

Administrative Penalty Review



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Administrative Penalty Review
c/o Policy and Planning
Labour and Advanced Education
PO Box 697
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Sent via email: LAEPOLICY@gov.ns.ca

Dear Policy and Planning:

Thank you for the opportunity to provide feedback on the Occupational Health and Safety Administrative Penalty Review. Please accept this submission from the Office of the Employer Advisor Nova Scotia Society.

The Department of Labour and Advanced Education released a discussion paper titled: Occupational Health and Safety Administrative Penalties Review. At page 8 of the review the Department posed the following five questions:

1. What do you think of the proposed solutions?
2. What do you think about the proposed graduated system? What factors should be considered for “zero tolerance” offences?
3. What are your thoughts on the proposed appeal process?
4. What is the best approach to communicate and collaborate with you and industry to improve workplace safety?

Please find our response to each question below.

Regards,

Erica Nichols

For Office of the Employer Advisor, Nova Scotia

Executive Summary: Administrative Penalties Regulation and Regulatory Review

March 2013

Introduction

In January 2010, the Nova Scotia government passed legislation implementing an Administrative Penalties Regulation. This legislation came into force without consultation in the business community. Since the introduction of administrative penalties in January 2010, the Government of Nova Scotia collected \$1,758,509 in total fines. This revenue is paid into the General Revenue Fund for the Province of Nova Scotia.

Occupational Health and Safety is funded by the Workers' Compensation Board of Nova Scotia through the accident fund. The accident fund is created by employer only paid premiums though an assessment on payroll. WCB is a government agency, not a government department. WCB receives no tax revenue from the General Revenue Fund. In turn, Occupational Health and Safety division of the Nova Scotia Dept. of Labour is funded from the same payroll assessment and of this funding arrangement to the OHS Division other non OHS positions in government policy are also paid for.

The government's position is the penalties like this act as a deterrent to unsafe workplace practices which have the potential to result in injury or illness.

The Response by Employers

Employers, particularly in more visible sectors, such as Construction have been opposed to the introduction of the Administrative Penalties Regulation since their implementation. In a FOIPOP disclosure to the OEA the numbers of inspections and penalties levied was greater in businesses where they were more visible to the general public. This also results in less visible employers such as the government themselves, shopping malls, hospitals and other health care facilities such as medical, physio clinics and many other businesses not being regularly inspected. By far, the construction industry paid the highest proportion of administrative penalties yet that sector has kept ahead in workplace safety practices resulting in noticeable reductions in workplace injuries and illness.

In January 2013, the Department of Labour and Advanced Education announced a review of the administrative penalty process and released a discussion paper titled: **Occupational Health and Safety Administrative Penalties Review**. Throughout the recent consultation for the new five-year Workplace Safety Strategy (in partnership with the WCB), the Department heard considerable feedback respecting administrative penalties. The objective of this review is to identify areas that could be strengthened and ensure that administrative penalties are applied consistently, fairly and appropriately.

The Nova Scotia *Occupational Health and Safety Act* grants Officers with a number of enforcement tools to obtain compliance with health and safety requirements. Under the *Act*, government may issue a compliance order, stop work, issue administrative penalties or initiate a prosecution.

The Nova Scotia *Occupational Health and Safety Administrative Penalty Regulation* (effective January 15, 2010) provides specific authority for the administration of penalties. An administrative penalty is a monetary penalty assessed and imposed by the regulator (OHS) against an employer or an individual for breaking workplace safety laws.

Questions Asked

Below are the five questions posed to Safety Leaders during the consultation meeting. The full text of OEA's submission is found on our website at: www.oceans.ca.

- **What do you think of the proposed solutions?**
- **What do you think about the proposed graduated system?**
- **What infractions should be considered for “zero tolerance” offenses?**
- **What are your thoughts on the proposed appeal process?**
- **What is the best approach to communicate and collaborate with you and industry to improve workplace safety?**

What is Ahead?

As part of this consultation, on February 26, 2013, the OEA and other Safety Leaders from across the province met with the Department. During this meeting the Department indicated that further consultation will occur respecting a proposed draft schedule of “zero tolerance” offences.

Where Can Employers Comment Further?

The OEA continues to invite employer comments and feedback respecting the administrative penalty review process. Please provide your feedback to info@oceans.ca.

Respectfully Submitted,

Erica Nichols

For Office of the Employer Advisor, Nova Scotia

DETAILED CONSULTATION RESPONSE

Question #1: What do you think of the proposed solutions?

Employers are pleased that the Department of Labour and Advanced Education is conducting a review of administrative penalties. Overall, the proposed solutions have merit but we would like to comment on some of the details.

The Department of Labour and Advanced Education takes the position that “[a]dministrative penalties act as a deterrent” (@ p.2). However, no evidence has been presented by the Department to demonstrate that this assumption is correct. It may be the Department’s experience that behaviour changes where an administrative penalty is applied but that observation does not support general deterrence.

It is our understanding that most, if not all, OHS inspections are initiated on the basis of an accident or a complaint. This reactive, rather than proactive, approach is premised upon the probable existence of a violation prior to a workplace safety inspection from an OHS Officer. The efficacy of an inspection and/or administrative penalty that is initiated on the basis of an accident is unclear as the rationale for acting on the risk (in many but not all cases) may already be present once the event/accident occurs.

In workplaces where no accident has occurred and no complaint is filed, it is unlikely that administrative penalties are an effective deterrent. In many cases there is merely the potential to receive an administrative penalty, at some future date, in a workplace that is unlikely to ever be inspected by an OHS Officer.

The OEA submits that a proactive approach is essential to address health and safety and, as one tool, random unannounced safety inspections should be considered by the Department.

- Recommendation: The OEA recommends a proactive approach to health and safety in the form of random unannounced safety inspections.

Revenue Generation to Fund a Proactive Approach

Since the introduction of administrative penalties in January 2010, employers have expressed the opinion that revenue generated from administrative penalties should go back into health and safety. This position was reiterated throughout the Prevention Consultation.

Since the initiation of administrative penalties in January 2010, the Government of Nova Scotia collected \$1,758,509 in total fines. This revenue is paid into the General Revenue Fund for the Province of Nova Scotia.

Occupational Health and Safety is funded by the Workers’ Compensation Board of Nova Scotia. WCB is a government agency, not a government department. WCB receives no tax revenue from the General Revenue Fund and all WCB revenues are collected through an assessment on payroll. In turn, Occupational Health and Safety is funded by the same payroll assessment.

In the first instance, government is generating general revenue from an arms-length agency that receives no tax revenue. We submit that this is inconsistent with the independence of the agency.

In the second instance, if the express purpose of administrative penalties is to act as a deterrent then additional resources would assist in this objective.

- **Recommendation:** The OEA recommends that revenue generated from administrative penalties be returned to Occupational Health and Safety for the purpose of, among other things, hiring more officers and/or staff to conduct random unannounced safety inspections and provide education.

Question #2(a): What do you think about the proposed graduated system?

In the Discussion Paper, the Department of Labour and Advanced Education proposes the implementation of a graduated model for administrative penalties, which promotes workplace safety education prior to giving orders or administrative penalties:

There will continue to be cases when education and warnings may not be a sufficient deterrent. Therefore, there is a need to identify specific, high risk situations that would result in automatic administrative penalties.

Employers welcome the commitment to provide education and warnings where appropriate.

One criticism of administrative penalties in Nova Scotia has been the application of this tool for relatively minor infractions, such as a failure to post the *Act*. If administrative penalties are to be seen as an effective part of the regulatory framework they must be applied fairly. On the spectrum of enforcement tools administrative penalties are viewed by employers as a tool that lies between two extremes compliance orders and prosecutions. Therefore, the receipt of an administrative penalty for failure to post the phone number for OHS, for example, has been viewed by employers as misplaced and unfair.

The proposed graduated system for OHS administrative penalties (education, warning and then penalty) appears to address some of these concerns and employers would be pleased to see a graduated enforcement approach.

As the Department considers fair application of this particular enforcement tool, the OEA would also like to encourage the Department to consider other forms of proactive compliance. Regulatory resources will always exceed the health and safety needs of workplaces. Other jurisdictions, such as Ontario, have adopted a form of self-audit. Self-audits could be leveraged by the regulator to address relatively minor infractions (i.e. failure to post the *Act*). Targeted industries could be asked to complete a “self-audit” and sign a compliance undertaking. This sends the message that certain workplaces should review health and safety practices. Where self-audits are completed, should the workplace be inspected in the future and the undertaking violated, an automatic penalty or penalty increase could attach.

- Recommendation: The OEA recommends that the Department undertake a broader review of existing compliance tools and consider options that are flexible, responsive and cost-effective, such as self-audits.

Question #2(b): What infractions should be considered for “zero tolerance” offenses?”

At page 6 of the Discussion Paper, Government states that the only violations that could result in an administrative penalty are the ones that are severe enough to be on the “zero tolerance” list.

Employers are pleased that the Department intends to clarify the type of violation that attracts an administrative penalty. However, Employers have expressed some concern with the words “zero tolerance”. Zero tolerance implies that there no room for an objective assessment of the facts (due diligence / effort to prevent the violation from occurring) which is essential under a fault based system and a regulatory scheme that provides OHS Officers with discretion. Employers believe that the OHS Officer should have authority to consider appropriate enforcement options, in light of the facts (initiate prosecution, stop work, administrative penalty or a compliance order). The OEA recommends that the words “zero tolerance” be replaced with the words: “serious contravention in a high-hazard situation that immediately place workers at serious risk”.

- Recommendation: The OEA recommends the words “zero tolerance” be replaced with the words “serious contraventions in a high-hazard situation that immediately place workers at serious risk”.

Question #3: What are your thoughts on the proposed penalty process/schedule? What factors should be considered for determining the amounts of fines?

Employers welcome clarity in the form of a proposed schedule.

However, the OEA wishes to express some concern over the drafting of a definitive violation “inclusion list” in a regulation as there may be unintended consequences where similarly serious violations (that do not attract a stop work order or a prosecution) occur.

At a high level, the factors that should be considered for determining the amount of an administrative penalty include severity of violation, history of workplace compliance, frequency of violation, and harm or potential harm. In terms of more specific criteria, the OEA conducted a jurisdictional scan and summarized some of the criteria below:

- The importance of compliance in the regulatory scheme (high risk of serious injury or death)
- Mitigating circumstances
- Whether an accident occurred
- Economic benefit derived, or reasonably expected to derive an economic benefit from the violation
- Violates the same section on more than one occasion

- Violates different sections on more than one occasion, with the number of violations indicating a general lack of commitment to complying with health and safety requirements
- Knowingly or with reckless disregard violates one or more sections
- Fails to comply with a previous order within a reasonable time.

Some jurisdictions, including Worksafe BC, articulate criteria that support the exercise of discretion in the application of the administrative penalty:

- Circumstances warrant an administrative penalty
- Steps taken to prevent re/occurrence
- An administrative penalty will not be imposed if an employer exercised due diligence.

Employers have expressed concerns respecting inconsistent decision-making. While a definitive schedule of violations may provide clarity, all independent judgement should not be removed from the process. Administrative penalties are applied by a regulator in the absence of due process and independence. The public interest requires that a regulator assigned such authority be accountable for the decision made. All discretion and independence should not be removed, particularly, in a fault based system that emphasizes due diligence.

Employers have also expressed concern that the administrative penalty system penalizes a corporate entity where management is not centralized and OHS compliance is site-specific. Under the current system the corporate entity would be considered a “repeat offender” if, for example, an administrative penalty is incurred at a Yarmouth site/location and then a second administrative penalty is incurred at an Amherst location/site. Employers recommend that the Department consider site-specific violations before an administrative penalty is applied and/or the amount of the penalty is determined.

Finally, the Department has indicated that employers will have an opportunity to review and comment on the proposed “Schedule of Violations”. We look forward to providing additional feedback at that time.

- Recommendation: The OEA recommends that the Department consider site-specific compliance and/or violations before an administrative penalty is applied and/or the amount of the penalty is determined.
- Recommendation: The OEA recommends that the factors considered to establish the amount of an administrative penalty include type of violation, frequency/history, intent and harm/potential harm.

Question #4: What are your thoughts on the proposed appeal process?

The Department proposes eliminating the current appeal process for compliance orders at the Director’s level and combining the appeal of both the compliance order and administrative penalty at the same time at the Labour Board.

Employers are pleased that the Department recognizes the problem with the current appeal process. Employers welcome a combined appeal process for both the compliance order and administrative penalty.

However, not all employers agree that Department should eliminate the Appeal to Director. A mechanism should continue to exist whereby errors that are evident to both parties could be corrected. This should include, but is not limited to, the type of violation and the amount of the administrative penalty.

For the purpose of clarity, employers would not support a change to the appeal process that eliminates specific violations from an independent review at the Labour Board. We do not believe that any argument against permitting an appeal from an administrative penalty (despite the violation) is persuasive. While this has not been proposed we recognize that other jurisdictions have canvassed the issue generally in relation to administrative penalties (see: Law Reform Commission of Saskatchewan, Administrative Penalties Final Report, 2012).

- Recommendation: The OEA recommends an amendment to the appeal process to include the simultaneous appeal of a compliance order and administrative penalty.

Question #5: What is the best approach to communicate and collaborate with you and industry to improve workplace safety?

Employers welcome sustained constructive dialogue respecting health and safety strategies and appreciate the opportunity to provide feedback respecting Department initiatives.

Employers appreciate the Departments' undertaking to share proposed Draft Schedule of Administrative Penalties for feedback.

We would also welcome an opportunity for feedback following implementation. That may include small group discussions with safety leaders and other business/industry representatives and written submissions.

- Recommendation: The OEA recommends ongoing periodic consultation respecting occupational health and safety initiatives.

Thank you for your consideration of these issues.