

## Can compliance help in the courtroom?

### *Understanding OHSAS 18001 the "Standard"*

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Gowlings' *Occupational Health and Safety Practice* has been receiving an increasing number of client inquiries regarding OHSAS 18001, Occupational Health and Safety Management Systems - Specification ("OHSAS 18001", the "Standard"). The inquiries have been about the value of complying with the specifications of the Standard as part of corporate OHS Due Diligence.

More specifically, several clients have posed a very valuable question: does compliance with OHSAS 18001 assist in a due diligence defence?

With prosecutions on the rise in every Canadian jurisdiction, implementing an effective Occupational Health and Safety Management System ("OHSMS") in order to prevent lost time accidents and fatalities, as well as minimize legal liability by establishing a due diligence defence before an accident occurs, is becoming increasingly important. In Ontario, for instance, the number of convictions rose from 287 in 2001 to 618 in 2003 - an increase of 215% during these years. Also, with the Bill C-45 amendment to the Criminal Code of Canada now in force, which establishes a new OHS Criminal Negligence duty to take "reasonable steps" to prevent bodily harm, comes an implied duty for organizations to implement and maintain an effective OHSMS. Individuals who are convicted of OHS Criminal Negligence causing death face life imprisonment while organizations who breach the duty can face unlimited fines.

OHSAS 18001, is the foremost emerging international OHSMS standard. The British Standards

Institute developed OHSAS 18001 in 1999 as a successor to BS 8800, with the purpose of making the framework of the Standard more compatible with ISO 9001 and 14001.

While OHSAS 18001 is not a recognized ISO standard, best estimates suggest that approximately 2000 worksites worldwide have been registered to OHSAS 18001 - the virtual ISO standard. Typically, organizations registering to OHSAS 18001 have been previously registered to ISO 9001 and/or 14001.

The Standard is based on the continual improvement theory and requires organizations to manage OHS issues by complying with the following specifications:

- 4.1 Establish and maintain an OHSMS;
- 4.2 Establish an OHS Policy;
- 4.3 Plan to ensure success of the OHSMS;
- 4.4 Implement practices, programs and procedures related to OHS issues;
- 4.5 Check for and correct identified problems as well as monitor and measure to evaluate OHS performance; and
- 4.6 Review the entire OHSMS at senior management level. It should also be noted that the Standard places a heavy emphasis on documentation and document/data control.

Specification 4.3.2 of OHSAS 18001 requires organizations to, "establish and maintain a procedure for identifying and accessing the legal and other OHS requirements that are applicable to it. The organization shall keep this information up-

to-date. It shall communicate relevant information on legal and other requirements to its employees and other relevant interested parties." This is a critical element of the Standard, since governing authorities and regulators in every Canadian jurisdiction, measure an organization's OHS success by inspecting the worksite for regulatory non-compliance.

If an organization is in contravention of applicable OHS legislation, charges can be laid by the governing authority, against employers and/or individuals. A conviction under OHS legislation can mean high fines for employers and even jail time for individuals (maximum fines are detailed in the Appendix). As previously mentioned, enforcement activities are on the rise in every Canadian jurisdiction, and so are the amount of fines.

Across Canada, due diligence is a legal defence to occupational health and safety and other regulatory charges. Due diligence is also, more broadly speaking, the application of the internal responsibility system in Canadian health and safety law by establishing an effective OHSMS. The internal responsibility system is realized by the development of a managed system to identify, assess and either eliminate or control hazards.

On the defence of due diligence, the Supreme Court of Canada in Sault Ste. Marie (City) said:

When an employer is charged [under OHS legislation]...the question will be whether the accused [1] exercised all reasonable care by establishing a proper system to prevent commission of the offence and [2] by taking reasonable steps to ensure the effective operation of the system.

Based on Gowlings' experience in defending employers and supervisors under OHS laws across Canada, successful due diligence defences have been able to demonstrate the following reasonable precautions taken by the accused:

1. Hazards applicable to the offence were identified;
2. Risks of the hazards that were identified were also assessed;
3. Risks associated with hazards that were identified were eliminated or controlled;
4. Hazards that were identified, the risks that were assessed and the control measures that were used to minimize the risks of the hazards were communicated to workers;
5. The worksite and worker performance was

monitored and supervised to ensure adherence to the requirements and expectations that were communicated to workers;

6. Any hazardous situations that were identified were corrected or remedied;
7. Employees that had contravened OHS legislation or company OHS policies or procedures were disciplined as a last resort; and finally,
8. The aforementioned seven (7) points were documented.

In our view, the specifications of OHSAS 18001 are completely in line with the key concepts of a successful due diligence defence. After all, due diligence is really the documented elements of an effective OHSMS. Therefore, complying with OHSAS 18001 assists in, if not completely establishes, a due diligence defence.

*Gowlings*, in partnership with the Canadian General Standards Board, offers a two-day course in the essentials of OHSAS 18001 and due diligence. In addition, *Gowlings* has developed the *OHSLAW™* Incident Response Protocol to help organizations minimize their legal risk when a serious incident at the worksite occurs.

*For more information on these or any other services, please contact Olga Jordache, OHS Practice Coordinator, at 1-866-862-5787 ext. 83580 or [olga.jordache@gowlings.com](mailto:olga.jordache@gowlings.com).*



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