

Punishing Workers, Ignoring Employers

AFL Response to Administrative Fines Discussion Paper

November 2003

The Alberta Federation of Labour, representing over 120,000 workers in Alberta, is appreciative of the opportunity to respond to the proposed policy establishing an Administrative Fines system in Alberta.

The discussion paper proposes regulation amendments that would permit Workplace Health and Safety to assess fines against workers in the construction industry. A broader strategy of allowing fines against employers was rejected by the department.

The AFL is strongly opposed to the policy as proposed in the discussion paper, for reasons to be outlined below. We would also like to comment on the flawed process surrounding this discussion paper and proposal.

The fundamental purpose of the proposed fine policy is to 'promote safety compliance' among workers who continue to work unsafely despite employers' best effort otherwise. This intent is misguided and will not result in the hoped-for improvements in worker behaviour.

This form of 'worker-only' fine places the heaviest burden of punishment on those who are least able to control the level of safety in a workplace, while letting those who can control the workplace escape any form of penalty. We suspect this policy will fail to produce any substantive results in safety, as it ignores the strongest motivations that lead to dangerous work. We will elaborate below.

1. Doing Management's Job

It is a fundamental right of the employer to manage their workplace as they see fit, within the broad parameters of human rights and employment legislation. In specific, they have the right to establish appropriate health and safety policies for their workers, and to enforce those policies. Employers have ample tools at their disposal to ensure their workers work safely. The range of tools includes warning, reprimand, suspension and - ultimately - dismissal.

In effect, the proposed legislation is doing management's job for them. By suggesting the fining of recalcitrant workers, the government is stepping into a role traditionally carefully guarded by employers. Would the government be so willing to fine workers who have absentee problems? We suspect not. Why is this any different.

The government is letting employers off the hook. It allows management to avoid its legal responsibility (under section 2 of the Occupational Health and Safety Act) to provide a healthy and safe workplace. In particular section 2(b) requires an employer to take all practicable steps

to ensure workers are aware of their responsibilities and duties under the Act. We argue that those practicable steps include appropriate disciplinary action.

How will the Health and Safety Officer investigate what steps the employer has taken to ensure compliance? What steps will be considered enough to allow a fine? This policy opens up a number of serious enforcement issues for the government. It would be far wiser to not take this step and to instead remind employers of both their obligation and right to ensure workers obey the law.

2. Punishing the Powerless

The proposed policy also ignores a fundamental reality about the employment relationship. The employer, by virtue of their position, holds most of the power. Workers are often understandably afraid to take a strong stand against their employer, even for something such as health and safety. The fear of being fired or losing hours due to displeasing the boss is real. This policy proposes to punish the people who are least able to control their working conditions.

This is not to defend workers who willingly work unsafely. Clearly their behaviour needs to be corrected. It is to acknowledge that the situation is far more complex.

It is often the employer who establishes the atmosphere at a workplace. If the employer places emphasis on speed and productivity, and urges or demands that workers cut corners, then that is what will happen. If the employer does not take health and safety seriously, how are we to expect a worker to do it on their own.

A worker who insists on proper fall protection with a manager who is more concerned with cutting costs will not be very successful in their effort. This is due to the power imbalance that inherently exists at a workplace. The balance of responsibilities under the Act reflects this imbalance, putting more responsibilities on the employer. This proposed regulation, however, ignores the power dynamics and puts many workers in an impossible position.

The case of residential roofing is a perfect example of how this policy is misguided. The roofing contractors are highly competitive, and there is a strong priority placed on low bids. This results in a drive to work quickly and cut safety corners. How will fining individual workers change this reality? It will not.

If residential roofing contractors were serious about making their workers work safely, we would see them pulling dangerous workers off of roofs. We do not see that. This is, in part, due to the macho bravado of the workers themselves, but it is mostly due to a culture of work - fostered by contractors - that diminishes the importance of working safely.

It makes no sense in this type of work environment to fine the worker and ignore the employer's responsibilities.

3. Punishment not Motivator

The discussion paper suggests the fines are not a 'punitive measure'. We disagree. Fining a worker what could be the equivalent of one or two days wages is punitive. This is not a small amount of money for a worker, especially a general labourer or a residential roofer. Just as speeding tickets are seen as punishment for breaking the speed limit, these fines are equally punitive.

The logic of 'motivating' workers through financial penalty exposes hypocrisy in government policy toward health and safety. For years we have been told that government enforcement of health and safety laws sets up conflict between employers and officers. We have been told it is far more effective to work cooperatively with employers to foster a stronger commitment to health and safety. Do not punish employers with hefty fines and orders, work with them to allow them to comply voluntarily, has been the mantra of the 1990s.

So why is the carrot approach best for employers, but workers need a stick to get them to behave properly? This contradiction is too much to ignore.

4. The Perils of Voluntary Compliance

The response from supporters of this fines policy is likely to be that the government has adequate regulation dealing with employers, and the worker fines are an additional tool. This argument could have some merit if it were not for the government practice of voluntary compliance.

The government of Alberta has indicated that 'voluntary compliance is preferred over orders and court orders.' (AHRE Website) Voluntary compliance is a process where the employer is given the opportunity to voluntarily choose to comply with regulations, rather than be ordered by an officer. A voluntary compliance request has no legal weight, and cannot be enforced. Often such compliance requests are not checked with follow-up inspections, and the hazard is left in a legal limbo.

In the past decade, not a single non-injury or death related infraction of the regulations has been prosecuted. Quite simply, the government has never prosecuted an employer for breaking the law if their misdeed did not kill or maim a worker. How can we then say that we need to punish workers when we have never even tried to use the tools currently at our disposal.

The government's reluctance to use its regulatory powers (and responsibilities) to ensure employers abide by the Act and regulations undermines its claim that appropriate tools are in place to govern the behaviour of an employer.

The AFL believes we should be using the current tools more effectively before implementing new tools of questionable validity. If the department spent two years actively enforcing orders

and court orders, we are confident the accident rate in construction would drop. Until this is done, the argument that an additional tool is needed is dubious.

5. Fines Instead of Orders

The proposal also raises the serious question of whether worker fines will replace enforcement orders on employers. If an officer witnesses dangerous work practices, will they first order the employer to abide by their responsibilities? In other words, will they first demand the employer fulfill its obligations to manage the workplace and ensure their workers obey the law? Or will the fine be assessed to the worker right away? How will the officer determine whether the problem is an individual worker or an employer who does not take health and safety seriously?

The policy provides no suggestion of how officers are expected to handle this issue. Until this can be answered satisfactorily, fines are a potentially dangerous choice. Are we going to start blaming construction workers for all the accidents that happen on a worksite?

6. Misunderstanding the Officer's Role

The discussion paper rejects the B.C. model because it supposedly 'sets up an adversarial relationship between officers and employers'. This is a fundamental misunderstanding of the role of a health and safety officer. They are not the employer's buddy. They are not there to keep the employer happy and content. They are there to uphold the Act and regulations and to keep workers safe. This means that from time to time, they need to conflict with the employer and 'make' them do things. It isn't pretty at times, but crucially necessary for the safety of workers.

A model of health and safety enforcement based upon 'cooperative' relationships is an ineffective one. Constructing policy based upon this model is worse than ineffective, it is dangerous.

7. Flawed Process

Finally we must comment on the flawed consultation process engaged for this policy. The committee studying this issue has only employer representatives sitting on it. They were given a narrow terms of reference, essentially leading them toward an Ontario model of fining only workers.

We need to state explicitly that this policy is clearly the creation of ideology rather than common sense. It is a political creation, rather than a sincere effort to bring all parties together to strengthen health and safety legislation.

8. Making Administrative Fines Work

The AFL suggests a far more effective system of administrative fines has been implemented by other provinces, including B.C. and Manitoba. These provinces have allowed officers to assess fines to employers and workers for infractions of the regulations that have not resulted in injury.

We support this system because it effectively addresses a hole in the enforcement net. Infractions that have not caused an injury do not get prosecuted in this province. Establishing a method for fines to be assessed on employers for less serious violations serves two purposes. First, it allows for a cost-effective way to prosecute such infractions. Second, it sends a clear message that Alberta takes health and safety seriously.

The discussion paper summarily dismisses this model, but it is lacking in evidence. It refuses to discuss Manitoba or Nova Scotia, although early reports from both provinces suggest the system has the potential to work effectively. The B.C. model is rejected because 'most employers' do not like it. This may or may not be true, but is entirely beside the point. The question is whether it is making workers safer. The B.C. Federation of Labour states that the fines system provides a hopeful avenue for workers looking for improvements at their workplace. It is a direct way to highlight problems at a worksite. This is a valuable achievement - one that should not be so quickly dismissed.

Conclusion

The AFL is deeply disappointed in this policy proposal. It is in stark contrast to the consensual process established under the regulatory review a couple of years back. This is a return to a system of legislation by edict - and a pandering to the narrow self-interests of employers.

We strongly oppose the recommended policy, and urge the department to shelve it indefinitely.

Thank you for your consideration.

Respectfully submitted,

Alberta Federation of Labour