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## ANOTHER REASON FOR SAFETY AWARENESS

### THE LEGAL VIEW

*By SeaBright Insurance Loss Control*

**T**he main objective of a *Supervisors' Safety Update* is to provide information and ideas that will strengthen a supervisor's skill in accident prevention. Some of our messages say what should be done, while others suggest how to do it. We also try to explain why a supervisor's commitment to safety is so critical. After all, the last thing you need is another responsibility, without understanding its logic. But the reasons for having a strong safety management system have become more and more complex. So our messages sometimes go beyond the "basics," as you will see in this issue.

#### The Logic of Accident Prevention

The most obvious reason for preventing accidents and injuries is to prevent human suffering and the disruption it can bring into a person's life. No one can argue with that. The second reason is, as any manager knows, industrial accidents are very costly. These costs *must* be controlled in today's competitive marketplace. No one can argue with that either. A third reason for making safety a high priority is to stay in compliance with safety codes and standards. Many do argue with this --complaining that state and federal regulations are often unreasonable, unrealistic, and have carried a worthy idea to a bureaucratic extreme. Nevertheless, a company has three choices: comply with safety regulations, fight for changes in the codes (but comply in the meantime), or ignore the codes and risk the penalties.

#### A New, Legal Reason for Safety Awareness

The last option has become doubly risky in today's litigious society. This is the fourth reason for assuring employee safety. A citation and a hefty fine may not be the *only* thing an employer receives for OSHA violations. Employers can in some cases be sued for failing to prevent a worker's injury.

The industrial insurance laws of 1911 were created to prevent lawsuits between management and labor. But some recent court decisions have undermined this intention. Managers--and even supervisors in some cases--have been sued for criminal negligence when safety violations were allegedly responsible for an employee's death or serious injury.

#### A Brief Lesson in "Workers Compensation" History

Before 1911, if an employee was seriously injured on the job, there was no provision for medical treatment and no compensation for lost wages. The worker could sue his employer for negligence, but resolutions often took years, and the family could be devastated in the meantime. On the other hand, if the worker won the case, settlements often forced the company into bankruptcy. The solution was creation of "no-fault" industrial insurance, which all employers are now required to have. This guaranteed medical treatment and wage-loss payments for work-related injuries and illness--without having to determine anyone's fault in the incident. Complex and costly lawsuits could then be avoided and attorneys need not be involved. But this situation is changing.

## **Why are Industrial Lawsuits Increasing?**

Some suggest it's because the number of attorneys has increased, to match the number of complex laws they helped create. Since several states limit attorney involvement in workers compensation cases, lawyers are honing their skills in the area of an employer's safety negligence. This takes the issue out of the "no-fault" industrial insurance arena and into tort law, where attorneys can practice freely. More and more people today are also willing to bring lawsuits for physical or mental harm they suffer. In addition, many lawyers accept cases "on contingency" hoping for large settlements. Often they succeed.

## **To Know and Not to Do is the Catch**

What constitutes safety negligence on the part of an employer? The terms "serious and willful" are key legal definitions that imply an employer's intent toward maintaining a safe work environment. This indicates that management *knew* there were safety hazards at the worksite, but chose to ignore them, placing workers at risk of harm. Usually, more than one level of a company's personnel "turned a blind eye" to dangerous work conditions or work practices.

The reasons for this are often understandable--if not excusable. "If the order isn't delivered, the contract will be lost." "If the project isn't finished on time, a costly penalty will result." "There's no time to do a new employee safety orientation!" "There's no money in the budget for the purchase of safety equipment." So, business decisions are often made that compromise employee safety.

Although those decisions may have "seemed like a good idea at the time," penalties for state and federal safety violations can result in up to twenty years in prison. OSHA fines up to \$70,000 can be levied for each violation. Court decisions for personal liability can run into millions of dollars. The possibility of a large fine and/or a jail sentence for violating health and safety laws is not just speculation. It's one of the unwelcome risks of doing business today.

Direct supervisors aren't included in lawsuits as often as upper management--where the "deep pocket" lies, but it does happen, and it can be emotionally and financially devastating for all parties.

## **A Lawsuit Filed Isn't Necessarily a Lawsuit Won**

But this may be small comfort if your company gets dragged into court. Defending lawsuits--even those that are not successful--is expensive in terms of time, effort and money that could be spent in better ways. Bad publicity comes at a high price too. Should you or your company be faced with this problem, the possibility of winning the case will be greater if you have prepared to avoid such an event.

## **Management's Responsibilities Are Well Defined**

All employers have a responsibility to establish safety and health programs in accordance with Federal and State OSHA, and their own particular industry. SeaBright's publications and consultation offer advice and guidance to help our customers prevent employee injuries and comply with safety regulations. We hope another by-product will be to reduce the potential for legal liability.

1. In most jurisdictions, you must have a formal, written and effective Injury and Illness Prevention Program tailored specifically for your company's operations and hazards. A supervisor or management official must take responsibility for the coordination of this program.
2. Besides the written safety program, management must ensure that safety and health activities are completed on a regular and consistent basis with appropriate documentation. These activities should include, but are not limited to:
  - New employee orientation and safety training for each new hire.
  - Safety meetings to discuss hazards, accidents and prevention.
  - Safety inspections to identify and correct hazards.
  - Accident investigations to determine causes and preventive strategies.
  - Pre-job safety planning for construction or temporary projects.
  - Hazard identification and training for specific needs such as confined space entry, fall protection, respiratory protection, chemical exposures, lockout/tagout procedures, etc.

The above activities, if documented, can provide important evidence that an employer has taken substantial steps to control hazards. But written documents and even safety training won't guarantee that safety management is a function of the day-to-day work environment. The best way to protect both employees and the company is to develop and maintain a "safety culture."

### **The First Line Supervisor's Role is Critical**

As part of the management team, supervisors can do more to prevent accidents, and often legal problems, more effectively than anyone else in the firm. They are closest to, and have the greatest influence on, the work crew. Supervisors must continually monitor the work environment for uncontrolled hazards. They must assure safe work practices and attend to crew morale--which influences both safety and management/labor relations. This is a big job--considering that supervisors tend to be promoted because they have knowledge and skill in production areas, not because they understand safety requirements. For this reason, SeaBright's Supervisor Safety Updates are published to help strengthen supervisory skills in accident prevention.

### **Management Leadership Is Essential**

But lest we sound insensitive to production demands and schedules, a final comment must be added. Strategies to avoid legal problems are strategies to control production losses as well. What supervisors need to protect themselves, their company and their workers--in addition to an understanding of safety regulations--is adequate time and adequate training to carry them out. This requires upper management's support. The entire management team must be part of the "safety culture" if everyone is to avoid the pain and pitfalls of litigation, and enjoy the security of a safe work environment.