

The General Duty Clause in OHS Legislation

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**What is a
“general duty clause”?**

What is a “General Duty Clause”?

Also called the:

Due Diligence Duty

Basket Clause

Umbrella Clause

What is a “General Duty Clause”?

1. It is in the Act.
2. It does not refer to the regulations for its content. It is “regulation independent”. It does not say “as prescribed”.
3. It is not about a specific type of hazard.
4. It is not about a specific type of control.
5. It says “take all reasonable care” in the circumstances (or words to that effect).

Why is a “general duty clause” important?

Why is it Important?

- It doesn't give any express guidance as to what to do, and is often over-looked when seeking to "comply with the Act".
- It's open-ended.
- It's what they prosecute you for if they can't find something specific in the regulations.
- It requires more creative, pro-active work than anything else in the Act.

The # 1 Nova Scotia General Duty Clause

The # 1 Nova Scotia General Duty Clause

13 (1) Every employer shall take every precaution that is reasonable in the circumstances to

(a) ensure the health and safety of persons at or near the workplace;

When an accident happens,
and a worker is killed or
injured, isn't that in itself proof
that all reasonable care was
not taken?

If all accidents are preventable, then all the judge has to do is find what could have prevented the accident, and then the defendant is guilty?

After the trial, the judge is using hindsight, with more time to consider, and more facts available, so won't it always be the case that the judge will find something the defendant ought to have known or ought to have done?

Is the breadth of a general
duty clause so great that a
defendant can never be
acquitted?

The # 1 Nova Scotia General Duty Clause

**“take every precaution that is reasonable
in the circumstances”**

This is the expression for....???

“Due Diligence”

“take every precaution reasonable in the circumstances”

“do everything reasonably practicable”

“take all reasonable care”

The # 1 Nova Scotia General Duty Clause

Which is the s.13(1)(a) general duty clause
is called the:

“Employer’s Due Diligence Duty”

... not to be confused with the “Defence of
Due Diligence”.

Two Forms of Due Diligence

1. Due diligence as a general duty.
2. Due diligence as a legal defence to a charge that one has breached a specific duty.

The standard is the same “do everything reasonable in the circumstances”, but the legal processes are different.

Due Diligence as a Duty

- Look for a very generally worded duty “take all reasonable care”.
- No specific hazard mentioned
- No connection (usually) with the regulations
- No specific control mentioned

Due Diligence as a Legal Defence

Here, due diligence is only meaningful if you first have identified a specific legal duty.

You then ask, for this specific legal duty, what would be due diligence? – what would a reasonable person to ensure they fulfilled the duty? – what is implicit in the specific duty?

Other Employer General Duty Clauses

New Brunswick Employer's General Duty Clause

9(1) Every employer shall

(a) take every reasonable precaution to ensure the health and safety of his employees;

Compare

NS: 13 (1) Every employer shall take every precaution that is reasonable in the circumstances to

(a) ensure the health and safety of persons at or near the workplace;

NB: 9(1) Every employer shall

(a) take every reasonable precaution to ensure the health and safety of his employees;

Compare – Warning!

- You can't really compare sections from two different jurisdictions unless you first plug in the meanings of the defined terms in the sections:
- NS: “employer”, “employee”, “workplace”.
- NB: “employer”, “employee”.

Compare

You might think the NS duty is narrower geographically since it's tied to the employer's own "workplace", but ...

(ah) "workplace" means any place where an employee is or is likely to be engaged in any occupation and includes any vehicle or mobile equipment used or likely to be used by an employee in an occupation.

NS: (p) "employer" means a person who employs one or more employees or contracts for the services of one or more employees, and includes a constructor, contractor or subcontractor;

NB: “employer” means

(a) a person who employs one or more employees,

(b) a manager, superintendent, supervisor, overseer or any person having authority over an employee, or

(c) an agent of any person referred to in paragraph (a) or (b);

NS: (o) "employee" means a person who is employed to do work and includes a dependent contractor;

NB: "employee" means

(a) a person employed at or in a place of employment, or

(b) a person at or in a place of employment for any purpose in connection therewith;

- Not simple to compare sections between jurisdictions because the words don't always mean the same thing.
- Even the definitions contain defined words.
- Not our purpose today to do a full comparison.... But ...

Compare

NS: 13 (1) Every employer shall take every precaution that is reasonable in the circumstances to

(a) ensure the health and safety of
persons at or near the workplace;

NB: 9(1) Every employer shall

(a) take every reasonable precaution to ensure the health and safety of his
employees;

- Interpretation rule: If there's a change in wording it means something different.
- NS: "person" is broader than "employee":
- S. 13 covers: students, patients, customers, anyone?
- So, the employer's general duty is much more than an OHS duty.

General Duty Clause

NS Occupiers' Liability Act

4 (1) An occupier of premises owes a duty to take such care as in all the circumstances of the case is reasonable to see that each person entering on the premises and the property brought on the premises by that person are reasonably safe while on the premises.

- The defined words in a duty section are conditional.
- Before we discuss whether there was reasonable care by the “employer”, we have to decide if the person charged is legally an “employer”.
- If not an “employer”, the duty wouldn’t apply to the defendant. Acquittal on that charge.

Nova Scotia “Employer” Case

Other Employer General Duty Clauses

Prince Edward Island Employer General Duty Clause

12. (1) An employer shall ensure

(a) that every reasonable precaution is taken to protect the occupational health and safety of persons at or near the workplace;

Newfoundland Employer General Duty Clause

4. An employer shall ensure, where it is reasonably practicable, the health, safety and welfare of his or her workers.

Canada Labour Code

Employer General Duty Clause

124. Every employer shall ensure that the health and safety at work of every person employed by the employer is protected.

Where's the word "reasonable"?

Other Nova Scotia General Duty Clauses

Other Nova Scotia General Duty Clauses

We need to ask “whose general duty”?

- employer
- supervisor
- worker
- officer
- owner
- supplier
- etc?

Nova Scotia

Employee's General Duty

17 (1) Every employee, while at work, shall

(a) take every reasonable precaution in the circumstances to protect the employee's own health and safety and that of other persons at or near the workplace;

Nova Scotia Contractor's General Duty

14 Every contractor shall take every precaution that is reasonable in the circumstances to ensure

(a) the health and safety of persons at or near a workplace;

Nova Scotia Constructor's General Duty

15 Every constructor shall take every precaution that is reasonable in the circumstances to ensure

(a) the health and safety of persons at or near a **project**;

Nova Scotia
Self-employed Persons' General Duty

18 Every self-employed person shall

(a) take every reasonable precaution in the circumstances to protect the self-employed person's own health and safety and that of other persons who may be affected by the self-employed person's undertaking;

Nova Scotia Owners' General Duty

19 Every owner shall

(a) take every precaution that is reasonable in the circumstances to provide and maintain the owner's land or premises being or to be used as a workplace

(i) in a manner that ensures the health and safety of persons at or near the workplace,

Nova Scotia

OHS Providers' General Duty

20 Every person or body who, for gain, is a provider of an occupational health or safety service shall take every precaution that is reasonable in the circumstances to

- (a) ensure that no person at a workplace is endangered as a result of the provider's activity; and

Nova Scotia General Duty Clauses

- Employer
- Employee
- Contractor
- Constructor
- Owner
- Self-employed person
- OHS provider

Anyone Missing?

**Who is Mentioned in the Nova
Scotia Definition of the IRS?**

Nova Scotia

s. 2 The foundation of this Act is the Internal Responsibility System which

(a) is based on the principle that

*(i) **employers, contractors, constructors, employees and self-employed persons at a workplace, and***

NS Definition Continued ...

- (ii) the owner of a workplace, a supplier of goods or provider of an occupational health or safety service to a workplace or an architect or professional engineer, all of whom can affect the health and safety of persons at the workplace,*
- share the responsibility for the health and safety of persons at the workplace;*

Anyone Missing?

- Supplier of goods
- Provider of an OHS service
- Architect
- Engineer

Nova Scotia

Architects and Engineers

21 (1) An architect, as defined in the Architects Act, who gives advice or affixes the architect's seal to documents or a professional engineer, as defined in the Engineering Profession Act, who gives advice or stamps documents ***shall take every precaution that is reasonable in the circumstances to ensure that*** a person who is likely to rely on the advice, seal or stamp will not be in contravention of this Act or the regulations as a result of such reliance.

Nova Scotia

Architects and Engineers

- Not quite as open-ended as the other general duty clauses.

Scope narrower: *“a person who is likely to rely on the advice, seal or stamp will not be in contravention of this Act or the regulations as a result of such reliance”*

Nova Scotia Suppliers

- 16 Every supplier shall take every precaution that is reasonable in the circumstances to
- (a) ensure that any device, equipment, machine, material or thing supplied by the supplier is in safe condition, and in compliance with this Act and the regulations when it is supplied;
 - (b) where it is the supplier's responsibility under a leasing agreement to maintain it, maintain any device, equipment, machine, material or thing in safe condition and in compliance with this Act and the regulations; and
 - (c) ensure that any biological, chemical or physical agent supplied by the supplier is labelled in accordance with the applicable federal and Provincial regulations.

Nova Scotia Suppliers

- Also not as specific as the other general duty clauses.

Nova Scotia Suppliers

Although, as an aside, it is dramatically broader than other Provinces' supplier duties as it's not just lease of equipment but a complete products liability regime!

(af) "supplier" means a person who manufactures, supplies, **sells**, leases, distributes or installs any tool, equipment, machine or device or any biological, chemical or physical agent to be used by an employee;

**Anyone Else in Nova Scotia
Who Doesn't Have Their Own
General Duty Clause?**

Anyone Missing?

- Supervisors
- Managers
- Officers of the company
- Directors of the company

The definition of the IRS didn't mention them expressly. Supervisors, managers and Presidents are "employees".

NS: (o) "employee" means a person who is employed to do work and includes a dependent contractor;

Nova Scotia

Employee's General Duty

17 (1) Every [**supervisor, manager, President**], while at work, shall

(a) take every reasonable precaution in the circumstances to protect the employee's own health and safety and that of other persons at or near the workplace;

**Why Not a Separate Supervisor
General Duty Clause?**

Newfoundland Supervisor General Duty Clause

5.1 A supervisor shall ensure, where it is reasonably practicable, the health, safety and welfare of all workers under his or her supervision.

**Why Not a Separate Manager
General Duty Clause?**

Northwest Territories Manager General Duty Clause

10. (1) The manager shall take every reasonable measure and precaution to protect the health and safety of employees and other persons at a mine.

Mine Health and Safety Act

**Why Not a Separate Officers and
Directors' General Duty Clause?**

Nova Scotia

Participation in offence

77 An officer, director, manager or agent of a corporation who directs, authorizes, assents to, acquiesces or participates in the commission of an offence pursuant to this Act is guilty of that offence.

Not the same as a general duty clause.

Ontario

32. Every director and every officer of a corporation shall take all reasonable care to ensure that the corporation complies with,

(a) this Act and the regulations;

(b) orders and requirements of inspectors and Directors; and

(c) orders of the Minister.

Close, but not quite as broad

No jurisdiction in Canada has
a perfect set of general duty
clauses for every individual in
the Internal Responsibility
System

What do we really mean
by *Due Diligence*?

Often we worry about:

- what does “reasonable” mean?
- who decides?
- what’s the standard?
- what circumstances are relevant?
- how do you prove it?

Where are We Going?

Due Diligence is a rich and subtle set of ideas.

Due Diligence is not a list of rules or a finite list of activities and it is not fixed. Due diligence is a way of thinking, of problem-solving, that involves a potentially infinite array of factors.

Due Diligence for the Organization as a Whole

Assume the organization is:

- a corporation
- an employer

The corporation is a separate legal person, distinct from the individuals who own it, run it, and work in it. The corporation employs workers and is an employer.

Due Diligence for the Organization as a Whole

The “Brain Problem”:

A corporate person is a legal fiction. It has no brain. It doesn't think. How can it know anything? How can it be reasonable? How can it do anything without a body to go with its non-existent brain?

Due Diligence for the Organization as a Whole

Solution to the Brain Problem – Vicarious
Liability.

The corporation is liable for the acts and
omissions of its employees.

Due Diligence for the Organization as a Whole

Solution to the Brain Problem – Vicarious Liability.

The legal fiction, the corporate employer as a person, does Due Diligence (or not) through the acts (or omissions) of its employees.

76 (1) In a proceeding or prosecution against an employer pursuant to this Act or the regulations, the act or omission of a manager, a superintendent or another person who exercises management functions for the employer is deemed to be the act or omission of the employer.

76(2) Notwithstanding subsection (1), the act or omission of a manager, a superintendent or another person who exercises management functions for the employer is not the act or omission of the employer where it is proven that the employer took every precaution reasonable in the circumstances to ensure that the act or omission would not occur and the employer

- (a) did not have actual knowledge of, or could not reasonably have known of, the act or omission; and**
- (b) did not expressly or impliedly consent to the act or omission.**

Due Diligence for the Organization as a Whole

The employee should be able to distinguish:

- am I doing this for the Due Diligence of my employer (on my employer's DD account)?
- am I doing this for my own personal Due Diligence account?

Due Diligence for the Organization as a Whole

- There is a large overlap between those two.
- In many cases, the employee will be killing two birds with one stone.
- E.g. if the employee is the supervisor and is ensuring a worker is wearing eye protection, the DD activities involved are fulfilling the supervisor's DD account at the same time as the employer's DD account.

Due Diligence for the Organization as a Whole

- It is important for senior management to understand the distinction.
- Senior management is thinking for the corporate employer's DD.
- If they view individual employees such as the Supervisor above as merely ensuring the corporate employer's DD they will not fully harness the supervisor's self-interest in DD (or everyone else's).

Due Diligence for the Organization as a Whole

If everyone is personally duly diligent on their own account, then the corporate employer's due diligence is largely (not entirely) assured.

What's the Problem with Regulations?

“There otta be a law!”

Can we have a law for everything? Can we have detailed regulations for all hazards – all tools, machines, materials, processes, etc.?

Why not?

The Knowledge Problem

1. regulators can't know everything because the world is too complex and messy.
2. even if they did know everything it would only be for an instant, because the world changes too fast.

Regulators can only regulate the known, the common, the universal, the generic ...

Local Knowledge

Only the people in the workplace have “local knowledge” – rich, intimate, unwritten knowledge about tools, machines, materials, processes, the environment, the other people ... (it’s also called “experience”).

To be successful in OHS that local knowledge has to be used. But the regulators don’t possess it.

So, to Cover “Everything” in the Province

1. we have regulations to cover the known and the common

AND

2. we have a general duty clause in the Act to cover the unknown, the new, the idiosyncratic, the rare, the ever-changing ... to capture and use local knowledge.

Nova Scotia

Employers' precautions and duties

13 (1) Every employer shall take every precaution that is reasonable in the circumstances to

(a) ensure the health and safety of persons at or near the workplace;

Employer General Duty

- Requires a program of hazard identification and risk evaluation to find things that are not covered in the regulations.
- This has to be a continuous cycle (PDCA).
- Results in OHS Management System elements (programs and procedures) that are company specific.

Employer General Duty

- Organization has to be DD to comply with its own procedures it made itself because of the general duty clause.
- The organization's procedures (rules) become partly the personal responsibility of the individuals in the organization.
- The 2nd level of DD rules of the employer “slide over” and become the 2nd level of DD rules of the individual.

What's the Problem with the Organization's Procedures?

“There otta be a procedure!”

Can we have an organizational procedure for everything? Can we have detailed procedures for all hazards – all tools, machines, materials, processes, etc.?

Why not?

The Knowledge Problem (Again!)

1. The employer can't know everything because the workplace is too complex and messy.
2. even if they did know everything it would only be for an instant, because the workplace changes too fast.

The employer can only make procedures (rules) for the known, the common, the universal, the generic ...

So, to Cover “Everything” in the Workplace

1. we have organizational procedures (rules) to cover the known and the common

AND

2. we have a general principle (employees’ DD general duty clause in the Act to [or a management principle to the same effect]) to cover the unknown, the new, the idiosyncratic, the rare, the ever-changing ... to capture and use local knowledge.

Nova Scotia

**17 (1) Every employee, while at work,
shall**

**(a) take every reasonable precaution in
the circumstances to protect the
employee's own health and safety and
that of other persons at or near the
workplace;**

Employee General Duty

- Requires an individual to engage in a process of hazard identification and risk assessment.
- This has to be a continuous cycle (PDCA).
- Results in [for the supervisor] a daily job plan that involves very specific instructions about that day's hazards and risks.

Cases

R. v. Dept. Transportation & PW

2002, Nova Scotia PC

The constructor was convicted under s.15(a), the constructor general duty clause.

15 Every constructor shall take every precaution that is reasonable in the circumstances to ensure

*(a) the health and safety of persons at or near a **project**;*

R. v. Dept. Transportation & PW

2002, Nova Scotia PC

The head of a boom truck was 6'2" from a 14,400 volt power line. Safety officer stopped the work. Truck was moved out of proscribed zone. No accident or injury.

(Unusual, as almost all prosecutions are related to an accident ... important to note, because it's about risk reduction)

R. v. Dept. Transportation & PW

2002, Nova Scotia PC

TPW was the “constructor” as it had ordered the work done by BML. TPW’s defence:

It was duly diligent in selecting BML to do the work, and so it was not reasonable that TPW employees had to be on site. BML had the greatest degree of control. TPW reasonably believed BML could be relied upon.

R. v. Dept. Transportation & PW

2002, Nova Scotia PC

TPW had a “safety system”. BML was contractually obligated to follow it. Court said that wasn’t enough. The safety system had to be implemented and monitored.

“... TPW ought to have required that the system be adopted by BML, or where there was deviation, require agreement.”

R. v. Dept. Transportation & PW

2002, Nova Scotia PC

TPW system required a journeyman electrician to prepare a hazard report. Not done with respect to the electrical hazard. TPW on site representative adverted to traffic safety but took no action to ensure that BML had a competent person to assess the electrical hazard. No confirmation that BML had anyone on site who knew what the voltage was.

R. v. Dept. Transportation & PW

2002, Nova Scotia PC

To be duly diligent under s.15(a), the constructor should confirm that the contractor complies with its contractual obligation to follow the constructor's system.

Other Applications of the General Duty Clauses

Other than being the basis of a prosecution, can a general duty clause be used for anything else?

Application

The effect of one general duty
clause on another when
sentencing

R. v. Sutherland

2009, Nova Scotia PC

The employer was convicted under the s.13 employer general duty clause. When considering the penalty, one of the factors was that the deceased employee's s.17 general duty was not complied with. The Court did not specify by how much the penalty was reduced because of this.

Application

Can a general duty clause support
an Order by an Officer or
Inspector?

Application

Can a general duty clause provide a justification for an employer's actions that are subject to a grievance in a unionized workplace?

Application

Can a general duty clause justify
what would otherwise be
discrimination under a Human
Rights Code?

Due Diligence as a General Duty

Example:

13 (1) Every employer shall take every precaution that is reasonable in the circumstances to

(a) ensure the health and safety of persons at or near the workplace;

NB General Duty Clause

10. Every contractor and sub-contractor shall

*(b)*for every project site for which he is responsible take every reasonable precaution to ensure the health and safety of any person having access to such project site.

PEI General Duty Clause

16. (1) A worker, while at work, shall
- (a) take every reasonable precaution to protect the worker's own occupational health and safety and that of other persons at or near the workplace;

NL General Duty Clause

- 6.** A worker, while at work, shall take reasonable care to protect his or her own health and safety and that of workers and other persons at or near the workplace.

General Duty Clauses

Canada Labour Code

126. (1) While at work, every employee shall

- (c) take all reasonable and necessary precautions to ensure the health and safety of the employee, the other employees and any person likely to be affected by the employee's acts or omissions;

Due Diligence as a Legal Defence

Here, due diligence is only meaningful if you first have identified a specific legal duty.

You then ask, for this specific legal duty, what would be due diligence? – what would a reasonable person to ensure they fulfilled the duty? – what is implicit in the specific duty?

Due Diligence as a Legal Defence

Example:

An employer has a specific duty to ensure that a supervisor is competent. What reasonable steps should be taken to ensure this? Training? About what? What is implied in the specific duty?

Due Diligence as a Legal Defence

Example:

The supervisor has to ensure that a worker is wearing his fall arrest.

What would a reasonable supervisor do to ensure this? Provide it, train on it, refresh the training, review in tailboard session, coach, discipline? The Act doesn't give the details.

The two forms of due diligence are not the levels of due diligence we want to focus on but they are closely related to them.

Confusion #1

People think about Due Diligence without thinking of the “who” question.

“Whose Due Diligence do we mean?”

Confusion #2

People think about Due Diligence without thinking about the “which” question:

Which level of Due Diligence do we mean?

DD for the regulation?

DD for the employer’s own rules

DD for the general duty clause?

Where are We Going?

- Due Diligence is a rich and subtle set of ideas.
- Due Diligence has two different SETS of levels (not two levels, but two SETS of levels).

Where are We Going?

Due Diligence has two different SETS of levels.

Set A – organizational levels

Set B – rule levels

Set A -- Organizational Levels of Due Diligence

- Level A1 – Due diligence for the organization as a whole
- Level A2 – Due diligence for the Directors
- Level A3 – Due diligence for the Officers
- Level A4 – Due diligence for the Managers
- Level A5 – Due diligence for the Supervisors
- Level A6 – Due diligence for the Workers

Set B – Rule Levels of Due Diligence

We have a very loose meaning of “rule” here; it includes, but is not limited to, a rule from a regulation or from a company procedure. It also includes a “decision rule” where there is no formal, express rule.

Set B – Rule Levels of Due Diligence

The rule levels are different depending on the organizational level.

The organization as a whole has two rule levels.

An individual has (or should have) three rule levels.

Set B – Rule Levels of Due Diligence

The organization as a whole has two rule levels:

Level B1 – Due diligence to ensure compliance with specific rules in the Regulations (and sometimes the Act), that apply to the organization as a whole.

Level B2 – Due diligence to ensure compliance with the general duty clause in the Act; to address hazards and risks not addressed in the specific rules. Results in organization specific rules.

Set B – Rule Levels of Due Diligence

An individual has (or should have) three rule levels:

Level B1 -- Due diligence to ensure compliance with specific rules in the Regulations (and sometimes the Act), that apply to the individual.

Level B2 – Due diligence to ensure compliance with the organization’s rules that it has developed in order to comply with the organization’s Level B2 due diligence.

Level B3 -- Due diligence to ensure compliance with the general duty clause for the individual in the Act (if any).

Organizational Levels of Due Diligence

Level A1 – Due diligence for the
organization as a whole

Due Diligence for the Organization as a Whole

- The organization is the defendant, the doer, the “thinker”, the object of concern.
- Which “hat” is the organization wearing?

Is it the:

employer
constructor
owner
supplier?

Which duties go with each?

Due Diligence for the Organization as a Whole

Can the organization be more than one type?

- employer and constructor
- employer and owner
- employer and supplier
- owner and constructor
- etc?

Due Diligence for the Organization as a Whole

Can the “organization” be one of:

- a corporation
- a partnership
- a sole proprietorship?

Due Diligence for the Organization as a Whole

In order to ensure Level A1 – Due diligence for the organization as a whole – the employer should be ensuring that Levels A2 – A6 can and are being done.

Set A -- Organizational Levels of Due Diligence

- Level A1 – Due diligence for the organization as a whole
- Level A2 – Due diligence for the Directors
- Level A3 – Due diligence for the Officers
- Level A4 – Due diligence for the Managers
- Level A5 – Due diligence for the Supervisors
- Level A6 – Due diligence for the Workers

Due Diligence for the Organization as a Whole

From the employer's perspective:

1. what do we do organizationally for the employer's DD that individuals can't do well for us?
2. how do we get individuals to be DD on the employer's DD account?
3. how do we get individuals to be DD on their own personal account?

Due Diligence for the Organization as a Whole

From the employee's perspective:

1. what do I do strictly for my employer's DD account (which doesn't assist my own personal DD account)?
2. what do I do for my own personal DD account (which will contribute indirectly to my employer's DD account)?

Due Diligence at Levels Below the Organization as a Whole

Set A -- Organizational Levels of Due Diligence

Level A2 – Due diligence for the Directors

Level A3 – Due diligence for the Officers

Level A4 – Due diligence for the Managers

Level A5 – Due diligence for the Supervisors

Level A6 – Due diligence for the Workers

Due Diligence for Individuals

- We could have designed OHS law to be based strictly on duties of the employer.
- Only employers would be charged.
- Employers would be left to figure out how to be DD corporately while individual look on passively.

Due Diligence for Individuals

That's not what we did. Instead, in OHS law, we adopted the Internal Responsibility System (IRS) philosophy:

Everyone does OHS 100% of the time.

Everyone is responsible for OHS directly as an integral part of their own work.

Due Diligence for Individuals

Remember that the IRS is not:

- “the H&S Committee is doing OHS for us”.
- “the two ‘workplace parties’ (labour and management) are doing OHS together for us”.

The IRS is first and foremost about everyone in the workplace as an *individual* doing OHS.

Due Diligence for Individuals

So, in addition to the employer being charged, or in the alternative to the employer being charged ...

Can anyone in the workplace, as an individual, be charged, convicted and penalized under the OHS Act?

OHS Law is Different

Not all regulatory regimes are the same. OHS is different because of the IRS. Other regulatory regimes do not explicitly break open the organizational structure and make individuals liable.

In other regimes (environment, public health, public safety) it is much rarer to see individuals charged. It is usually the corporate entity as an economic player that has to be deterred through fines.

See the Difference ...

Invite an environmental lawyer to an OHS conference to talk about due diligence.
What you get is:

“For due diligence you need ... a policy, a management system, some procedures... and... a training program... and lots of records”

See the Difference ...

Those are all elements of the employer's corporate DD. They are not elements of a supervisor's or a worker's personal DD. Supervisors have no control over corporate level policy, systems, programs and so on.

See the Difference ...

Invite an environmental coordinator or manager to talk about the EMS. What you get is in response to the question “who is doing ‘environment’?”

“Well, we have a Director of Environment and we have 3 technical committees and we have ...”

See the Difference ...

The EMS is designed for the employer's environmental DD not individual's DD and the "roles and responsibilities" or "organizational arrangements" part of the EMS are not built on the IRS – everyone doing environment – but on select individuals or groups. And then they wonder why the EMS is just a 3 ring binder.

Due Diligence for Individuals

A supervisor needs to know what is DD for a supervisor.

Yes, the supervisor needs to know what is DD for the employer, because from the employer's perspective (as we have seen) the employer will be unlikely to be DD unless individuals are working on its behalf.

Due Diligence for Individuals

Would a supervisor also need to appreciate what is personal DD for the ...

- directors
- officers
- managers
- workers
- contractors, etc.?

Due Diligence for Individuals

A worker first and foremost needs to know what he or she must do for his or her own DD ...e.g.

- use PPE
- report hazards
- follow procedures
- don't take the guard off the machine

But shouldn't the worker also appreciate the DD needs of the supervisor, etc.?

Rule Levels of Due Diligence

Recall ...

Set B – Rule Levels of Due Diligence

The rule levels are different depending on the organizational level.

The organization as a whole has two rule levels.

An individual has (or should have) three rule levels.

Set B – Rule Levels of Due Diligence

The organization as a whole has two rule levels:

Level B1 – Due diligence to ensure compliance with specific rules in the Regulations (and sometimes the Act), that apply to the organization as a whole.

Level B2 – Due diligence to ensure compliance with the general duty clause in the Act; to address hazards and risks not addressed in the specific rules. Results in organization specific rules.

Set B – Rule Levels of Due Diligence

An individual has (or should have) three rule levels:

Level B1 -- Due diligence to ensure compliance with specific rules in the Regulations (and sometimes the Act), that apply to the individual.

Level B2 – Due diligence to ensure compliance with the organization’s rules that it has developed in order to comply with the organization’s Level B2 due diligence.

Level B3 -- Due diligence to ensure compliance with the general duty clause for the individual in the Act (if any).

Combine organizational levels of due diligence and rule levels of due diligence

Individual DD – The Supervisor

The supervisor will be interested in:

1. the supervisor's own DD
2. the employer's DD
3. the DD needs of other individuals in the organization
4. the DD needs of contractors and their workers

The supervisor can be prosecuted over #1, but needs to contribute to #'s 2,3,4.

Individual DD – The Supervisor

Rule Levels and the Supervisor's own DD:

1. DD to comply with the regulations
2. DD to comply with the organization's rules
3. DD to go beyond rules when necessary (because of the general duty clause)

Individual DD – The Worker

Rule Levels and the Worker's own DD:

1. DD to comply with the regulations
2. DD to comply with the organization's rules
3. DD to go beyond rules when necessary (because of the general duty clause)

Myth of DD as “Regulatory Compliance” (Solely)

Have you heard:

1. “Our goal is regulatory compliance.”
2. “Due Diligence means complying with the regulations.”
3. “‘Safety’ means complying with the regulations.”
4. “We’re far beyond ‘due diligence’ because we go waaaay beyond regulatory compliance.”?

Myth of DD as “Regulatory Compliance” (Solely)

If all regulations were complied with ...

1. could there still be accidents?
2. could you still be charged?
3. could you still not be duly diligent?

“Compliance” Means:

1. compliance with the regulations

AND

2. compliance with the Act.

And what #2 means is that you have to go beyond the regulations and beyond specific requirements in the Act itself ... because the “general duty clause” tells you to.

“Compliance”

So, never confuse “compliance” with
“regulatory compliance”.

Individual DD – The Supervisor

Rule Levels and the Supervisor's own DD:

1. DD to comply with the regulations
2. ***DD to comply with the organization's rules [Came from Employer's fulfillment of the employer's general DD duty]***
3. DD to go beyond rules when necessary (because of the general duty clause)

Then where does the individual's 3rd level of DD come from, and why?

Individual DD – The Supervisor

Rule Levels and the Supervisor's own DD:

1. DD to comply with the regulations
2. DD to comply with the organization's rules [Came from Employer's fulfillment of the employer's general DD duty]
3. ***DD to go beyond rules when necessary (because of the employee general duty clause)***

Repeat for all levels of the organization, not just the supervisor.

- Worker
- Supervisor
- Manager
- Officer
- Director

Recall -- Due Diligence for the Organization as a Whole

From the employee's perspective:

1. what do I do strictly for my employer's DD account (which doesn't assist my own personal DD account)?
2. what do I do for my own personal DD account (which will contribute indirectly to my employer's DD account)?

Due Diligence and Reciprocity

But it's more complicated than that.

Shouldn't an individual understand the DD needs of everyone at all levels A2-A6 and not just the employer's A1 level?

Do we all recognize that Person A has an interest in Person B doing Person B's DD even though Person A is unlikely to be prosecuted for B's failure and B is unlikely to be prosecuted for A's failure?

Self Interest and Altruism

- If everyone self-interestedly pursues their own DD on their own account, we will go very far in reducing risk (everyone is DD on their own account).
- But we will go even further if people are contributing to the DD of others even when it is not for their own direct legal self-interest.

Self Interest and Altruism

Reciprocal Altruism – It's a Deal!

If we look out for the DD interest of others,
and this is mutual, then risk is driven down
as low as we can reasonably get it.

Implications

- Training
- OHS System design
- Hazard/risk assessment processes
- Auditing/measuring
- IRS analysis – AI
- IRS analysis – HS Committee
- Leadership
- Contractor Safety Program

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Limits to Procedural Regulation

It is not possible for regulators to prescribe detailed rules for OHS that will cover all workplaces, technologies, tools, processes, machines, circumstances

The “knowledge problem” – the world is too rich, complex and ever-changing for us to rely on procedural regulation alone.

Limits to Command and Control

It is not possible for employers to prescribe detailed company rules for OHS that will cover all technologies, tools, processes, machines, circumstances

The “knowledge problem” – the workplace is too rich, complex and ever-changing for us to rely on command and control alone.

Solution

Establish a broad performance standard:

“Take every precaution reasonable in the circumstances for the protection of a worker.”

Open-ended, all inclusive.

Performance Standard

Due Diligence as a philosophy, a way of life, requires an individual to constantly assess personal performance against an objective standard that is very high.

Requires thinking, creativity, initiative – not just rule-following and conformance.

Objective Standard

Because the Due Diligence standard is broadly worded, people mistakenly think it is vague and therefore subjective.

Due Diligence is measured by the standard of the reasonable peer, so one must be able to justify decisions in terms of an external standard.

Reasonable Peer

The “reasonable peer” is a hypothetical person who is experienced, knowledgeable, motivated, unbiased and without character flaws.

The “reasonable peer” is less than superman, but more than the “average peer”.

Reasonable Peer

Superman

Reasonable Peer

Average Peer

Reasonable Person

Average person

Due Diligence Variables

- What industry are you in?
- What are the intrinsic risks of the industry?
- Who are you in terms of position, authority?
- What are your duties?
- What knowledge and skill should a person like you have?
- What are existing standards?

Due Diligence Variables

- What constraints are you under?
- Who are you responsible for?
- What area are you responsible for?
- What risks have emerged today?
- What controls are available to you?
- What special or specific knowledge do you have today?

Due Diligence and Risk

We do not want risk assessment to be done solely in a staff function; done globally for the organization.

We want risk assessment to be done daily by individuals as they are routinely making decisions.

Risk

Personal assessment of risk allows an individual to figure out:

- what techniques to use
- when to use them
- how often to use them
- with what emphasis
- what to forego, as resources are limited

Risk is Always Shifting

Risk varies with:

Novelty – people, location, tools, equipment,
materials, processes, technology

Energy – forms of energy

Complexity

Matching Activities to Risk

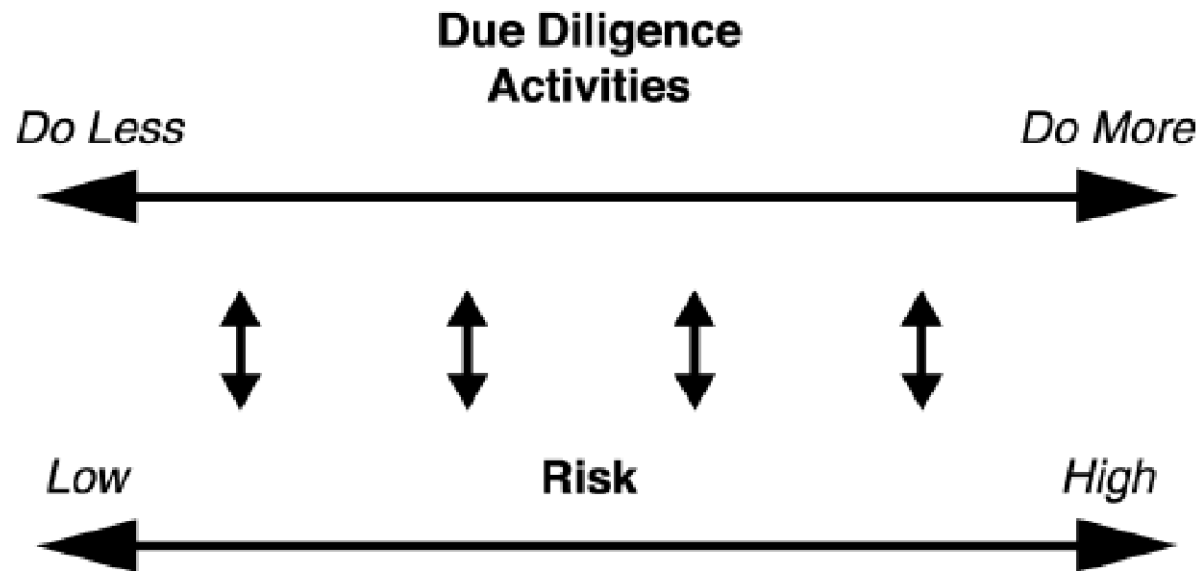
Think of a gradient of risk.

Think of a gradient for each due diligence activity.

Match the level of due diligence with the level of risk.

In a world of scarce time and resources, you must be able to show that your “balance” of effort is reasonable in the circumstances.

Due Diligence Maps Onto Risk



What's high risk?

- Novelty
- High Energy
- Special Structures
- Complex Tasks

Cost

Does cost affect what is “reasonable”?

Is there a set amount of money that is reasonable in all circumstances?

Always need to combine cost with risk.

Size of Organization

Do large, rich organizations have to do more than small organizations for due diligence?

All must reach the minimum standards in the regulations.

For general duty clauses, what would the reasonable PEER do? Larger must do more.

Industry

Is there an acceptable level of risk that is the same for all industries?

Once you reach that level of risk you can quit taking due diligence steps to further reduce risk?

No, get risk down as far as you can reasonably go ... different end points in different industries.

Technology

As technology improves, the standard for due diligence activities goes up.

New technologies often involve unknown risks, so caution ...

Due diligence does not mean latest technology, but is high risk, can mean “best practice”.

Requires constant surveillance of external environment.

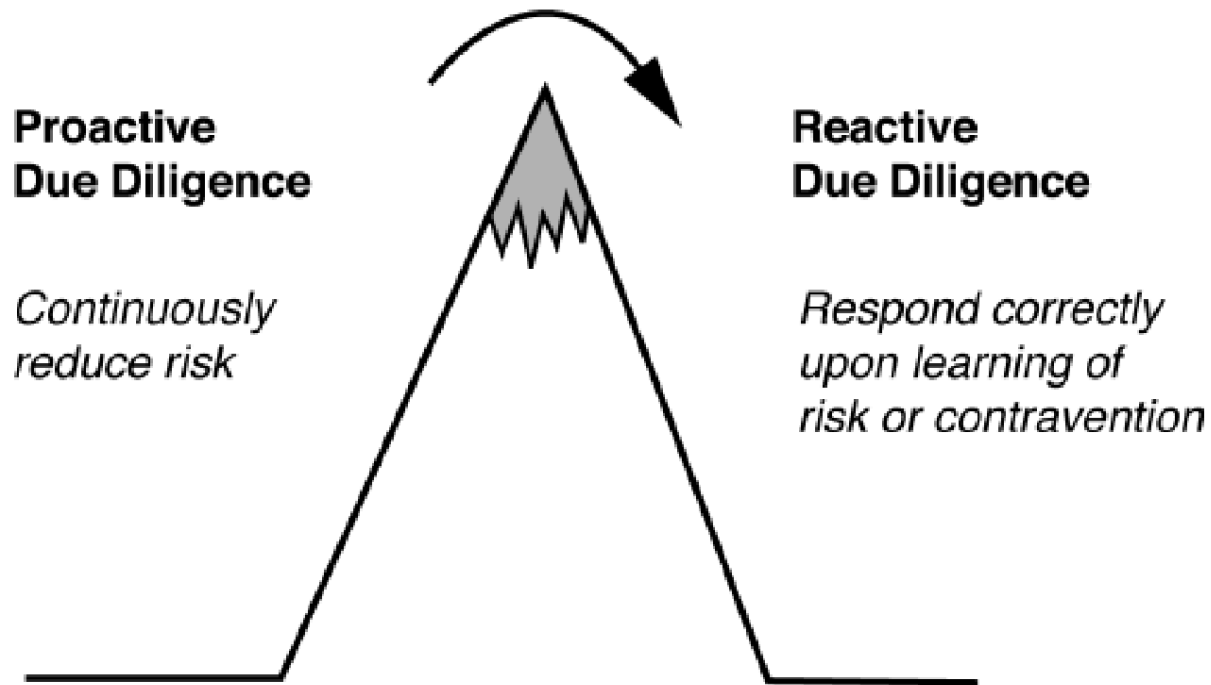
Knowledge

Knowledge changes everything.

What would the reasonable peer do, not knowing of specific defects, contraventions and hazards? -- proactive due diligence.

What would the reasonable peer do, **knowing** of specific defects, contraventions and hazards? -- reactive due diligence.

You Know!!



- 1. Duty to report upwards*
- 2. Duty to react with due diligence*

***Taken together makes the IRS
a dynamic problem-solving machine***

Due Diligence and the Management System

Due Diligence and the EHS System

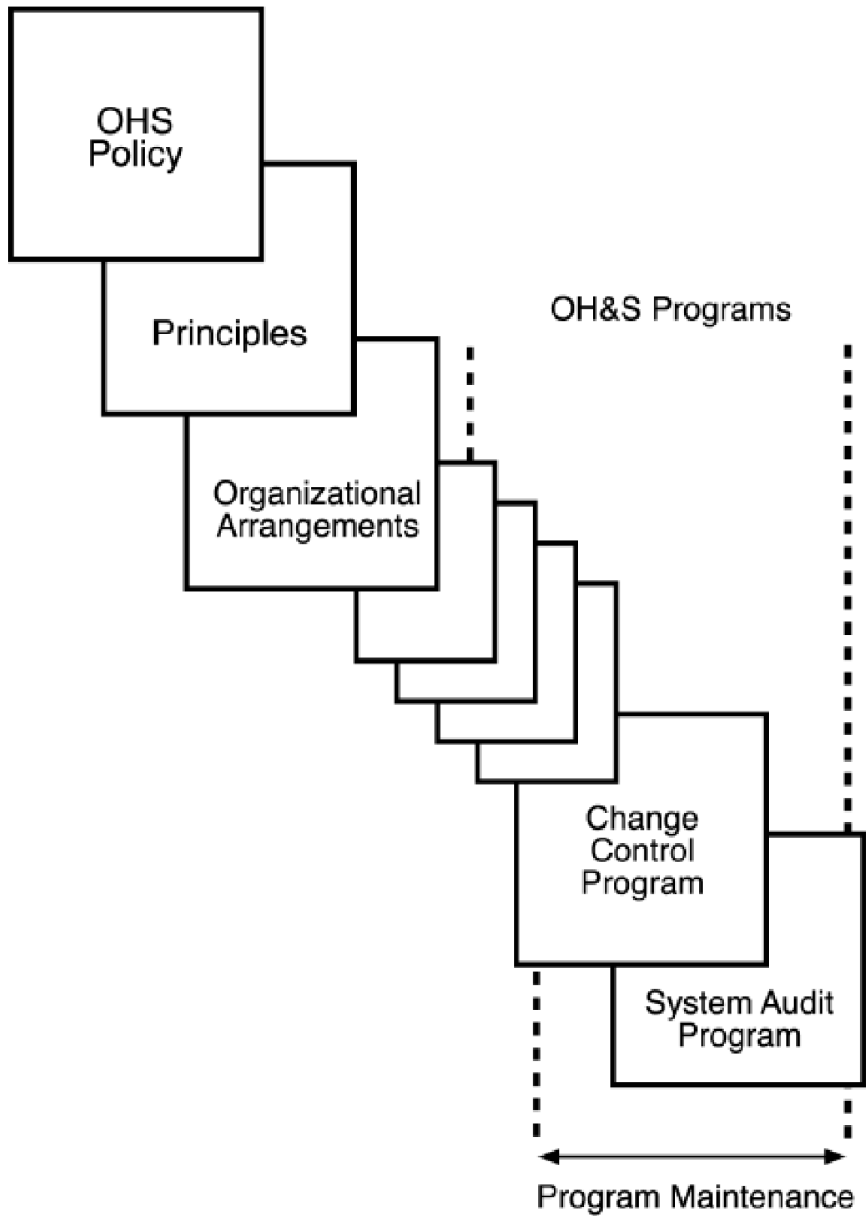
The EHS System should enable each individual and the organization to be duly diligent and to provide the evidence of due diligence should it be needed.

What are the Elements of an EHS System?

An Occupational Health and Safety and Environment (EHS) System is comprehensive (covering all functions, positions and activities) and is workplace-specific.

What are the Elements of an EHS System?

1. An EHS **Policy** Statement that provides the overarching set of values that the EHS System is designed to promote;
2. A set of prescriptive **Principles** that further develop the meaning and intent of the EHS Policy Statement;

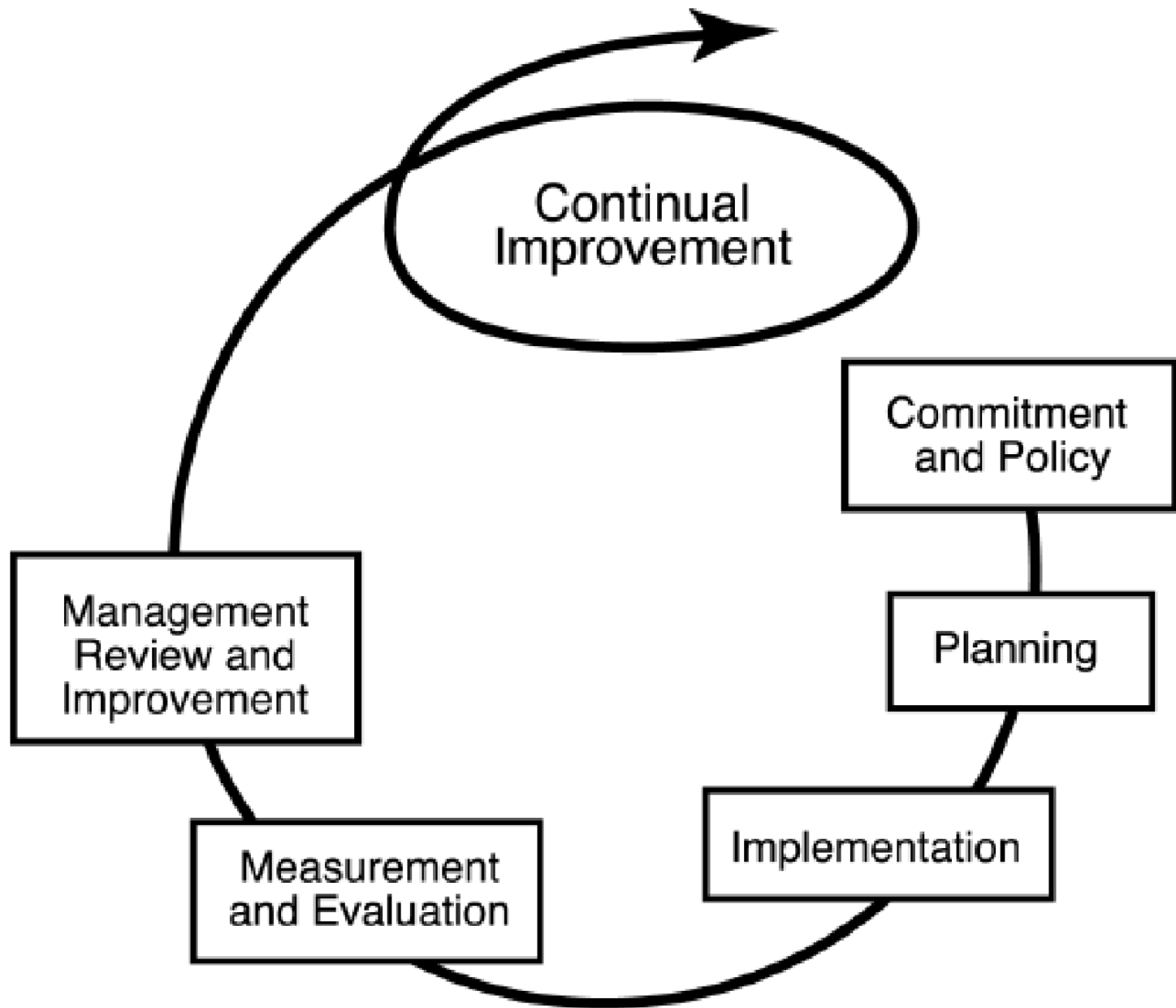


What are the Elements of an EHS System?

3. **Organizational Statements** that outline the distribution of authority, responsibility, and accountability for EHS throughout the organization; ie the IRS.
4. An interlocking set of **EHS Programs**, where each Program is associated with a set of EHS concerns and sets out the responsibilities, procedures, standards and so forth that address those EHS concerns; and

What are the Elements of an EHS System?

5. Special EHS programs, the **Change Control Program** and the **EHS System Audit program**, which ensures that the other system elements are implemented, maintained current and are continuously improved.



OHS & EMS

1. Must be integrated ... EHS
2. Risk done systemically and by individual
3. Quality process and CI by individual
4. Explicit IRS a necessity
5. Program content borrowed from existing MSs
6. Account for regulatory compliance and general duty clauses
7. Audits must include IRS audit