Manager's Handbook Canada Labour Code - Part II

From Treasury Board of Canada Secretariat

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Introduction

The purpose of this handbook is to assist federal public service managers in interpreting and implementing requirements of Part II ("Occupational Health and Safety") of the *Canada Labour Code* (the Code). It is intended to assist managers in developing occupational health and safety policies and programs within their departments and agencies.

As legal interpretations of the Code continue to evolve with experience, this handbook is subject to revision. **It is published only in this web-based format. Readers may download, copy, distribute and use this document in any electronic or paper form in support of health and safety activities within the federal public service.**

Users of this handbook should also consult the text of law. The Code and its related regulations are available on the Justice Canada website.

In addition, managers are strongly advised to consult with their departmental occupational health and safety coordinators when they require additional interpretation of requirements contained in the Code or in the Treasury Board policy on occupational safety and health.

Additional information on federal occupational health and safety matters in the form of pamphlets, brochures and booklets is available through the Human Resources and Skills Development Canada (HRSDC) website and the Occupational Health and Safety Practitioners' Portal.

Chapter 1: Overview

▶ **In this section**

The *Canada Labour Code* (the Code) applies to employees who work under federal jurisdiction, which encompasses about 10 per cent of the Canadian workforce. The Code defines what "federal work, undertaking or business"

means, which covers key sectors of the economy, notably air, rail and highway transport, pipelines, banks, broadcasting and telecommunications, uranium mines, marine transport and related services.

The federal public service, Native reserves, and Crown corporations and agencies are also subject to the Code. Enforcement and administration of the *Code* comes under the responsibility of the Labour Program of HRSDC (Human Resources and Skills Development Canada) in partnership with Transport Canada and the National Energy Board (extended jurisdictions).

Interpretation: Part II — Occupational Health and Safety (section 122)

Definitions are provided in section 122 of the Code. Further clarification is provided here for some terms.

“Danger” is defined as any existing or potential hazard, condition or activity that could reasonably be expected to cause injury or illness to a person exposed to it. The definition includes any exposure to a hazardous substance that is likely to result in a chronic illness, disease or damage to the reproductive system.

“Danger” is used in provisions that govern refusal to work, in health and safety officers’ power to give directions, and in the definition of “safety.” The related word “endanger” (to put in danger) is used within the context of employer duties with respect to ensuring that persons granted access to the work place do not endanger employees.

As well, reference to “a person” relates to the use of that expression in employer duties outlined in sections 124, 125(1)(*y*) and 125(1)(*z.14*) of the Code. Because the word “safety” is used in those duties, the persons

referred to in those duties must be protected from danger. This also has consequences for the employee duty to report a contravention (paragraph 126(1)(*j*)).

Further elaboration on the significant consequences of the definition of danger can be found in Chapter 2.

An "employee" is defined as a person employed by an employer is important in that it implies a much broader scope than the definition in the *Public Service Labour Relations Act*. This definition could include people in an employment relationship with a department or agency other than those who are traditionally considered to be employees in the public service (e.g., casual employees).

"Prescribe" means prescribed by regulation of the Governor in Councilor determined in accordance with rules prescribed by regulation of the Governor in Council. For example, the more specific Code requirements are prescribed in the *Canada Occupational Health and Safety Regulations* (COHSR (Canada Occupational Health and Safety Regulations)). If specific requirements, such as references to technical standards and training, are not prescribed in a regulation, this limits the extent of prescription contained in the regulation.

"Safety" means protection from danger and hazards arising out of, linked with or occurring in the course of employment. Wherever the term "safety" is used in the Code or regulations, the protection must take into account and include the expanded concept of "danger."

"Work place" is defined as any place where an employee is engaged in work for the employee's employer. This includes locations where work is being performed outdoors and on third-party premises.

The work place controlled by the employer is not necessarily a building, structure or surrounding property; it is any place owned or controlled by the employer where an employee is engaged in work for the employer. Also, to be a work place for the purposes of the Code, the place must be associated with an employee who is, has been, or can be expected to be present in or otherwise associated with that place.

Determining when a work place is controlled by the employer and therefore subject to the Code is very important. For instance, there is a need to recognize the employer's responsibility for contractors granted access to the work place when the place in question may be federally owned property where employees rarely, if ever, perform work.

Note: Throughout the Code, the duties, responsibilities and powers of employers, employees, policy committee members and work place committee members, health and safety officers, and appeals officers are prefaced by "shall" or "may." It is important to note that the imperative "shall" must be complied with; "may" is optional. For instance, an employer shall comply with all identified duties (sections 124 and 125), but an employee may refuse to work (section 128).

Purpose of Part II (section 122.1)

The purpose of Part II of the Code is to prevent accidents and injury to health arising out of, linked with or occurring in the course of employment. Although not a duty as such, this "purpose" clause is often used by boards and before the courts to interpret the Code or its regulations, and to decide whether an employer has fulfilled the responsibilities under the Code.

In addition, "preventive measures" should consist first of the elimination of hazards, then the reduction of hazards, and finally the provision of personal protective equipment, clothing, devices or materials, all with the goal of

ensuring the health and safety of employees. This interpretation of preventive measures is often referred to as the "hierarchy of controls" approach to resolving health and safety issues (section 122.2).

Health and safety officers can be expected to apply the principle of hierarchy of controls when conducting an investigation, and appeals officers can be expected to consider it when hearing an employee's appeal of a refusal-to-work decision or an employer's appeal of a direction.

The intent should be applied to the extent possible, especially with respect to employer duties outlined in paragraphs 125(1)(*z.03*) and 125(1)(*z.04*) (prevention programs) and the associated regulations.

Methods of Communication (section 122.3)

The Code deals with methods of communication. It specifies that any employee who has a special need be given directions, notices, information, instruction or training that is required to be given to employees under Part II by any method of communication that readily permits the employee to receive it. Methods can include Braille, large print, audiotape, computer disk, sign language and verbal communication.

Application (section 123)

Under the application provisions, it is clear that Part II of the Code applies to the public service of Canada through section 240 in Part 3 of the *Public Service Labour Relations Act*, which declares the public service as "a federal work, undertaking or business." For the purposes of this provision, the public service includes all departments, agencies, Crown corporations and separate employers.

Employer Duties (sections 124-125)

Every employer shall ensure that the health and safety of every person employed by the employer is protected at work. As a “general duty” clause, this places a general obligation on employers to protect the health and safety of employees.

Note: This duty covers every person in an employment relationship with the employer, not only those who are employees for the purposes of the *Public Service Labour Relations Act*.

Section 125 of the Code outlines the specific duties of employers in respect of every work place controlled by the employer and, in respect of every work activity carried out by an employee in a work place that is not controlled by the employer, to the extent that the employer controls the activity. It is critical that each of the 45 employer duties be read and understood in context with this opening statement.

Duties cover the “activities” of employees and other persons employed by a department or agency. Where the employer does not control the conditions in the work place concerned, “activities” include those occurring outside of work places under the employer’s control. Although employers may not be able to control a work place, they can control the activities of their employees in work places that are not under their direct control and where the employees are working. This includes employees working in third-party premises, those who telework, and employees who have duties that are not conducted from a fixed location.

This provision gives a higher profile to situations where persons employed in the public service are engaged in the multitude of activities carried out on behalf of the government on third-party premises or away from the office or work location. This means that in an extreme situation, an employer may have to remove employees from an unsafe third-party premise.

Note: As part of developing and planning for an occupational health and safety program, it is important for employers to undertake consultations with policy committees and work place committees in fulfilling many of the following employer duties. These committees can provide useful advice and feedback with respect to various aspects of the prevention program and can facilitate the program's effective implementation in the work place.

Specific employer duties are listed in section 125. Clarifications are provided where interpretations have previously been obtained. Paragraph 125.(1)(*e*) of the Code states the following: "Make readily available to employees for examination, in printed or electronic form, a copy of the regulations made under this Part that apply to the work place."

In addition to the requirement to post a copy of Part II and the employer's general policy document, a copy of the regulations must be made "readily available." This is a reactive rather than a proactive condition, as "readily available" indicates a response to an employee's request. It is essential that it is the current regulation that is made available in printed or electronic form. It is not the intent of this duty to require the employer to provide a copy to each employee. Paragraph 125(1)(*f*) states the following: "if a copy of the regulations is made available in electronic form, provide appropriate training to employees to enable them to have access to the regulations and, on the request of an employee, make a printed copy of the regulations available."

The COHSR (Canada Occupational Health and Safety Regulations) under Part II of the Code are available on the Justice Canada website. If the Internet is accessible to employees and employees are instructed on how to use it, then access can be assumed to be available for the purposes of this requirement.

***Canada Labour Code*, paragraph 125(1)(*m*)**

(m) ensure that the use, operation and maintenance of the following are in accordance with prescribed standards:

i. boilers and pressure vessels,
ii. escalators, elevators and other devices for moving passengers or freight,
iii. all equipment for the generation, distribution or use of electricity,
iv. gas or oil burning equipment or other heat generating equipment, and
v. heating, ventilation and air-conditioning systems.

The heating, ventilation, and air-conditioning standards required by this duty are prescribed through the permanent structures regulations and hazardous substances regulations (Part II and Part X of COHSR (Canada Occupational Health and Safety Regulations)), which deal with building safety.

***Canada Labour Code*, paragraph 125(1)(*q*)**

(*q*) provide, in the prescribed manner, each employee with the information, instruction, training and supervision necessary to ensure their health and safety at work

There is no stand-alone regulation that prescribes the information, instruction, training and supervision that is to be provided. However, several regulations address one or more requirements for information, instruction, training or supervision (e.g., regulations on hazard prevention programs, hazardous substances, confined spaces, diving, electrical work, materials handling, first aid, etc.).

Even though the necessary information, instruction, training and supervision may not be prescribed for a particular situation, the “purpose” clause and “general duty” clause should be applied to ensure that

employers inform, instruct and train employees on work place safety and health issues related to their job and in doing their job safely.

***Canada Labour Code*, paragraph 125(1)(*w*)**

> (*w*) ensure that every person granted access to the work place by the employer is familiar with and uses in the prescribed circumstances and manner all prescribed safety materials, equipment, devices and clothing

The regulation that addresses persons granted access in the context of protective equipment is "Safety Materials, Equipment, Devices and Clothing" (Part XII of COHSR (Canada Occupational Health and Safety Regulations)). This regulation specifically requires the employer to provide such "persons" (versus "employees") with skin protection (section 12.9), fall-protection systems (section 12.10), protection against drowning (section 12.11) and instructions and training (section 12.15) in general.

***Canada Labour Code* , paragraph 125(1)(*y*)**

> (*y*) ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees

The use of the defined terms "work place" and "every person granted access" is very broad. The duty outlined in paragraph 125(1)(*y*) of the Code includes, as a minimum, an understanding of the expected activities of contractors, employees from other work places, students, volunteers, visitors, clients, etc. It also requires that, considering the potential risk that these persons may give rise to, appropriate control measures be developed, initiated and monitored. This duty is linked to the employer requirement that requires these persons to be advised of any risk that they may be exposed to (paragraph 125(1)(*z.14*)).

There is a requirement for determining which work place is in effect, which should be clearly understood and given a very broad interpretation. Understanding when a work place is controlled by the employer and therefore subject to this duty is very important when, for instance, determining responsibility for contractors granted access to the work place when the place in question may be a project on federally owned property where employees rarely go, if ever.

Once an employee is involved for any reason, departments, managers and site supervisors need to clearly understand that, regardless of any agreement they have with the contractor, the place in all probability becomes a work place that is assumed to be controlled by the employer and is therefore subject to the duty in paragraph 125(1)(*y*).

***Canada Labour Code*, paragraph 125(1)(*z*)**

> (*z*) ensure that employees who have supervisory or managerial responsibilities are adequately trained in health and safety and are informed of the responsibilities they have under this Part where they act on behalf of their employer

This is an open-ended employer's duty that, in order to demonstrate "due care and diligence," requires training and instruction of all supervisors and managers appropriate to their duties and responsibilities. The definition of the employer includes "any person who acts on behalf of an employer." Therefore, all employer duties, identified in the Code, will need to be reviewed to determine which duty applies to which supervisor or manager. They will require both general training in their responsibilities under the Code and specific training and instruction, depending on their individual responsibilities.

***Canada Labour Code*, paragraph 125(1)(*z.01*)**

(*z.01*) ensure that members of policy and work place committees and health and safety representatives receive the prescribed training in health and safety and are informed of their responsibilities under this Part

Because the establishment of committees is an area that should be given priority, appropriate training should be initiated as soon as possible. Training requirements will be different for policy committees than those for work place committees. If alternate members are used regularly, these people will also require the training that is consistent with their responsibilities. In addition to any prescribed training, this duty requires that all committee members and alternates be informed of their responsibilities (sections 127.1, 128, 134.1, 135, 135.1 and 135.2).The effectiveness of committees will be greatly determined by the extent and nature of training provided to their members.

***Canada Labour Code*, paragraph 125(*z.02*)**

(*z.02*) respond as soon as possible to reports made by employees under paragraph 126(1)(*g*)

Employees have a duty to report hazards in a work place. Reports must be responded to and, more importantly, be acted upon. An employee's report under paragraph 126(1)(*g*) is less formal than the Internal Complaint Resolution Process (section 127.1), and, unless it takes the form of a complaint, will not automatically activate that process.

However, this duty still requires management to respond to an employee's report of a perceived hazardous situation. Complaints related to health or safety in the work place are to be resolved by employers and employees through the Internal Complaint Resolution Process. As part of this process, it is highly likely that health and safety officers will intervene if they become

aware that an employee's report was not responded to within a reasonable period of time. Supervisor and manager training will need to address the need to comply with the duty to respond to an employee.

***Canada Labour Code*, paragraph 125(1)(*z.03*)**

> (*z.03*) develop, implement and monitor, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, a prescribed program for the prevention of hazards in the work place appropriate to its size and the nature of the hazards in it that also provides for the education of employees in health and safety matters

This is an essential component of the Code. The program developed in consultation with the policy committee will be the vehicle through which most of the Code and regulatory requirements will be delivered. Combined with the associated supervisor and management training, the confirmation of the development, implementation and monitoring of an overall hazard prevention program, including ergonomics-related hazards, will form an essential part of being able to demonstrate the "due care and diligence" associated with demonstrating compliance with all the employer duties under the Code.

In the hazard prevention program regulations (Part XIX of COHSR (Canada Occupational Health and Safety Regulations)), the essential elements of a hazard prevention program are identified. The regulations require the following:

- Development of a hazard identification methodology;
- Hazard and risk assessment;
- Hazard and risk control;
- An implementation plan;

- Regular program evaluation; and
- Employee training and education.

All of this is to be developed in consultation with the policy committee or work place committee and carried out with the participation of the latter.

The Treasury Board is the employer for the core public administration, and the *Public Service Labour Relations Act* establishes the application of Part II of the Code to the public service as a federal work, undertaking or business. Under the Treasury Board policy on occupational safety and health, departmental policy committees, under the leadership of the deputy head, departmental management and employee representatives and/or unions, will address the policy committee's roles and responsibilities defined under the Code, as part of the development and implementation of departmental occupational health and safety policies and programs. Where required, the Treasury Board of Canada Secretariat provides guidance to departments and agencies in order to ensure consistency in the government's approach to dealing with common service-wide issues. [1] In some cases, such guidance may take the form of standards, directives or other documents issued by the Treasury Board under its policy on occupational safety and health. One of the goals of the Treasury Board is to improve occupational health and safety in the core public administration.

Subsequently, departmental, agency and separate employer policy committees adapt these frameworks to their particular operational requirements in compliance with the Code. Regardless of their size, departments should always have a central forum, in the form of a policy committee, to carry out policy development functions. Additional information on policy committees can be found in Chapter 6.

Because departments must have a hazard prevention program in place, such programs will need to be reviewed and adjusted as necessary, and missing elements jointly developed. Departmental occupational health and safety specialists will be an essential resource to departmental senior management, supervisors and policy committees.

***Canada Labour Code*, paragraph 125(1)(*z.04*)**

> (*z.04*)where the program referred to in paragraph (*z.03*) does not cover certain hazards unique to a work place, develop, implement and monitor, in consultation with the work place committee or the health and safety representative, a prescribed program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards

The prescribed hazard prevention program is that referred to in paragraph 125(1)(*z.03*) above. This duty is intended to address situations where an employer, department or agency has a truly unique work place that has hazards that do not occur elsewhere in the organization and that have not been addressed at the corporate level. However, to the extent possible, common and consistent programs should be developed and monitored at the corporate level, and even situation-specific programs should be monitored at the departmental level. Actual program implementation would be at the work place level. Monitoring and control will be essential, especially with respect to implementation, monitoring and training.

***Canada Labour Code*, paragraph 125(1)(*z.05*)**

> (*z.05*) consult the policy committee or, if there is no policy committee, the work place committee or the health and safety representative to plan the implementation of changes that might affect occupational health and safety, including work processes and procedures

All changes, including renovations and changes to the layout, furniture, equipment, materials, work methods or work environment, could have a health and safety component. Regardless of the change, it should be first assessed to determine whether there is any possible link to occupational health or safety.

Procedures should be developed, in consultation with the policy committee, to ensure that the planning and implementation of changes include the involvement of both levels of committees.

***Canada Labour Code*, paragraph 125(1)(*z.06*)**

> (*z.06*) consult the work place committee or the health and safety representative in the implementation of changes that might affect occupational health and safety, including work processes and procedures

This duty is similar to paragraph 125(1)(*z.05*) except that these changes would be specific to the particular work place. Being specific to the work place, local work place committees or health and safety representatives must be consulted.

***Canada Labour Code*, paragraph 125(1)(*z.08*)**

> (*z.08*)cooperate with the policy and work place committees or the health and safety representative in the execution of their duties under this Part

This duty requires the consultation and cooperation that an employer should extend to a committee. It gives the regulator the ability to enforce compliance upon any employer that is reluctant to cooperate. It could result in directions if the level of cooperation is not satisfactory to the health and safety officer. Disregarding this provision could eventually lead to prosecution.

***Canada Labour Code*, paragraph 125(1)(*z.09*)**

> (*z.09*) develop health and safety policies and programs in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative

This is broader than the hazard prevention program duty (paragraph 125(1)(*z.03*)), in that the appropriate committee level will be involved in developing all employer occupational health and safety policies and programs. Everything done in respect to occupational health and safety program development will require joint committee involvement.

***Canada Labour Code*, paragraph 125(1)(*z.10*)**

> (*z.10*) respond in writing to recommendations made by policy and work place committees or the health and safety representative within **thirty days** [emphasis added] after receiving them, indicating what, if any, action will be taken and when it will be taken

This is similar to the duty under paragraph 125(1)(*z.08*). However, the above provision under paragraph 125(1)(*z.10*) is an enforceable duty designed to ensure the effective operation of committees and to ensure that issues are dealt with in a timely manner. Compliance should not be a problem because management, through its representation on committees, will already be aware of the need for the information.

Departmental occupational health and safety staff are likely to be tasked with developing, and possibly implementing, the procedures needed to comply with this duty.

***Canada Labour Code*, paragraph 125(1)(*z.11*)**

> (*z.11*) provide to the policy committee, if any, and to the work place committee or the health and safety representative, a copy of any report

on hazards in the work place, including an assessment of those hazards

This relates to all reports and assessments related to work place health and safety, not only those required by the hazard prevention program regulations (Part XIX of COHSR (Canada Occupational Health and Safety Regulations)) and by the hazardous substances regulations (Part X of COHSR (Canada Occupational Health and Safety Regulations)). Given the potential for considerable impact, appropriate procedures should be developed and implemented to ensure compliance. Although information related to the health and safety of employees must be open and shared, the committees and representatives are not entitled to access information related to non-occupational health and safety matters (e.g., security-related information and individual information governed by privacy laws).

***Canada Labour Code*, paragraph 125(1)(*z.12*)**

> (*z.12*) ensure that the work place committee or the health and safety representative inspects each month all or part of the work place, so that every part of the work place is inspected at least once each year

The above duty is linked to the powers of work place committees or representatives that will be expected to establish procedures to ensure that the required inspections are done. This is an enforceable duty on the employer to ensure that the inspections are carried out. It will require training for the committee members or representatives involved. Departments should ensure that committees and representatives have appropriate support material such as standard inspection report forms and check sheets, and that they are provided with status and follow-up reports. Health and safety officers can be expected to request and review inspection reports. Additional information about work place committees and representatives can be found in Chapters 7 and 8, respectively.

***Canada Labour Code*, paragraph 125(1)(*z.13*)**

> (*z.13*) when necessary, develop, implement and monitor a program for the provision of personal protective equipment, clothing, devices or materials, in consultation, except in emergencies, with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative

This requirement reflects concerns that the provision of personal protective equipment is not always properly addressed and that employees are not involved in decisions related to their protection.

Where work activities require the use of personal protective equipment of any type, departments and agencies must consult their policy committee or, if there is no policy committee, the appropriate work place committee or representative, to develop, implement and monitor a program that will address the requirements of the work place concerning personal protective equipment.

However, in the event of an emergency situation that requires a unique piece of equipment, immediate action should be taken, with consultation and follow-up conducted later.

Departmental occupational health and safety staff should be involved in obtaining advice and support from technical specialists, suppliers, etc.

***Canada Labour Code*, paragraph 125(1)(*z.14*)**

> (*z.14*) take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer's employees, are informed of every known or foreseeable health and safety hazard to which they are likely to be exposed in the work place

The above is the converse duty to the employer's duty with respect to persons granted access (paragraph 125(1)(*y*)). To demonstrate due care and diligence, this duty will require employers to apply a broad interpretation of the work place and persons granted access to it. Departments and agencies that allow contractors, contract employees, students, visitors, clients, customers and others into their facilities or onto their property will need to develop appropriate policies and procedures to ensure that these persons are informed of hazards and risks that they are likely to be exposed to, not necessarily about every known or foreseeable hazard in the work place. Development of policies and procedures shall be done in consultation with policy committees or work place committees. As required by paragraph 125(1)(*y*), procedures should also ensure that these persons granted access to the work place do not endanger employees.

***Canada Labour Code*, paragraph 125(1)(*z.16*)**

- (*z.16*) take the prescribed steps to prevent and protect against violence in the work place

This employer duty deals with the broad area of preventing and protecting against violence and does not necessarily limit the employer's responsibility to merely protect employees against physical violence or potential violence. Violence Prevention in the Work Place" (Part XX of COHSR (Canada Occupational Health and Safety Regulations)) prescribes the required steps to prevent and protect against violence.

All forms of potential violence and the root causes should be addressed. A violence prevention program should include the following:

- Developing a violence prevention policy;
- Identifying potential violent situations or environments;
- Assessing potential violent situations or environments;

- Developing control measures;
- Developing response and investigation procedures;
- Developing training and education programs; and
- Developing audit and review protocols.

In addition, "Safe Occupancy in the Work Place" (Part XVII of COHSR (Canada Occupational Health and Safety Regulations)) requires the development, in consultation with the policy or work place committee or representative, of emergency procedures for situations where a person commits or threatens to commit an act that is likely to be hazardous to the health and safety of the employer or employees.

Depending on the extent to which employees interact with clients and the public, the impact of this specific duty could be considerable.

Employer Duties: Hazardous Substances, Controlled Products and the Work Place Hazardous Materials Information System (section 125.1)

Section 125.1 of the Code includes an important extension of employers' duties to include the activities of employees in work places not controlled by the employer and where those activities may result in exposure to hazardous substances and controlled products. In Canada, controlled products fall within the Workplace Hazardous Materials Information System (WHMIS (Workplace Hazardous Materials Information System)), which deals with legislated requirements for both suppliers and users of "controlled products" as defined under Part II of the *Hazardous Products Act*.

The impact will depend on the extent to which employees are in work places not controlled by the employer, as well as the probability of them being exposed to hazardous substances, including controlled products.

With respect to hazardous substances, employers are to ensure that concentrations of hazardous substances in the work place are controlled in accordance with standards prescribed in the hazardous substance regulations (Part X of COHSR (Canada Occupational Health and Safety Regulations)). Employers must also ensure that all hazardous substances in the work place are stored and handled in the manner prescribed, and that all hazardous substances in the work place, other than controlled products, are identified in the manner prescribed.

With respect to controlled products, subject to the *Hazardous Materials Information Review Act*, employers are to ensure that each controlled product or container of a controlled product in the work place has a label that discloses the required hazard information and all required hazard symbols. With respect to each controlled product to which employees may be exposed, employers must make available to every employee a material safety data sheet that discloses the specified information required under the *Hazardous Products Act* and prescribed in the Act's *Controlled Products Regulations*.

Under section 125.1 of the Code, where employees may be exposed to hazardous substances, investigation and assessment are now an employer's duty rather than a regulatory requirement. Employers are to investigate and assess the exposure in the manner prescribed, with the assistance of the work place committee or the health and safety representative. It is essential to involve work place committees when investigating and assessing employee exposure to hazardous substances in the work place. This requirement also applies to work activities that are under the employer's control and that occur in work places that the employer does not control directly.

Employers must also make available to affected employees all personal records of exposure to hazardous substances and keep and maintain all records of exposure in the prescribed manner. This is an important area that should be addressed in the overall hazard prevention program. This duty requires the recording of all exposures. This duty is similar to the requirement in paragraph 10.4(1)(*g*) of the hazardous substances regulations (Part X of COHSR (Canada Occupational Health and Safety Regulations)), except that it reads "likely to be exposed" rather than "likely to be endangered." The impact could be high, depending on the work place's use of hazardous substances and the probability and degree of worker exposure.

It is highly likely that health and safety officers will, in addition to investigating a possible employee exposure to a hazardous substance, request and review any previous incidents to assess what corrective measures were taken, if any. Officers most likely will also check for confirmation of the involvement of the work place committee or representative.

If requested, employers are required to provide information on controlled products that are in their possession to a physician treating an employee or for the purpose of making a medical diagnosis.

Additional general information about the WHMIS (Workplace Hazardous Materials Information System) and specific work place requirements for employers is found on Health Canada's website.

Employee Duties (section 126)

The Code outlines employees' responsibilities while at work under section 126. Clarifications are provided where interpretations have previously been obtained.

***Canada Labour Code*, paragraph 126(1)(*g*)**

> (*g*) report to the employer any thing or circumstance in a work place that is likely to be hazardous to the health or safety of the employee, or that of the other employees or other persons granted access to the work place by the employer

This duty is related to the employer duty that requires the employer to respond to the reporting of a hazard as soon as possible.

***Canada Labour Code*, paragraph 126(1)(*i*)**

> (*i*) comply with every oral or written direction of a health and safety officer **or** [emphasis added]an appeals officer concerning the health and safety of employees

This paragraph is related to health and safety officers' authority that provides for giving directions to employees.

***Canada Labour Code*, paragraph 126(1)(*j*)**

> (*j*) report to the employer any situation that the employee believes to be a contravention of this Part by the employer, another employee or any other person.

This requirement aims to increase the involvement of employees in ensuring that the purpose of the legislation is implemented. This clause is similar to the requirement in paragraph 126(1)(*g*) above, except that the duty specifically relates to a contravention of Part II. Although not specifically linked to the employer's duty (paragraph 125.1(*z.02*)), managers and supervisors should ensure that reports are responded to as soon as possible.

No employee can be found to be personally liable for anything done, or omitted to be done, in good faith by the employee when the employee is assisting the employer, as requested by the employer, in providing first aid or in carrying out any other emergency measures. This provision limits the liability for employees who are carrying out these and other similar duties (e.g., chief and deputy chief emergency wardens, etc.) on behalf of the employer. Employers will need to ensure that these duties are identified and fulfilled through volunteers or otherwise (subsection 126(3)).

Employment Safety: Control of Accident Sites (section 127)

Section 127 deals with situations where an employee is killed or seriously injured in a work place. No person is allowed, unless authorized to do so by a health and safety officer, to remove or in any way interfere with or disturb any wreckage, article or thing related to the incident. The exceptions are those cases where the action is needed to:

- Save a life, prevent injury or relieve human suffering in the vicinity;
- Maintain an essential public service; or
- Prevent unnecessary damage to or loss of property.

However, no authorization by a health and safety officer is required where an employee is killed or seriously injured by an accident or incident involving an aircraft, a ship, rolling railway stock or a commodity pipeline, where the accident or incident is being investigated under the *Aeronautics Act*, the *Canada Shipping Act* or the *Canadian Transportation Accident Investigation and Safety Board Act*, or where the accident or incident involves a motor vehicle on a public highway.

Internal Complaint Resolution Process (section 127.1)

An employee who believes on reasonable grounds that there has been a contravention of the Code or that there is likely to be an accident or injury to health arising out of, linked with or occurring in the course of employment, is required to make a complaint to the employee's supervisor. This is a mandatory approach aimed at ensuring that employees' health and safety concerns are addressed by the employer without the employee needing to initiate refusal-to-work protection (section 128). Failure of an employee to follow the process is a contravention and could result in compliance action. Although primarily a right, it is also an employee's duty (paragraph 126(1)(*j*)) to report any contravention by the employer, another employee or any other person.

This provision provides a mandatory process whereby the work place parties are to resolve occupational health and safety problems internally. The employee's right to complain is limited only by the need to have reasonable grounds for the belief.

To a complaint of non-compliance made directly to a health and safety officer, the officer's initial response will be to ensure that the parties have tried to resolve the problem through the Internal Complaint Resolution Process.

For more details on the Internal Complaint Resolution Process, refer to Chapter 3.

Right to Refuse to Work (section 128)

The Code deals with the right of an employee to refuse to use or operate a machine or thing, work in a place, or perform an activity if the employee has reasonable cause to believe that:

- The use or operation of the machine or thing constitutes a danger to the employee or to another employee;

- A condition exists in the place that constitutes a danger to the employee; or
- The performance of the activity by the employee constitutes a danger to the employee or to another employee.

A clear understanding of the definition of danger is essential. For all points covered in this section of the Code, actions must be taken without delay.

Note: Managers, supervisors and employees need to clearly understand the intent and meaning of the broad approach to determining what constitutes a danger. Additional information on danger as defined in the Code can be found in Chapter 2.

For more details on the refusal-to-work process, refer to Chapter 4.

Pregnant and Nursing Employees (section 132)

Protection for pregnant or nursing employees relates to a perceived health risk to the fetus or child. It may be exercised from the beginning of the pregnancy until the employee is no longer nursing, and it ensures that employees are paid during the period needed to obtain a medical opinion respecting the perceived risk. This provision is not part of the refusal process but a separate right. It gives an employee the opportunity to remove herself from exposure to a possible hazard until a medical certificate is obtained.

Additional information on the Code's provision for pregnant and nursing employees can be found in Chapter 5.

Complaints When There Is an Action Against Employees (section 133)

Section 133 is a very significant and important provision in that a complaint may be made in writing to the Public Service Labour Relations Board (the Board) with respect to **any** disciplinary or prohibited discriminatory action (section 147), not merely those related to the right to refuse-to-work provisions in sections 128 or 129.

In addition to section 147 being a prohibition that is enforceable through the courts, an employee can make a complaint to the Board, and the Board can hear the complaint under its own rules of procedure.

Furthermore, a person designated by the employee for that purpose can make the complaint on the employee's behalf. The impact could be significant if supervisors are not aware of the prohibition and the possible consequences. Additional information on prohibited disciplinary or discriminatory action can be found in Chapter 9.

Policy Health and Safety Committees (section 134.1)

Provisions for establishing policy committees are a focal point of the federal jurisdiction's approach to internal responsibility and joint decision making. They are also a key component in managing occupational health and safety in the federal jurisdiction. For every employer who normally directly employs 300 or more employees, a policy committee must be established to address health and safety matters that apply to the work, undertaking or business of the employer. The employer selects and appoints the committee's members.

Given that these are influential committees and that they participate in an important advisory capacity, the resulting decisions and actions taken by departments and agencies, based on their recommendations, could have a considerable impact on the way in which organizations deal with occupational health and safety issues.

Throughout the provisions that deal with work place committees (sections 134.1 and 135), references to a “committee” mean the committee as an entity, not just one group within the committee.

Policy committees are expected to perform an oversight function, be involved in resolving health and safety issues that affect more than one work place, and be involved in developing recommendations that impact on the entire organization. Support in the form of research, document preparation, interface with work place committees, progress reports, etc. will impact on a number of areas, but primarily on departmental occupational health and safety staff.

Additional information on policy health and safety committees can be found in Chapter 6.

Work Place Health and Safety Committees (section 135)

For the purposes of addressing health and safety matters that apply to individual work places, employers shall establish a work place committee for each work place controlled by an employer at which 20 or more employees are normally employed. Subject to section 135.1, which deals with common provisions for both policy and work place committees, the employer shall select and appoint its members.

Although departmental or agency-wide programs will be developed primarily at the policy committee level, monitoring and implementation will be carried out at the work place level. This will require a greater level of expertise, authority and accountability of the management members of work place committees.

By exception, establishing a work place committee for work places on board ships in respect of employees whose base is a ship is not required (subsection 135(2)).

Additional information on work place health and safety committees can be found in Chapter 7.

Provisions Common to Policy and Work Place Committees (section 135.1)

Section 135.1 deals with those provisions common to both policy and work place committees in terms of their structure, selection and appointment of chairpersons and members, and their various functions.

Additional information on provisions common to policy and work place committees can be found in Chapter 7.

Health and Safety Representatives (section 136)

For each work place controlled by the employer at which fewer than 20 employees are normally employed or for which an employer is not required to establish a work place committee, the Code requires that the employer appoint the person selected in accordance with subsection 136(2) as the health and safety representative(representative) for that work place. Under this requirement, there must be a committee or a representative for any work place that has one or more employees.

Note: Additional information on health and safety representatives can be found in Chapter 8.

Health and Safety Officers (section 140)

The Minister of Labour may designate any person who is qualified as a regional health and safety officer or as a health and safety officer to perform the duties of such officers. The person to be designated as an officer must be capable of competently fulfilling the duties.

Note: Additional information on health and safety officers can be found in Chapter 10.

Powers of Health and Safety Officers (section 141)

A health and safety officer, in carrying out his or her duties and at any reasonable time, can enter any work place controlled by an employer.

The Code provides special safety measures, most notably directions that a health and safety officer can issue to terminate a contravention under Part II (section 145).

In less serious cases and where the employer admits to a contravention, a health and safety officer may obtain an Assurance of Voluntary Compliance (AVC (Assurance of Voluntary Compliance)) from an employer. Managers and supervisors who give such assurances must have the authority to ensure compliance. Failure to comply is likely to result in a direction.

Managers and supervisors should remember what an AVC (Assurance of Voluntary Compliance) is and understand the implications of signing one. They should ensure that AVC (Assurance of Voluntary Compliance) compliance is not given or signed unless the manager fully understands the implications and has the resources and authority to comply.

Note: Additional information on health and safety officers, their powers and special safety measures can be found in Chapter 10.

Appeals of Decisions and Directions (section 145.1)

The Minister of Labour may designate as an appeals officer any person who is qualified to perform the duties of such an officer. Sections 145.1, 146, 146.1, 146.2, 146.3, 146.5 and 146.6 are likely to have a considerable impact on any employer faced with an employee's appeal of a "no danger"

decision or an appeal of a direction. Given the complexity of the appeals process and the legislated protection given to the appeals officer, legal advice in preparing and presenting an appeal will most likely be essential.

Appeals officers have all the powers, duties and immunity of health and safety officers. Because there is very limited redress and the courts recognize that these officials have the necessary skills to exercise them responsibly, this is an extensive power that could have a tremendous impact (subsection 145.1(2)).

An employer, employee or trade union, aggrieved by a health and safety officer's direction, may appeal the direction to an appeals officer. It is important to note that the time period for an appeal is **30 days** after the date of the direction being issued or confirmed in writing and that the notice of appeal must be in writing (section 146).

Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction. This is an important provision that could, however, allow for a stay of a direction. The legislation is silent on how the application is to be made to the appeals officer (subsection 146(2)).

If an appeal is brought forward concerning a decision of a health and safety officer regarding danger (subsection 129(7)) or regarding an officer's direction (section 146), the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it (subsection 146.1(1)).The appeals officer will provide a written decision with reasons to the employer, employee or trade union concerned.

Note: Additional information about appeals of decisions and directions can be found in Chapter 11.

Disciplinary Action (section 147)

Section 147 deals with disciplinary action taken against employees who exercise various rights provided for under Part II. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period of time that the employee would have worked, or take any disciplinary action against or threaten to take any such action against an employee because the employee has sought the enforcement of his or her rights or privileges under the Code.

In addition to being a prohibition enforceable through the courts, a complaint can be made to the Public Service Labour Relations Board by the employee or somebody acting on behalf of the employee (likely to be a union representative). The Board can hear the complaint under its own rules of procedure.

The impact could be extensive if supervisors, managers and staff relations specialists are not fully aware of this provision and the possible action on the part of employees, their union representative or the Board.

Note: Additional information on disciplinary action can be found in Chapter 9.

Offences and Punishment (section 148)

Every person who contravenes a provision of Part II is guilty of an offence and liable on conviction to fines and/or imprisonment.

The impact of this provision could be extensive in the event of a prosecution. Under past Code provisions, prosecutions in the public service have usually followed a fatality or serious, near-fatal injury. Given the significant increase in maximum penalties under the current provisions, the courts most likely will substantially increase fines when they are imposed.

If a corporation or a department or other portion of the public service of Canada commits an offence, persons who direct, authorize, assent to, acquiesce in or participate in the commission of the offence are party to and may also be guilty of the offence. The addition of the public service to the Code confirms that the chain of command within a department or agency is potentially liable for the offence if it "directed, authorized, assented to, acquiesced in or participated in the commission of the offence" (subsection 149(2)).

The confirmation that most offences are now "strict liability" combined with the definition of "employer," which has been the vehicle through which public service managers and supervisors have been charged in the past, emphasizes the need to exercise and demonstrate "due care and diligence." This requires a greater understanding of managerial occupational health and safety responsibility and a greater emphasis on those occupational health and safety programs required by the Code and essential when confirming "due care and diligence."

Note: Additional information related to offences and penalties under Part II of the Code can be found in Chapter 12.

Providing of Information (section 155)

The Minister of Labour can serve notice to a person that requires him or her to provide information for the purposes of Part II.

Powers of the Canada Industrial Relations Board (section 156)

In the case of Part II complaints originating within the public service, subparagraph 240(*a*)(ii) of the *Public Service Labour Relations Act* refers such matters to the Public Service Labour Relations Board.

Fees (section 156.1)

The Governor in Council may fix the fees to be paid for providing services, facilities and products provided by the Minister of Labour under the purpose of Part II.

Regulations (section 157)

The Governor in Council may make regulations applicable to all employment to which Part II applies, to one or more classes of employment, or to such employment in one or more work places.

Application of Provincial Laws (sections 158-159)

The Governor in Council by regulation can direct that Part II applies in respect of any employment, or any class or classes of employment, on or in connection with a federal work, undertaking or business set out in the regulation that is, or is part of, a provincial Crown corporation (section 158).

In whole or in part, the Governor in Council, by regulation, can exclude from the application of any of the Part II provisions any employment, or any class or classes of employment, works or undertakings whose activities are regulated under *Nuclear Safety and Control Act* (section 159).

Reference Materials and Resources

- "Canada Labour Code, Part II—Overview," Human Resources and Social Development Canada, Labour Program
- "Canada Labour Code, Part II: An Overview," e-learning course provided by the Canadian Centre for Occupational Health and Safety
- "Pamphlet 2A—Employer and Employee Duties," Human Resources and Social Development Canada, Labour Program
- "Pamphlet 2B—Managers and Supervisors Training," Human Resources and Social Development Canada, Labour Program

- "Health and Safety Laws and Regulations," Human Resources and Social Development Canada, Labour Program
- Workplace Hazardous Materials Information System (WHMIS (Workplace Hazardous Materials Information System)), Health Canada

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1 A service-wide occupational health and safety committee has been established as a forum. It comprises union and employer representation for discussion of common service-wide issues for which the Treasury Board is responsible.

Chapter 2: Danger

▶ **In this section**

Since 1978, Part II ("Occupational Health and Safety") of the *Canada Labour Code* (the Code) has included a provision that allows an employee to withdraw from work and initiate the formal investigation of a dangerous situation. To ensure that the broad dictionary meaning was not applied to legal or quasi-legal interpretations of what was dangerous, the term "imminent danger" was used as a qualifier in conjunction with the right to withdraw.

When the legislation was revised in 1986, the word "imminent" was dropped, and a specific definition of danger was added to the interpretation section of Part II for greater clarity. Although subjective, the definition still retained the sense of imminence.

In September 2000, the legislation was further revised, and the definition of danger was broadened. It is essential that managers and supervisors be aware of the scope and impact of the current definition of danger and the

many conditions and circumstances to which it must be applied. In addition, labour relations officers who may be involved in refusal-to-work situations and occupational health and safety staff who are asked to provide advice must also be aware of the implications of the definition and where the intent must be applied.

The concept of danger must also take into account the assessment of known or foreseeable hazards and what represents reasonable risks in terms of probable exposure to such hazards. Some risks are inherent by the very nature of the work or activity, which in turn can represent some degree of danger. By the nature of the foreseeable hazards, the notion of inherent danger is particularly relevant to higher-risk occupations such as firefighters, police officers, emergency workers, first responders and others. Moreover, where there are inherent dangers, employers should be minimizing the potential harm, either acute or chronic in nature, from such risks through all reasonable and practical measures available to do so. For this reason, under the Code's right-to-refuse provisions (subsection 128(2)), an employee is not allowed to refuse to use or operate a machine or thing, to work in a place or to perform an activity if the danger is a "normal condition of employment" (paragraph 128(2)(*b*)). The known risks represented by a normal condition of employment can usually be reduced through risk management and various health and safety measures such as engineering controls, work procedures, training or personal protective equipment. In light of ongoing advances in science and technology, current measures taken to reduce risks with respect to inherent dangers should be reassessed on a continuing basis and adjusted accordingly.

Definition of Danger (section 122)

In Part II of the Code (section 122), the following definition of danger is provided:

“Danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

One needs to consider the broad scope of the definition of danger, the time frame for the incident and the possible results of the incident, including any future consequences. In addition, the concept of imminence includes potential hazards by using “existing” or “potential” as qualifiers for hazards or conditions, and “current” or “future” for activities. It is important to recognize that the harm that can be done to an employee or person does not have to occur immediately after the exposure to the hazard. The effects, notably to a person’s health, can appear later. This concept is reflected in the reference to “chronic illness,” which includes illness potentially resulting from exposure to hazardous substances that are known carcinogens, mutagens or teratogens.

Note that the definition uses the expression “person” rather than “employee.” This has implications for the employer’s general duty (section 124) to ensure the protection of the health and safety of every person employed, and the specific employer duty (paragraph 125(*z.14*)) of the Code to inform persons granted access to the work place of known or foreseeable hazards. As per the employer duty paragraph 125(1)(*y*), by employing the term “person,” it is especially important for the employer to ensure that persons granted access to the work place do not endanger employees.

To reflect the fact that certain activities, in addition to the hazards or conditions of the work environment may constitute a danger, the word “activity” is an acknowledgement that what a person does can have just as significant an effect as the equipment they use or the conditions they work under. In addition, the employer’s duties include a responsibility for the activities of employees in work places not controlled by the employer and for the exposure of that employee to danger.

Determination of the existence of danger requires a reasonable expectation of an “injury or illness before the hazard or condition can be corrected, or the activity altered.”

The highly subjective definition calls for a greater understanding of the possible outcome of an employee’s activities, the equipment they work with and the chemical, physical or biological agents they may be exposed to. In reviewing situations of potential danger, particular attention should be paid to situations where exposure to hazardous substances could potentially result in chronic illness, disease or damage to the male or female reproductive systems. Probability of misinterpretation will increase unless managers, supervisors, safety personnel and individual employees clearly understand the intent.

With the definition of danger and the appeals process for resolving health and safety officers’ decisions of “no danger,” departments, agencies and managers and supervisors acting on their employer’s behalf should ensure that they participate in the appeals hearing and obtain the advice of Justice Canada legal services whenever a decision is appealed. A summary of the process for appealing decisions and directions (subsections 145.1 to 146.5) has been included in this chapter and is covered in more detail in Chapter 11.

In addition to its continued use in the refusal-to-work process and the health and safety officer's powers, the word "danger" and its defined meaning will also apply to the definition of safety and to the Internal Complaint Resolution Process (subsection 127.1(7)). Closely related is "employer duty" in paragraph 125(1)(*y*) that uses the word "endanger" (to put in danger) with respect to the health and safety of employees who may be exposed to the actions of other persons.

Definition of Safety (section 122)

In Part II of the Code, "safety" is defined as "protection from danger and hazards arising out of, linked with or occurring in the course of employment."

The word "safety" is used in many provisions of Part II, including the duties of the employer and the employee. In addition, numerous provisions of the pursuant regulations use this word. Because of the broad concept of danger as it relates to safety, it is essential that managers and supervisors be aware of the scope of their responsibilities with respect to employee safety.

The legislation, wherever it uses the word "safety," has by definition placed the emphasis on protecting employees from danger and employment-related hazards rather than on preventing injuries resulting from exposure to a hazard. By using the defined word "danger" wherever safety is used, such as in the employer's general duty (section 124) and specific employer duties in paragraphs 125(1)(*q*), (*s*), (*y*), (*z*), (*z.09*) and (*z.14*), the obligation to protect means that the employer's duty includes protection from danger.

Health

Although not defined in the legislation, “health” is used in conjunction with “safety” throughout Part II of the Code. Generally, the consensus is that the health aspect of occupational health and safety in the federal jurisdiction should be considered as meaning the absence of physical disease, infirmity, illness or pain arising out of, linked with or occurring in the course of employment.

The greater emphasis on protecting an employee’s health has introduced some additional issues under the definition of danger, particularly as it applies to chronic illnesses. Increasingly, employers are dealing with pre-existing medical conditions of individual employees when assessing the potential nature and degree of risks to their health from exposure to certain hazards. The issue of pre-existing medical conditions has surfaced in a number of recent work refusal cases in Canada. Even in cases where a hazard may be considered as a normal condition of employment and the work was not likely to endanger the average worker, an individual employee may perceive that the risks to his or her health may be greater because of a pre-existing medical condition. This has been particularly an issue with respect to susceptibility to ergonomic-related or musculoskeletal injuries.

For example, although an employer may have implemented various measures to protect workers from known musculoskeletal injuries, it may be necessary to go one step further in order to accommodate employees who have additional health concerns so as to minimize the risk of musculoskeletal injuries for those particular individuals. Failure to do so could lead to a refusal to work and in turn to the lengthy investigation process that such a refusal entails under the Code. Moreover, by implication, managers and supervisors also must take into consideration any relevant medical conditions of individual employees when assessing risks associated with the normal working conditions and hazards within the

work place. Such considerations in turn can be closely linked to an employer's policies on accommodation for persons with particular medical conditions or disabilities.

Duties of Employers Related to Protecting Against Danger

An overview of the duties of employers is provided in Chapter 1.

By referring to safety, paragraphs 125(1)(*q*), (*s*), (*y*), (*z*), (*z.09*) and (*z.14*) automatically require the consideration of danger in that duty. The duty under paragraph (*y*), where "endanger" (to put in danger) is used in conjunction with protecting the health and safety of employees from the activities of other persons in the work place, places an additional emphasis on the obligation to consider the risks to which an employee may be exposed:

***Canada Labour Code*, paragraph 125(1)(*y*)**

> (*y*) ensure that the activities of every person granted access to the work place do not endanger the health and safety of employees

Concerns resulting from this duty are primarily focused on contractors coming into a building or onto the employer's property to do work. However, the use of the terms "every person granted access" and "work place" (defined as "any place where an employee is engaged in work for the employee's employer") combined with the use of the word "endanger" provides a broad scope for this duty. Because the accepted dictionary meaning for "endanger" is "to put in danger," the dangers from which employees are to be protected are those defined in Part II of the Code.

Officials of the Labour Program of HRSDC have indicated that "every person granted access" includes contractors, visitors, tour groups and other employees. If access to work places is permitted, this term in the

public service would also include contract employees, students, clients and the general public.

By referring to “every person granted access” in the above two duties, the application is in respect of “work places controlled (not necessarily owned) by the employer.” A work place controlled by the employer is not necessarily a building, structure or surrounding property. It is any place owned or controlled by the employer where an employee is, or is likely to be, engaged in work for the employer. This includes locations where work is being performed outdoors and on third-party premises. However, the place in question may be a portion of federally owned property where employees rarely, if ever, perform work.

***Canada Labour Code*, paragraph 125(1)(*z.14*)**

> (*z.14*) take all reasonable care to ensure that all of the persons granted access to the work place, other than the employer’s employees, are informed of every known or foreseeable health or safety hazard to which they are likely to be exposed in the work place

The duty under paragraph 125(1)(*y*) is linked to the converse paragraph 125(1)(*z.14*), whereby the employer must also ensure that those persons granted access to the work place are informed of every known or foreseeable health and safety hazard they are likely to be exposed to.

Under both these duties, departments and agencies and managers, supervisors and persons acting on their behalf will need to apply a broad interpretation to “work place” and to “persons granted access.” In allowing contractors, contractors’ employees, students, visitors, clients, customers, etc. into their facilities or onto their property, departments and agencies will need to be fully aware of their responsibilities for the persons involved and for their own employees who may be affected by such persons.

Departments and agencies that deal with the public or that contract for work or services, or allow access to their buildings or property, will need to develop and apply appropriate policies and procedures, in consultation with policy or work place committees and representatives, to address these two duties.

Internal Complaint Resolution Process (section 127.1)

The Internal Complaint Resolution Process is intended to ensure that an employee's concerns about his or her health and safety can be properly addressed without the need to initiate a refusal to work or when the employee would prefer a less formal resolution process. This process is more fully addressed in Chapter 3.

It is essential that managers and supervisors be aware of the intent, the provisions of this process, and the many conditions and circumstances to which the process may be applied. In addition, they should be aware of the consequences of not following the process and of taking inappropriate action against an employee who raises a complaint.

However, "danger" appears in subsection 127.1(7) and, if the employee's concern is one of danger, the employee has the option of using this process or exercising his or her right to refuse to work (section 128).

Refusal to Work (section 128)

The Code allows an employee to refuse to use or operate a machine or thing at work, to work in a place, or to perform an activity if the employee has reasonable cause to believe that:

a. the use or operation of the machine or thing constitutes a danger to the employee or to another employee;

b. a condition exists in the place that constitutes a danger to the employee; or
c. the performance of the activity constitutes a danger to the employee or to another employee.

Paragraph (*c*) includes "activity," i.e., what an employee does, as a factor to be considered in identifying the perceived danger. Although this clarification should not be a major problem, it is essential that employees, managers, supervisors and other personnel, such as staff relations officers and occupational health and safety staff, clearly understand the intent and meaning of the expanded approach to determining "danger" and an employee's rights.

Note: The process is different for an employee working on a ship or aircraft that is in operation. If such an employee believes that there is a work-related danger, it must be brought to the attention of the person in charge, who will then make a decision on what to do after taking into account the safety of the aircraft or ship.

Where an employee has exercised the right to refuse, even when the perceived danger is determined by a health and safety officer not to exist after an investigation, the employer is prohibited from disciplining the employee simply because he or she exercised this right (section 147).

Further information on prohibited or discriminatory action by an employer is found in Chapter 9.

Health and Safety Officers' Directions

Health and safety officers, appointed by the Minister of Labour to enforce the provisions of Part II of the Code, have extensive powers to enter work places, conduct investigations and demand information to ensure compliance. Depending on the circumstances, an officer may:

- Accept an assurance of voluntary compliance (AVC) from a responsible manager or supervisor, normally in the case of a low risk where the employer admits a contravention;
- Give a verbal direction, to be confirmed in writing, for a contravention;
- Give a written direction in a situation of danger; or
- Issue a cessation of use order.

Note: An assurance of voluntary compliance is part of HRSDC's written *Compliance Policy* on occupational health and safety.

In addition, it would be a health and safety officer who initiates the charges in the event of a prosecution.

Although there is a process by which a direction can be reviewed by a designated official, managers and supervisors should be aware of the powers of a health and safety officer and of the consequences of receiving, and more importantly, not complying with a direction.

In the Event of Danger

A health and safety officer has the authority to give directions with respect to situations of danger. The danger must be apparent at the time the officer was present. This constraint is very important, especially with respect to the investigation of a refusal to work. The officer cannot consider something that occurred in the recent past unless it is an unrelated contravention, in which case another authority would apply (subsection 145(1)).

Direction to the Employee in the Event of Danger

If a health and safety officer considers that there is a danger to the employee or to another employee, the officer, in addition to directions issued under subsection 145(2), must issue a direction in writing to the

employee to discontinue the use, operation or activity, or cease to work in that place until the employer has complied with any directions issued (subsection 145(2.1)).

This provision, linked to employee duty in paragraph 126(1)(*i*), provides the authority for a health and safety officer to issue a direction to an employee if it is the actions of the employee that are the source of the danger. Managers and supervisors should be aware of this authority and ensure that, where it is clearly the actions of an employee that constitute the danger, they insist that the officer issue such a direction.

Appeals of Decisions and Directions

Managers and supervisors who are in receipt of a direction from a health and safety officer with which they do not agree need to be fully aware of the appeals process. They should be especially aware of the method by which an appeal of directions should be made and, of the very limited 30-calendar-day time period for getting the appeal to Occupational Health and Safety Tribunal Canada (Tribunal).

Departments and agencies, especially those with regional structures or remote locations, should establish procedures whereby speedy legal and other advice can be obtained and decisions can be made to accommodate the time limitation.

If a health and safety officer decides that a danger does not exist, the employee is not entitled to continue to refuse to use or operate the machine or thing, work in that place or perform that activity (subsection 129(7) or section 128). However, the employee, or a person designated by the employee for the purpose, may appeal the officer's decision, in writing, to the Tribunal within **10 days** after receiving notice of the "no danger" decision.

Note: Appeals of decisions and directions are dealt with in greater detail in Chapter 11.

Note: Additional guidance on the interpretation of "danger" as defined in the Code can be found in HRSDC's Interpretations, Policies and Guidelines (IPGs) document entitled "Definition of Danger" (905-1-IPG-062).

Chapter 3: Internal Complaint Resolution Process

▶ **In this section**

Under Part II of the *Canada Labour Code* (the Code), an employee has legislated options for having a health or safety concern addressed. There is the right to refuse work that the employee considers to be dangerous, the right to bring a complaint to the attention of the work place health and safety committee, the right for a pregnant or nursing employee to withdraw from work, and an Internal Complaint Resolution Process for ensuring that employees' health and safety concerns are addressed by the employer without the employee having to initiate a formal refusal-to-work action.

The Internal Complaint Resolution Process was developed to allow employees to raise any health and safety concern with their supervisor and be assured that the concern will be dealt with promptly.

Managers and supervisors should be aware of their responsibilities under this provision, of the consequences of not dealing with a complaint promptly, and of taking disciplinary or discriminatory action against an employee for making a complaint. In addition, employees should be made aware of this process and of their responsibility to follow it.

Internal Complaint Resolution Process (section 127.1)

Where an employee believes on reasonable grounds that there has been a Part II contravention or that there is likely to be a work place accident, injury or illness, the employee must, before exercising any other recourse available under Part II, make a complaint (subsection 127.1(1)) to the employee's supervisor. The employee's right to complain is limited only by the need to have "reasonable grounds" for the belief. Although primarily a right, it is also an employee's duty (paragraph 126(1)(*j*)) to report any contravention by the employer, another employee or any other person.

The potential grounds for a complaint are very broad. First, there can be a belief that Part II of the Code has been contravened. Because the phrase "this Part" (i.e., Part II of the *Canada Labour Code*) encompasses the provisions of the Code and all the applicable regulations, the complaint can relate to any provision in the regulations, including prescribed requirements and referenced standards, that apply to the employee's work place.

Second, there can be a belief that there is likely to be an accident or injury to health. This belief can be more subjective in that it does not necessarily need to be linked to a contravention. In addition, the potential risk of an accident, injury or illness is not necessarily limited to the employee making the complaint.

In order for the employee to confirm that there is a contravention, it should be noted that the employer duty (paragraph 125(1)(*e*)) requires making available, in printed or electronic form, a copy of all the regulations applicable to that work place.

For the employee, it is important that this complaint process is followed. It is also critical that the parties be allowed to resolve the perceived problem before the employee uses any other recourse that is provided by Part II of

the Code. These other recourses, such as contacting a member of the work place health and safety committee or a health and safety officer, form part of this process, but they should occur only when the employee and supervisor cannot first resolve the concern.

For a complaint of non-compliance made directly to a health and safety officer, the officer's initial response will be to ensure that the parties have tried to resolve the problem through the Internal Complaint Resolution Process detailed in the Code. Although the employee would, if possible, be referred to this process to resolve the concern, confidential complaints under health and safety officers' powers (paragraph 141.1(*k*)) would not be considered as a complaint for the purposes of the Internal Complaint Resolution Process.

It is the policy of HRSDC (Human Resources and Skills Development Canada) Labour Program that anonymous or confidential occupational health and safety complaints shall be returned to the complainant because the *Code* requires the employee to first discuss any health and safety related issue with his or her supervisor, before contacting HRSDC (Human Resources and Skills Development Canada) Labour Program.

However, if the employee's concern is one of danger, the employee has the option to exercise the right to refuse to work (section 128). An employee may also invoke the rights given to a pregnant or nursing employee (section 132).

For the manager or supervisor, it is critical that they accept the complaint as a genuine concern, that they address it immediately and, most importantly, that they do not do or say anything that may be construed as a threat of disciplinary or discriminatory action.

The employee and the supervisor must first try to resolve the complaint between themselves as soon as possible. The initial employer responsibility rests with the employee's supervisor to whom the complaint is initially made. Jointly with the employee, the supervisor should make every effort to resolve the complaint to the satisfaction of the employee at their own level.

It is essential that management provides first-line supervision, with the opportunity, authority and responsibility to respond to and resolve problems, concerns and issues that employees draw to their attention.

There will be considerable peer pressure on the supervisor, and to some degree on the employee, to resolve the problem, concern or issue at their level and between themselves. The next stage, involving designated committee members, would most likely take the resolution of the concern out of the direct control of the supervisor.

Even if the complaint is resolved at this stage, the results of the investigation should always be documented. Information on the types of complaints and, more importantly, on the situations that gave rise to the complaints, along with the actions taken, will be very useful at a later date if similar situations arise or if the employer needs to demonstrate due care and diligence.

Departments and agencies will need to ensure that employees clearly understand their rights and that managers and supervisors clearly understand their responsibilities. If a danger is identified, managers and supervisors also need to clearly understand their obligations and the consequences of not resolving a problem that in turn will result in the involvement of a health and safety officer.

Furthermore, managers and supervisors must be fully aware of the consequences of taking discriminatory or disciplinary action against an employee making a complaint (sections 133 and section 147).

An employee or a supervisor may refer an unresolved complaint to the chairperson of the work place committee or to the health and safety representative, to be investigated jointly by an employee member and an employer member of the work place committee, or by the representative and a person designated by the employer.

Because this stage requires other managers and employees to leave their work in order to participate, there is also likely to be considerable peer pressure on the supervisor to avoid allowing complaints to reach this level.

Committee members, assigned to address these complaints, need to be properly trained in the procedures to be followed and in their responsibility and authority to recommend corrective action. To avoid confusion, committees should have designated teams whose members are ready to respond to a complaint. The extent of the training required, beyond that required by other provisions of the Code or regulations, will depend on the specific work environment.

The regulation that deals with the prescribed training to be provided to committee members, referred to in employer duty in paragraph 125(1)(*z.01*), is expected to come into effect later in 2013. However, this duty also requires the employer to ensure that committee members are made aware of their responsibilities, including the fair and correct resolution of employee complaints. This requirement is not dependent on regulations.

Persons who investigate a complaint must inform the employee and the employer in writing, in the form and manner prescribed (if any), of the results of the investigation. Barring any future prescribed requirements,

the content of the investigation's results should include as a minimum the following:

- The date, subject and nature of the complaint;
- The name of the supervisor involved in the original investigation and the result of that investigation;
- The names of the committee members and other persons involved in this second-stage investigation;
- The conclusion reached; and
- The action taken (subsection 127.1(4)).

Persons who investigate the complaint may make recommendations to the employer with respect to the situation that gave rise to the complaint, whether or not they conclude that the complaint is justified(subsection 127.1(5)).

Once there has been an investigation by the designated committee members, the original complaint cannot be dismissed without some form of closure. Recommendations may derive from conditions that the original employee was not aware of.

Even if an investigation reveals that there is no contravention to the code or the regulations, the persons investigating the complaint may still make recommendations to the employer regarding the situation that led to the complaint.

If the persons who investigate the complaint find that the investigation's results conclude that the complaint is justified, the employer shall in writing and without delay inform the persons who investigated the complaint of how and when the employer intends to resolve the matter. The employer shall take steps to resolve the matter accordingly(subsection 127.1(6)).

The mandatory resolution process requires a clear understanding of the intent of the joint resolution process. It is important to acknowledge that the employer has already been involved in determining that the complaint is justified, through a designated employer member of the committee taking part in the investigation.

Compliance on the part of the employer at this stage is essential. Otherwise, a health and safety officer involved in the next stage may make decisions and give directions that may be more binding on the employer. Compliance is especially essential with respect to responding to the committee members who investigated the complaint. Although not specifically identified as the employer's responsibility, the original employee should also be informed of the action to be taken.

Managers and supervisors directly and indirectly involved in the process should be aware of their responsibilities to participate in the process, develop solutions, respond to the investigation team and, most importantly, carry out the recommended solution.

If the persons who investigate the complaint conclude that a danger exists as defined in the Code, until the situation is rectified, the employer shall, on receipt of written notice, ensure that no employee uses or operates the machine or thing, works in the place or performs the activity that constitutes the danger. Even though the employee may not have identified the complaint as a situation of danger, and the refuse-to-work provision was not used, the parties conducting the investigation may determine that there is in fact a danger. The impact of this provision will depend on the state of compliance in the work place where the concern was raised. This provision is intended to produce the same result as a formal "lock out" that would have been ordered by a health and safety officer under similar circumstances (subsection 127.1(7)).

However, the circumstances under which the danger must occur are restricted to those identified below. “Danger” is defined in the Code (subsection 122(1)) as follows:

- “Danger” means any existing or potential hazard or condition or any current or future activity that could reasonably be expected to cause injury or illness to a person exposed to it before the hazard or condition can be corrected, or the activity altered, whether or not the injury or illness occurs immediately after the exposure to the hazard, condition or activity, and includes any exposure to a hazardous substance that is likely to result in a chronic illness, in disease or in damage to the reproductive system.

Additional information on the concept of danger under the Code can be found in Chapter 2.

Complaints to Health and Safety Officers (subsection 127.1(8))

An employee or employer may refer a complaint of a contravention of Part II to a health and safety officer in the following circumstances:

1. where the employer does not agree with the results of the investigation;
2. where the employer has failed to inform the persons who investigated the complaint of how and when the employer intends to resolve the matter or has failed to take action to resolve the matter; or
3. where the persons who investigated the complaint do not agree between themselves as to whether the complaint is justified.

If the internal complaints resolution process fails to resolve the problem, the above provision represents a partial limitation on the circumstances under which an employee can refer a complaint to a health and safety

officer of HRSDC's Labour Program. A clear understanding of this phase of the process by employees, managers and supervisors is essential and will occur only if the work place parties have failed to resolve the concern.

Normally, health and safety officers will not respond to a complaint if the employee had not first attempted to use this internal process. In other than the most unusual circumstances, officers receiving a complaint would first ask employees if they had followed the internal phases of the complaint resolution process.

A health and safety officer shall then investigate or cause another officer to investigate the complaint referred to the officer under the above provision. An officer must, upon notification of the complaint (where the internal process has failed to resolve the complaint), investigate the complaint. Before investigating and becoming directly involved in the resolution of the complaint, the officer will ensure that the complainant has fulfilled his or her obligation in trying to have the problem resolved internally (subsection 127.1(9)).

Managers and supervisors should be aware that, once involved, the officer is not restricted to investigating the circumstances of that complaint. In all likelihood, the officer will want to meet with employees who may have similar concerns, ask for the records of any other complaints, and request the minutes and records of the work place health and safety committee. In some cases, the officer might also conduct a general inspection of the work place.

The health and safety officer's authority and role is outlined within the Code where the parties have failed to resolve the concern through the internal process (subsection 127.1(10)).

The officer who has investigated a complaint may give a direction (subsection 145(1)) or recommend that the employer and employee resolve the matter themselves. However, should the officer conclude that a danger exists, the officer shall issue a direction (subsection 145(2)).

The Internal Complaint Resolution Process does not limit a health and safety officer's power and duty to issue directions under section 145 if the officer determines that a direction is required. The referred authority is extensive and is not necessarily restricted to the circumstances of the complaint (subsection 127.1(11)).

More detailed information on issuance of directions is outlined in Chapter 10.

Prohibited Disciplinary Action (section 147)

Managers and supervisors should be aware of the consequences of taking action against an employee acting in accordance with his or her rights and responsibilities under Part II of the Code, or of trying to have the provisions of Part II implemented.

The Code deals with disciplinary action taken by an employer against employees exercising various rights provided for under Part II. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period of time that the employee would have worked, or take any disciplinary action against, or threaten to take any such action against, an employee because the employee has:

- Testified or is about to testify in a proceeding taken or an inquiry held;
- Provided information to a person engaged in the performance of duties under Part II regarding the conditions of work affecting the

health or safety of the employee, or of any other employee of the employer; or

- Acted in accordance with the legislation or has sought the enforcement of any of the legislated provisions.

Additional information on prohibited disciplinary action can be found in Chapter 9.

Complaints When There Is an Action Against Employees (section 133)

In addition to being a prohibition enforceable through the courts, a complaint can be made to the Public Service Labour Relations Board (Board) by a public service employee or somebody acting on behalf of the employee. The Board can then hear the complaint under its own rules of procedure.

A person designated by the employee may also make the complaint on the employee's behalf. Although the employee may contact a lawyer, there can be little doubt that this other person most likely would be an experienced union official or employee representative.

It is important to note that the complaint can be with respect to any prohibited action of section 147, not just with what is related to an employee's refusal to work. The impact could be extensive if supervisors, managers and staff relations specialists are not fully aware of this provision and the possible action on the part of employees, their union representative or the Board.

Note: Additional information on the Internal Complaint Resolution Process under Part II, including a diagram outlining the related steps, is available in HRSDC's "Pamphlet 3 - Internal Complaint Resolution Process."

Chapter 4: Refusal to Work

▶ **In this section**

Since 1978, Part II ("Occupational Health and Safety") of the *Canada Labour Code* (the Code) has included a provision that allows an employee to withdraw from work and initiate the formal investigation of a dangerous situation. To ensure that a broad dictionary meaning was not applied to legal or quasi-legal interpretations of what was "dangerous," the term "imminent danger" was used as a qualifier in conjunction with the right to withdraw.

When the legislation was revised in 1986, the word "imminent" was dropped, and a specific definition of danger was added to the interpretation section of Part II for greater clarity. Although subjective, the definition still retained a sense of imminence.

In September 2000, the legislation was further revised and the definition of danger was broadened. It is essential that managers and supervisors be aware of the broad scope and impact of the current definition of danger and the right to refuse dangerous work. In addition, labour relations officers who may be involved in refusal-to-work situations, and occupational health and safety staff who may be asked to provide advice on perceived situations of danger, must also be aware of the implications of its definition and the scope of the right to refuse dangerous work. Additional explanation of danger can be found in Chapter 2.

Refusal-to-Work Process (section 128)

An employee may refuse to use or operate a machine or thing at work, refuse work in a place, or refuse to perform an activity if the employee has reasonable cause to believe that:

a. the use or operation of the machine or thing constitutes a danger to the employee or to another employee;
b. a condition exists in the place that constitutes a danger to the employee; or
c. the performance of the activity constitutes a danger to the employee or to another employee.

Paragraph (*c*) refers to an activity-i.e., what an employee does and whether that activity could affect somebody else - as a factor to be considered in identifying the perceived danger. It is essential that employees, managers, supervisors and other personnel, such as labour relations officers and occupational health and safety staff, clearly understand the employee's rights and the intent of the circumstances under which an employee may perceive that he or she is in a situation of perceived danger.

An employee cannot refuse to use or operate a machine or thing, refuse to work in a place, or refuse to perform an activity if the refusal puts the life, health or safety of another person directly in danger, or if the danger is a normal condition of employment. The phrase "normal condition of employment" is intended to reflect this intent.

Note: The Code has specific provisions that relate to employees engaged in the operation of ships and aircraft. Subsection 128(3) effectively allows the master of the ship or the captain of the aircraft to delay the refusal process if he or she has reasonable grounds to believe that the withdrawal from work of the crew member would affect the safety of the ship or aircraft. The delay can remain in effect until the ship docks or the aircraft lands in Canada. Once back in Canada, the crew member of a ship or aircraft who had his or her refusal delayed by the master or captain would be in a position to reactivate the refusal process by reporting the incident to a representative of the employer (subsections 12(3), (4) and (5)).

An employee who refuses to work under the right-to-refuse provision or who is prevented from acting in accordance with the provision must report the circumstances of the matter to the employer without delay. The person to whom the report is made is likely to be the employee's manager or supervisor. The manager or supervisor receiving the report should be fully aware of his or her responsibilities in investigating the circumstances of the refusal and of the rights of the employee making the report.

The report sets in motion a process that, if the concern or potential exposure is not resolved immediately, could involve members of the work place health and safety committee or the health and safety representative, or eventually a health and safety officer of HRSDC's Labour Program.

Where a report is made under the above provision, the employee, if there is a collective agreement in place that provides for a redress mechanism in circumstances described in section 128, must inform the employer in a timely manner whether the employee intends to exercise recourse under the agreement or this section. The selection of recourse is irrevocable unless the employer and employee agree otherwise. This requirement is intended to resolve problems where collective agreements contain refusal-to-work provisions that can cause considerable delays if the choice of process is not declared early and "locked in" for the duration of the refusal.

If the employer agrees that a danger exists, the employer must take immediate action to protect employees from the danger. The employer shall in turn inform the work place committee or the health and safety representative of the matter and of the action taken to resolve it (subsection 128(8)).

This provision is intended to ensure that a report of a perceived danger does not automatically require the formal investigation provisions of subsection (10). This clarification will be important in situations where

agreement is immediate and a formal investigation would not add any value. The work should cease in cases where the perceived danger is at a remote location and there is immediate agreement on the part of the supervisor or manager that further work could place the employee at risk.

If the employer agrees that there is danger and takes immediate action to correct the danger or protect the employee, a formal investigation involving committee members and others need not take place. However, the employer must subsequently inform the committee representing the employee or work place of the incident and of any actions taken to rectify the situation.

Managers and supervisors to whom reports are made should make every effort possible to identify the reason for the reported refusal and resolve the concern by taking immediate action to protect the employee.

Employer Investigation and Continued Refusal by Employees

If the matter is not resolved under the above provision, an employee may continue the refusal. Without delay, the employee must report the circumstances of the matter to the employer and to the work place committee (the committee) or the health and safety representative (the representative) (subsection 128(9)).

Immediately on being informed of an employee's continued refusal, the employer must investigate the matter in the presence of the employee who reported it and in the presence of (subsection 128(10)):

a. at least one member of the work place committee who does not exercise managerial functions;
b. the health and safety representative; or
c. if no person is available under paragraph (*a*) or (*b*), at least one person from the work place who is selected by the employee.

Throughout Part II of the Code, the generic term “employer” is used to describe both the corporate employer and the managers and supervisors acting on behalf of the corporate employer. For the purposes of this subsection, the investigating employer could be the supervisor to whom the report was first made or, if the committee members have received training in the investigation of refusals to work, a management member of the committee, preferably accompanied by the original supervisor.

The participating employee member of the committee should also be appropriately trained, as should the representative, if he or she is the third person in accordance with paragraph (*b*) above.

If, and only if, an employee member of the committee or a representative is not readily available to participate in the investigation, the refusing employee can select another employee from that work place to be present to participate in the investigation.

If more than one employee has made a report of a similar nature, those employees may designate one employee from among themselves to be present at the investigation. This provision is intended to resolve situations where multiple refusals have a labour relations rather than a health and safety objective (subsection 128(11)).

Departments need to ensure that employees, managers and supervisors are aware of this provision, and that those employees involved are also aware of their right to designate one of them to represent their interests.

An employer can proceed with an investigation in the absence of the employee who reported the matter if that employee, or a designated person, chooses not to be present. This provision is intended to ensure that the internal investigation can proceed without unreasonable delay. The

employer's investigation of a refusal shall not be delayed if the employee foregoes the opportunity to be present. The investigation of the danger can still proceed (subsection 128(12)).

Use of the authority provided by the above provision should be documented in case a complaint is made to a health and safety officer.

The employee may continue to refuse if he or she has reasonable cause to believe that the danger continues to exist, even after the measures have been taken by the employer to protect the employee, or if the employee does not agree with the employer's investigation. On being informed of the continued refusal, the employer shall notify a health and safety officer. Because it is the employer's duty to make the report, it is not necessary for both the employer and the employee to report to a health and safety officer. Departments need to ensure that supervisors are aware of their responsibility to report. The sooner the officer is informed, the sooner the investigation can proceed. The responsible supervisor could be held accountable if the report is not made and a serious situation of danger is later identified.

The employer must inform the committee or the representative of any steps taken by the employer under subsection 128(13). This is a provision aimed at ensuring that the committee or the representative is kept informed. Committee rules of procedure should address how members will be informed. Note that there is no time frame (subsection 128(14)).

Payment of Employees and Alternative Work

Unless otherwise provided in a collective agreement or other agreement, employees are to be paid for the period of the work stoppage, or to the end of the shift, if they are unable to perform their work as the result of another

employee's refusal to work, or if alternative work is not available. With the collective agreements in place in the public service, this has not been an issue and is not expected to become one (subsection 128.1(1)).

Similar to subsection (1) above, another provision extends the same protections to the next shift. Where there has been a stoppage of work arising from application of the right to refuse and if alternative work is not available, employees scheduled to work on the next shift must be given at least one hour's notice not to attend work. In cases where shift provisions in a collective agreement provide for a specific time period of advance shift change notification, such provisions would not apply under the above scenario (subsection 128.1(2)).

An employer may assign reasonable alternative work to employees who are deemed to be at work under subsection (1) or (2) above. This provision provides managers or supervisors with the authority to assign alternative work to all or some employees affected by a work refusal (subsection 128.1(3)).

Employees affected by a work stoppage under a refusal to work may be required to repay wages and benefits paid during the period of "unjustified refusal" because another employee unjustifiably refused to work. After the employee has exhausted all avenues of redress, this provision applies unless a collective agreement or other agreement provides otherwise.

The qualification "after all avenues of redress have been exhausted by the employee" is an important restriction on the employer. These avenues of redress could include, as a minimum, a review of a health and safety officer's decision on the danger by an appeals officer, a review of that decision by the Federal Court, Trials Division, and a further appeal to the Federal Court, Appeals Division. In addition, the refusing employee could complain to the Board of discriminatory threats or action (section 133) or

via the collective agreement. Departments or agencies considering such action can expect a delay of approximately 18 months before being able to exercise this process. Any action taken before all avenues of redress have been taken is likely to result in a complaint to the Board, under section 133, that there had been a violation of section 147.

Investigation by Health and Safety Officers and Resulting Directions and Decisions (section 129)

On being notified that an employee continues to refuse to work under subsection 128(13), a health and safety officer or other designated health and safety officer shall without delay investigate the matter. The investigation will take place in the presence of the employer of the employee and one other person who is an employee member of the work place committee, a representative or, in the absence of the above persons, another employee from the work place designated by the employee.

If the investigation involves more than one employee, those employees may in turn designate one employee from among themselves to be present at the investigation. However, a health and safety officer may proceed with an investigation in the absence of any person mentioned above if that person chooses not to be present.

For example, due to the distances and other priorities that could be involved, the health and safety officer may not arrive before the end of the shift or the work day. The officer has the authority to proceed without the persons identified above being present. Other than for health and safety committee members and representatives, managers and supervisors should note that there is no provision in the Code to pay any other employees involved for their time if the officer’s investigation takes place or continues after or beyond their shift (subsection 129(3)).

A health and safety officer shall, on completion of an investigation made under this section, decide whether the danger exists and shall immediately give written notification of the decision to the employer and the employee. This is important in that the notification of the decision on the existence of danger shall be in writing and before the officer leaves the work place (subsection 129(4)).

Managers and supervisors should be aware that the health and safety officer must inform the employer and employee in writing of the decision as to whether there is a danger. If the officer decides that a danger does exist, he or she is required to issue a written direction to rectify the condition. This is a positive provision in that the employer representative and the employee concerned will have immediate written confirmation of the decision, regardless of the outcome. Managers and supervisors should be instructed to attempt to obtain this written decision before the officer leaves (subsection 145(2)).

Before the health and safety officer's investigation and decision, the employer may require that the employee concerned remain at a safe location near the place in respect of which the investigation is being made. The employer can also assign the employee reasonable alternative work (subsection 129(5)) but cannot assign any other employee to perform the refusing employee's work unless:

a. the other employee is qualified for the work;
b. the other employee has been advised of the refusal of the employee concerned and of the reasons for the refusal; and
c. the employer is satisfied on reasonable grounds that the other employee will not be put in danger.

Additional limitations in paragraph (*a*) and (*c*) above are applied to the qualifications of and risks to the replacement employee. Managers and supervisors should be aware of their responsibility to ensure that the replacement employee is both qualified to do the work and will not be in danger while doing so.

If a health and safety officer decides that the danger exists, the officer shall issue the directions that the officer considers appropriate. An employee may continue to refuse to work until the directions are complied with or until they are varied or rescinded (subsection 129(6)).

Managers and supervisors should attempt to ensure that the officer issues the direction and that they receive it before the officer leaves. If the manager or supervisor does not agree with the direction or an aspect of the contents, he or she should immediately contact whoever has been designated within the department to determine whether an appeal is warranted. The appeals officer hearing the appeal has the authority to confirm, vary or rescind directions, or issue new ones based on the information provided.

The refusing employee or employees may continue to refuse to perform the task in question or refuse to work in that location until the direction is complied with or amended by the appeals officer. These employees are entitled to refuse only the task in question; they are not entitled under the law to go home. The manager or supervisor should assign alternative work if at all possible.

Under certain circumstances, if the decision of danger clearly relates to the employee and the employee’s ability to do the job, the job may be assigned to another employee under the same conditions as specified in subsection 129(5).

If a health and safety officer decides that there is no danger, the employee is not to continue to refuse to work. However, the employee, or a person designated by the employee, may appeal the decision in writing to an appeals officer within10daysafterreceiving notice of the decision (subsection 129(7)).

In instances where a decision of no danger by a health and safety officer may be wrong and an employee may in fact still be at risk, an appeals officer most likely will give priority to these types of appeals over employer appeals of directions.

An important aspect of this provision is to allow a person designated by the employee to make the appeal. Departmental officials designated to advise on, and participate in, hearings before an appeals officer should be aware of the likely involvement of experienced union officials or other employee representatives, and should be properly prepared with legal advice and expert assistance.

The Minister of Labour may, on the joint application of the parties to a collective agreement, exclude the employees from the application of sections 128 and 129 for the period during which the agreement remains in force. The Minister must be satisfied that the agreement contains provisions that are at least as effective as those sections in protecting the employees to whom the agreement relates from danger to their health or safety (section 130).

Note: This is a special-purpose provision intended for use in specific federally regulated industries and is not applicable in the public service. Even though there are public service collective agreement provisions related to the right to refuse to work, public service requests for exemption of the Code provisions would not be approved by the Minister of Labour.

The fact that an employer or employee has complied with or failed to comply with any of the Code provisions may not be construed as affecting any right of an employee to compensation under any statute relating to compensation for employment injury or illness, or as affecting any liability or obligation of any employer or employee under any such statute.

Note: The inclusion of illness with respect to compensation rights is very important.

Appeals of Decisions and Directions

With the definition of danger in effect, and with the appeals process for resolving health and safety officers' decisions of no danger, departments, agencies, and their managers and supervisors acting on the employer's behalf should ensure that an appropriate official participates in hearings convened by the appeals officer. In addition, there should be a designated official to coordinate decisions related to appeals and to obtain the advice of Justice Canada's legal services before appealing a decision.

Managers and supervisors who are not in agreement with a direction received from a health and safety officer need to be fully aware of the following process. They should be especially aware of the method by which an appeal is made and of the very limited time period of 30 calendar days for getting the appeal to the Occupational Health and Safety Tribunal Canada (Appeals Office).

Departments and agencies, especially those with regional structures or remote locations, should establish procedures whereby decisions are coordinated, speedy advice is obtained and timely decisions are made in order to meet the time limitation.

The Minister of Labour may designate as an appeals officer any person who is qualified to perform the duties of such an officer. Sections 145.1, 146, 146.1, 146.2, 146.3, 146.5 and 146.6 are likely to have a considerable impact on any employer faced with an employee's appeal of a "no danger" decision or an appeal of a direction. Given the complexity of the appeals process and the legislated protection given to the appeals officer, legal advice in preparing and presenting an appeal will most likely be essential (section 145.1).

More detailed information on the appeals process can be found in Chapter 11.

Prohibited Disciplinary Action (section 147)

The Code deals with disciplinary action taken against employees who are exercising various rights provided for under Part II. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period of time that the employee would have worked, or take any disciplinary action against, or threaten to take any such action against, an employee because the employee:

a. has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
b. has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
c. has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

It is important for managers and supervisors to note that the complaint can be with respect to any prohibited action, especially that in paragraph (*c*) above, not just disciplinary or discriminatory action resulting from a disputed refusal to work.

The impact could be extensive if managers, supervisors, and occupational health and safety and staff relations specialists involved in providing advice are not fully aware of this provision and the possible action that can be taken against them (see discussion of section 133 below).

More detailed information on prohibited disciplinary action can be found in Chapter 9.

Complaints When There Is an Action Against Employees (section 133)

This is a very significant and important provision in that a complaint may be made in writing to the Public Service Labour Relations Board (the Board) with respect to **any** disciplinary or prohibited discriminatory action (section 147), not merely those related to refusals to work.

In addition to being a prohibition enforceable through the courts, a complaint can be made to the Board by the employee, and the Board can hear the complaint under its own rules of procedure.

Furthermore, a person designated by the employee for that purpose could make the complaint on the employee's behalf. Although an employee may contact a lawyer, the strong likelihood is that this other person will be an experienced union official or employee representative.

The impact could be significant if supervisors are not aware of the prohibition and the possible consequence of taking such action.

Note: Additional information on the right-to-refuse provisions under Part II, including a diagram outlining the various related steps, can be found in HRSDC's "Pamphlet 4 "Right to Refuse Dangerous Work."

Chapter 5: Pregnant and Nursing Employees

▶ **In this section**

Under Part II of the *Canada Labour Code* (the Code), employees who are pregnant or nursing have health and safety rights and responsibilities that extend beyond their own physical well-being.

A pregnant employee may be exposed to an increased risk to herself, as a result of her physical condition, while being responsible for the health and safety of the fetus she is nurturing. For example, certain physical hazards and chemical, infectious and biological agents, although being relatively harmless to the mother, could have a serious and permanent effect on the fetus.

Because of her exposure to hazardous chemical substances, infectious agents and biological contaminants, it is also possible that a nursing employee may transmit sufficient quantities of the agent or agents to have a chronic effect on her child.

To allow a pregnant or nursing employee to take immediate action to temporarily remove herself from a potential health risk to herself or to her fetus or nursing child, a specific right has been established by Part II of the Code. This right may be exercised from the beginning of the pregnancy until the employee is no longer nursing.

To confirm or alleviate her concern, the employee is required to consult a qualified medical practitioner as soon as possible. Furthermore, she has the legal right to choose the medical practitioner. Although the legislation is silent on how the medical practitioner will provide an opinion on whether continuing her job functions constitutes a risk to her health or to that of her fetus or nursing child, the employee should protect her rights by obtaining a medical certificate.

The right to take this action is in addition to the complaint process (section 127.1) and to the right to refuse to perform dangerous work (section 128). Departments and agencies should ensure that managers and supervisors are aware of this right and of the protection given to the employee while she is exercising it.

Although not defined in the legislation, the term “health” is used in conjunction with the term “safety” throughout Part II of the Code. There is also general consensus that the health aspect of occupational health and safety in the federal jurisdiction should reflect the absence of physical disease or infirmity arising out of, linked with or occurring in the course of employment. For managers and supervisors, this statement would be an appropriate approach to understanding the employer’s obligations to protect the occupational health of employees and would be especially applicable in the following provisions.

Protection of Pregnant and Nursing Employees (section 132)

These provisions relate to an employee’s perception of a health risk to herself, her fetus or her nursing child. Section 132 of the Code may be exercised from the beginning of the pregnancy until the employee is no longer nursing, and ensures that employees are paid during the period needed to obtain a medical opinion respecting the perceived risk. This

provision is not part of the refusal process but a separate right; it gives an employee the opportunity to remove herself from a possible hazard until a medical certificate is obtained.

An employee who is pregnant or nursing may cease to perform her job if she believes that, by reason of the pregnancy or nursing, continuing any of her current job functions may pose a risk to her health or to that of the fetus or child. On being informed of the cessation, the employer shall, **with the consent of the employee**, notify the work place committee or the health and safety representative (subsection 132(1)).

Managers and supervisors should ensure that the employee gives her consent before the work place committee, or that the health and safety representative is informed of the employee's decision to seek removal from exposure to a possible hazard.

The employee is to consult as soon as possible with a qualified medical practitioner of her choice (as defined in Part III, section 166, of the Code) to establish whether continuing any of her current job functions poses a health risk to herself, her fetus or her nursing child. A qualified medical practitioner is defined as "a person who is entitled to practise medicine under the laws of a province" (subsection 132(2)).

To the extent that is reasonable, the intent of this provision is to minimize the time during which the employee ceases to perform her regular duties while the possible risk is investigated. The employee continues to be paid while obtaining an appointment and the necessary confirmation of the medical practitioner's opinion.

Subsection 132(4) provides flexibility for the employer to reassign a pregnant or nursing employee who has withdrawn from work that she believes may be a risk to herself, her fetus or her nursing child. The

reassignment provision is to cover the period between the time the woman withdraws until she obtains a medical opinion attesting to any risk.

Subsection 132(5) protects a woman from suffering a financial or other penalty for exercising the right to withdraw. The additional purpose is to allow the woman, her fetus or her child to be protected from any perceived risk until a medical practitioner can confirm whether or not the risk exists.

The Code clearly gives the choice of the medical practitioner to the employee (subsection 132(1) and (2)). Managers and supervisors should be aware that the choice of the medical practitioner is to be made by the employee and that the employer is not allowed to demand, or request, a second opinion. See provisions 133 and 147 outlined below.

If a medical practitioner has established that a risk to the employee, the fetus or the nursing child does not reasonably exist, the pregnant or nursing employee is prohibited from continuing to withdraw from work under the protection of this provision (subsection 132(3)).

If the medical practitioner has established that there is a risk, and has provided a medical certificate to confirm it, the employee can no longer cease to perform her job under this provision. However, the employee can request to be accommodated under current collective agreements within the core public administration, and the employer must make every reasonable attempt to accommodate the employee (e.g., modification of the employee's job or duties, or reassignment).

An employee making such a request is to be immediately assigned alternative duties until such time as the manager modifies her job functions, reassigns her, or informs her in writing that it is not reasonably practicable to do so. Under the direction of the Treasury Board,

departments within the core public administration will continue to provide the employee with her regular pay and benefits for the duration of her job modification, reassignment, deployment or transfer.

Should accommodation not be reasonably practicable or should the pregnant or nursing employee refuse such accommodation, the employee may be required to take leave without pay in addition to other leaves provided for in her collective agreement or other types of benefits (e.g., insurance).

Prohibited Disciplinary Action (section 147)

The Code deals with disciplinary action taken against employees exercising their various rights provided for under Part II. No employer shall dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee remuneration in respect of any period of time that the employee would have worked, or take any disciplinary action against, or threaten to take any such action against, an employee because the employee:

a. has testified or is about to testify in a proceeding taken or an inquiry held under this Part;
b. has provided information to a person engaged in the performance of duties under this Part regarding the conditions of work affecting the health or safety of the employee or of any other employee of the employer; or
c. has acted in accordance with this Part or has sought the enforcement of any of the provisions of this Part.

It is important for managers and supervisors to note that the complaint can be with respect to any prohibited action. In the context of paragraph (*c*), this is especially important if a pregnant or nursing employee has acted

in accordance with the Part II provisions.

The impact could be extensive if supervisors, managers and staff relations specialists are not fully aware of this provision and the possible action that can be taken against them if they violate any employee right or protection established by Part II of the Code.

Complaints When There Is an Action Against Employees (section 133)

Part II of the Code contains a very significant and important provision whereby a complaint may be made in writing to the Public Service Labour Relations Board (the Board) with respect to **any** disciplinary or prohibited discriminatory action (section 147), not merely those related to refusals to work in cases of perceived danger or investigations of refusals by health and safety officers.

In addition to disciplinary or discriminatory action being a prohibition enforceable through the courts, section 147 permits the employee to make a complaint to the Board, and the Board can hear the complaint under its own rules of procedure.

Furthermore, a person designated by the employee for that purpose could make the complaint on the employee's behalf. Although an employee may contact a lawyer, the strong likelihood is that this other person will be an experienced union official or employee representative.

The impact could be significant if supervisors are not aware of the prohibition and the possible consequence of taking such action. For instance, requesting an independent medical opinion from a physician selected by the employer, especially if that request could be interpreted as intimidation or a threat, would likely be the subject of a complaint to the Board by the employee or union.

A complaint must be made to the Board not later than **90 days** after the date on which the complainant knew, or in the Board's opinion, ought to have known, of the action or circumstances giving rise to the complaint (subsection 133(2)).

A complaint in respect of the exercise of a right (section 128 or 129) may no tbe made unless the employee has complied with subsection 12(6), or a health and safety officer has been notified under subsection 128(13), as the case may be, in relation to the matter that is the reason for the complaint. Subsection 128(6) relates to the employee's responsibility to report the refusal to the employer, and subsection 128(13) provides for the employee requirement to report a continued refusal to the employer (subsection 133(3)).

Notwithstanding any law or agreement to the contrary, an employee may not refer a complaint made under section 133 to arbitration or adjudication. This provision ensures that, regardless of any collective agreement dispute resolution process, a complaint to the Board takes precedence.

On receipt of a complaint made under this section, the Board may assist the parties to the complaint to settle the complaint. The Board shall hear and determine the complaint if it decides not to so assist the parties, or if the complaint is not settled within a period considered by the Board to be reasonable in the circumstances.

Under this process, a complaint made in respect of the exercise of a right to refuse to perform dangerous work is itself evidence that the contravention actually occurred. If a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party. This

reverses the onus of proof on the employer. The employee can complain that disciplinary or discriminatory action was taken, and the employer must prove that it did not occur.

Under section 134 of the Code, if the Board determines that an employer has contravened section 147, the Board may, by order, require the employer to cease contravening that section and may, if applicable, by order, require the employer to:

a. permit any employee who has been affected by the contravention to return to the duties of their employment;
b. reinstate any former employee affected by the contravention;
c. pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention, have been paid by the employer to the employee or former employee; and
d. rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by, the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.

The above provision grants extensive powers to the Board to take remedial action with respect to any action referred to in section 147.

Note: Additional information on Code provisions for pregnant and nursing employees, including a reference chart, can be found in HRSDC's "Pamphlet 5 - Pregnant and Nursing Employees."

Chapter 6: Policy Health and Safety Committees

▶ **In this section**

A key objective of Part II of the *Canada Labour Code* (the Code) is to establish a more efficient balance between what the regulator does and what the employers and employees have responsibility for in the work place. The responsibilities for work place health and safety have been realigned by placing a greater onus on employers, employees and their unions to work together to ensure that work place health and safety issues are identified and resolved in a timely manner. The regulator's role will be directed toward intervention where the work place parties cannot jointly resolve work place health and safety problems themselves. To ensure that intervention will be effective and employees protected, the powers of health and safety officers have been enhanced, and the consequences of non-compliance have been increased.

One of the key means of achieving this objective is to establish a committee structure that will ensure that health and safety issues are regularly on the agenda of senior management. Through a corporate-level health and safety policy committee, health and safety issues and the mechanisms for dealing with them can be addressed at the highest possible level.

As a consultative body, policy committees are to be involved in a range of employer activities that have an organization-wide impact, including the following:

- Developing and implementing health and safety hazard prevention programs;
- Developing and implementing violence prevention programs;
- Planning and implementing changes, work processes and procedures that may affect health and safety;
- Developing health and safety policies and programs; and

- Developing, implementing and monitoring a personal protective equipment program.

The Code requires the establishment of a policy committee for the purposes of addressing health and safety matters applicable to a work, undertaking or business of an employer (section 134.1). The Treasury Board is the employer for a considerable segment of the public service, and the *Public Service Labour Relations Act* establishes the application of Part II of the Code to the public service as though the public service were a work, undertaking or business. Under the Treasury Board policy on occupational safety and health, departmental policy committees will address departmental issues and the development and implementation of departmental occupational health and safety policies and programs. Where required, the Treasury Board of Canada Secretariat will provide guidance to departments and agencies in order to ensure consistency in their approach to dealing with common service-wide issues. In some cases, such guidance may take the form of standards, directives or other documents issued by the Treasury Board under the policy on occupational safety and health. The ultimate goal of the Treasury Board is to improve occupational health and safety in the federal public service.

Departmental policy committees complement the work of work place health and safety committees in each department and agency. On the one hand, policy committees focus on organization-wide issues and the development of policies and programs needed to address those issues. Work place committees, on the other hand, focus on implementing and monitoring the policies and programs and on addressing local issues. Both types of committees are independent of one another. Although the committees have a responsibility to work together, as outlined in the Code,

and work place committees may refer certain matters to the policy committee, the policy committee does not have an oversight responsibility with respect to work place committees.

Managers who are members of policy committees, or who are responsible for their effective operation, should ensure that they are aware of and support the implementation of the following employer duties respecting the establishment and support of committees, and the powers and duties of policy committees.

Employer Duties Related to Policy Committees

Employers are to ensure that members of policy and work place committees and health and safety representatives receive any prescribed training in health and safety and are informed of their responsibilities under Part II of the Code. Appropriate committee member training and information on their responsibilities should be initiated as soon as possible (paragraph 125(1)(*z.01*)).

The responsibilities of committee members and chairpersons are identified in numerous provisions of the Code, and additional responsibilities are identified in the Code's hazard prevention program regulations and the violence prevention in the work place regulations. If the employer, the Treasury Board or a department establishes additional member responsibilities, training and information on these responsibilities should also be provided. Training requirements for policy committees will be different from those for work place committees. If alternates are used, these people will require training that is consistent with their responsibilities. With the possible introduction of any related future regulation, additional subjects would most likely need to be addressed, including related training to be provided at a later time.

In addition to the prescribed training, this duty requires that all policy and work place committee members be informed of their responsibilities (sections 127.1, 128, 134.1, 135, 135.1 and 135.2). The effectiveness of committees will be greatly determined by the extent and nature of information and training provided to their members.

In consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative, departments will develop health and safety policies and programs. For example, the hazard prevention program is to be appropriate to the work place's size and the nature of the hazards in it. The program must provide for the education of employees in related health and safety matters. Policy committees therefore have a very important role in assisting employers in preventing hazards in the work place because the required hazard prevention program, developed in consultation with the policy committee, will be the vehicle through which the employer will fulfill most of the Code and regulatory requirements.

Note: This requirement implies the development and implementation of a broad hazard prevention program aimed at general health and safety issues, not just a program to prevent accidents that may result from a work place hazard.

The purpose of policy committees is to address health and safety matters that apply to the work, undertaking or business of an employer. "Work place" should be given a very broad interpretation because the "work place" follows the employee wherever he or she may be while engaged in work for the employer. This includes locations where work is being performed outdoors and on third-party premises. The work place controlled by the employer is not necessarily a building, structure or surrounding property. It is any place owned or controlled by the employer

where an employee is engaged in, or is likely to be engaged in, work for the employer. Also, to be a work place for the purposes of the Code, the place needs an employee who is, has been, or can be expected to be, present in, passing through or associated with that place.

The hazard prevention program regulations require:

- Development of a hazard identification methodology;
- Hazard and risk assessment;
- Hazard and risk control;
- An implementation plan;
- Regular program evaluation; and
- Employee training and education.

All of these elements are to be developed by the employer in consultation with the policy committee and carried out with the participation of the work place committee.

Representatives of the employer must consult with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative to plan the implementation of changes that may affect occupational health and safety, including work processes and procedures. All work place changes, whether they are to the plant, layout, furniture, equipment, materials, work methods or work environment, could have a health and safety component. Regardless of the change, it should be first assessed to determine whether there is any possible link to occupational health or safety.

Following the assessment, if required, procedures should be developed, in consultation with the policy committee, to ensure that the planning is done at that level. The implementation of changes involves the work place

committee. Even if the assessment does not indicate an impact on health and safety, the policy committee should be informed.

Managers must ensure the availability in the work place of premises, equipment and personnel for the operation of the policy and work place committees. With respect to providing support for policy committees, the legislated role and responsibilities of committees, combined with the necessary decision-making level of the members, this provision will require considerable personnel to provide support in conducting research and preparing options papers, policy documents and to allow committee members to effectively fulfill their responsibilities (paragraph 125(1)(*z.07*).

Departments must cooperate with the policy and work place committees or the health and safety representative in the execution of their duties under Part II. This duty requires the consultation and cooperation that an employer should extend to a committee and gives the regulator the ability to enforce compliance upon any employer who is reluctant to cooperate (paragraph 125(1)(*z.08*)).

With respect to a policy committee, the decision-making level of the management members of the committee should be such that the concerns of the employer have already been addressed within the committee.

Departments must develop health and safety policies and programs in consultation with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative. This is broader than the hazard prevention program duty (*z.03*) in that the policy committee will be involved in developing **all** departmental occupational health and safety policies and programs (paragraph 125(1)(*z.09*)).

Management must respond in writing to recommendations made by policy and work place committees or the health and safety representative within 30 days after receiving them. The response must indicate what, if any, action will be taken and when it will be taken. This clause is similar to the employer duty to cooperate with the policy and work place committees or the health and safety representative. However, this is an enforceable duty and requires a time frame to ensure the effective operation of committees and to ensure that issues are adequately dealt with. Compliance should not be a problem because management, through its representation on the committees, will already be aware of the need for the recommendations and the reasons for making them (paragraph 125(1)(*z.10*)).

Policy and work place committees or health and safety representatives must be provided with a copy of any report on hazards in the work place, including an assessment of those hazards. This requirement relates to **all** reports and assessments, not to only those currently required by the hazardous substances regulations (Part X of COHSR) and by the hazard prevention program regulations (Part XIX of COHSR). Given their potential for considerable impact, appropriate procedures should be developed and implemented to ensure compliance. Although information related to the health and safety of employees must be open and shared, the committees and representatives are not entitled to access information related to non-occupational health and safety matters (e.g., security-related and individual information governed by privacy laws) (paragraph 125(1)(*z.11*)).

When necessary, employers are to develop, implement and monitor a program for providing personal protective equipment, clothing, devices or materials. This requirement must be fulfilled in consultation, except in emergencies, with the policy committee or, if there is no policy committee, with the work place committee or the health and safety representative. This is related to the hierarchy of controls objective (section 122.2). Both

requirements address concerns that the provision of personal protective equipment is not always properly dealt with and that employees are not involved in decisions related to their protection (paragraph 125(1)(*z.13*)).

Where hazards cannot be eliminated or sufficiently reduced and the work to be performed requires the use of personal protective equipment of any type, departments and agencies must consult with their policy committee and develop, implement and monitor a program that will address the personal protective equipment requirements of the work places covered by the committee.

However, in the event of an unforeseen emergency situation that requires the provision and use of a unique piece of equipment, immediate action should be taken, with consultation and follow-up with the committees conducted later.

Within 30 days after receiving a request, or as soon as possible afterward, employers must provide any information requested by a policy committee (subsection 134.1(5) or (6)), by a work place committee (subsection 13 (8) or (9)), or by a health and safety representative (subsection 136(6) or (7)). The duty requires cooperation with policy committees and with work place committees or health and safety representatives by providing them with the information they need in fulfilling their duties under the Code. Compliance is essential, although management has, through its committee members, an equal role in deciding what information is requested. Once a request has been jointly agreed to, the duty to respond applies, and the 30-day time limit should be respected to the extent possible (paragraph 125(1)(*z.18*)).

Duty to Establish Policy Health and Safety Committees (section 134.1)

For the purposes of addressing health and safety matters that apply to the work, undertaking or business, every employer that normally directly employs 300 or more employees is required to establish a policy committee and select and appoint its members. This is the focal point of the federal jurisdiction approach to internal responsibility and joint decision making, and the requirement represents a key component of the legislation in terms of dealing with the management of occupational health and safety within federally regulated organizations. This concept was based in part on long experience with past “national committee” approaches to joint decision making used in many public service departments. These will be very powerful committees whose decisions and advice could have a considerable impact on the way departments deal with occupational health and safety (subsection 134.1(1)).

Where normally more than 20 but fewer than 300 employees are directly employed, an employer may establish a policy committee. Given the structure, authority and mandate of policy committees and the benefits of having department-wide health and safety decisions made by a central committee consisting of senior employer and union representatives, establishing a policy committee is strongly recommended, regardless of the size of the department. The alternative of having a designated work place committee that has the same authority and mandate of a policy committee is far less attractive. See employer duties (*z.03*), (*z.05*), (*z.09*) and (*z.13*) noted above (subsection 134.1(2)).

An employer may establish more than one policy committee with the agreement of the trade union representing the employees if such a union exists, and with the agreement of employees in the case of employees not represented by a trade union. Given the mandate and authority of policy committees and the possibility of conflicting decisions, it is strongly recommended that duplicate committees not be established. The potential

for negative impact and conflicting decisions is very high. Key management and union resources would be seriously affected if participation in duplicate committees becomes necessary (subsection 134.1(3)).

Additional Provisions Common to Policy and Work Place Committees (section 135.1)

A policy committee or a work place committee shall consist of at least two persons, and at least half of the members shall be employees who do not exercise managerial functions. This provision ensures the participation of employees in any committee established for the purposes of occupational health and safety.

Considering the legislated roles, responsibilities and authority assigned to both policy and work place committees, departments and agencies should ensure, to the extent possible, that the most senior managerial staff possible speaks for management on both committees.

Employee members on both committees must be selected by the employees in the work place if the employees are not represented by a trade union. If employees are represented by a trade union, they are to be selected by the trade union in consultation with employees who are not represented. Unions also have an obligation to ensure that persons capable of carrying out their responsibilities represent their members. Failure of the union to select members is addressed below in subsection (4) and (5) (paragraph 135.1(1)(*b*)).

Despite the above provisions, and if specified in a collective agreement or other agreement, members of a policy committee may include persons who are not employees. This is a significant provision that allows for union officials, facilities or technical experts who are not employees to be appointed as committee members, with the agreement of the parties. This

provision was primarily aimed at policy committees where the expertise, leadership and authority within their unions could be a considerable asset in achieving consensus (subsection 135.1(2)).

If there is no policy committee, and when dealing with an issue that would have come within the responsibilities of a policy committee, a work place committee can select two additional members. Unless otherwise provided in a collective agreement or other agreement, one of the additional members shall be an employee who meets the selection criteria set out in subsection 135.1(1). This option is intended to allow for a work place committee to be augmented by additional members, one of whom could be a union official, where organizations that have more than 20 but fewer than 300 employees decide not to establish a policy committee. These additional members are to allow that work place committee to have all the authorities and to carry out all the functions of a policy committee. However, this is an option that should not, to the extent possible, be used by public service departments or agencies. Instead, policy committees should always be established (subsection 135.1(3)).

If a trade union representing employees fails to select a person, in consultation with any employees who are not so represented, a health and safety officer may accordingly notify the local branch of the trade union in writing. The officer shall send a copy of any such notification to the trade union’s national or international headquarters and to the employer, indicating that the committee is not established until a person is selected. This provision is intended to overcome a serious problem that some federal employers had with their unions under the previous legislation when a union deliberately left the employer in violation of the Code by not selecting their work place committee members. Although there is no obligation on the employer to inform the health and safety officer if such a situation arises, it would be advisable to do so. (subsection 135.1(4)).

Furthermore, if a person is not selected under paragraph 135.1(1)(*b*), the employer would perform the functions of the committee until a person is selected and the committee is established. This clause is related to subsection (4) above. Where a union has failed to select employee members, the employer shall perform all the functions of a committee until such time as the union complies. Examples of these functions are accident investigations, work place inspections, developing and implementing hazard and violence prevention programs, participating in refusal-to-work investigations, and providing the second stage in the Internal Complaint Resolution Process (subsection 135.1(5)).

Employers and employees may select alternate members to serve as replacements for members selected by them who are unable to perform their functions. Alternate members for employee members must also meet the above selection criteria. This clause is intended to ensure the smooth operation of both policy and work place committees. This is an enabling provision that should be read as “shall” rather than “may.” Although policy committees meet less frequently than work place committees and meetings should be scheduled to ensure that all members are able to attend, alternates should be designated, trained in the provisions and rules of procedure applicable to the committee, informed of the agenda issues, and authorized to make decisions on those topics (subsection 135.1(6)).

Committees are to have two chairpersons selected from the committee members. The employee members select one of the chairpersons, and the employer members select the other. This is a requirement of the committees and representatives regulations that was moved to the body of the Code in order to give the concept a higher visibility (subsection 135.1(7)).

Chairpersons of a committee jointly designate members of the committee to perform the committee's functions as follows (subsection 135.1(8)):

a. if two or more members are designated, at least half of the members shall be employee members; or
b. if one member is designated, the member shall be an employee member.

This provision relates primarily to work place committees. Where designated, and appropriately trained, committee members are an essential element of committee functions such as inspections, refusals to work, internal complaint resolution, and health and safety officer visits. Given the duties that these members are to perform and the likely impact associated with carrying out the duties, there should always be two-member teams.

Committees must ensure that accurate records are kept of all matters that come before them and that minutes are taken and kept of their meetings. Committees must also make the minutes and records available to health and safety officers at their request. Management should ensure that these minutes and records are maintained; health and safety officers will most likely make it a regular part of their monitoring activities to request and review these documents.

Members of a committee may take the time required during their regular working hours to attend meetings or to perform any of their other committee functions, including preparation and travel authorized by both chairpersons of the committee. Payment of wages while doing so is addressed below. The provision is intended to ensure that committee members are provided with enough time during normal hours of work to be able to carry out committee functions, including attendance at meetings, preparation and travel time. Although the chairpersons of a

policy committee have the joint authority to approve preparation and travel time, the impact could be considerable, especially on employee members when distance is a factor. Policy committees should have clearly understood procedures to deal with preparation, travel time and payment (subsection 135.1(10)).

Participation in committee activities should not be considered an additional duty on top of regular duties, but an integral element of the responsibilities of management, employees and their unions. Appropriate guidelines should be jointly developed to ensure that committees function effectively.

Given the extensively expanded roles and responsibilities of work place committees, committee rules of procedure should clearly address how and by whom the other functions of the committee will be handled, and to what extent alternates will be used (subsection 135.1(6)). It is essential that committees established for multi-shift or continuous operation work places have clearly understood guidelines and rules of procedure.

A committee member shall be compensated by the employer for performing committee functions, whether performed during or outside the member's regular working hours. Compensation is to be at the member's regular rate of pay or a premium rate of pay, as specified in the collective agreement or, if there is no collective agreement, in accordance with the employer's policy. This is a significant provision respecting payment of wages for committee-related activities. It reflects an adjustment of the previous legislation to accommodate an Ontario Court of Appeal and subsequent Federal Court decision related to the payment of committee members for time spent on committee activities. The Court of Appeal decided that the subsection was to be read as one sentence and concluded that the intent of Parliament was that employees had to be "at work"

before they could be “away from their work” in order to participate in committee activities and therefore be entitled to be paid (subsection 135.1(11)).

This requirement is split into subsection (10) and (11) to clearly indicate that committee members must first be allowed time to carry out their duties and then be compensated for the time involved.

The impact could be high if meetings are not scheduled to reflect employee work schedules and if alternates have not been identified.

Departmental managers and supervisors should be made aware that non-payment of a committee member’s wages is a form of discipline taken against an employee who had acted in accordance with the Code while being a member of a committee. In addition to being a prohibited action (paragraph 147(*c*)), an employee, or person acting on behalf of the employee, can complain of such action to the Public Service Labour Relations Board. The resulting decision of the Board could have a significant impact on both the department concerned and the public service as a whole.

The same provisions noted above for committee members also apply to alternate members, but only while they are actually performing the functions of the committee member they are replacing (subsection 135.1(12)).

No person serving as a member of a committee can be personally held liable for anything authorized by the Code that is done or omitted to be done by the person in good faith. This represents liability protection for committee members acting in good faith while carrying out their duties (subsection 135.1(13)).

Subject to subsection 134.1(7), subsection 135(10) and any regulations made (subsection 135.2(1)), a committee is required to establish its own rules of procedure with respect of the terms of office, which are not to exceed two years, and the time, place and frequency of regular committee meetings. A committee may also establish any other rules of procedure for its operation that it considers advisable. It is essential that rules of procedure are established for all committees. It is preferable that core rules of procedure for work place committees be established centrally in consultation with the policy committee, and that they be made applicable to all work places and the appropriate committees (subsection 135.1(14)).

The Governor in Council may make regulations as follows (section 135.2):

a. specifying the qualifications and terms of office of members of a committee;
b. specifying the time and place of regular meetings of a committee;
c. specifying the method of selecting employee members of a committee if employees are not represented by a trade union;
d. specifying the method of selecting the chairpersons of a committee and their terms of office;
e. establishing any rules of procedure for the operation of a committee that the Governor in Council considers advisable;
f. requiring copies of minutes of committee meetings to be provided by and to any persons that the Governor in Council may prescribe;
g. requiring a committee to submit an annual report of its activities to a specified person in the prescribed form within the prescribed time; and
h. specifying the manner in which a committee may exercise its powers and perform its functions.

A regulation made under this provision may be made applicable generally to all committees or particularly to one or more committees or classes of committees.

The current *Safety and Health Committees and Representatives Regulations* address items (*a*), (*c*), (*d*, (*f*) and (*g*).

Powers and Duties of Policy Committees

In all of the following authorities it is important to focus on the fact that each authority is a function of the committee and does not represent one side or the other of the committee. Committee requests, decisions and participation require consensus.

A policy committee is to participate in developing health and safety policies and programs. This is associated with the employer duty to develop health and safety policies and programs in consultation with the policy committee (paragraph 125(1)(*z.09*). The clause is broader than the prevention program duty in that the appropriate committee level will have an involvement in developing **all** occupational health and safety policies and programs. The impact depends on what policies and programs currently exist and what needs to be done (subsection 134.1(4)).

A policy committee must consider and expeditiously dispose of matters concerning health and safety raised by members of the committee or referred to it by a work place committee or a health and safety representative. With respect to this two-tiered committee approach to "internal responsibility," there is a concern that it could lead to a situation where problems could be kept bouncing between the two committees. The wording "or referred to it by a work place committee" addresses this concern in that, if a matter was referred to the policy committee, it would be dealt with and not be sent back to the work place committee.

Note: The Code does not acknowledge regional committees. For those departments that have effective regional committees and wish to maintain them, jointly developed procedures should be put in place to ensure that this level of committee does not result in process delays.

The policy committee is to participate in developing and monitoring a program for the prevention of hazards in the work place that also provides for the education of employees in health and safety matters. See the association with the employer's duty at paragraph 125(1)(*z.03*).

Policy committees are also to participate to the extent that they consider necessary in inquiries, investigations, studies and inspections pertaining to occupational health and safety. These activities will depend on the work environment, hazards, accident and incident experience of the department or agency for which the committee was established.

Management members of the committee should be fully aware of the consequences of agreeing to allocate committee time to such activities. For work place–specific situations, the work place committee concerned would be the more effective means of obtaining the information. For organization-wide inquiries, investigations and broader studies, the use of specialized support personnel reporting back to the policy committee would be more effective.

A policy committee is required to participate in developing and monitoring a program for providing personal protective equipment, clothing, devices or materials (see the link with paragraph 125(1)(*z.13*)). Depending on the extent to which personal protective equipment is or should be used, the impact and activity could be considerable.

Policy committees must cooperate with health and safety officers. Because policy committees are a key element in effectively implementing the provisions of the Code, it is highly likely that health and safety officers responsible for the headquarters of departments and agencies will take an active interest in those committees.

Policy committees are required to monitor data on work accidents, injuries and health hazards. Although this monitoring is indicated as a committee function, the actual gathering of the data will likely be the responsibility of support personnel and departmental occupational health and safety staff.

Policy committees must also participate in the planning and implementation of changes that may affect occupational health and safety, including work processes and procedures. See the link with the employer's duty paragraph 125(1)(*z.05*). The impact and level of such activity could be considerable. All changes, whether they are plant, furniture, equipment, materials, work methods or work environment, could have a health and safety component. Regardless of the change, it should be first assessed to determine whether there is any possible link to occupational health or safety. Procedures should be developed, in consultation with the policy committee, to ensure that the planning and implementation of changes involves both levels of committees.

A policy committee can request from an employer any information that the committee considers necessary to identify existing or potential hazards with respect to materials, processes, equipment or activities in any of the employer's work places. See the link with the employer duty paragraph 125(1)(*z.18*). The employer has a responsibility to respond to such a request as soon as possible, to a maximum of 30 days. Compliance is essential.

However, management has an equal role in deciding what information is requested, through its committee membership. Once a request has been jointly agreed to, the duty to respond applies (subsection 134.1(5)).

Policy committees have full access to all government and employer reports, studies and tests that relate to the health and safety of the employees in the work place, or to the parts of those reports, studies and tests that relate to the health and safety of employees. However, committees cannot have access to the medical records of any person without the person's consent. In addition, although information related to the health and safety of employees must be open and shared, the committees and representatives are not entitled to access information related to non-occupational health and safety matters (e.g., security-related and individual information governed by privacy laws).

The above requirement is similar to the authority for work place committees. Decisions to request information must be jointly agreed to (subsection 134.1(6)).

At least quarterly, policy committees must meet during regular working hours. If other meetings are required as a result of an emergency or other special circumstance, a committee shall meet as required during regular working hours or outside those hours (subsection 134.1(7)).

Policy committees are expected to perform an oversight function, be involved in resolving health and safety issues that affect more than one work place, and be involved in decisions that impact on the entire organization. Committee members are expected to be at a level in management that is capable of making those decisions, as is the case for the unions representing employees.

Support in the form of research, document preparation, interface with work place committees, progress reports, etc. will impact on a number of areas but primarily on committee support personnel and departmental occupational health and safety staff.

Below is a checklist for managers to consider with respect to the establishment and operation of policy committees.

Checklist for Management

1. Are committee members aware of their responsibilities and those of the committee?
2. Are they aware of the operations of the department or agency?
3. Are they aware of the health and safety issues within the department or agency?
4. Do committee members have the level and authority to make decisions?
5. Is the membership representative of the organization?
6. Is the composition of the committee an even mix of management and employee representatives?
7. Is the committee of a manageable size? If it is too big, effectiveness could be a problem.
8. Is there a process for selecting the chairpersons?
9. Are there written rules of procedure?
10. Do the rules of procedure address the following:
    - Alternating the chair;
    - Scheduling regular meetings;
    - Scheduling emergency meetings;
    - Establishing agenda items;
    - Preparing and distributing agendas;
    - Recording, preparing and distributing minutes;

- Determining terms of office of members;
- Repeating terms of office to retain a base of expertise;
- Rotating membership (alternate years);
- Including union officials as members;
- Planning the use of alternates;
- Establishing preparation and travel time;
- Determining committee operations and processes;
- Determining consensus agreements; and
- Dealing with non-consensus issues.

Note: Additional information on policy committees can be found in HRSDC's "Pamphlet 6A - "Policy Health and Safety Committees."

Chapter 7: Work Place Health and Safety Committees

▶ **In this section**

A key objective of Part II of the *Canada Labour Code* (the Code) is to establish a more efficient balance between what the regulator does and what the employers and employees have responsibility for in the work place. Responsibilities for work place health and safety have been realigned by placing a greater onus on employers, employees and their unions to work together to ensure that work place health and safety issues are identified and resolved in a timely manner.

One of the means of achieving this objective is to establish a committee structure that will ensure that health and safety issues are regularly on the agenda of senior management and employee representatives. This is achieved, first, through a corporate-level health and safety policy

committee and, second, by enhancing the role, powers and level of involvement of work place committees to allow them to better identify and resolve problems as they arise in the work place.

For work places that have 20 or more employees, work place committees will be involved in a range of activities that have an impact on health and safety in the work places they represent, including the planning, implementation and monitoring of hazard prevention programs, violence prevention programs, changes to work processes and procedures that may affect health and safety, personal protective equipment programs, and regularly scheduled work place inspections.

Employer Duties Related to Work Place Committees

Employers are to ensure that members of work place committees and health and safety representatives (representative) receive any prescribed training in health and safety and are informed of their responsibilities under Part II. Because establishing policy committees and the roles and responsibilities of work place committees are priority requirements, appropriate committee member training and information on their responsibilities should be initiated as soon as possible. The effectiveness of committees will be greatly determined by the extent and nature of training provided to their members. Training requirements for policy committees will be different from those for work place committees. If alternates are used, these people will require training that is consistent with their responsibilities (paragraph 125(1)(*z.01*)).

The responsibilities of committee members and chairpersons are identified in numerous provisions of the Code. Additional responsibilities and training are identified in the hazard prevention program regulations and in the violence prevention in the work place regulations.

If the employer, the Treasury Board or a department establishes additional member responsibilities, training and information on these responsibilities should also be provided.

In addition to the prescribed training, this duty requires that work place committee members be informed of their general roles, responsibilities and functions (sections 135, 135.1 and 135.2),those specifically related to the joint investigation of an employee's complaint (section 127.1), and the joint investigation of a refusal to work (section 128).

In consultation with the policy committee or, if there is no policy committee, with the work place committee or the representative, employers are to develop, implement and monitor a prescribed hazard prevention program in a work place appropriate to its size and the nature of the hazards. Policy committees have a very important role in preventing hazards in the work place because the required hazard prevention program will be the primary vehicle through which the employer will deliver most of the Code and regulatory requirements. Note that this will be a broad "hazard prevention program," not just a program to prevent accidents that may result from a work place hazard (paragraph 125(1)(*z.03*).

Where a policy committee has not been established, a work place committee, modified accordingly, will participate in developing the prevention program (subsection 135(3)).

The purpose of policy committees, or of the modified work place committee, is to address health and safety matters that apply to the work, undertaking or business of an employer. "Work place" should be given a very broad interpretation because the "work place" follows the employee wherever he or she may be while engaged in work for the employer. This includes locations where work is being performed outdoors and on third-party premises. The work place controlled by the employer is not

necessarily a building, structure or surrounding property; it is any place owned or controlled by the employer where an employee is engaged in, or is likely to be engaged in, work for the employer. Also, to be a work place for the purposes of the Code, the place needs an employee who is, has been, or can be expected to be present in, passing through, or associated with that place.

The essential elements identified in the hazard prevention program regulations require the following:

- Development of a hazard identification methodology;
- Hazard and risk assessment;
- Hazard and risk control;
- An implementation plan;
- Regular program evaluation; and
- Employee training and education.

All of these elements are to be developed by the employer in consultation with policy committees and carried out with the participation of work place committees.

Where the hazard prevention program referred to in the above provision does not cover certain hazards unique to a work place, the employer, again in consultation with the work place committee or the representative, must develop, implement and monitor a prevention program for those hazards. Such a program must provide for the education of employees in health and safety matters related to those hazards (paragraph 125(1)(*z.04*)).

This duty is intended to address situations where an employer, department or agency has a truly unique work place that has hazards that do not occur anywhere else in the organization and that have not been addressed at the national level. However, to the extent possible, common and consistent

program frameworks should be developed and monitored at the national level, by a policy committee or a modified work place committee. Even situation-specific programs should be monitored at the departmental level; development and implementation would be at the work place level.

Employers are to consult with the policy committee or, if there is no policy committee, the work place committee or the representative, to plan the implementation of changes that may affect occupational health and safety, including work processes and procedures. All work place changes, be they to the plant, layout, furniture, equipment, materials, work methods or work environment, could have a health and safety component. Regardless of the change, it should be first assessed to determine whether there is any possible link to occupational health or safety. Following the assessment, procedures should be developed, in consultation with the policy committee or modified work place committee, to ensure that the planning is done at that level; the implementation of changes involves the specific work place committee. Even if the assessment does not indicate an impact on health and safety, the policy and work place committees should be informed (paragraph 125(1)(*z.05*)).

Employers must also consult the work place committee or the representative in the implementation of changes that may affect occupational health and safety, including work processes and procedures. This is similar to the above requirement, except that these changes would be specific to implementing changes in the particular work place. Being work place–specific, there is a risk of situations getting out of control if there is not an active system of monitoring and central guidance through the policy committee or a designated point of contact (paragraph 125(1)(*z.06*)).

Employers are to ensure the availability in the work place of premises, equipment and personnel for the operation of the policy and work place committees. With respect to providing support for work place committees, the roles and responsibilities of these committees, combined with the necessary decision-making level of the members, will require considerable support and record keeping to ensure that the committees and designated teams function effectively and that members are able to effectively fulfill their responsibilities (paragraph 125(1)(*z.07*)).

Employers must also cooperate with the policy and work place committees or the representatives in the execution of their Part II duties. This duty requires the consultation and cooperation that an employer should extend to committees. It gives the regulator the ability to enforce compliance if a department, agency or responsible manager is reluctant to cooperate. Examples of areas where cooperation is required by the Code are complaint resolution; access to health- and safety-related records; development, implementation and monitoring of hazard prevention programs; participation in inquiries, investigations and inspections; implementation of work place changes; regular work place inspections; and hazardous substance and personal protective equipment assessments (paragraph 125(1)(*z.08*)).

With respect to work place committees, the decision-making level of the management members of the committee should be such that the concerns of the employer have already been addressed within the committee before any action on the part of the department or agency is requested.

In consultation with the policy committee or, if there is no policy committee, with the work place committee or the representative, employers are to develop health and safety policies and programs. This is broader than the hazard prevention program duty (*z.03*) in that the policy

committee, or designated work place committee, will be involved in developing **all** employer occupational health and safety policies and programs. Everything done in respect to occupational health and safety programs will require the involvement of joint committees (paragraph 125(1)(*z.09*)).

An employer must respond in writing to recommendations made by policy and work place committees or a representative within **30 days** after receiving them and indicate what, if any, action will be taken and when it will be taken. This clause is similar to the employer's duty to cooperate with policy and work place committees or the representatives. However, this is an enforceable duty and establishes time limits to ensure that there is an effective operation of committees, that issues are dealt with, and that a committee is informed of the action to be taken. Compliance should not be a problem because management, through its representation on committees, will already be aware of the need for the recommendations and the reasons for making them (paragraph 125(1)(*z.10*)).

Employers must provide to the policy committee, and to work place committees or the representative, a copy of any report on hazards in the work place, including an assessment of those hazards. This clause relates to **all** reports and assessments, not only to those required by the hazardous substances regulations (Part X of COHSR) and the hazard prevention program regulations (Part XIX of COHSR). Given their potential for considerable impact, appropriate procedures should be developed and implemented to ensure compliance. Although information related to the health and safety of employees must be open and shared, the committees and representatives are not entitled to access information related to non-occupational health and safety matters (e.g., security-related and individual information governed by privacy laws) (paragraph 125(1)(*z.11*)).

Each month, the work place committee or the representative must inspect all or part of the work place, so that every part of the work place is inspected at least once each year. Work place inspections are a responsibility of work place committees, which will be expected to jointly establish procedures to ensure that the required inspections are done. This is an enforceable duty on the employer to ensure that the inspections are carried out. This provision will also require training for the committee members involved. Departments should ensure that committees have appropriate support material, such as standard inspection report forms and check sheets, and that they are provided with status and follow-up reports. Health and safety officers can be expected to request and review inspection reports (paragraph 125(1)(*z.12*)).

Where hazards cannot be eliminated or sufficiently reduced for the work to be performed and in consultation with the policy committee or, if there is no policy committee, with the work place committee or the representative, employers are to develop, implement and monitor programs for providing personal protective equipment, clothing, devices or materials. Both this provision and the “hierarchy of controls” objective (section 122.2) address concerns that the provision of personal protective equipment is not always properly dealt with and that employees are not involved in decisions related to their protection. The appropriate work place committee will normally monitor at the work place level (paragraph 125(1)(*z.13*)).

However, in the event of an unforeseen emergency situation that requires the provision and use of a unique piece of equipment, immediate action should be taken, with the consultation and follow-up with the committee conducted later.

Within **30 days** after receiving a request or as soon as possible afterward, an employer must provide information requested by a policy committee (subsection 134.1(5) or (6)), by a work place committee (subsection 135(8) or (9)), or by a representative (subsection 136(6) or (7)). This employer duty requires cooperation with policy committees and with work place committees or representatives by providing them with the information they need to fulfill their duties under the Code. Compliance is essential, although management has an equal role in deciding what information is requested by virtue of its representation as a committee member. Once a request has been jointly agreed to, the duty to respond applies, and the 30-day time limit should be respected to the extent possible (paragraph 125(1)(*z.18*)).

Employers must consult with the work place committee or the representative on the implementation and monitoring of any programs developed in consultation with the policy committee. This provision relates directly to the implementation phase of the employer's health and safety policies and programs. Work place committees will participate in implementing and monitoring programs developed in consultation with the policy committee or designated work place committee. Departments will need to ensure that there is adequate ongoing communication between the two levels of committees (paragraph 125(1)(*z.19*)).

Duty to Establish Work Place Health and Safety Committees

Work place committees are required for work places that have 20 or more employees. The use of "for" rather than "at" means that a committee could represent the employees at more than one work place. However, the considerable expansion of the roles and responsibilities of these committees, and their increased involvement in the day-to-day operations

of the work place and with the employees they represent, means that the intent of the legislation could be jeopardized if the scope of the committee's responsibilities were spread too thinly.

For the purposes of addressing health and safety matters that apply to individual work places, every employer, for each work place controlled by the employer at which 20 or more employees are normally employed, is to establish a work place committee and, subject to section 135.1, select and appoint its members.

Although departmental or agency-wide programs will be primarily developed at the policy committee or designated work place committee level, monitoring and implementation will be carried out at the work place level. This will require considerable training of all members and a greater level of expertise, authority and accountability of the management members of work place committees.

The Code exempts employers from establishing a work place committee for a work place on board ships in respect of employees whose base is a ship. However, ships will require a representative (subsection 135(2)).

Note: Subsections 135(3) to (5) allow for exemption from work place committee requirements and will not be applicable in the public service. They are aimed specifically at low-risk industries, such as banking, where there will be policy committees at the corporate level and representatives at each individual bank.

Work place committees are given the following specific duties in respect of the work places for which they are established (subsection 135(7)):

a. "Shall consider and expeditiously dispose of complaints relating to the health and safety of the employees." With increased emphasis on resolving complaints at the work place level, the mandated internal

dispute resolution process could very likely bring more items before the committee.

b. “Shall participate in the implementation and monitoring of the program referred to in paragraph 134.1(4)(*c*).” The program referred to is the prescribed hazard prevention program developed in consultation with the policy committee. Depending on the size, nature and risks of the work place(s) covered by the committee, the impact will vary. There will be some impact on occupational health and safety staff and local managers and supervisors.
c. “Where the program referred to in paragraph 134.1(4)(*c*) does not cover certain hazards unique to the work place, shall participate in the development, implementation and monitoring of a program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards.” To the extent possible, these programs should be developed and monitored at the national level. Even situation-specific programs should be monitored at the national level; implementation would be at the work place level. Central monitoring and direction of programs developed at the local level will be essential, especially with respect to implementation and training.
d. “Where there is no policy committee, shall participate in the development, implementation and monitoring of a program for the prevention of hazards in the work place that also provides for the education of employees in health and safety matters related to those hazards.” The impact could be considerable if activities are not monitored at the national level. For additional impact, see the provision to exempt an employer from the requirement to establish a work place committee (subsection 135(3)).

e. “Shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the committee on those matters.” As in the case of policy committees, this section has a similar “to the extent that it considers necessary” provision. The work place committee’s role should involve strictly local activities and should not conflict with activities at the national level. Examples of local activities would be accident and incident investigations, refusals to work, complaint resolution, air quality investigations, and ergonomic studies. The committee’s inspection role is covered in paragraph (*k*) below.

f. “Shall participate in the implementation and monitoring of a program for the provision of personal protective equipment, clothing, devices or materials and, where there is no policy committee, shall participate in the development of the program.” This requirement relates to employers’ duty to develop, implement and monitor programs for providing personal protective equipment, clothing, devices or materials, and to the policy committee’s roles (section 134.1). Other than in the rare cases where there is no policy committee, the focus will be on implementation and monitoring at the individual work place level.

   Depending on the use of personal protective equipment in a work place covered by the committee, initial involvement in implementing the program could be considerable. In advising and supporting the committees, there should be considerable involvement of departmental occupational health and safety staff or, depending on the hazard, other specialists.

g. “Shall ensure that adequate records are maintained on work accidents, injuries and health hazards relating to the health and safety of

employees and regularly monitor data relating to those accidents, injuries and hazards." Although this is a requirement, it is primarily a monitoring role for the committee to extract and review the data contained in those records.

h. "Shall cooperate with health and safety officers." Because work place committees are a key element in the effective implementation of the Code's provisions, it is highly likely that health and safety officers will take an active interest in these committees.

i. "Shall participate in the implementation of changes that might affect occupational health and safety, including work processes and procedures and, where there is no policy committee, shall participate in the planning of the implementation of those changes." This requirement relates to employers' duty to plan the implementation of changes that may affect occupational health and safety, and to the role of policy committees to participate in planning and implementing changes (paragraph 134.1(4)(*h*)). Other than in the rare cases where there is no policy committee, the work place focus will be on implementation and monitoring. There will likely be considerable involvement of departmental occupational health and safety staff and technical specialists in supporting this committee role.

j. " Shall assist the employer in investigating and assessing the exposure of employees to hazardous substances." This relates to employers' duty to protect workers from such exposure (section 125.1) and to the hazardous substance regulations (Part X of COHSR), where the method of assessing exposure is prescribed and the committee's involvement is allowed for but not required. This provision supersedes the above regulation, and committee involvement is now mandatory. There will likely be considerable involvement of departmental staff and technical specialists. Depending on the work place for which the committee was

established and the current level of compliance, the impact could be high.

k. “Shall inspect each month all or part of the work place, so that every part of the work place is inspected at least once each year.” This clarifies the right of the committee to participate in inspections. Committee rules of procedure should clarify how and at what intervals the inspections shall be done.

l. “Where there is no policy committee, shall participate in the development of health and safety policies and programs.” In the public service, there should be little or no reason for this to happen. There is minimal impact with respect to work place committees because all departments should have a policy committee.

A work place committee may request from an employer any information that the committee considers necessary to identify existing or potential hazards with respect to materials, processes, equipment or activities. It is essential for departmental management and management members of the committee to be aware that it is the committee as a whole that makes the request and that, once the request is made, there is a bone fide justification for the request (subsection 135(8)).

Work place committees are to have full access to all government and employer reports, studies and tests relating to the health and safety of employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees. However, they are not entitled to have access to the medical records of any person except with the person’s consent. This provision addresses instances where documents containing information applicable to the health and safety of employees are withheld on the grounds of confidentiality.

In addition, although information related to the health and safety of employees must be open and shared, the committees and representatives are not entitled to access information related to non-occupational health and safety matters (e.g., security-related and individual information governed by privacy laws). The provision's impact depends on what the committee decides to request (subsection 135(9)).

Additional Provisions Common to Policy and Work Place Committees

Section 135.1 deals with those provisions common to both policy and work place committees in terms of their structure, selection and appointment of chairpersons and members, and various committee functions.

A policy committee or a work place committee is to consist of at least two persons, where at least half of the members are employees who meet the following two conditions:

- The employee(s) do not exercise managerial functions. This is intended to ensure the participation of employees in any committee established for the purposes of occupational health and safety. Although the Code does not specifically say so, the statement "employees who do not exercise managerial functions" should be interpreted to mean that employer representatives should exercise managerial functions, such as having decision-making authority, in order for the committee to be effective. Considering the legislated roles, responsibilities and authority assigned to both policy and work place committees, departments and agencies should ensure to the extent possible that the most senior managerial staff possible speaks for management while on the committee; and
- Subject to any regulations, the employees on committees must be selected by the employees, if the employees are not represented by a

trade union, or by the trade union representing employees, in consultation with any employees who are not so represented. Unions also have an obligation to ensure that persons capable of carrying out their responsibilities represent their members. Failure of the union to select members is addressed in subsections (4) and (5) below (subsection 135.1(1)).

If there is no policy committee, a work place committee may, when dealing with an issue that would have come within the responsibilities of a policy committee, select two additional members. Unless otherwise provided in a collective agreement or other agreement, one of the additional members shall be an employee who meets the selection criteria noted above. This option is intended to allow a work place committee to be augmented by additional members, one of whom could be a union official where departments or agencies that have more than 20 but fewer than 300 employees decide not to establish a policy committee. In this way, a work place committee can carry out all the functions of a policy committee. However, this is an option that, to the extent possible, should not be used by public service departments or agencies; policy committees will be justified for all but the smallest organizations and should otherwise always be established (subsection 135.1(3)).

If a trade union fails to select a person, a health and safety officer may notify in writing the union’s local branch, and will send a copy of any such notification to the trade union’s national or international headquarters and to the employer. The notification will indicate that the committee cannot be established until a person is selected. This provision is intended to overcome a problem that some employers experienced with their unions whereby the employer was in non-compliance by not being able to appoint the required employee committee members. Although there is no obligation on the employer to inform the health and safety officer if such a

situation arises, it would be advisable to do so. This has never been a problem in the public service nor is it expected to become one (subsection 135.1(4)).

In cases where no person is selected under this section, the employer can perform the functions of the committee until a person is selected and the committee is established. This provision is related to subsection (4), as noted above. Where a union has failed to select employee members, the employer shall perform all the functions of a committee until such time as the union complies. Examples of these functions are accident investigations, work place inspections, developing and implementing hazard and violence prevention programs, participating in refusal-to-work investigations, and being the second stage in the Internal Complaint Resolution Process (subsection 135.1(5)).

The employer and employees may select alternate members to serve as replacements for members selected by them who are unable to perform their functions. Alternate members for employee members shall meet the same selection criteria indicated above. This is to clearly identify the concept of alternates and allow for the committee rules of procedure to guide their use. Designated alternates shall receive the same training as regular members. Although this is an enabling provision, it should be read as “shall” rather than “may.” The provision is intended to enable the smooth operation of both policy and work place committees (subsection 135.1(6)).

A committee’s two chairpersons are to be selected from among the committee members. One chairperson shall be selected by the employee members, with the other selected by the employer members. This was previously a requirement in the regulations that was moved to the body of the Code to ensure higher visibility (subsection 135.1(7)).

A committee's chairpersons are to jointly designate members of the committee to perform the functions of the committee as follows:

- If two or more members are designated, at least half of the members shall be employee members; or
- If one member is designated, the member shall be an employee member (subsection 135.1(8)).

This is an important provision intended to ensure that designated and appropriately trained members are available to carry out committee functions such as inspections, refusals to work, internal complaint resolution investigations, health and safety officer visits. Given the duties that these members are to perform, there should always be two-member teams.

A committee must ensure that accurate records are kept of all matters that come before it and that minutes are kept of its meetings. A committee is also required to make the minutes and records available to a health and safety officer at the officer's request. Management should therefore ensure that these minutes and records are kept; officers will make it a regular part of their monitoring activities to request and review these documents (subsection 135.1(9)).

Committee members are entitled to take the time required during their regular working hours to attend meetings or to perform any of their other functions, and for the purposes of preparation and travel, as authorized by both chairpersons of the committee. The provision is intended to ensure that committee members are provided with enough time during normal hours of work to be able to carry out committee functions, including attendance at meetings, preparation and travel time. This requirement is related to subsection (11), addressed below, which deals with the payment of wages for committee members (subsection 135.1(10)).

Participation in committee activities should not be considered an additional duty on top of regular duties but an integral element of the responsibilities of management, employees and their unions. Appropriate guidelines should be jointly developed to ensure that committees function effectively.

Although the chairpersons of a committee have the joint authority to approve preparation and travel time, the impact could be considerable, especially on employee members when distance is a factor. Committees should have clearly understood procedures to deal with preparation and travel time and compensation.

Given the extensively expanded roles and responsibilities of work place committees, committee rules of procedure should clearly address how and by whom the “other functions” of the committee will be handled, and to what extent alternates will be used. It is essential that committees established for multi-shift or continuous operation work places have clearly understood established guidelines and rules of procedure.

Committee members are to be compensated by the employer for committee functions. Compensation is to be at the member’s regular rate of pay or a premium rate of pay, as specified in the collective agreement, or, if there is no collective agreement, in accordance with the employer’s policy. It is an adjustment of the previous legislation to accommodate an Ontario Court of Appeal and subsequent Federal Court decision related to the payment of committee members for time spent on committee activities. The Court of Appeal decided that the subsection was to be read as one sentence and concluded that the intent of Parliament was that employees had to be “at work” before they could be “away from their work” in order to participate in committee activities and therefore be entitled to compensation (subsection 135.1(11)).

This provision is split into the above subsections (10) and (11) to clearly indicate that committee members must be allowed time to carry out their duties and consequently be compensated for the time involved. The impact could be high if meetings are not scheduled to reflect employee work schedules and if alternates have not been identified.

Departmental managers and supervisors should be made aware that non-payment of a committee member's wages is a form of discipline taken against an employee who had acted in accordance with the Code while a member of a committee. In addition to being a prohibited action on disciplinary action (paragraph 147(*c*)), an employee, or person acting on behalf of the employee, can complain of such action to the Public Service Labour Relations Board. The resulting decision of the Board could have a significant impact on both the department concerned and the public service as a whole.

The above provisions for committee members also apply to alternate members, but only while they are actually performing the functions of the committee member they are replacing (subsection 135.1(12)).

No person serving as a member of a committee can be personally held liable for anything authorized by the Code that is done or omitted to be done by the person in good faith. This provides liability protection for committee members acting in good faith while carrying out their many duties under the Code (subsection 135.1(13)).

Subject to subsection 134.1(7), subsection 135(10) and any regulations made under subsection 135.2(1), a committee is required to establish its own rules of procedure in respect of the terms of office, which are not to exceed two years, and the time, place and frequency of regular committee meetings. A committee may also establish any rules of procedure for its operation that it considers advisable. It is essential that rules of procedure

are established for all committees. It is preferable that core rules of procedure for work place committees be established centrally in consultation with the policy committee and be made applicable to all work places and committees (subsection 135.1(14)).

The Governor in Council may make regulations as follows (section 135.2):

a. specifying the qualifications and terms of office of members of a committee;
b. specifying the time and place of regular meetings of a committee;
c. specifying the method of selecting employee members of a committee if employees are not represented by a trade union;
d. specifying the method of selecting the chairpersons of a committee and their terms of office;
e. establishing any rules of procedure for the operation of a committee that the Governor in Council considers advisable;
f. requiring copies of minutes of committee meetings to be provided by and to any persons that the Governor in Council may prescribe;
g. requiring a committee to submit an annual report of its activities to a specified person in the prescribed form within the prescribed time; and
h. specifying the manner in which a committee may exercise its powers and perform its functions.

A regulation made under subsection 135.2(1) may be made applicable generally to all committees or particularly to one or more committees or classes of committees.

The current *Safety and Health Committees and Representatives Regulations* address items (*a*), (*c*), (*d*), (*f*) and (*g*) above.

Note: Additional information on work place committees can be found in HRSDC's "Pamphlet 6B - Work Place Health and Safety Committees."

Chapter 8: Health and Safety Representative

▶ **In this section**

The September 2000 revisions to Part II of the *Canada Labour Code* (the Code) included a realignment of the responsibilities of employers and employees for work place health and safety. This was achieved by placing a greater onus on employers, employees and their unions to jointly ensure that work place health and safety issues are identified and resolved in a timely manner.

One of the key means of achieving this objective was to establish a new committee structure to ensure that health and safety issues are regularly on the agenda of senior management and employee representatives through a corporate-level health and safety policy committee (policy committee) tasked with assisting in developing health and safety policies and programs. In addition, the role, powers, and level of involvement of work place health and safety committees (work place committee) and health and safety representatives (representative) were enhanced to allow them to participate in implementing policies and programs and better identify and resolve problems as they arise in the work place. In work places at which one or more employees are regularly employed, employees will be represented by either a work place committee or a representative.

For work places that have 20 or more employees, work place committees will be involved in a range of activities that have an impact on health and safety in the work places they represent, including the planning, implementation and monitoring of hazard prevention programs, violence

prevention programs, changes to work processes and procedures that may affect health and safety, personal protective equipment programs, and regularly scheduled work place inspections.

Where the work place has fewer than 20 employees or is a ship, a representative essentially having the same powers and responsibilities as a work place committee is to be selected by the employees or union, and is then to be appointed by the employing department or agency.

Employer Duties Related to Health and Safety Representatives

Employers must ensure that members of policy and work place committees and representatives receive the prescribed training in health and safety and are informed of their responsibilities under Part II of the Code. Because establishing policy committees and implementing the expanded roles and responsibilities of work place committees and representatives are essential components of the Code, initial representative and committee member training that addresses their roles and responsibilities should begin as soon as possible (paragraph 125(1)(*z.01*)).

Until a specific regulation prescribing additional health and safety training of representatives is put in place, the essential responsibilities of representatives are identified in numerous provisions of the Code. Additional responsibilities and training are identified in the hazard prevention program regulations (Part XIX of COHSR) and in the violence prevention in the work place regulations (Part XX of COHSR).

In addition to the prescribed training, this duty requires that representatives be informed of their general powers, duties and rights (subsections 136(5), (6), (7), (8) and (9)); their specific responsibilities related to the joint investigation of an employee's complaint (section 127.1); and the investigation of a refusal to work (section 128).

In consultation with the policy committee or, if there is no policy committee, with the work place committee or the representative, employers are to develop, implement and monitor a prescribed hazard prevention program in a work place that is appropriate to its size and the nature of the hazards. Policy committees have a very important role in preventing hazards in the work place. The required hazard prevention program will be the primary vehicle through which most of the Code and regulatory requirements will be delivered. It should be noted that this is to be a broad hazard prevention program, not just a program to prevent accidents that may result from a work place hazard (paragraph 125(1)(*z.03*)).

Where a policy committee has not been established, a work place committee, modified accordingly (subsection 135(3)), will participate in developing the prevention program. Where the organization is too small to justify establishing a policy committee or a work place committee, the representative will participate in developing the prevention program.

The essential elements identified in the hazard prevention program regulations require the following:

- Development of a hazard identification methodology;
- Hazard and risk assessment;
- Hazard and risk control;
- An implementation plan;
- Regular program evaluation; and
- Employee training and education.

Where the hazard prevention program referred to in the above provision does not cover certain hazards unique to a work place, the employer, in consultation with the representative, must develop, implement and monitor a prevention program for those hazards. Such a program must

provide for the education of employees in health and safety matters related to those hazards. This duty is intended to address situations where an employer, department or agency has a truly unique work place that has hazards that do not occur anywhere else in the organization and that have not been addressed at the corporate level. Where there is no work place committee, the health and safety representative will participate in developing, implementing and monitoring the program (paragraph 125(1)(*z.04*)).

Employers are to consult with the representative, if there is no policy or work place committee, to plan the implementation of changes that may affect occupational health and safety, including work processes and procedures. All work place changes, be they to the plant, layout, furniture, equipment, materials, work methods or work environment, could have a health and safety component. Regardless of the change, this component should be first assessed to determine whether there is any possible link to occupational health or safety. Following the assessment, procedures should be developed, and the implementation of changes must involve the representative. Even if the assessment does not indicate an impact on health and safety, the representative should be informed (paragraph 125(1)(*z.05*)).

Employers must also consult the representative in implementing changes that may affect occupational health and safety, including work processes and procedures. This is similar to the above provision, except that these changes would be specific to implementing changes in the particular work place. Being work place–specific, there is a risk of situations getting out of control if there is not an active system of monitoring and central guidance through the policy committee or a designated point of contact (paragraph 125(1)(*z.06*)).

Employers must also cooperate with representatives in the execution of their Part II duties. This duty requires the consultation and cooperation that an employer should extend to representatives. It gives the regulator the ability to enforce compliance if a department, agency or responsible manager is reluctant to cooperate. Examples of areas where cooperation is required by the Code are complaint resolution; access to health- and safety-related records; development, implementation and monitoring of hazard prevention programs; participation in inquiries, investigations and inspections; implementation of work place changes; regular work place inspections; and hazardous substance and personal protective equipment assessments (paragraph 125(1)(*z.08*)).

In consultation with the representative, employers are to develop health and safety policies and programs. This is broader than the hazard prevention program duty (*z.03*) noted above, in that the policy committee, or designated work place committee, will be involved in developing **all** employer occupational health and safety policies and programs. Everything done in respect to occupational health and safety programs will require the involvement of employees through their representative or joint committee. Where the organization is so small as to not require a policy or work place committee, or where the program is work place–specific, the representative will be the person to consult (paragraph 125(1)(*z.09*)).

An employer must respond in writing to recommendations made by a representative within **30 days** after receiving them, indicating what, if any, action will be taken and when it will be taken. This clause is similar to the employer's duty to cooperate with policy and work place committees or the representatives. However, this is an enforceable duty and establishes time limits to ensure that there is an effective operation of representatives, that issues are dealt with, and that representatives are informed of the action to be taken (paragraph 125(1)(*z.10*)).

Employers must provide to the representatives a copy of any report on hazards in the work place, including an assessment of those hazards. This provision relates to all reports and assessments, not only to those required by the hazardous substances regulations (Part X of COHSR) and the hazard prevention program regulations (Part XIX of COHSR). In order to ensure compliance, appropriate procedures should be developed and implemented, and personnel resources should be allocated. There is a potential for considerable impact because everything related to the health and safety of employees must be open and shared through the committee and representative structure (paragraph 125(1)(*z.11*)).

Each month, the representative must inspect all or part of the work place, so that every part of the work place is inspected at least once each year. Where no work place committee exists, work place inspections are now the responsibility of representatives, who are expected to jointly establish procedures to ensure that the required inspections are done. This is an enforceable duty on the employer to ensure that the inspections are carried out. This provision will also require training for the representatives involved. Departments should ensure that representatives have appropriate support material, such as standard inspection report forms and check sheets, and that they are provided with status and follow-up reports. Health and safety officers can be expected to request and review inspection reports (paragraph 125(1)(*z.12*)).

Where hazards cannot be eliminated or sufficiently reduced for the work to be performed, employers are to develop, implement and monitor programs for providing personal protective equipment, clothing, devices or materials, in consultation with the policy committee or, if there is no policy committee, with the work place committee or the representative. Both this provision and the “hierarchy of controls” objective (section 122.2) were based on considerable concerns on the part of the regulator and unions

that the provision of personal protective equipment is not always properly addressed, and that employees are not involved in decisions related to their protection. For organizations that are too small to have policy or work place committees, the health and safety representative will be the person to be consulted. In turn, the appropriate representative will undertake any monitoring at the work place level (paragraph 125(1)(*z.13*)).

In the event of an unforeseen emergency situation, or one that requires the provision and use of a unique piece of equipment, immediate action should be taken. Subsequent consultation and follow-up with the representative can be conducted at a later time.

Employers must meet with the representative as necessary to address health and safety matters. The increased legislated role and involvement of employees in health and safety issues through their committee or representative, and the development and implementation of policies and programs to address those issues, makes it essential that management maintains the same level of contact with a representative as it would a committee. To all intents and purposes, this requirement to meet will result in a two-person committee. In most situations, it would be more effective to strike a small committee, with one member being designated as the employee representative (paragraph 125(1)(*z.15*)).

Within **30 days** after receiving a request or as soon as possible after that, an employer must provide information requested by a representative (subsection 136(6) or (7)). This employer duty requires cooperation with representatives by providing them with the information they need in fulfilling their duties under the Code. Compliance is essential and, once a request has been made, the duty to respond applies, and the 30-day time limit should be respected to the extent possible (paragraph 125(1)(*z.18*)).

Employers must consult with the work place committee or the representative on implementing and monitoring any programs developed in consultation with the policy committee. This provision relates directly to the implementation phase of the employer duty noted above. Representatives will participate in implementing and monitoring the programs developed in consultation with the policy committee or designated work place committee. Departments will need to ensure that there is adequate ongoing communication between the committee that is developing the program and the representative involved in implementing and monitoring the program (paragraph 125(1)(*z.19*)).

Duty to Appoint Health and Safety Representatives

Representatives are required for smaller work places that have fewer than 20 employees, work places that are ships, and work places that meet the strict requirements for a Minister of Labour exemption.

For each work place controlled by the employer at which fewer than 20 employees are normally employed or for which an employer is not required to establish a work place committee, employers must appoint the person selected as the health and safety representative. The phrase “or for which an employer is not required to establish a work place committee” refers to the exemption of ships (subsection 135(2)) or a work place exempted by the Minister of Labour (subsection 135(3)).

Given that representatives have been given the same expanded powers, authorities and protection given to committees, it would be preferable to obtain union agreement to have the minimum of a two-person committee at or for each work place. One of those persons should be designated as the health and safety representative.

The representative for a work place shall be selected as follows (subsection 136(2)):

a. the employees at the work place who do not exercise managerial functions shall select from among those employees the person to be appointed; or
b. if those employees are represented by a trade union, the trade union shall select the person to be appointed, in consultation with any employees who are not so represented, and subject to any regulations made under subsection (11).

The employees or the trade union shall advise the employer in writing of the name of the person so selected. If a union represents the employees, it would be reasonable to require written notification. However, it would be difficult for a small group of unorganized employees to initiate written confirmation of their selection. The responsible manager should develop a written notification signed by the selected employee and the majority of the employees who made the selection.

If a trade union fails to select a person under subsection (2) above, a health and safety officer can so notify by writing to the local branch of the trade union. The officer will send a copy of the notification to the trade union's national or international headquarters and to the employer. Unions have the obligation under subsection (2) to select a representative. This provision allows the regulator to exert some degree of pressure on a union failing to do so. Although there is no obligation on the employer to inform the health and safety officer, if such a situation arose, it would be advisable to inform the regulator in order to meet the employer's obligation to appoint (subsection 136(3)).

Until such time that a person is selected under the above selection criteria, the employer is to perform the functions of the representative. This is an employer obligation related to subsection (3) above. Where a union has failed to select the representative, management shall perform all the functions of a representative until such time as the union complies. Examples of these functions are accident investigations, work place inspections, developing and implementing accident and violence prevention programs, participating in refusal-to-work investigations, and being the second stage in the Internal Complaint Resolution Process. However, the legislation is silent on the consequences of unorganized employees failing to select a representative. In this case as well, management should still assume the responsibilities of the representative (subsection 136(4)).

Duties of Health and Safety Representatives (subsection 136(5))

In respect of the work place for which the representative is appointed, the representative:

a. "Shall consider and expeditiously dispose of complaints relating to the health and safety of employees." With the increased emphasis on resolving complaints at the work place level, this provision and the internal dispute resolution process could likely result in more employee complaints for the representative to deal with.
b. "Shall ensure that adequate records are maintained pertaining to work accidents, injuries, health hazards and the disposition of complaints related to the health and safety of employees and regularly monitor data relating to those accidents, injuries, hazards and complaints." Although this is a requirement, it is primarily a monitoring role for the representative aimed at ensuring the records are kept and authorizes

the representative to extract and review the data contained in those records.

c. “Shall meet with the employer as necessary to address health and safety matters.” This paragraph is to address union concerns that representatives do not have access to management. The representative has the right to meet with management to discuss occupational safety and health issues when necessary. However, the representative must also have a valid reason for seeking a meeting. Within reason, managers should be able to schedule regular meetings and keep track of activities.

d. “Shall participate in the implementation and monitoring of the program referred to in paragraph 134.1(4)(*c*).” The program referred to in paragraph 134.1(4)(*c*) is the prescribed hazard prevention program, developed in consultation with the policy committee. Depending on the size, nature, risks and training needs of the work place represented, the impact and level of the representative’s involvement will vary.

   Where the work place is complex, or the prescribed hazard prevention program components include a high level of local involvement, there is also likely to be some impact on the time and workload of the managers and supervisors of the work place for which the representative has been appointed.

e. “Where the program referred to in paragraph 134.1(4)(*c*) does not cover certain hazards unique to that work place, shall participate in the development, implementation and monitoring of a program for the prevention of those hazards that also provides for the education of employees in health and safety matters related to those hazards.” To the extent possible, prevention programs should be developed and monitored at the national level through the departmental policy

committee. Even situation-specific programs, developed and implemented at the work place level, should be monitored at the national level. However, whenever program elements are developed for a work place for which a representative has been appointed, the representative shall participate in developing, implementing and local monitoring.

f. “Where there is no policy committee, shall participate in the development, implementation and monitoring of a program for the prevention of hazards in the work place that also provides for the education of employees in health and safety matters.” Health and safety representatives are to be involved in implementing and monitoring the program elements in the work place they represent.
g. “ Shall participate in all of the inquiries, investigations, studies and inspections pertaining to the health and safety of employees, including any consultations that may be necessary with persons who are professionally or technically qualified to advise the representative on those matters.” Because the level of participation of both representatives and committees has increased considerably, these activities could include monitoring prevention program implementation, accident and incident investigations, participation in refusal-to-work investigations, complaint resolution where the supervisor has not resolved an employee’s concern, air quality investigations and ergonomic studies. The work place inspection role is covered in paragraph (*j*) below.
h. “Shall cooperate with health and safety officers.” Because committees and representatives are a key element in effectively implementing the provisions of the Code, it is highly likely that health and safety officers will take an active interest in the effectiveness of representatives and would want to meet with them.

i. “Shall participate in the implementation of changes that may affect occupational health and safety, including work processes and procedures and, where there is no policy committee, shall participate in the planning of the implementation of those changes.” This is a role related to employers’ duty to consult with the appropriate committee or representative to plan changes, and to the policy committee’s roles in participating in planning and implementing changes. Other than in the rare cases where there is no policy committee, the representative’s focus will be on implementation and monitoring.

j. “ Shall inspect each month all or part of the work place, so that every part of the work place is inspected at least once each year.” This clarifies the right of representatives to conduct work place inspections. Management should, in consultation with the representative, develop procedures that clarify how and at what intervals the inspections shall be done.

k. “Shall participate in the development of health and safety policies and programs.” If there are programs and policies unique to the particular work place, management should ensure that the representative participates as required by this provision.

l. “Shall assist the employer in investigating and assessing the exposure of employees to hazardous substances.” This relates to employers’ duty to protect employees exposed to hazardous substances and to the hazardous substances regulations (Part X of COHSR) where the method of assessing exposure is prescribed and the representative’s involvement is allowed for, but not required. Because involvement of the representative is now mandatory, this provision supersedes the above regulation. There will likely be considerable involvement of departmental staff and technical specialists. Depending on the work place for which the representative was appointed, as well as the use of

hazardous substances and the current level of compliance with the regulation, the impact on the representative's time could be high.

m. "Shall participate in the implementation and monitoring of a program for the provision of personal protective equipment, clothing, devices or materials and, where there is no policy committee, shall participate in the development of the program." This role is related to the employer's duty to develop, implement and monitor a personal protective equipment program, and to the policy committee's participation in developing and monitoring the program. Other than in the rare cases where there is no policy committee, the focus of the representative's involvement will be on implementation and monitoring at the individual work place level. Depending on the use of personal protective equipment in the work place for which the representative was appointed, involvement in implementing the program could very likely be considerable.

A representative may request from an employer any information that the representative considers necessary to identify existing or potential hazards with respect to materials, processes, equipment or activities. This provision is related to the employer's duty to cooperate with policy and work place committees or representatives by providing them with the information they need in fulfilling their duties under the Code. Management should be aware that compliance is essential. Once a request has been made, the duty to respond applies, and the specified **30-day** time limit (paragraph 125(1)(*z.18*)) should be respected to the extent possible (subsection 136(6)).

Representatives are entitled to have full access to all government and employer reports, studies and tests relating to the health and safety of the employees, or to the parts of those reports, studies and tests that relate to the health and safety of employees. However, the representative shall not have access to the medical records of any person except with the person's

consent. This provision relates to a number of incidents where documents containing information applicable to employees' health and safety were withheld on the grounds of the confidentiality of parts of the report. In addition, although information related to the health and safety of employees must be open and shared, representatives are not entitled to access information related to non-occupational health and safety matters (e.g., security-related and individual information governed by privacy laws). The impact depends on what the representative decides to request. This provision is related to subsection (6) above and to the employer's duty, once the request is made, to respond within 30 days (subsection 136(7)).

During their regular working hours, representatives are to be given enough time to carry out their duties, including attendance at meetings, and, when authorized by the policy committee chairpersons or the employer where there is no policy committee, sufficient preparation and travel time. Appropriate guidelines should be jointly developed to ensure that representatives function effectively. It is essential that clearly understood procedures are in place from the very beginning. Payment of wages while performing representative functions is addressed in the following provision (subsection 136(8)).

A representative is to be compensated by the employer for all functions above. Compensation is to be at the representative's regular rate of pay or premium rate of pay, as specified in the collective agreement or, if there is no collective agreement, in accordance with the employer's policy. Departmental managers and supervisors should be made aware that non-payment of a representative's wages is a form of discipline taken against an employee who had functioned in accordance with the Code while acting as a representative. In addition to being deemed to fall under the prohibition provisions against disciplinary action (paragraph 147(*c*)), an employee, or person acting on behalf of the employee, can complain of

such action to the Public Service Labour Relations Board. The Board's resulting decision could have a significant impact on both the department concerned and the public service as a whole. It is essential that clearly understood procedures are in place from the very beginning regarding the representative taking the time required to perform his or her duties and the payment of wages when the time is related to such duties (subsection 136(9)).

No representative can be held personally liable for anything done or omitted to be done in good faith under the authority of this section. This provides liability protection for representatives acting in good faith while carrying out their many duties under the Code (subsection 136(10)).

Regulations

The Governor in Council may make regulations for health and safety representatives that specify the following (subsection 136(11)):

a. the qualifications and term of office of a health and safety representative;
b. the method of selecting a health and safety representative if employees are not represented by a trade union; and
c. the manner in which a health and safety representative may exercise their powers and perform their functions.

Note: Additional information on representatives can be found In HRSDC's "Pamphlet 6C - Health and Safety Representatives."

Chapter 9: Prohibited Disciplinary or Discriminatory Action

▶ **In this section**

In 1986, a revised Part II ("Occupational Health and Safety") of the *Canada Labour Code* (the Code) became applicable to the public service of Canada, and public service employees were given the same legislated protection as other federally regulated employees with respect to the right to refuse to perform work they perceived to be dangerous to their health and safety. At the same time, they were given protection against the employer taking disciplinary or discriminatory action as a result of their exercising that right.

The protection took two forms. First, the taking of such action was deemed prohibited and subject to prosecution. Second, the employee was given the right to have an impartial board hear and dispose of a complaint that a department, manager or supervisor took or threatened to take disciplinary or discriminatory action as a result of an employee exercising the right to refuse to work. In the case of a public service employee, the *Financial Administration Act* had established that the board to hear these complaints would be the former Public Service Staff Relations Board (the Board).

This right to complain was considered so important that the Code placed a reverse onus of proof on the employer under which the very making of a complaint to the Board was deemed to be proof that the offence took place. As a result, the employer was required to prove otherwise.

The September 2000 changes to the Code included two important changes to an employee's protection against disciplinary or discriminatory action. The first is that an employee may make a complaint to the Board respecting any disciplinary action prohibited under section 147. For the public service under the Code, subparagraph 240(*a*)(ii) of the *Public Service Labour Relations Act* refers to the Public Service Labour Relations Board as the "Board." The second change is that a person acting on the employee's behalf can initiate the complaint.

Prohibited Disciplinary Action (section 147)

Employers cannot dismiss, suspend, lay off or demote an employee, impose a financial or other penalty on an employee, or refuse to pay an employee's remuneration when an employee exercises rights provided under Part II.

In addition, employers cannot take any disciplinary action against or threaten to take any such action against an employee because the employee has testified or is about to testify in a proceeding taken or an inquiry held under Part II. Proceedings and enquiries that may require an employee's testimony could include an inquiry initiated by the Minister of Labour (subsection 138(2)), an inquiry conducted by a health and safety officer (paragraph 141(1)(*a*)), an inquiry conducted by an appeals officer (subsection 146.1(1)), proceedings before the Public Service Labour Relations Board inquiring into an employee's complaint, and proceedings before a court in the event of a prosecution.

Employers cannot take disciplinary action against, or threaten to take such action against, an employee who has provided information to a person engaged in the performance of duties under Part II of the Code regarding conditions of work that affect the health or safety of th eemployee or of any other employee. Persons having information-gathering duties or exercising their responsibilities under Part II include health and safety officers and appeals officers appointed by the Minister of Labour, Board members, members of policy committees, members of work place committees, and health and safety representatives.

Employers cannot take disciplinary action against, or threaten to take such action against an employee who has acted in accordance with Part II or has sought the enforcement of any of its provisions. Employees acting in

accordance with Part II (section 126) are protected by this very broad provision when they:

- Follow prescribed procedures with respect to their health and safety and take all reasonable and necessary precautions to ensure the health and safety of themselves, other employees or any person likely to be affected by the employee's acts or omissions;
- Cooperate with any person carrying out a duty under Part II;
- Cooperate with or provide information to members of policy or work place committees or health and safety representatives;
- Report to the employer any thing or circumstance in a work place that is likely to be hazardous to the employee's health or safety, or that of other employees or persons granted access to the work place by the employer; or
- Report to the employer any situation that the employee believes to be a contravention of the Code or regulations by the employer, another employee or other person.

The prohibition also applies to action taken against an employee who complains to his or her supervisor (section 127.1), refuses to work (section 128), ceases to work (section 132) or initiates a complaint to the Board (section 133).

Part II enforcement is the responsibility of health and safety officers appointed by the Minister of Labour. The protection afforded by the above provision also applies to employees who contact or complain to these officers respecting a perceived hazard or violation.

Complaints When There Is an Action Against Employees (section 133)

In addition to being a prohibition enforceable through the courts, an employee or somebody acting on behalf of the employee may make a complaint to the Board that disciplinary or discriminatory action has been taken against them. The Board can hear the complaint under its own rules of procedure (section 134) and, by order, require the employer to take the corrective action.

A complaint must be made to the Board not later than **90 days** after the date on which the complainant knew, or in the Board's opinion, ought to have known, of the action or circumstances giving rise to the complaint. The Board has considerable discretion in deciding when the 90-day time limit should have started, especially if the complaint relates to a threat rather than a recorded disciplinary action (subsection 133(2)).

A complaint in respect of the exercise of the right to refuse (sections 128 and 129) may not be made unless the employee has complied with the right-to-refuse reporting provisions (subsection 128(6)), or a health and safety officer has been notified (subsection 128(13)) of the matter that is the subject of the complaint. Section 128 is the process to be followed during the initial refusal to work. Section 129 is the process to be followed when a health and safety officer conducts an investigation following a continued refusal on the part of the employee. An employee cannot complain of disciplinary or discriminatory action if he or she did not comply with his or her obligation to report the refusal to the employer or report a continued refusal to the employer (subsection 133(3)).

In addition, an employee may not refer a complaint to arbitration or adjudication. To preserve the exclusive authority of the Board, an employee or union acting on behalf of the employee may not, if a complaint to the

Board of disciplinary or discriminatory action has been initiated, refer the same complaint to a parallel dispute resolution authority (subsection 133(4)).

On receipt of a complaint, the Board may assist the parties to the complaint to settle the complaint. If the Board decides not to so assist the parties or the complaint is not settled within a period considered reasonable by the Board, it shall hear and determine the complaint (subsection 133 (5)).

A complaint in respect of the exercise of the right to refuse (sections 128 and 129)is itself evidence that the contravention actually occurred. If a party to the complaint proceedings alleges that the contravention did not occur, the burden of proof is on that party. There is reverse onus of proof on the department, manager or supervisor who the employee claims to have taken the disciplinary or discriminatory action. If an employee complains that prohibited action was taken because he or she refused to work, the department, manager or supervisor must prove that it did not take such action, or that the action taken was not related to the employee's refusal to work. It is essential that managers and supervisors be aware of the potential impact of this provision (subsection 133(6)).

If the Board determines that an employer has taken disciplinary action in contravention of section 147, the Board may by order require that the employer cease contravening section 147. If applicable, the Board may also order the employer (section 134) to:

a. permit any employee who has been affected by the contravention to return to the duties of their employment;
b. reinstate any former employee affected by the contravention;
c. pay to any employee or former employee affected by the contravention compensation not exceeding the sum that, in the Board's opinion, is equivalent to the remuneration that would, but for the contravention,

have been paid by the employer to the employee or former employee; and

d. rescind any disciplinary action taken in respect of, and pay compensation to any employee affected by, the contravention, not exceeding the sum that, in the Board's opinion, is equivalent to any financial or other penalty imposed on the employee by the employer.

This section grants extensive powers to the Board to take remedial action with respect to any prohibited disciplinary action (section 147).

Chapter 10: Assurances of Voluntary Compliance (AVCs) and Directions

▶ **In this section**

In monitoring and ensuring compliance with Part II of the *Canada Labour Code* (the Code), health and safety officers (officers) appointed by the Minister of Labour have three graduated options for encouraging and ensuring compliance.

The first is to accept a written assurance of voluntary compliance (AVC) from the employer's representative responsible for the work place who agrees that there is a problem that needs to be rectified. The subject of the assurance could be a minor infraction of the Code, regulations or a referenced standard. It could also be a potentially hazardous situation or activity that the employer acknowledges as needing to be corrected. The person giving the AVC must also be able to assure the officer that the action will be taken within an agreed time frame.

To rectify a more serious situation, an officer's second option is to use the authority to issue a direction with respect to an employer (subsections 145(1) and (2)), or with respect to an employee (subsection 145(2.1)).

Because a direction is the equivalent of a regulation under the *Statutory Instruments Act* and can be changed only under the powers given to an appeals officer, this authority given to a health and safety officer is extensive and could have a considerable impact.

The third compliance option available to an officer is to recommend and initiate the prosecution of an employing department, agency or Crown corporation when a situation, usually a fatality or serious incident, warrants such a response. If the actions or inaction of a manager or supervisor can be shown to have resulted in the incident, or in the circumstances leading to the fatality or serious injury, that person is also likely to be prosecuted.

Assurances of Voluntary Compliance (AVCs)

Although it is not a legislated requirement for a manager or supervisor acting on the employer's behalf to give an officer a written assurance that compliance with an agreed-to action will be voluntary, the giving and receiving of such assurances is a key component of the regulator's compliance policy. Although officers have extensive powers and the authority to issue directions, they do not have the power or legal authority to issue AVCs. However, they can accept such assurances from an employer's representative.

Note: The concept of "assurance of voluntary compliance" still does not have any legal authority. An AVC is currently part of HRSDC's *Compliance Policy* on occupational health and safety of HRSDC. The compliance policy was developed as part of a Justice Canada initiative to assist regulatory departments to prepare and publish graduated policies on regulatory

compliance activities. The compliance policy encourages employers to voluntarily comply with the intent of the legislation by allowing them to provide the officer with a written assurance of their intent.

The concept of an AVC is a statement written or approved by a person acting on behalf of the employer who acknowledges that there has been a minor violation that would not warrant the issuance of a formal direction. Managers and supervisors who give such assurances must have the authority to assign resources and ensure compliance within the time frame established with the officer.

An essential condition for allowing employers the opportunity to voluntarily comply with an agreed solution to a problem is that failure to abide by the agreement could lead to more direct action on the part of the regulatory authority.

Appointment of Health and Safety Officers (section 140)

The Code establishes who may be a health and safety officer (officer) and how they are appointed.

The Minister of Labour may designate any person who is qualified as a regional health and safety officer or as an officer to perform the duties of such officers. Reflecting concerns about the complexity of the legislation to be applied by officers and the ability of officers to perform their duties, the phrase “any person who is qualified to perform the duties of such an officer” is part of the designation criteria. The person to be designated as an officer must be capable of competently fulfilling the duties (subsection 140(1)).

The Minister of Labour, with the approval of the Governor in Council, may also enter into an agreement with any province or any provincial body, specifying the terms and conditions under which a person employed by

that province or provincial body may act as an officer for the purposes of Part II of the Code. If such an agreement has been entered into, a person so employed and referred to in the agreement is deemed to have been designated as a federal health and safety officer under subsection (1) above. Currently, provincial agencies in Ontario, Manitoba and Saskatchewan have entered into administrative agreements to serve as federal officers within specific sectors such as uranium mining and nuclear electricity generation. Separate federal legislation, referencing provincial labour legislation, has been enacted to cover such arrangements in each case (subsection 140(2)).

Powers of Health and Safety Officers (section 141)

The Code establishes the extensive powers of the officer to enter a work place and obtain the information necessary to perform his or her duties.

An officer, in carrying out the officer's duties and subject to section 143.2, at any reasonable time, is permitted to enter any work place controlled by an employer and, in respect of any work place, in order (subsection 141(1)) to:

a. conduct examinations, tests, inquiries, investigations and inspections or direct the employer to conduct them;
b. take or remove for analysis, samples of any material or substance or any biological, chemical or physical agent;
c. be accompanied or assisted by any person and bring any equipment that the officer deems necessary to carry out the officer's duties;
d. take or remove, for testing, material or equipment if there is no reasonable alternative to doing so [an officer, if requested, must return the material or equipment unless it is required as evidence in a prosecution (subsection 141(3))];

e. take photographs and make sketches;
f. direct the employer to ensure that any place or thing specified by the officer not be disturbed for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing;
g. direct any person not to disturb any place or thing specified by the officer for a reasonable period pending an examination, test, inquiry, investigation or inspection in relation to the place or thing [this provision, allowing the officer to direct a contractor, another employer or the owner of the property not to disturb an incident site, is intended to address concerns over contractors or other government agencies disturbing evidence];
h. direct the employer to produce documents and information relating to the health and safety of the employer's employees or the safety of the work place and to permit the officer to examine and make copies of or take extracts from those documents and that information;
i. direct the employer or an employee to make or provide statements, in the form and manner that the officer may specify, respecting working conditions and material and equipment that affect the health or safety of employees;
j. direct the employer or an employee or a person designated by either of them to accompany the officer while the officer is in the work place [this is related to the provision whereby an officer can proceed with an inspection in the absence of any person if that person chooses not to be present (subsection 141.1(2)); to the extent possible, employer representatives should always accompany the officer]; and
k. meet with any person in private, or at the request of the person, in the presence of the person's legal counsel or union representative.

An officer may issue a direction whether or not the officer is in the work place at the time the direction is issued. Directions referred to in this provision are distinct from the contravention and “danger” directions (section 145 and subsection 141(2)).

The only powers for which the officer does not need to be present in a work place to reach the required opinion on which to base the direction are among those found in paragraphs 141.(1)(*a*), (*f*), (*g*), (*h*) and (*i*) above. The direction or confirmation of the direction can be issued by mail, facsimile or other electronic means. However, this authority cannot be exercised with respect to the above paragraphs 141.(1)(*b*), (*c*), (*d*), (*e*), (*j*) or (*k*), as they require the physical presence of the officer in order to decide that a direction is justified (subsection 145(1.1)).

If requested by the person from whom material or equipment was taken or removed under paragraph (*d*) above, an officer may return the material or equipment after the testing is completed. An exception is in the case where the material or equipment is required for the purposes of a prosecution. This assures the return of anything taken or removed by an officer (subsection 141(3)).

An officer shall investigate every incident that resulted in the death of an employee or that resulted in an injury that occurred in the work place or while the employee was working. This provision requires that every fatality or serious injury be investigated (subsection 141(4)).

If the death results from a motor vehicle accident on a public road, as a part of an investigation the officer will obtain a copy of any police report as soon as possible after the accident (subsection 141(5)).

Within 10 days after completing a written report on the findings of an inquiry or investigation, the officer must provide the employer and the work place committee or the health and safety representative with a copy of the report. This ensures that employers and committees are made aware of everything that is on file with respect to their work place. The advantage will be that employers will be aware of all visits and consequent actions taken by the officer (subsection 141(6)).

The Minister of Labour provides every officer with a certificate of authority. When carrying out duties, the officer is required to show the certificate to any person who asks to see it (subsection 141(7)).

An officer is not personally liable for anything done or omitted to be done by the officer in good faith while carrying out his duties under the Code (subsection 141(8)).

Notwithstanding subsection (8) above, Her Majesty in right of Canada is not relieved of any civil liability to which Her Majesty in right of Canada may otherwise be subject (subsection 141(9)).

An officer is to conduct an inspection of the work place in the presence (section 141.1(1)) of:

a. an employee member and an employer member of the work place committee; or
b. the health and safety representative and a person designated by the employer.

Supervisors and managers will need to be aware of the above constraints and the right of committee members or representatives to be present during an inspection.

An officer may proceed with an inspection in the absence of any person mentioned in paragraphs (*a*) and (*b*) above, if that person chooses not to be present. This provision is intended to ensure that the process is not blocked by the failure of somebody declining to be present during the inspection (subsection 141.1(2)).

General Matters

The Code imposes duties on employers and employees to assist health and safety officers and appeals officers in the performance of their duties under Part II.

A person in charge of a work place and every person employed at, or in connection with, a work place shall give every appeals officer and health and safety officer all reasonable assistance to enable them to carry out their duties (section 142).

No person is permitted to obstruct, hinder, or make a false or misleading statement, either orally or in writing, to an appeals officer or health and safety officer engaged in carrying out his or her duties (section 143).

No person shall prevent an employee from providing information to appeals officers or health and safety officers engaged in carrying out their duties. This provision is intended to ensure that employers, notably managers or supervisors acting on behalf of an employer, do not block an officer's access to an employee or the employee's access to an officer. The impact will depend on interpretation. It could be minimal if the employee and health and safety officer or appeals officer are situated at the work place. The impact could be high if it is interpreted as including an appeals officer's hearing involving another employee (section 143.1).

Any person who carries out a duty under Part II can enter a work place that is situated in an employee's residence only with the employee's permission. This is a special provision intended to ensure that the personal rights of teleworking employees are protected. The "persons" referred to include employer representatives, work place committee members, or health and safety representatives and officers. This will have a positive impact by eliminating arguments about anybody's assumed right to inspect telework locations in private homes (section 143.2).

The provisions of section 144 also protect health and safety officers and appeals officers against being forced to disclose information, and prohibit them and anybody accompanying them from disclosing confidential information.

Health and safety officers, appeals officers or persons accompanying or assisting such officers in their duties are not required to give testimony in a civil suit with regard to any resulting information obtained. The only exception is for health and safety officers and persons assisting them when the Minister of Labour gives written permission (subsections 144(1) and (2)).

Subject to subsection (4) below, no appeals officer or health and safety officer admitted to a work place under the powers conferred on an officer (section 141), and no person accompanying such an officer, shall disclose to any person information obtained in the work place with regard to any secret process or trade secret, except for the purposes of Part II or as required by law (subsection 144(3)).

The Code deals with employer information on hazardous substances (e.g., confidential information such as trade secrets or secret processes) exempted under the *Hazardous Materials Information Review Act* that is obtained in the work place. Notwithstanding the *Access to Information Act* or

any other Act or law, appeals officers, health and safety officers, or persons accompanying such officers shall not disclose such exempted information to any other person except for the purpose of Part II (subsection 144(4)).

The Code prohibits the publishing or disclosure of the results of an analysis, examination, testing, inquiry, investigation or sampling made or taken by, or at the request of, an appeals officer or health and safety officer. Exceptions can occur for the certain purposes under Part II, such as for the purposes of a prosecution (subsection 144(5)).

Except for the purposes of Part II, the Code prohibits persons to whom information obtained is communicated in confidence from divulging the name of the informant to any person. In addition, no such person can be compelled to divulge the name of the informant before any court or other tribunal (subsection 144(6)).

Special Safety Measures (section 145)

Health and safety officers (officers) have the authority to issue directions with respect to contraventions of the Code and regulations, and a much stronger authority with respect to situations that an officer considers to be a danger.

An officer who is of the opinion that a provision of Part II is being contravened or has recently been contravened may direct the employer or employee concerned, or both (subsection 145(1)), to:

a. terminate the contravention within the time that the officer may specify; and
b. take steps, as specified by the officer and within the time that the officer may specify, to ensure that the contravention does not continue or re-occur.

It should be noted that an officer can issue a direction for something that occurred in the recent past and does not have to have been present to witness the contravention. Paragraph (*b*) also covers off the perceived lack of authority to issue directions with respect to continuation or reoccurrence. In these situations, both the manager and the officer need to clearly understand "recent" in the context of the contravention. Managers should, if there is any question, ensure that they have a written direction that can be challenged if necessary. The impact could be considerable, and some departments may find this authority used quite often.

As noted above, in less serious cases and where the employer admits to a contravention, an officer may choose instead to obtain an AVC from an employer.

An officer who has issued a direction orally shall provide a written version of it (subsection 145(1.1)):

a. before the officer leaves the work place, if the officer was in the work place when the direction was issued; or
b. as soon as possible by mail, or by facsimile or other electronic means, in any other case.

This is a very important provision that is directly related to the "telephone direction" authority (subsection 141.1(2)). The clarification that directions will be in writing will require officers to clearly understand the Code and regulations and to write a precise direction at the time of the visit. If the officer was on site, the employer's representative should always attempt to get the written direction before the officer leaves.

If an officer considers that the use or operation of a machine or thing, a condition in a place, or the performance of an activity constitutes a danger to an employee while at work, the officer must notify the employer of the

danger and issue direction(s) in writing to the employer directing the employer, immediately or within the period that the officer specifies, to take measures to (paragraph 145(2)(*a*)):

i. correct the hazard or condition or alter the activity that constitutes the danger, or
ii. protect any person from the danger.

The meaning of "activity" is linked to the definition of danger and the refusal-to-work provisions. With respect to these two situations, the officer must be present, the danger must be apparent at the time, and the officer must witness it. The officer cannot consider the recent past unless it is an unrelated contravention in which case subsection 145(1) above would apply.

Note: Additional information about the definition of danger is provided in Chapter 2.

If the officer considers that the danger or the hazard, condition or activity that constitutes the danger cannot otherwise be corrected, altered or protected against immediately, an officer may issue a direction in writing to the employer. The employer may be directed that the place, machine or thing or activity not be used, operated or performed, as the case may be, until the officer's directions are complied with. However, nothing in this provision prevents the doing of anything necessary in order to comply with the direction (paragraph 145(2)(*b*)).

As directions issued under the authority of this provision are likely to be serious situations, the employer's representative should obtain the direction before the officer leaves the site.

If an officer considers that the use or operation of a machine or thing by an employee, a condition in a place, or the performance of an activity by an employee constitutes a danger to the employee or to another employee, an officer shall issue a direction in writing to the employee to discontinue the use, operation or activity or cease to work in that place until the employer has complied with any directions issued under paragraph 145(2)(*a*). An officer can and should give a direction to an employee if there is likelihood that it is the employee's actions, rather than the equipment he or she is using, that presents the danger (subsection 145(2.1)).

In respect to a direction issued by an officer under paragraph 145(2)(*a*), the officer shall affix or cause to be affixed to or near the place, machine or thing, or in the area in which the activity is performed, a notice in the form of, and containing the information specified by, the Minister. No person can remove such a notice unless authorized to do so by an officer (subsection 145(3)).

If an officer issues a direction under paragraph 145(2)(*b*), the employer is required to discontinue the use or operation of the place, machine or thing or the performance of the activity. No person shall use or operate the place, machine or thing or perform the activity until the measures directed by the officer have been taken. This is confirmation that these directions are "stop work" orders that are in effect until the directed action is taken (subsection 145(4)).

Subsections (5), (6) and (7) below ensure that persons potentially affected by the danger and the resulting direction are aware of the officer's involvement.

Ifan officer issues a direction under the above provisions, or makes a report in writing to an employer on any matter, the employer shall without delay (subsection 145(5)):

a. cause a copy or copies of the direction or report to be posted in the manner that the officer may specify; and
b. give a copy of the direction or report to the policy committee and a copy to the work place committee or the health and safety representative.

If an officer issues a direction in writing under subsections (1), (2) or (2.1) noted above, or makes a report referred to in subsection (5) in respect of an investigation made by the officer pursuant to a complaint, the officer must immediately give a copy of the direction or report to each person, if any, whose complaint led to the investigation (subsection 145(6)).

If an officer issues a direction to an employee under subsections (1) or (2.1) noted above, the officer is to provide a copy of the direction to the employee's employer(subsection 145(7)).

If an officer issues a direction under subsections (1), (2) or (2.1), or makes a report referred to in subsection (5), the officer may require the employer or the employee, to whom the direction is issued or to whom the report relates, to respond in writing to the direction or report within the officer's specified time. In turn, the employer or employee must provide a copy of the response to the policy committee and to the work place committee or the health and safety representative. This provision ensures that the officer issuing the direction and the policy and work place committee or the health and safety representative are informed of the employer's actions taken to comply with the direction (subsection 145(8)).

Employers, managers or supervisors who are given directions under section 145 should be aware of their right to appeal the direction to an appeals officer within **30 days**. See Chapter 11 for further information about the appeals process.

Chapter 11: Appeals of Decisions and Directions

▶ **In this section**

Decisions

Under the previous legislation, the decisions of health and safety officers that an employee was not entitled to invoke the right to refuse to work based on a perceived danger could be referred to either the Canada Industrial Relations Board or, in the case of a public service employee, to the former Public Service Staff Relations Board. The decision to use an existing independent board, rather than an official of the regulatory agency, was based primarily on the need to protect the rights of the employee concerned and on the fact that the boards already existed to deal with labour relations issues.

Over the ensuing years, the boards established a considerable history of case law on the intent and interpretation of “danger” as used in the Code. The boards determined how the associated rights should be applied and ruled on complaints of discriminatory or disciplinary action taken against employees for exercising the right to refuse to work.

Although the boards were comfortable with dealing with the labour relations components of a refusal-to-work decision, they were sometimes concerned with their role as a technical expert when dealing with a perceived danger and being asked to overturn a health and safety officer’s decision.

Directions

At the request of an employer, employee or trade union, an appeals officer now conducts the technical review of a health and safety officer's direction. Although the review of directions was intended to be an administrative process, subsequent court decisions determined that the role of a regional safety officer (now an appeals officer) was in fact quasi-judicial in nature and should be conducted accordingly.

The Process

A unit physically and administratively separated from the policy and compliance activities of the interpretation and enforcement of Part II of the *Canada Labour Code* (the Code) has been established. Called Occupational Health and Safety Tribunal Canada (Appeals Office), this unit consists of a director and several appeals officers who will hear and dispose of all decisions of health and safety officers related to the definition of danger as it applies to a refusal to work. As decisions of "no danger" could have a considerable impact on an employee, hearings on these appeals will take priority. In addition, somebody acting on behalf of the employee can make the appeal of the decision of "no danger." The time period for the written notice to the Appeals Office is **10 calendar days** from receiving the decision.

Appeals officers will also have the responsibility of determining the validity of a direction issued by a health and safety officer if an employer, employee or trade union challenges the direction. The time period for getting the notice of appeal of a direction to the Appeals Office is **30 days**. The notice must be in writing.

The appeals process under Part II is likely to have a considerable impact on employers faced with an employee's appeal of a "no danger" decision or their own appeal of a direction. Given the complexity of the appeals

process and the legislated protection given to the appeals officer, legal advice in preparing and presenting an appeal is essential (sections 145.1 to 146.1).

Appeals of Decisions and Directions

The Minister of Labour may designate as an appeals officer any person who is qualified to perform the duties of such an officer. These officers hear and dispose of all appeals related to decisions of “no danger” in the event that a health and safety officer makes such a decision when investigating a refusal to work. Appeals officers may also vary, rescind or confirm a direction issued by a health and safety officer (subsection 145.1(1)).

An appeals officer has all the powers, duties and immunity of a health and safety officer. Because there is very limited redress under the Code and the courts recognize that these officials have the necessary skills to exercise them responsibly, this is an extensive power that could have a tremendous impact. The impact could also be significant if appeals officers exercise the power to issue directions (subsection 145.1(2)).

An employer, employee or trade union, aggrieved by a health and safety officer’s direction, may appeal the direction to the Appeals Office. It is important to note that the time period for an appeal is **30 days** after the date of the direction being issued or confirmed in writing, and the notice of appeal must be in writing (subsection 146(1)).

Unless otherwise ordered by an appeals officer on application by the employer, employee or trade union, an appeal of a direction does not operate as a stay of the direction. This is important in that it could allow for a stay of a direction if the appeals officer determines that a stay is justified. Although the legislation is silent on how the application for a stay is to be

made to the appeals officer, the process and time period under subsection 146(1) should be respected. In requesting a stay, legal advice is essential (subsection 146(2)).

If an appeal is brought concerning a decision of health and safety officer regarding danger (subsection 129(7)) or an officer's direction (section 146), the appeals officer shall, in a summary way and without delay, inquire into the circumstances of the decision or direction, as the case may be, and the reasons for it. The appeals officer may then (subsection 146.1(1)):

1. vary, rescind or confirm the decision or direction; and
2. issue any direction that the appeals officer considers appropriate under subsection 145(2) or (2.1).

Subsection 129(7) is a health and safety officer's decision of "no danger" with respect to a refusal to work. An appeals officer may give a "dangerous situations" direction without needing to be on site, as a health and safety officer must be. Furthermore, there is no mechanism for appealing an appeals officer's direction. With no constraints on the appeals officer having to be present and no further appeals process, this provision's impact could be extensive.

The appeals officer shall provide a written decision, with reasons, and a copy of any direction to the employer, employee or trade union concerned. Without delay, the employer in turn shall provide a copy to the work place committee or health and safety representative. This is similar to the requirements for a health and safety officer's direction (subsection 146.1(2)).

If the appeals officer issues a direction, the employer is required, without delay, to affix a notice of the direction to or near the machine, thing or place, in respect of which the direction is issued. The notice shall be in a

form and contain information that the appeals officer may specify. No person may remove the notice unless authorized to do so by the appeals officer. Similar to the requirements for a health and safety officer's direction, this gives a lot of power to the appeals officer (subsection 146.1(3)).

Where an appeals officer directs, under paragraph (*b*) above, that a machine, thing or place not be used or an activity not be performed until the direction is complied with, no person may use the machine, thing or place or perform the activity until the direction is complied with. However, nothing in this subsection prevents the doing of anything necessary for the proper compliance with the direction. This is similar to the requirements for a health and safety officer's direction (subsection 146.1(4)).

An appeals officer may for the purposes of inquiring into the circumstances and ruling on the appeal of a direction or decision(section 146.2):

1. summon and enforce the attendance of witnesses and compel them to give oral or written evidence under oath and to produce any documents and things that the officer considers necessary to decide the matter;
2. administer oaths and solemn affirmations;
3. receive and accept any evidence and information on oath, affidavit or otherwise that the officer sees fit, whether or not admissible in a court of law;
4. examine records and make inquiries as the officer considers necessary;
5. adjourn or postpone the proceeding from time to time;
6. abridge or extend the time for instituting the proceeding or for doing any act, filing any document or presenting any evidence;
7. make a party to the proceeding, at any stage of the proceeding, any person who, or any group that, in the officer's opinion has

substantially the same interest as one of the parties and could be affected by the decision;

8. determine the procedure to be followed, but the officer shall give an opportunity to the parties to present evidence and make submissions to the officer, and shall consider the information relating to the matter;
9. decide any matter without holding an oral hearing; and
10. order the use of a means of telecommunication that permits the parties and the officer to communicate with each other simultaneously.

As the appeals officer's role has been determined by the courts to be quasi-judicial, these powers, similar to those of a board, are necessary to carry out the duties assigned to the officer.

An appeals officer's decision is final and cannot be questioned or reviewed in any court. Although it is a fact that, regardless of what is stated here, the Federal Court has jurisdiction and the authority to review the officer's decision in certain circumstances, the appearance of total protection and the possibility of a Federal Court avenue may not be apparent in the event that the appeals officer made an error. However, the grounds granted by the *Federal Courts Act* are limited, and the time delay could be considerable. Legal advice on whether to proceed to the Federal Court is essential (section 146.3).

No order may be made, process entered or proceeding taken in any court, whether by way of injunction, certiorari, prohibition, quo warranto or otherwise, to question, review, prohibit or restrain an appeals officer in any proceeding under Part II. This is the same protection as given to a member of the Canada Industrial Relations Board under Part I of the Code (section 146.4).

An employee party to a proceeding under the appeals process who attends the proceeding is entitled to be paid by the employer. Compensation shall be at the employee's regular rate of wages for the time spent at the proceeding that would otherwise have been time at work(section 146.5).

Advice to Managers

Departments or agencies should establish designated contact personnel with access to legal advice so that whenever a manager receives a direction that he or she questions for any reason, the manager or department can immediately determine whether an appeal should be initiated.

Although appeals officer hearings are as informal as possible, they are still quasi-judicial in nature. When hearing a review of a decision, the Federal Court assumes that the officers are experts in their field. In addition, evidence or information cannot be raised before the Federal Court if it was not presented during the appeals hearing.

In preparing for an appeal of a decision or a direction, departments should obtain expert advice and present as much relevant information as possible.

Chapter 12: Offences and Penalties

▶ **In this section**

Offences under Part II of the *Canada Labour Code* (the Code) reflect a 1978 Supreme Court of Canada decision whereby the courts recognize the following three categories of offences under "laws of public safety and good order," such as the Code and the *Canadian Environmental Protection Act*. The first category is *mens rea* offences, meaning a guilty mind expressed in terms of intention or recklessness (but not negligence), whereby a person who wilfully contravenes a provision of the law (see

subsection 148(3) below) is guilty of such an offence. Second, there are situations of “strict liability” offences where the guilty mind need not be established, but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care or due diligence is available. Public welfare offences are in this category unless the legislation declares otherwise. Finally, there are “absolute liability” offences that apply where guilt would follow proof beyond reasonable doubt that the offence took place.

In 1978, Part II of the Code was in the final stages of being revised and was the first federal piece of “public safety and good order” legislation to incorporate this Supreme Court decision.

Potential penalties for offences under Part II have since been increased considerably to reflect the seriousness that other Canadian jurisdictions now give to violations of health and safety legislation, indicating to the courts that the federal jurisdiction is equally serious.

General Offence

Every person who contravenes a provision of Part II is guilty of an offence and liable (subsection 148(1)):

a. on conviction on indictment, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than two years, or to both; or
b. on summary conviction, to a fine of not more than $100,000.

There are “strict liability” offences for which the defence of reasonable care and due diligence is available. There has been a considerable increase in maximum summary conviction penalties from the previous legislation, when the maximum penalties ranged from $5,000 to $100,000 for regular Code offences. For offences related specifically to hazardous substances

legislation, indictment and a penalty of up to $1,000,000 or imprisonment is possible. The regulator has the option of seeking an indictment for any contravention.

The impact of this provision could be extensive in the event of a prosecution. In the past, Code prosecutions in the public service have usually followed a fatality or serious near fatal injury. Given the significant increase in maximum penalties under current provisions, the courts most likely will substantially increase fines when they are imposed.

Death, Illness or Injury

For persons who contravene a Part II provision directly resulting in an employee fatality, serious illness or serious injury, the persons are guilty of an offence and are liable (subsection 148(2)):

a. on conviction on indictment, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than two years, or to both; or
b. on summary conviction, to a fine of not more than $1,000,000.

Contravention of the Code or regulations resulting in serious illness is included in this offence. The maximum summary conviction fine is $1,000,000, and the regulator has the option of seeking indictment and possible imprisonment for any death, serious illness or serious injury.

Risk of Death or Injury

The Code deals with cases where there is a possible risk of death or injury. It provides that every person who wilfully contravenes a Part II provision knowing that the contravention is likely to cause the death of, serious illness of or serious injury to an employee is guilty of an offence and liable (subsection 148(3)):

a. on conviction on indictment, to a fine of not more than $1,000,000 or to imprisonment for a term of not more than two years, or to both; or
b. on summary conviction, to a fine of not more than $1,000,000.

This is the single *mens rea* offence under Part II of the Code under which the prosecution needs to prove the wilful intent that has a likelihood of leading to the death, serious illness or serious injury of an employee. As in the above-noted provision, the scope of the offence includes the likelihood of a serious illness.

Defence

The Code contains three provisions that represent the only remaining "absolute liability" offences under Part II. The three provisions are "investigate all accidents," "respond in writing to committee recommendations" and "provide any hazard or assessment report to committees." "Strict liability" is thus applied to all other violations, for which the defence of due care and diligence is available before the courts (subsection 148(4)).

Meaning of "Reasonable Care and Due Diligence"

If a manager is truly diligent and did everything that a reasonable person should do to prevent the incident, there is less likelihood of charges being laid, and it would be easier to demonstrate that reasonable care and due diligence was exercised to avoid the contravention or incident.

However, the defendant must be able to demonstrate to the court's satisfaction that the due diligence components were in place before the incident.

The prosecution is not required to prove that the accused failed to take all reasonable care. The burden of proof is upon the accused to show that all reasonable care was taken to prevent the incident, even though the offence or incident took place.

Responsibility and accountability can be delegated as long as the delegation is clearly demonstrated and the delegation is carried out and confirmed.

The closer to the incident that the accused is in the chain of command, the more detailed the reasonable care requirements will be.

Senior management must:

- Be aware of responsibilities and have written policies and directions in place;
- Ensure that system-wide programs are in place;
- Require regular reports and conduct periodic spot checks; and
- Immediately act when made aware of potentially serious situations.

Senior managers are entitled to rely on their health and safety regime unless made aware that the system is defective.

Middle management must:

- Be aware of responsibilities and issues;
- Ensure that the appropriate hazard prevention programs are in place;
- Where necessary, give specific direction;
- Report upward and manage downward; and
- Exercise supervision and control over those he or she may normally be expected to influence or control.

Middle managers have a responsibility to not only give instructions but to also see that those instructions are carried out.

Line management must:

- Ensure that hazard prevention program components are implemented;
- Ensure that supervisors and employees are trained and that training is confirmed and recorded; and
- Ensure that incidents are investigated and reported, corrective action is implemented and that follow-up is done.

Presumption

The Code deals with standards or other things prescribed by regulations made (subsection 157(1.1)) in relation to health or safety matters. This provision allows charges to be based on the contravention of any provision of any of the hundreds of standards that are referenced or sub-referenced in regulations made under the authority of Part II of the Code (subsection 148(5)).

Minister's Consent Required

No proceeding in respect of an offence may be instituted except with the consent of the Minister of Labour or a person designated by the Minister (subsection 149(1)).

Officers and Senior Officials

If a corporation or a department or other portion of the public service of Canada commits an offence, any person who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence. The following persons are liable on conviction to the punishment provided for the offence, whether or not the corporation, department or portion of the public service has been prosecuted or convicted (subsection 149(2)):

a. any officer, director, agent or mandatary of the corporation;
b. any senior official in the department in, or portion of, the federal public administration; or
c. any other person exercising managerial or supervisory functions in the corporation or department in, or portion of, the federal public administration.

The addition of the public administration to this statement confirms that the chain of command within a department or agency is potentially liable for the offence if it "directed, authorized, assented to, acquiesced in or participated in the commission of the offence."

The confirmation that most offences are now "strict liability" combined with the definition of the employer, which has been the vehicle through which public service managers and supervisors have been charged in the past, emphasizes the need to exercise and demonstrate "reasonable care and due diligence." Essential when confirming "reasonable care and due diligence," this provision is likely to result in a greater understanding of managerial responsibility and a greater emphasis on programs required by the Code.

Evidence of Direction

For prosecution of an offence, the Code refers to conditions under which copies of directions are submitted as evidence (subsection 149(3)).

Limitation Period

Proceedings in respect of an offence must be instituted within **one year** after the time when the subject matter of the proceedings arose. The regulatory department must ensure that it is in a position to initiate

proceedings within 12 months of the incident or contravention having occurred (subsection 149(4)).

Venue

A complaint or information in respect of an offence may be heard, tried and determined by provincial court judge or justice if the accused is resident or carrying on business within the territorial jurisdiction of the provincial court judge or justice, notwithstanding that the matter of the complaint or information did not arise in that territorial jurisdiction (section 150).

Information

In any proceedings in respect of an offence, the Code provides that information may include more than one offence committed by the same person and that all those offences may be tried concurrently. One conviction for any or all such offences may be made (section 151).

Injunction Proceedings

The Minister of Labour may apply or cause an application to be made to a judge of a superior court or the Federal Court, Trials Division, for an order enjoining persons from contravening a provision, whether or not a prosecution has been instituted for an offence, or enjoining persons from continuing any act or default for which the person was convicted of an offence (section 152).

Injunction

At a judge’s discretion, a judge of a court, to whom an application is made, can make the order applied for. The order may be entered and enforced in the same manner as any other order or judgment of that court (section 153).

Imprisonment Precluded

Section 154 deals with persons convicted of an offence on proceedings by way of summary conviction. In this case, no imprisonment may be imposed or, in default of payment of any fine, be imposed as punishment. Where a person is convicted of an offence and the fine that is imposed is not paid when required, the prosecutor may, by filing the conviction, enter as a judgment the amount of the fine and costs, if any, in a superior court of the province in which the trial was held. The judgment is then enforceable against the person in the same manner as if it were a judgment rendered against the person in that court in civil proceedings (section 154).

Jurisprudence and Due Diligence

Background

R. v. City of Sault Ste. Marie - Supreme Court of Canada May 1978 *Environmental Protection Act*

This is a precedence-setting case that established for the first time that "public welfare offences" under "laws of public safety and good order," such as the *Canadian Environmental Protection Act* and the *Canada Labour Code* (the Code), whereby the courts will recognize three categories of offences. These are as follows:

First: "*Mens rea*" ("a guilty mind") expressed in terms of intention or recklessness, but not negligence. While very difficult to prove, Part II of the Code has a single offence (subsection 148(3)) in this category using the terms "wilfully contravenes" and "knowing the contravention is likely to cause death or serious injury."

Second: "Strict liability" in which *mens rea* need not be established, but where the defence of reasonable belief in a mistaken set of facts or the defence of reasonable care is available. Public welfare offences are in this category unless the legislation declares otherwise. Part II of the Code identifies 30 duties and offences, where guilt would follow proof beyond a reasonable doubt that the offence took place. However, for these cases, reasonable care and due diligence have been identified as available as a defence.

Third: "Absolute liability" whereby one's guilt would follow proof beyond reasonable doubt that the offence took place. By identifying the "strict liability" situations, all other duties and offences other than under subsection 148(4) are "absolute liability" offences.

In 1978, Part II of the Code was in the final stages of being revised and was the first piece of federal "public safety and good order" legislation to incorporate this Supreme Court decision.

In the Code, only three employer (minor recording and reporting) duties will have an "absolute liability" obligation. All others will be "strict liability" open to reasonable care and due diligence as a defence.

R. v. Bata Industries and Three Corporate Officers – Ontario Court 1992
Environmental Protection Act

This is another precedence-setting case that established the level of due diligence that a director or an officer of a corporation needs to demonstrate to the satisfaction of the court.

Summary of proceedings indicated that there is no requirement on the Crown to prove that officers failed to take all reasonable care; therefore, the burden of proof of due diligence is upon the accused officers:

- With the offence clearly proven, the corporation was found guilty of the offence; and
- The CEO of the corporation was acquitted.

The CEO's responsibilities were primarily directed at the global level of the organization. He was able to demonstrate that he was aware of his responsibilities and had written directions to that effect, and when made aware of a particular concern he immediately acted upon it.

He placed an experienced director on site and was entitled in the circumstances to assume that this director was addressing the concerns, and was entitled to rely on this system unless he became aware that the system was defective.

The president of the company concerned was convicted. Although he was not the on-site director, there was no evidence that, once the spill was brought to his attention, that he took any steps to view the site and assess the problem. Due diligence required him to exercise a degree of supervision and control over those that he may normally be expected to influence or control. He had a responsibility not only to give instructions but also to see that those instructions were carried out.

The on-site plant director was convicted. He failed to establish that he took all reasonable care to prevent the unlawful discharge. He only obtained a quotation for cleaning up the spill and then another when the first was considered too high. The second quote was lower, but the contractor was unable to successfully do the work. As on-site director, he was responsible, if he delegated the responsibility, to ensure that the delegate received the training necessary for the job and that he received detailed reports from the delegate.

Lessons

- Although the Code requires a considerable amount of employee and union participation in developing, implementing and monitoring prevention activity, the Code also confirms that the employer and management are responsible and liable.
- If a manager was truly diligent and did everything that a reasonable person should do to prevent the incident, there is less likelihood of charges being laid, and it would be easier to demonstrate that due care and diligence were exercised to avoid the contravention or incident.
- The defendant must be able to demonstrate that the due diligence components were in place before the incident.
- Whether the liability is strict or absolute, the prosecution is required only to prove beyond reasonable doubt that the offence took place.
- Prosecution is not required to prove that the accused failed to take all reasonable care. The burden of proof is upon the accused to show that all reasonable care was taken to prevent the incident, even though the offence took place.
- Responsibility and accountability can be delegated as long as the delegation is clearly demonstrated and the delegation is carried out and confirmed.
- The closer to the incident that the accused is in the chain of command, the more detailed will be the reasonable care requirements.

Important case law (Occupational Health and Safety Tribunal Canada and Federal Court)

Violence, Bullying and Harassment:

- N. Tryggvason v. Transport Canada, 2012 OHSTC 10
- I.D. Tench v. National Defence, OHSTC - 09-001
- K. Forster v. Canada Customs and Revenue Agency, OHSTC - 02-014

Environmental Sensitivities:

- C. Hutchinson v. Environment Canada, OHSTC - 97-003

Danger:

- J. Verville v. Correctional Services Canada, 2004 FC 767

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