NIOSH guidelines, each province or territory in Canada has its own regulation on noise exposure limits. It is essential that the activities and programs designed to eliminate or reduce NIHL are created to reflect those regulations.

When controlling high frequency noise levels in the workplace we need to look at the three areas to implement controls; at the source, along the path and at the worker. The most effective place to implement any control is always at the source. An example would be to purchase quiet equipment and maintain the equipment accordingly, install vibration isolation mounts or mufflers. Controls along the path include sound barriers or noise enclosures to insulate the noise source. Controls at the worker include hearing protection such as ear plugs or ear muffs. When selecting hearing protection be aware of the noise levels that the workers are exposed to and select those with the appropriate Noise

Reduction Rating (NRR). Workers should also be trained in their proper use, care and maintenance.

In addition to these types of controls, hearing loss prevention can be controlled through an effective hearing conservation program. The program should include measuring noise in the workplace, regular audiometric testing of exposed workers and controlling noise sources in the workplace. Gowlings Occupational Health and Safety Group can assist your company in developing an affective hearing conservation program.

Directors Personally Responsible to Ensure Compliance with Changes to Alberta OHS Code

BY: CHRIS SABAT, LL.B., ASSOCIATE
STEVE WILL

The phase-in period for employers to comply with the amendments to the OHS Code ends June 30, 2009. The obli-

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gation for ensuring compliance is imposed personally on the director and officer of a corporation who oversees the health and safety of workers as this individual is captured under the definition of an “employer” in the *Act*. All employers, including corporations and its director or officer are exposed if the employer is not in compliance on July 1, 2009.

There have been significant changes to several parts of the *Code*. The most extensive changes concern Part 9, Fall Protection. This part has been expanded to establish a hierarchy of employer-provided fall protection controls. Employers must ensure workers are protected from falling not only from heights, but also in situations where a worker may fall into or onto a hazardous substance or through an opening in a work surface. The employer must install engineering controls such as guardrails in both permanent and temporary work sites and ensure employees use or wear those systems. If the use of a guardrail is not practicable, the employer must ensure that a worker uses a travel restraint, personal fall arrest or equally effective fall arrest system. There are new detailed training requirements for worker training. In addition, the amendments include new fall protection requirements for fixed ladders, climbable structures and loads on vehi-

cles which were not required under the 2006 *Code*. Also included are new requirements for leading edge fall protection systems in building construction and very limited allowance for employer developed procedures in place of fall protection equipment.

Provisions to reduce the minimum strength of rigging components, requirements to identify and locate “embedded facilities/utilities” when demolishing or removing concrete and requirements for safe use of concrete pump trucks will further impact the construction industry.

The health care industry will also be impacted with new site and program requirements for safe lifting of patients and changes involving “safety-engineered” sharps (needles, knives, scalpels, blades, scissors, etc.) for use in health care and industries with biological hazards.

There have also been several changes to Part 36, Mining. There are now specific restrictions on the use of certain light metal alloys as a “spark” hazard, which were previously only general requirements.

The 2009 amendments have added several new requirements including:

- a direct correlation between the number of appropriately trained

and equipped mine rescue teams and the number of workers underground;

- requirements to address the absence of an underground mine manager;
- the underground storage of rescue breathing apparatus;
- mine openings to be certified by a professional engineer;
- establishing requirements for installing escape “guide lines”; and
- lowering flammable gas levels to 40% of lower explosive limit.

The 2009 amendments to the *Code* will impact every employer and industry. Every employer has an obligation under the *OHS Act* to ensure that workers are aware of their responsibilities under the *Act*, *Regulations*, and *Code*. The amendments mean that all employers must review the changes to the *Code* and their impact on their worksite and to their health and safety programs. Employers must also ensure workers are adequately trained on any new requirements. Not only is this the responsibility of the “employer” but personally that of the director or officer of a corporation who oversees the health and safety of workers.

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Canadian Health and Safety Law: A Comprehensive Guide to the Statutes, Policies and Case Law

Canadian Health and Safety Law: A Comprehensive Guide to the Statutes, Policies and Case Law

BY NORMAN A. KEITH



This resource provides detailed coverage of occupational health and safety law in every jurisdiction in Canada — provincial, federal and territorial — reviewing health and safety law thematically, with commentary, case law and practical analysis clarifying the law. It also clearly sets out the statutes and regulations required for a solid understanding of your client’s obligations, while each court and tribunal decision helps to indicate what must be done to reduce or avoid liability.

Must-know information includes:

- the requirements for workplace joint health and safety committees and health and safety representatives
- the legal defence of due diligence
- statutes, regulations, policy and case law that make up Canadian health and safety law
- the right to refuse unsafe work and the authority of government inspectors in the workplace
- judicial interpretation of the statutes and regulations..and much more!

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