

The Importance of Due Diligence



Worst Case: Fatality

The following scenario is an example of what could happen if you fail to do everything in your power to prevent incidents and injuries in your workplace.



A long-term laboratory worker succumbed to cancer after a lengthy illness. An autopsy showed that one of chemicals the worker had long-term exposure to had accumulated in internal organs. As a result of this incident the employer was ordered to do the following:

- Inventory and document all hazardous substances in use
- Provide written instruction and direction to workers on chemical safety
- Provide regular training on the safe use of hazardous substances in the workplace
- Make regular site inspections to ensure that safe work practices are followed

The Defence



The worker's family sued the employer for negligence.

The employer argued that since there were no specific regulations requiring them to instruct their employees on the safe use of the substances in question, neither they nor their supervisors were negligent. They also invoked a defense of 'due diligence' arguing that they had taken all

reasonable precautions to avoid harm and that there was no way the fatality could have been anticipated.

The Judgement



The judge, in rejecting the first argument, noted that even though there were no specific provisions in the regulations for instructing workers on the safe use of the substance in question, the employer had a general duty to protect the health and safety of its workers by having its supervisors properly instruct them in the safe use of all potentially hazardous substances.

On the issue of due diligence, the judge found that the employer and the on-site supervisor should have recognized and investigated the potential dangers of the substance in question. He also noted that supervisors should not automatically assume their workers know how to use substances properly or follow safe work practices consistently.

The judge imposed both a fine and jail term and ordered the employer and the supervisor to prove they had complied with the orders imposed on them.

Why Due Diligence is Important

If the prosecution establishes that a regulatory offence has been committed, the defendant is no longer presumed innocent. The burden of proof then shifts to the defendant who must persuade the court that he or she was 'duly diligent' or be convicted.

The defense of due diligence allows a person or company who might otherwise be found guilty of violating the regulations to avoid guilt by showing they acted carefully and reasonably by taking all reasonable steps to prevent an incident from occurring.



If you are charged under OHS legislation, you will have to prove that you took every reasonable precaution in the situation to protect the health and safety of workers. The practice of identifying and correcting workplace hazards to prevent injuries and incidents is known as 'due diligence.'

The Due Diligence Defence

The defense of due diligence can be used in one of two ways.



In the first, the person or company reasonably believes their actions were correct even though they were based on a mistaken set of facts which, if true, would have made them innocent.

The second is to demonstrate that all reasonable precautions were taken to avoid the violation thereby rendering the violation beyond their control.

Of the two, the most common defense is the second, since the first implies a degree of ignorance that is generally not an acceptable defense.

Two Examples of Due Diligence

Example 1:



One of your workers is involved in an incident as a result of failing to meet regulatory requirements. You did not know about the specific regulatory requirement but took precautions that seemed reasonable to you and your workers. You would satisfy the standard of due diligence by

proving that the precautions were perceived as sufficient and that you took all reasonable steps to avoid the incident.

Example 2:

A worker entered a confined space and died as a result of asphyxiation. The investigation showed that the worker had been trained, provided with proper equipment, and that all legislated procedures and emergency responses were in place. The cause of the accident was attributed to the worker failing to follow procedures. The supervisor and employer were not convicted.



Due Diligence is a Flexible Concept

Due diligence is a flexible concept. What constitutes due diligence in one workplace may not come close to it in another.



To determine if you have taken all reasonable precautions to avoid an incident, the courts assess a number of factors. One of the factors is whether the actions you've taken are appropriate to the degree of risk present. Because risks vary with the industry and specific circumstances, so must your response in a situation.

You must show that the controls you've put in place meet or exceed the regulations and legislation in your jurisdiction and that you have reasonably anticipated all potential risks and attempted to control them.

You must also be able to prove that you're in the habit of informing your workers of all potential hazards, even the obvious ones, since you cannot assume they will always be aware of them.

Practicing Due Diligence

As a supervisor, you must instruct workers under your direction to work in accordance with safe operating instructions and work procedures and you must properly supervise them while they work.



You must be knowledgeable of health and safety requirements and your responsibilities. You must be able to demonstrate that a safety system has been implemented and is working. This system should ensure your workers are aware of all known or reasonably foreseeable hazards and should promote consultation and cooperation with safety committees, safety representatives and safety professionals.

Supervisor Speaks



Supervisor: “Even if you think you’ve planned for every possible situation, there’s still no guarantee that governing bodies or the courts won’t find something you have overlooked. When you try to assess and foresee risk, it might help to imagine that the workers you are trying to protect are your own sons, daughters or other close relatives. Try this technique the next time you train your workers or plan a new job. It might help you

make the right decision.”

Document it!

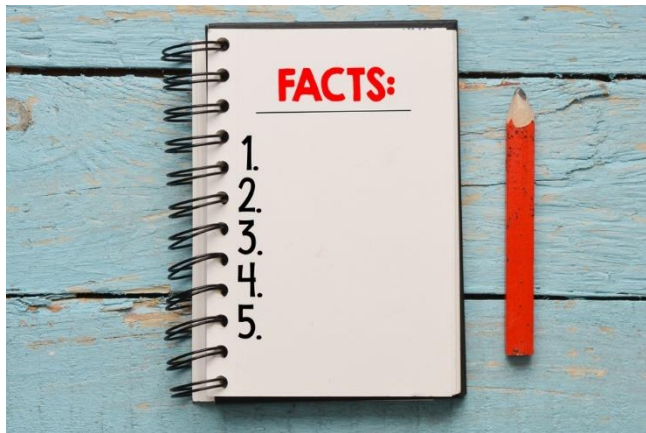


One very important way of avoiding the legal consequences of committing a health and safety offence is to establish a history of preventative activity by thoroughly documenting everything. The following are some examples of the types of records and reports to be maintained:

- Worker training / orientation sessions, including date, length, attendance, instructor, general content
- Dated notes of safety meeting minutes and crew talks
- Inspection and investigation reports
- Your notes and logs of safety consultations with workers
- Records of corrective actions for unsafe behavior or conditions

- Equipment maintenance log books
- Forms, checklists and instructions for safe work procedures
- Medical certificates, hearing tests, first aid reports
- Sampling and monitoring records
- Frequency and severity of injury and disease statistics

Other valuable evidence includes:



- Workplace conditions
- Your workers' experience in the work leading up to the incident
- Work practices of the worker
- Your knowledge, and your worker's knowledge, of the hazard
- Frequency and depth of workplace inspections.