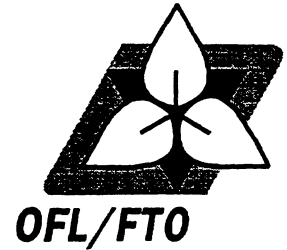


4th BIENNIAL CONVENTION
Working People Working Together
NOVEMBER 24-28, 1997



"LABOUR'S PROGRAM

FOR AN

EFFECTIVE

ENFORCEMENT SYSTEM"

Revised September 19, 1997

LABOUR'S PROGRAM FOR AN EFFECTIVE ENFORCEMENT SYSTEM

INTRODUCTION

Enforcement of the Occupational Health and Safety Act is a vital element of a comprehensive approach to occupational health and safety. An approach that includes;

- the development of up to date health and safety legislation;
- strong enforcement of the legislation by the ministry;
- proper training for all committee members;
- negotiating language in collective agreements to address health and safety issues; and
- strong enforcement of the collective agreement through the grievance procedure and arbitration.

Up to date occupational health and safety legislation would include;

- regulations for the control of occupational exposure to toxic substances;
- regulations which address the hazards which lead to repetitive strain injuries and other musculoskeletal injuries;
- regulations for protection from violence in the workplace;
- requirements for training all members of the joint health and safety committees and health and safety representatives;
- unilateral right of certified committee members to shut down unsafe work without loss of pay to affected workers; and
- providing the joint health and safety committee with decision making powers.

Employers are ultimately responsible for ensuring a safe and healthy workplace. Knowing that they will be held accountable and prosecuted for not maintaining a safe and healthy workplace will force employers to fulfil their responsibilities under the Act. It will also provide good reason for them to deal with the worker committee members in good faith.

Labour is actively involved in improving many of the elements of the comprehensive approach outlined above. The main focus of this document is the issue of the enforcement by the Ministry of Labour of the employers' responsibilities under the Occupational Health and Safety Act.

ENFORCING VS FACILITATING

Labour desires a clear and unequivocal enforcement role for the Ministry of Labour inspectorate.

The Ministry must devote and dedicate its resources towards high level enforcement activity to enhance this role.

This role must not be diluted by advisory and consultative functions directed at facilitating the internal responsibility system (IRS). Such mixing of roles only provides mixed messages about the seriousness of the inspectorates enforcement role. It also uses valuable resources duplicating the roles played by organizations such as the Workers' Health and Safety Centre, the Occupational Health Clinics for Ontario Workers, and various other employer safety associations.

Labour supports the IRS as a **supplement** to external enforcement **but not as its substitute**. It is labour's position that the enforcement system should **drive** the IRS. The IRS should not drive the enforcement system.

It is Labour's conviction that a dedicated enforcement function based on clear policies can bring about much needed improvements and enhance the internal responsibility system. It is our view that a highly visible and enforcement mandated inspectorate is a key factor for positive health and safety performance.

BASIC PRINCIPLES OF AN EFFECTIVE ENFORCEMENT SYSTEM

1. The enforcement system must be designed and operated to give a clear message that violations of our health and safety laws and endangerment of workers will not be tolerated.

The system must be based on two operating principles:

- a. The cost of violating the law will be greater than the cost of compliance;
 - b. Potential violators must expect that there is a high probability of being caught and penalized when they violate.
2. The enforcement system must drive the legal framework of the IRS. The IRS must be **enforced** on the basis of the following operational elements:
 - a. Zero tolerance for violations of the IRS;
 - b. Orders must be written when the IRS is violated;
 - c. Employers must be penalized when they deliberately violate the provisions of the IRS;

- d. Orders and penalties must be issued when employers fail to implement their own internal policies, programs and standards;
- e. Employers must be penalized for reprisals against workers for using their rights under OHSA.

ELEMENTS OF AN EFFECTIVE ENFORCEMENT SYSTEM

1. The inspectorate must be highly visible. To this end the Ministry must re-institute the system of cyclical inspections. This will require that the inspectorate be staffed to full complement and more.
2. Inspectors must be clear about their role and given a clear mandate to enforce:
 - a. The policy must apply consistently across the province.
 - b. Area directors must be held accountable and responsible for the consistent administration of Ministry enforcement policies;
 - c. The policy must be monitored frequently to ensure consistent overall and individual application.
 - d. The Minister must direct that no exceptions to the policy will be tolerated.
3. Inspectors must be mandated and supported to issue orders and penalties for all violations.
 - a. All violations must be recorded when orders are written so that the employer's compliance record is known;
 - b. Certain violations must result in mandatory penalties. A schedule of violations that will automatically result in specific action must be developed and followed consistently;
 - c. Repeat violations must result in higher penalties and mandatory sanctions. Penalties and sanctions must increase as violations increase.
 - d. Penalties must reflect the seriousness of the violation, how long the violation has been occurring, the number of workers affected, whether an injury has occurred.
4. Enforcement tools must provide inspectors with the means to have an immediate impact. The Ministry must institute a speedy approach to bring violators to court. This can be achieved readily by mandating and preparing inspectors in the routine use of Part III Form 104 Summons and Part I Offence Notices and Summons. This the Ministry can institute now without resort to legislative amendment.

5. Employer gross negligence that leads to injury or death must be dealt with under criminal law. To deliberately endanger is violence against a person and must be treated as an act of violence. This also can be instituted without legislative amendment. Such incidence should be handed over for police investigation and crown prosecution.

6. A penalty system that is speedy and not easily circumvented must be developed and instituted. This system would be driven by an administrative monetary penalty system that has no appeal to the courts. It uses a combination of penalty assessments that include ticketing; WCB assessments; and a schedule of fines assessed by the inspectors. This system is an effective deterrent as well as a mechanism to drive prevention programs. This system has the following advantages:
 - a. It is immediate and avoids expensive and time consuming prosecutions;
 - b. It allows for penalty accumulation depending on the seriousness of the violation, length of time violations have occurred, past compliance record of the employer;
 - c. It provides penalty flexibility that is in the hands of those directly involved in health and safety enforcement;
 - d. Its flexibility allow it to drive prevention programs. Since it can be devised to enforce deadlines and scheduled so that the cost of violation is greater than the cost of compliance.
 - e. It has the additional advantage of keeping the monetary fines within the Ministry's coffers to promote better programs, hire additional staff and fund further regulatory development.

Note: This administrative penalty system would require a legislative amendment to the Act.

LABOUR'S RATIONALE FOR A STRONG ENFORCEMENT SYSTEM

SCIENTIFIC BASIS:

The enforcement approach advocated by labour is supported by substantial scientific evidence showing significant reductions in workplace accidents when enforcement efforts are increased.

Several studies of historical trends in the U.S. and British mining industry showed that dramatic declines in injury rates were highly correlated with periods marked by elevated levels of external enforcement efforts.

Similarly, several recent studies of the U.S. Occupational Safety and Health Administration showed that inspection frequency and enforcement activity have a positive impact on health and safety performance.

In sum, the evidence supports a highly visible and enforcement-mandated inspectorate as an effective deterrent as well as a positive force for safety performance.

PROBLEMS WITH THE CURRENT APPROACH

The approach advocated by Ministry of Labour policy-makers is based on blind faith in the IRS as the fundamental mechanism to achieve compliance. While the IRS and the notion of "self-compliance" is a worthy ideal, it lacks the appropriate legal mechanisms that fully empower workers to influence decisions about health and safety issues. It must be remembered that certified worker members are not fully empowered to unilaterally issue stop work directions. Employers are not required to comply with the recommendations of joint committees.

This approach not only lacks supportive scientific evidence for its effectiveness, but it dangerously ignores:

- 1) the current command structure in labour/management relations;
- 2) the fact that the IRS is based on weak labour rights in law;
- 3) the powerful economic imperatives driving corporate operations that militate against safety improvements; and
- 4) substantial scientific evidence showing that the frequency of inspection activity improves safety performance.

This approach has led to a steady long-term decline in the number of inspections and inspection-related activity. By 1991-92 only 7 per cent of all companies under the industrial program had been inspected.

Much of this is a result of the Ministry's abandonment of its inspection system that placed companies on routine inspection cycles. Instead, the system is essentially reactive and demand driven leaving little expectation that firms will be routinely visited by the inspectorate.

From 1984 to 1990 prosecutions amounted to a little less than one-third of one per cent of all orders issued. That is, about .33% of all violations resulted in a prosecution. The average fine against employers in 1990 was only \$5,626.

The Ministry argues that the drop in the number of prosecutions is explained by its emphasis on taking on time consuming high profile cases as a deterrent strategy. However, scientific evidence suggest that size of the fine has little deterrent value when the overall chances of getting caught are very low. In fact, available data from the OSHA studies show that it was the rate of inspection and rate of penalty imposition rather than the level of the fine which had most deterrent value.

There are also indications that the Ministry of Labour's approach to enforcement has not produced any substantial improvement in workplace health and safety.

Historical trends in frequency rates of lost time injuries have been relatively constant throughout the 1980s. Some decline in these rates were seen between 1989 and 1992. There is serious question, however, as to whether these declines reflect any real improvements for the following reasons:

There is strong evidence to suggest that "experience rating" has led to substantial under-reporting of lost time claims. There are several indications of this:

- 1) while lost-time claims have declined, there has been a corresponding increase in "no lost-time claims";
- 2) experience rated employers are more likely to appeal claims;
- 3) empirical studies of 1,000 experience rated employers indicated that 20 per cent allowed injured workers to use their short term disability plan instead of filing claims, and 13 per cent encouraged workers with less severe injuries to take time off with pay.

This also appears to be inconsistent with the 36 per cent increase in the number of "critical injuries" reported to the Ministry in this same period.

At the same time, it must be remembered that decline has occurred during one of the most severe down turns in economic activity since the great depression. Indeed, the trend may be more reflective of declining industrial activity than an indicator of improved safety performance.

Given these factors, there is every reason to believe that the Ministry of Labour enforcement system has critically deteriorated. This has resulted in few employers being held accountable for the pain and suffering they inflict on workers and their families.

REFORMING THE INTERNAL RESPONSIBILITY SYSTEM

ADMINISTRATIVE POLICY

As with any other institution given the responsibility of enforcement and administration of legislation, the Occupational Health and Safety Division of Ministry of Labour developed a means of administering the legislation they were responsible for, in this case the Occupational Health and Safety Act.

They developed what became known as "The Internal Responsibility System" or IRS. The basic rationale the Ministry placed behind this system is that voluntary compliance is a better means of ensuring the employer adheres to the legal standards than forced or compulsory compliance. In other words self-regulation. The Ministry's earlier Strategic Directions Paper spelled out the intent fairly well. They are moving more towards self reliance and self compliance.

Many in labour objected to this IRS arguing that it was used as an excuse not to enforce the legislation. It's not that labour is opposed to internal responsibility, we were negotiating joint health and safety committees in our collective agreements before they were required by law, the point is that Labour does not agree with the MOL's interpretation of IRS. It is therefore important to understand the differences of what we mean by IRS and the MOL version.

MINISTRY IRS PROPHECY

The Ministry had decided that their role and the role of the Inspectors is that of a facilitator rather than the health and safety police. They had decided that they will assist workers and employers to work together to solve their problems and find solutions through ethical compliance.

The Internal Responsibility System is not found in the Act. It has not been given the power of law and there is no definition given for this system. An understanding of their intent may, however, be found in the Operations Manual that the Ministry of Labour provides to its Inspectors. But even here the explanation is not found in one location, it has been spread out over several sections of the Manual. Below are paragraphs quoted from an early version of the Industrial Health and Safety Branch, Inspectors Operations Manual put into a sequence which we think describes the Ministry's approach.

1. "The objective of the Industrial Health and Safety Branch is to influence, in the best available way, the creation of a safe and healthy work environment..." "Influence is achieved through enlightening, educating and stimulating management, union and workers in all aspects of health and safety, and through helping them to develop an effective Internal Responsibility System."

2. "The Industrial Health and Safety Branch has a facilitating and supportive role to encourage...owners, employers, supervisors and individual workers to actively assist in the creation of a safe and healthful working environment."
3. "The establishment of an effective Internal Responsibility System is an essential first step to prevent injury or health deterioration. As an Internal Responsibility System improves, the level of compliance will move from enforced compliance, through self-compliance to ethical compliance."
4. "To encourage this Internal Responsibility System to develop, the role of facilitator has been given to the Inspector, who will identify, evaluate and review the actions of labour and management on a regular basis. This will facilitate that first step by identifying areas where the Internal Responsibility System can be improved."
5. "Most work places are reviewed at least once every three years to assess the effectiveness of their Internal Responsibility System and determine compliance with legislation, and to facilitate compliance through consultation, issuance of orders, and where necessary, prosecutions."

CRITIQUE OF THE IRS

For years studies, reports and surveys had detailed the failure of the MOL's Internal Responsibility System. Large numbers of employers were not even complying with the minimum legislation never mind finding ethical compliance.

Workers have not had equal authority, resources and training for their committee members. This has prevented workers equal participation and influence in the IRS. We have only just begun to address the training issue but the lack of resources and power will continue to hinder workers from playing a full role in the IRS.

Amid criticisms about the operation of the Ministry's H&S division in the late 1980's two consultants, Geoffry MacKenzie and John Laskin were commissioned to conduct an independent review into all aspects of the administration of the Occupational Health and Safety Act and to make a public report. In the report that followed their review, they dealt with the issue of the IRS and the factors which they considered necessary for its success. Those factors are quoted below:

"For the system to be effective, the complete line of command, from the Board of Directors through the chief executive, managers, supervisors and workers, must be accountable for health and safety in the workplace. Our review has confirmed this conclusion. Support from the top is vital; the chief executive who sets health and safety as an equal and integral part of the management process, along with productivity and cost control, will achieve direct benefits in the form of a better health and safety record, and indirect benefits through improved morale, employee pride in their company and public recognition.

In their opinion, effectiveness of the IRS also depends upon:

- a sustained presence in the workplace by Division personnel through regular inspections,
- commitment by senior management to provide for meaningful worker participation in health and safety matters,
- access by workers to relevant information on health and safety hazards,
- education and training on health and safety for workers and management personnel, and
- consistent enforcement of the Act and meaningful penalties for those who violate the rules."

LABOUR VIEWS ON INTERNAL RESPONSIBILITY

Labour supports internal responsibility systems which guarantee workers meaningful and equal participation into the decisions which affect their health, safety and well-being.

We feel that the system, as it had been established by the MOL was very much putting the cart before the horse. Establishing an internal responsibility system without providing equal training so the workers will have meaningful participation and be able to argue intelligently with the employers about what is required in a safe and healthy workplace meant it was doomed to failure and it has been the workers who have paid the price.

To ensure that the employers take our representatives on the committee seriously and deal with them in good faith, the employers have to know that the government will come to the workplace when they are summoned. They need to know that the inspector will enforce the legislation when employers are not meeting their obligations under the law.

The IRS as it is today only works where there is a willingness on the employer to make it work. The present system assumes a common interest in health and safety. It ignores the fact that the employers interest is increasing profits while keeping costs low. Health and safety is not always profitable. Too many employers will voluntarily improve conditions only when they see that the direct and indirect costs of accidents and illnesses exceed the costs of eliminating them. Seeing financial benefits is particularly difficult in cases of hazardous substances where the costs of engineering controls are often large and immediate while the financial costs of not paying for controls (increased WCB premiums) are years in the future. Too few look at the human costs of not controlling hazards.

FIXING THE IRS

The problem with the present IRS system is not terminal. We do know how to fix it. The changes made by Bill 208 started to address some of our concerns. More steps will be needed in the future to get us where we want to be.

Future changes should also:

- provide committees with decision making powers
- require the employer to obtain agreement from the committee prior to implementing decisions which affect worker health and safety
- provide workers equal access to information
- provide workers equal time to research hazards and assess hazardous substances
- provide certified members with the unilateral right to stop work
- provide wage protection for all workers affected by health and safety work stoppages

In the case of the first two bullet points, employers who disagree with the decisions of the committee should be required to abide by the committee decision until any appeal is heard.

CONCLUSION:

It is labour's view that there is significant room for improvement in the health and safety conditions in Ontario's workplaces. These improvements can only be achieved by a comprehensive and balanced approach as outlined in "Labour's Program for an Effective Enforcement System. This approach includes;

- providing for the specialized needs of the internal responsibility system through the training and facilitative efforts of organizations such as the Workers Health and Safety Centre;
- updating occupational health and safety legislation;
- providing for a strong and dedicated enforcement function through the Occupational Health and Safety Division of the Ministry of Labour.

Since even the design of the workplace and organization of the work can impact on workers health, there is very little that a well trained joint health and safety committee could not make improvements on.

NOTES

