

# Navigating the New OSHA Obligations for Remote Workers

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# Overview

- The Ontario Government recently substantially changed workplace health and safety obligations
- As part of legislative amendments, the *Occupational Health and Safety Act* now officially extends to remote workplaces (e.g. private homes)
- The purpose of today's webinar is to review how to best navigate these new obligations for remote workers
- This webinar touches on issues that impact all employers (unionized or not), for unionized employers
- This webinar should not be relied on in lieu of legal advice, and you should always consult with your employment lawyer to understand your legal options and obligations

# Agenda

1. Overview of the OHSA
  - a) Responsibilities
  - b) Enforcement
  - c) Prosecutions
  - d) Defences
2. OHSA and Remote Workers
  - a) New OHSA Provisions
  - b) New Workplace Violence Risk Assessments
  - c) New Safe Work Policy
  - d) New Safe Work Procedures
  - e) New Safe Work Training

# 1) Overview of the OHSA

## a) RESPONSIBILITIES

- The Ontario *Occupational Health and Safety Act* (“OHSA”) Regulations sets out the Health & Safety obligations and responsibilities which provincially regulated employers in Ontario must follow
- OHSA is based on an Internal Responsibility System which places specific obligations on various parties in a workplace to ensure that workplaces operate safely
- The specific duties and requirements with respect to workplace health and safety are dealt with in great detail the various Regulations to OHSA
- There are numerous Regulations to OHSA, including those for Industrial Establishments, Construction Projects and Workplace Hazardous Materials Information Systems (WHMIS), amongst others

# 1) Overview of the OHSA

## a) RESPONSIBILITIES

- OHSA also has specific provisions and obligations relating to Workplace Violence and Harassment
- In order to meet its obligations under OHSA, employers must have fulsome Occupational Health and Safety Policies and Procedures in place and must also train its employees on an ongoing basis relating to the requirements of the Company's Occupational Health and Safety Policies and Procedures as well as the general OHSA and the Regulations

# 1) Overview of the OHSA

## a) RESPONSIBILITIES

- OHSA establishes specific obligations for employers, supervisors and workers
- Under Section 25 of OHSA an employer's responsibilities include:
  - Taking every precaution reasonable in the circumstances for the protection of workers;
  - Providing information, instruction and supervision to a worker in order to protect the health and safety of the worker;
  - Appointing a competent person as a supervisor;
  - Preparing and reviewing at least annually a written occupational health and safety policy
  - Developing and maintaining a program to implement the occupational health and safety policy;
  - Assisting the Joint Health and Safety Committee and/or the Health and Safety Representative to improve health and safety within the workplace; and
  - Complying with all reporting obligations regarding workplace accidents and cooperating with Ministry Investigators and Orders.

# 1) Overview of the OHSA

## a) RESPONSIBILITIES

- OHSA defines a supervisor as a person who has charge of a workplace or authority over a worker
- Employers must ensure that its supervisors are able to perform their obligations which, in general, are as follows:
  - Ensuring that the workplace is safe, that workers follow the requirements of the OHSA, the employer's Health and Safety Policies and Procedures, and that workers use required protective equipment;
  - Advising workers about potential or actual dangers to the health and safety of the worker; and
  - Taking every precaution reasonable in the circumstances to protect workers.

# 1) Overview of the OHSA

## a) RESPONSIBILITIES

- Individual workers must also help to ensure a safe workplace. Under OHSA, workers are required to:
  - Work in compliance with OHSA and the Regulations;
  - Use the protective equipment and the protective devices or clothing that the employer requires the worker to wear;
  - Report any issues regarding protective equipment or protective devices; and
  - Report any contraventions of OHSA or the Regulations or the existence of any workplace hazard

# 1) Overview of the OHSA

## b) ENFORCEMENT

- Ministry of Labour (“MOL”) has Inspectors who enforce OHSA and its Regulations
- MOL Inspectors have significant powers. Amongst other things, they can:
  - Enter a workplace without notice
  - Demand the production of and copy any documents in the workplace; and
  - Interview any person in the workplace.

# 1) Overview of the OHSA

## b) ENFORCEMENT

- Inspectors can also issue Orders when there has been found to be non-compliance in a workplace with OHSA and its Regulations
- These Orders can include:
  - An Order that the employer must stop the use of a specific piece of equipment
  - An Order that the employer stop all work until the Order is withdrawn or cancelled by the Inspector; and
- The Orders will provide a date by which the employer must comply with the contents of the Order

# 1) Overview of the OHSA

## c) PROSECUTIONS

- As part of an investigation, in addition to issuing Orders, an Inspector can also make recommendations that the MOL bring prosecutions for contraventions of OHSA and the Regulations
- These can be brought against Companies but also against individuals such as Supervisors, Officers and Directors and even workers
- The maximum fines which can be imposed under OHSA and the length of imprisonment which individuals can receive have both greatly increased over the years
- Recently the penalties for an OHSA conviction were increased so that:
  - A corporation may be liable for a fine of up to \$2,000,000.00 per offence;
  - A Director or Officer of a corporation may be liable for a fine of up to \$1,500,000.00 per offence or to imprisonment of up to 12 months, or both; and

# 1) Overview of the OHSA

## c) PROSECUTIONS

- An individual may be liable for a fine of up to \$500,000.00 per offence, or to imprisonment of up to 12 months, or both.
- Most recently, when the *Working for Workers Six Act, 2024* received Royal Assent on December 19, 2024, OHSA was further amended, in part, to provide for a new minimum fine of \$500,000.00 per offence for corporations convicted of repeated offences that result in death or serious injury within a 2-year period
- A 25% Victim Impact Surcharge is also added to any fines imposed

# 1) Overview of the OHSA

## c) PROSECUTIONS

- When determining the fines or jail sentences to be imposed, the Court will consider both aggravating and mitigating factors
- The aggravating and mitigating factors to be considered were first established in the 1982 Ontario Court of Appeal decision in ***R. v. Cotton Felts Ltd.***
- In this decision the Court of Appeal stated the factors to be considered included the size of the Company, the scope of economic activity, the extent of harm to the public and the maximum penalty prescribed by Statute

# 1) Overview of the OHSA

## c) PROSECUTIONS

- ***Cotton Felts*** also held that it is the Court's duty to impose a punishment which serves as a general deterrent for all Companies under OHSA
- Accordingly, in limited instances, Courts will not follow agreed-to submissions made by Counsel with respect to an appropriate fine
- In fact, in ***Cotton Felts***, the Court imposed a fine 10x higher than what had been agreed to by the Crown and Defence Counsel

# 1) Overview of the OHSA

## c) PROSECUTIONS

- The mitigating/aggravating factors to be considered by Courts have been further expanded in cases following ***Cotton Felts***
- With respect to mitigating factors, Courts will now also consider the Defendant's prior history, the seriousness of the offences, and the remorse demonstrated by the Defendant
- In particular, the actions a Company or an individual takes after an accident or injury has taken place or even after charges have been laid will be examined closely by the Court
- If it can be shown that the Company or an individual have undertaken significant steps and incurred costs in order to address the issues which led to the charges being laid, this can be a basis for a Court to impose a lesser fine or shorter incarceration

# 1) Overview of the OHSA

## c) PROSECUTIONS

- With respect to aggravating factors, in 2022 OHSA was amended to provide specific aggravating factors which will lead to the imposition of more substantial fines or incarcerations
- Currently, under Section 66(2.2) of OHSA the aggravating factors are listed as follows:
  - The offence resulted in the death, serious injury or illness of 1 or more workers;
  - The Defendant/employer committed the offence recklessly;
  - The Defendant/employer disregarded an order of an inspector;
  - The Defendant/employer was previously convicted of an offence under the OHSA or another act;

# 1) Overview of the OHSA

## c) PROSECUTIONS

- The Defendant/employer has a record of prior non-compliance with the OHSA or its regulations;
- The Defendant/employer lacks remorse;
- There is an element of moral blameworthiness of the Defendant/employer's conduct;
- In committing the offence, the Defendant/employer was motivated by a desire to increase revenue or decrease costs;
- After the commission of the offence, the Defendant/employer:
  - Attempted to conceal the commission of the offence from the Ministry or other public authorities; or
  - Failed to cooperate with the Ministry or other public authorities; or
- Any other circumstances prescribed under the OHSA or its Regulations as an aggravating factor in the future.

# 1) Overview of the OHSA

## c) PROSECUTIONS

- Not surprisingly, over time Courts have continually awarded more significant penalties
- Moreover, recent decisions highlight not just the increases in fines for Corporations but also the greater frequency for Company Officers and Directors to face prosecutions

# 1) Overview of the OHSA

## c) PROSECUTIONS

- For instance, in April 2024, in *R v. Eastway Tank, Pump & Meter Limited* the Court imposed on Eastway the highest fine ever issued under OHSA for a small or even a mid-sized company
- In January 2022 there was an explosion at an Eastway facility in Ottawa that killed six workers and severely and injured a seventh
- Fines were imposed in the amount of \$850,000.00 for Eastway and \$80,000.00 for a company Director
- In delivering his decision Justice Hoffman describe the penalties as “precedent-setting fines that send a clear message to the business community, to other commercial enterprises about the need to prioritize worker safety.”

# 1) Overview of the OHSA

## c) PROSECUTIONS

- Employers must also be mindful that it is possible for significant fines to be imposed even if no workplace injury or accident has taken place
- In *R. v. THS Industries Ltd.*, an anonymous complaint was received by the MOL alleging that proper guarding devices were not being used on the Company's nail-making machines
- The MOL investigated and found unfixed access gates on several of the machines
- One case worker was seen working inside an open access gate of a running machine

# 1) Overview of the OHSA

## c) PROSECUTIONS

- Furthermore, another machine's lid was left open when the machine was operating
- As a result, a fine of \$85,000.00 was imposed against the Company with the Company's Chief Executive Officer being fined \$15,000.00 personally

# 1) Overview of the OHSA

## d) DEFENCES

- Violations of OHSA are considered strict liability offences
- The Defences which can be raised when defending strict liability offences are limited
- The most frequently used Defence to a strict liability offence is the second component of the “Due Diligence Defence”

# 1) Overview of the OHSA

## d) DEFENCES

- The Supreme Court of Canada in *R. v. City of Sault Ste. Marie* outlined the Due Diligence Defence as follows:
  - The Defence will be available:
    - (i) if the accused reasonably believed in the mistaken set of facts which, if true, would render the act or omission innocent; or
    - (ii) if he took all reasonable steps to avoid the particular event.

# 1) Overview of the OHSA

## d) DEFENCES

- As stated above, second aspect of the Due Diligence Defence is the most frequently relied defence to OHSA prosecutions
- This provides that in order to establish a Due Diligence Defence, a Defendant must demonstrate to the Court's satisfaction that it took every precaution reasonable in the circumstances to prevent the breach

# 1) Overview of the OHSA

## d) DEFENCES

- Examples of what a Defendant can show in order to bring a successful Due Diligence Defence includes:
  - Compliance with the Act and Regulations;
  - That the Company had a fulsome Health and Safety Policy;
  - That a competent supervisor is present at the workplace;
  - That all workers have been fully trained and there is documentation to confirm the training;
  - That regular equipment inspections are done and records of the inspections are retained; and
  - That a Joint Health and Safety Committees or a Health and Safety Representative as applicable have been appointed and fully trained and that Committee Meetings take place at least every 3 months.

# 1) Overview of the OHSA

## d) DEFENCES

- A recent decision which shows a successful Due Diligence Defence is the *R. v. Taurus Natural Inc.*
- In this decision a machine became clogged
- The worker who was operating the machine then climbed inside it to try and fix it
- While the employee was doing this, the machine was turned on and the worker was killed
- The Company was charged with 24 violations of OHSA
- The Company's Due Diligence Defence proved fully successful and the Court dismissed all 24 charges

# 1) Overview of the OHSA

## d) DEFENCES

- In dismissing the charges, the Court relied on the following facts:
  - The Company was able to demonstrate that it had provided the worker with full training, including training with respect to the need to lock out a machine before going inside it;
  - The Company was able to demonstrate that it had taken steps to ensure the victim was competent to operate the machine;
  - The Company was able to demonstrate that it had proper supervision in place;
  - The Company had a detailed machinery lock-out procedure in place; and
  - The Company had adequate rescue and communication procedures in place.

# 1) Overview of the OHSA

## d) DEFENCES

- As mentioned, the first aspect of the Due Diligence Defence is mistake of fact
- Mistake of fact does not apply to situations where the Defendant was simply unaware of its non-compliance with OHSA
- Rather, it must be established that the Defendant genuinely and reasonably believed they were complying with OHSA

# 1) Overview of the OHSA

## d) DEFENCES

- In *R. v. Graydex Ottawa* a mistake of fact Defence was accepted by the Court
- In the case the walls of a trench that were being excavated collapsed, killing one of the workers who was inside the trench and installing a water pipe
- At Trial, the employer admitted that the trench did not meet the OHSA requirements but raised a mistake of fact Defence
- The employer contended that based on the employer's understanding of the trench's measurements, it was reasonable for it to believe that it was not necessary for a support system to be installed in the trench

# 1) Overview of the OHSA

## d) DEFENCES

- The Court accepted this Defence on the basis that as there had been conflicting measurements, (between the employer, the Ministry of Labour, police and emergency services) there proved to be no consensus as to the measurements of the trench and whether a support system had been required
- Accordingly, the Court concluded that it was not unreasonable for the employer to rely on its measurements when it concluded that a support system was unnecessary

# 1) Overview of the OHSA

## d) DEFENCES

- There is one other substantive Defence which can be raised to defend OHSA Prosecutions and this is the Officially Induced Error Defence
- The Supreme Court of Canada in ***Lévis (City) v. Tétreault, Lévis (City) v. 2629-4470 Québec*** outlined what the Defendant must demonstrate in order to bring a successful Officially Induced Error Defence:
  - That an error of law or mixed law and fact was made;
  - The Defendant assessed the legal consequences of his or her actions;
  - The advice obtained came from an appropriate official;
  - The advice was reasonable;
  - The advice was erroneous; and
  - The Defendant relied on the advice on committing the OHSA breach.

# 1) Overview of the OHSA

## d) DEFENCES

- Officially Induced Error provides that although a Defendant may have violated OHSA, the Defendant cannot be convicted given the fact that the violation was the result of advice obtained from an “appropriate Official”
- This Defence is extremely rare

## 2)a) OHSa and Remote Workers: New OHSa Provisions

- On October 28, 2024, Bill 190, Working for Workers Five Act, 2024, received royal assent
- Bill 190 brings about significant amendments to the OHSa
- As part of the amendments, the OHSa obligations now officially extend to private residences where telework is performed (i.e. remote workplaces)
- In particular, the OHSa had been amended to add subsection 3(1.1), which provides that, despite the Act normally not applying to private residences, the Act now applies to private residences when telework is performed
- As a result of this amendment, obligations to properly identify and address workplace hazards, obligations to prevent and respond to workplace accidents, and obligations to report critical accidents, now all extend to include when the worker is working from home

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## 2)b) OSHA and Remote Workers: Violence Assessments

- Under the OSHA, employers are required to conduct a workplace violence risk assessment
- A workplace violence risk assessment is a careful review to consider the potential for workplace violence and the measures in place to prevent and respond to incidents of workplace violence
- The workplace violence risk assessment is to be shared with the Health and Safety Representative or the Joint Health and Safety Committee
- The workplace violence risk assessment is to be reflected in the company's workplace violence policy and the company's workplace violence procedures

## 2)b) OHSA and Remote Workers: Violence Assessments

- Pursuant to subsection 32.0.3(4), a workplace violence risk assessment is to be redone from time to time
- For example, a workplace violence risk assessment is to be redone when a new and different workplace is added
- As a result of the amendment of the OHSA to include remote workplaces, employers are now effectively required to conduct an updated workplace violence risk assessment

## 2)b) OHSA and Remote Workers: Violence Assessments

- To comply with the OHSA, the new workplace violence risk assessment regarding remote workplaces should be properly documented
- Employers may wish to create a new or updated workplace violence risk assessment questionnaire to ensure they properly identify hazards and measures in place in regard to remote workplaces
- There are free workplace violence risk assessment questionnaires available online, however most are inappropriate or incomplete in regards to remote workplaces
- For example, the workplace violence risk assessment questionnaire shared by the Government of Canada does not address telework from home

## 2)c) OSHA and Remote Workers: New Safe Work Policy

- The OSHA requires that employers have in place a written and shared workplace safety policy
- This safe work policy is normally a single page policy that is posted on the physical health and safety board and shared electronically
- This safe work policy sets out general obligations and expectations regarding the health and safety

## 2)c) OSHA and Remote Workers: New Safe Work Policy

- As a result of the amendment to the OSHA, employers should now update their safe work policy to specifically address remote workplaces
- The policy should expressly confirm that the health and safety obligations extend to the worker's home when they are working remotely
- The policy should confirm that when workers are working remotely from their home they must work in a safe manner, report any hazards, address any hazards, and report any accidents
- For supervisors, the policy should confirm that they are responsible for ensuring the health and safety of workers who are working remotely, under their supervision

## 2)d) OSHA and Remote Workers: New Safe Work Procedures

- The OSHA requires that employers have in place a written and shared workplace safety procedures
- These procedures normally take the form of a Health and Safety Handbook
- The Handbook is normally available physically and electronically
- The Health and Safety Handbook is generally quite extensive, covering various subjects
- The Health and Safety Handbook should cover subjects such as general health and safety protocols, the health and safety representatives, workplace inspections, housekeeping, safe lifting, fall protection, tools and equipment, personal vehicles, lockouts and tag-outs, workplace chemicals, first aid, fire protection, workplace violence, workplace harassment, workplace sexual harassment, workplace accidents, attending at other workplaces, and other workplace specific safety concerns

## 2)d) OSHA and Remote Workers: New Safe Work Procedures

- As a result of the amendment to the OSHA, employers will now need to update their Health and Safety Handbook to specifically address remote workplaces
- As part of updating the Health and Safety Handbook, the first step should be to add a provision confirming that it applies when a worker is working from their private home remotely
- If your Health and Safety Handbook already confirms that the definitions within it are what the OSHA provides, then technically, your Handbook already extends to remote workplaces
- However, as it may not be intuitive to your workers that the Health and Safety Handbook applies at times to their private home, it is still recommended that you expressly confirm the scope and applicability
- It may also be helpful to provide examples of when OSHA obligations extend to the home, to avoid any confusion or uncertainty

## 2)d) OSHA and Remote Workers: New Safe Work Procedures

- You should also review your Health and Safety Handbook to identify provisions that should be revised as a result of the extension of the OSHA obligations to remote workplaces
- For example, the provision there is a first aid kit in the workplace will need to be updated

## 2)d) OSHA and Remote Workers: New Safe Work Procedures

- You should also add content to the Health and Safety Handbook to expressly address the unique health and safety concerns that arise regarding remote workplaces
- This includes specifically addressing:
  - what are the general safe work expectation for working at home,
  - how workplace hazards are to be identified and addressed by remote workers,
  - how the health and safety representative or joint health and safety committee is to address its obligations in regard to remote workplaces, and
  - how OSHA violations and workplace accidents are to be handled in regard to remote workplaces

## 2)e) OSHA and Remote Workers: New Safe Work Training

- To comply with the OSHA, employers have to provide their workers with proper safe work training
- As a result of the amendment of the OSHA, employers will now need to provide updated safe work training in regard to remote workplaces
- This training should specifically address:
  - the updated policies and procedures
  - how workers are expected to keep their workspace tidy and organized
  - how workplace hazards are to be identified and addressed by remote workers
  - how the health and safety representative or joint health and safety committee is to address its obligations in regard to remote workplaces
  - when an incident or accident at home must be reported
- There should also be supervisor-specific workplace training in regard to how they are to ensure that members of their team are working safely when working remotely

# Managing your HR Issues

Wilson Vukelich LLP can help ensure that your employment and labour law matters are handled effectively and efficiently, and in a manner that is reflective of new legal developments and obligations. If you have any questions or require further information, please contact:

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