

Farm Worker Health and Safety: Ensure Due Diligence Now or Pay Later

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■ Introduction

In most Alberta workplaces, workplace health and safety issues are governed by the *Occupational Health and Safety Act*. Workplace health and safety issues in farming are unique in that this statute specifically exempts farmers and their employees from coverage. Although farm employers are therefore free from much of the regulation that other employers face, they still must address many of the same issues. In fact, farm employers are more vulnerable to lawsuits from employees and others injured at the workplace because they are not covered by the *Workers' Compensation Act*. Instead of liability under statutes, farm employers face potential liability under the common law.

It is useful for farm employers to understand how the *Occupational Health and Safety Act* works for two reasons. First, common law responsibilities will likely be guided by the principles set out in the *Act*. Second, it is always possible that the exemption of farmers and their employees will be removed, especially as farm operations become more industrialized. In fact, a similar farming exemption was removed from employment standards legislation in Saskatchewan.

■ Duties of Employers

Every employer has a duty to ensure the health and safety of all workers on its work site, as far as it is reasonably practicable to do so. An employer must also ensure that its workers are aware of their responsibilities and protections under the *Act*.

Employers must implement safe work practices at work sites and make sure that these practices are followed. Safe work practices not only include practices that comply with legislation but also general common sense safe practices. Employers must monitor workers to ensure they are following the safe practices and provide them with the training, knowledge, and equipment to allow them to follow proper procedures.

Employers should also make sure that employees are aware of any dangers or hazards on the work site. An example of hazardous conditions on a farm operation might relate to dangerous equipment or the exposure to dust, endotoxins, and gases. If employees work in hazardous conditions, special precautions may be required. For instance, employees may be required to have regular medical examinations, during normal working hours, which are paid for by the employer.

In addition to ensuring the health and safety of workers and the work site, an employer should provide and maintain certain first aid services, supplies, and equipment for its workers. This responsibility not only arises under the First Aid regulation of the *Act*; it is also just a sensible business practice.

Although the above requirements arise specifically under the *Act* or case law dealing with the *Act*, similar responsibilities exist at common law. Employers have a duty of care to safeguard their employees from harm at work. They must exercise a reasonable standard of care towards employees. Taking reasonable steps to ensure safe work practices will reduce both the risk of incidents occurring and employer liability being found if incidents do occur. These practices are what due diligence is about. Due diligence involves the following:

- taking steps to identify and remove hazards from the workplace (or at least contain and safely store hazards)
- taking steps to prevent or avoid safety incidents from arising
- properly training, equipping, and supervising workers
- appropriately dealing with and investigating incidents
- implementing necessary changes to the workplace or personnel as circumstances dictate.

It is helpful to keep in mind that employees also have duties to take reasonable care to protect the health and safety of themselves and other workers. Employees must cooperate with the employer to achieve reasonable safety objectives. Cooperating includes participating in required safety and health training, following workplace safety practices, and using protective and safety equipment. Employers should ensure that workers are informed of these safety responsibilities. Ideally, a safety program should be in writing, and employees should be required to sign their understanding of the program and agreement to follow it.

Employees may also have the right to refuse unsafe work. Under the *Act*, there must be imminent danger to the worker or others before the worker can refuse work. Imminent danger is a danger not normally encountered in the worker's work. A similar standard would likely apply to farm operations. Conduct will be assessed based on what a reasonable operator would do in the circumstances. Certainly, it can be helpful to have employees identify hazards, although that may not entitle them to refuse work. If reports of hazards do arise, employers should investigate them.

■ Defences against Liability

Offences under the *Act* are strict liability offences. This means that liability can arise even though there was no intention to cause any harm or create a risk of harm. The existence of an incident that causes injury may be enough to create liability. Aside from the *Act*, liability to farm employers will depend on establishing that the employer breached the reasonable standard of care owed to employees in the circumstances. It is an objective test.

In either case, due diligence is a valuable defence. Employers have to show that they exercised all reasonable care to avoid the breach. In exercising reasonable care, you must do what a reasonable person would do in the same circumstances.

What is reasonable? It depends. For example, it may be reasonable to rely on consultants with specialized knowledge in dealing with a safety issue rather than making independent inquiries. However, if the objective evidence is clearly contrary to the consultant's recommendations, you may be required to go farther.

In one case, the employer had witnessed a dangerous event occurring on several occasions. Although no one was injured (until the accident), the court found that this should have been an indicator to the employer that the activity was not safe and that it was reasonable that someone may become injured as a result of the dangerous event. Therefore, reasonable conduct may require employers to invoke preventive measures to avoid future incidents. If a future incident does occur, and the evidence shows the employer was aware of an increased risk without having taken precautions, liability will be more easily established.

Another defence against liability is if the employer believed in a mistaken set of facts, which, had they been true, would have rendered acts or omissions innocent. This, however, is a narrow defence that is difficult to prove:

- The defence cannot be based on the "unforeseeable and peculiar way in which an accident unfolds"

- The employer cannot argue “blissful ignorance of whether the hazard exists or not;” there must actually be belief that the hazard is not there
- The defence may only be available when arguing a latent defect.

■ **Examples of Due Diligence**

Court cases have shown the following factors are helpful to employers demonstrating due diligence and reasonable conduct:

- Employee training including:
 - videos
 - booklets, and
 - written safety procedures
- An employer's safety history including:
 - rapport with Workplace Health and Safety officers
 - safety inspection reports
 - safety ratings
 - participation in the Workplace Hazardous Materials Information System program
- The company's overall attitude towards safety including:
 - an established program of safety consciousness
 - a clear policy that puts safety ahead of other considerations
 - a policy of hiring personnel with training and experience in safety-related procedures
 - resources allocated to ensure proper training of new employees, and
 - the knowledge of safety supervisors.

Courts have been impressed by employers with safety procedures in place prior to an incident occurring. These steps should be taken not only to prevent an accident but to limit your exposure if there is one.

Due diligence may even occur after an accident, although its use is more related to the amount of liability (or future liability) than avoiding liability for the incident in question. Courts may look at the remorse of an employer, any changes that were made to the workplace, and any changes to safety requirements. These are all useful considerations in dealing with damage control, but their benefits will depend on the circumstances.

■ Investigating Safety Incidents

An important element to any safety program is effectively investigating safety incidents and infractions. It is important that investigations are conducted as soon as possible after an incident to ensure that critical evidence is not lost or destroyed. Photographs, sketches, and measurements should be taken of the site to preserve any relevant evidence.

The next step is to interview potential witnesses. Two members of management should conduct the interviews. One person should act as the interviewer, and the other should take detailed notes. Every witness statement should be reduced to writing. This can either be done by having the witness write out a statement or by having the witness sign the notes of the interviewer.

The suspected wrongdoer, if there is one, should be interviewed last. Depending upon the information given, witnesses may need to be interviewed more than once. Be prepared for that eventuality.

The due diligence required in the investigation portion of an accident would require clarification of any inconsistencies that may arise from the various witness statements. Additionally, if there are any leads that arise because of the interviews, it is necessary to follow up on them.

In response to the information gathered, it is important to make the required changes to avoid future accidents (discussed above). Employers should continue to follow up on the workplace changes that result.

■ Conclusion

Health and safety issues are important considerations in any business, including farm operations. Although farming may be exempted from the *Occupational Health and Safety Act*, farm operations face the same issues. The importance to farms may be even greater because of the potential for lawsuits. It is essential that due diligence is exercised to prevent and deal with safety incidents on farms.