

Memo

To: All DSTs, Litigation Team, Negotiations Team, MEET, Provincial Services Team, and Management Team

From: Beverly Mathers, Senior Director, Labour Relations

Date: November 3, 2016

Re: **ONA Members Acting as Supervisors under the OHSA**

The Issue

This Direction replaces a previous Direction from November 20, 2015 titled *ONA Members Acting as Supervisors under the OHSA*. Do ONA members who assume supervisory roles in the workplace (e.g. evenings, nights and weekend RN in a long-term care home) fall within the definition of “supervisor” under the *Occupational Health and Safety Act (OHSA)*? If so, what are the obligations or liabilities of the member when in these?

Direction

1. The Ministry of Labour (MOL) has explanatory material posted on its website explaining which employees might qualify as a supervisors under the *OHSA*;

“In health care institutions like hospitals or nursing homes, an employer may assign responsibilities to a nurse that could make him or her a supervisor under the *OHSA*, depending on the circumstances. For example, a nurse acting in the capacity of a charge nurse may be considered a supervisor under the *OHSA* if the manager is not present on the unit or in the hospital or nursing home, and s/he has the following responsibilities:

- giving directions to other healthcare workers,
- monitoring how other healthcare co-workers carry out directions,
- reassigning duties, calling in extra staff when short staffed, and/or
- being in charge of the building.

In such a case, the employer would be obligated to train this nurse to the same competency level as any other supervisor.”

https://www.labour.gov.on.ca/english/hs/pubs/gl_supervisor.php

2. If ONA members assume roles that place them in “*charge of the workplace*” or with “*authority over a worker*” then using the above factors expanded on below, ONA should assess whether the member falls within the definition of “supervisor” under the *OHSA*. It is important to note that the role of “supervisor” for occupational health and safety purposes is different than the exercise of “managerial functions” for labour relations purposes under the *Labour Relations Act*.

3. For roles where it is possible (such as for charge nurses in large hospitals), ONA should advocate that its members not take on any duties in roles that potentially place them within the definition of supervisor under the *OHS/A*. For example, if it is possible to remove or reassign certain responsibilities away from ONA members to members of management (e.g. on-call manager) then ONA bargaining unit leaders should raise these issues with the employer at labour-management meetings or through the Joint Health and Safety Committee (JHSC) and notify their ONA Labour Relations Officer (LRO). It is, however, not clear that any agreement made with an employer in this respect will be accepted; it is up to the Courts or the Ontario Labour Relations Board (OLRB) to decide, based on the facts, whether someone meets the definition of “supervisor” under the *OHS/A*.
4. In some cases it may be impossible to avoid the designation of “supervisor” under the Act since this is a factual determination to be decided by a third party, namely, the Ministry of Labour, the Ontario Labour Relations Board, or a Court of Law. In cases where this is unavoidable, ONA should advocate to ensure that our members receive proper training regarding their responsibilities under the Act and that their roles and responsibilities regarding health and safety in the workplace are clearly defined. To do so, ONA should question pertinent members about their duties and request copies of the employer’s training materials, job descriptions, and supervisor training records.
5. Keep in mind the Ministry of Labour has confirmed that the short “awareness” training they offer on-line, is insufficient to make anyone “competent” as defined in the *OHS/A*. That training only makes employees aware of who qualifies as a supervisor, and what to expect of the supervisor. It does not make anyone “competent” to be a supervisor.
6. Large industries with mature internal responsibility systems have extensive, on-going training to make their supervisors competent. Supervisors who have front-line responsibility for worker safety, need to be comfortable handling concerns and issues. They also need to be versed in what to do if there is a work refusal, a serious injury, etc. The Workers Health and Safety Centre (WHSC) and the Public Services Health and Safety Association (PSHSA) offer some initial supervisor competency training and advice for the healthcare sector.
7. If you find supervisor preparation and training is lacking then ONA should strongly suggest that the JHSC recommend in writing to the employer that these deficits be remedied and that all supervisors be made “competent” as defined in the *OHS/A*. The JHSC can submit a collective recommendation to the employer, to which the employer has 21 days to respond in writing. If good faith attempts to reach committee consensus fail, the co-chair can independently write the employer with a recommendation, and the employer has the same legal duty to respond to a co chair’s written recommendation. If the committee or co-chair does not write a recommendation to the employer, ONA staff should assist the bargaining unit JHSC members to do so directly (see sample recommendation for supervisor competency attached).
8. If the employer fails to respond or if we are not satisfied with the response, then ONA should request that the JHSC contact a Ministry of Labour (MOL) inspector to attend the workplace and resolve the dispute. If the JHSC is unwilling to contact the Ministry then ONA JHSC members, executive or staff should do so directly. For guidance on when to call MOL and what to say, see:

http://www.ona.org/documents/File/guides/ONA_guidelines_whencallMoL_20120418.pdf

In some of ONA's workplaces, the MOL has issued orders. For sample orders posted on our website, see the following:

http://www.ona.org/documents/File/healthandsafety/mol/ONA_IntRespSyst_Law_SprvioryComp.pdf

http://www.ona.org/documents/File/healthandsafety/mol/ONA_IntRespSyst_LawSprvisorComp_201210.pdf

9. Send a letter to the Administrator/CEO to advise that appropriate supervisor training is required.
10. Grievances can also be filed where there are violations of the collective agreement (e.g. there is specific training referenced as a requirement).

Background

As professionals, nurses often direct or supervise the work of other staff. In some cases the supervision is of an oversight nature such as a RN in a long-term care home who is responsible for supervising all of the staff on the evenings, nights or weekend shift. An RN who acts as a charge nurse and directs healthcare workers in his/her area, may be in charge of the workplace and may be responsible for making important decisions that affect the health and safety of other workers. For instance, these nurses may face such issues as the outbreak of infectious disease, incidents of violence from a resident, or evacuating the Home in the case of a fire or other emergency. Similarly a nurse working in a small rural hospital may be responsible for the health and safety of other workers on evenings, nights and weekends.

The *Occupational Health and Safety Act (OHSA)* imposes a duty on employers and the persons they appoint to supervise the workplace to be knowledgeable and competent in the handling of workplace health and safety issues. If a supervisor falls short of this obligation, the employer can be charged for not appointing "competent" persons as supervisors. Supervisors themselves can also be charged and fined under the *OHSA* for not complying with legislated supervisor duties.

The Legislation

The relevant sections of the *Occupational Health and Safety Act* are set out below:

- s. 1. (1) "competent person" means a person who,
 - (a) is qualified because of knowledge, training and experience to organize the work and its performance,
 - (b) is familiar with this Act and the regulations that apply to the work, and
 - (c) has knowledge of any potential or actual danger to health or safety in the workplace;
 - ...
 - (h) take every precaution reasonable in the circumstances for the protection of a worker;
- s. 27.(1) A supervisor shall ensure that a worker,
 - (a) works in the manner and with the protective devices, measures and procedures required by this Act and the regulations; and

- (b) uses or wears the equipment, protective devices or clothing that the worker's employer requires to be used or worn.
 - (2) Without limiting the duty imposed by subsection (1), a supervisor shall,
 - (a) advise a worker of the existence of any potential or actual danger to the health and safety of the worker of which the supervisor is aware;
 - (b) where so prescribed, provide a worker with written instructions as to the measures and procedures to be taken for protection of the worker; and
 - (c) take every precaution reasonable in the circumstances for the protection of a worker.
- s. 66.(1) Every person who contravenes or fails to comply with,
- (a) a provision of this Act or the regulations;
 - (b) an order or requirement of an inspector or a Director; or
 - (c) an order of the Minister,

Is guilty of an offence and on conviction is liable to a fine of not more than \$25,000 or to imprisonment for a term of not more than twelve months, or to both.

<https://www.ontario.ca/laws/regulation/130297>

A Misleading Regulation

The *Occupational Health and Safety Awareness and Training Regulation 297/13* includes basic health and safety training for supervisors that is available in brief on-line modules; this training does not make anyone "competent" as defined in the *OHSA* and should not be considered for any supervisor competency training. This training only makes the participant "aware" of what a supervisor is and what to expect of the supervisor.

To reiterate, to qualify as a supervisor under the *OHSA*, the person must simply be "in charge of the workplace" or must have "authority over a worker". If the person meets this definition then the employer is responsible to ensure that the supervisor is competent in their knowledge of the *OHSA* and its regulations, and competent in their awareness of actual or potential health and safety risks in the workplace. A supervisor has a duty to warn other staff of potential or actual dangers in the workplace, and to take every precaution reasonable in the circumstances to protect other staff. If a supervisor fails in these or other duties, he or she may be subject to an individual fine up to \$25,000 and possible imprisonment. If an employer fails in its duty to appoint a competent person to supervision, then it too can be charged, convicted and fined.

For more information about who is a supervisor, see the Ministry of Labour's Guide entitled "Who is a Supervisor under the Occupational Health and Safety Act" at:
https://www.labour.gov.on.ca/english/hs/pubs/gl_supervisor.php

Case Law

Who is a Supervisor?

In *R. v. Walters*¹ an Ontario Court determined that a lead hand on a work crew for the City of Toronto's department of parks & recreation was a "supervisor" for the purposes of the *OHSA*. In that case a summer student was seriously injured when the blade of lawn mower amputated part of his foot. Following an investigation by the Ministry of Labour, it was found that the crew's lead hand, Mr. Walters, had disabled the emergency shut off switch on the mower. The Ministry charged Walters directly for failing to meet his obligations as supervisor under the Act.

Walter appealed arguing that he was not a supervisor and had no authority to hire, fire or discipline member of the crew but was simply the lead hand. The Court disagreed with this view stating that a supervisor can be someone who works alongside other staff but has certain hands-on authority to direct or assign the work. In Walters' case the other staff looked to him for instruction with equipment and it was expected that he would deal with a safety issues if there were problems with the equipment. In the end the Court held that Walters was both in "charge of the workplace" and had "authority over the other crew members" and as such met the definition of supervisor under the Act. The Court upheld a fine of \$500 against him.

In *Albarquez v. Ontario*² the Ontario Court of Appeal took a more restrictive approach to defining who is a "supervisor" for the purpose of the Act. In this case, ONA brought a lawsuit on behalf of a group of nurses who died or became ill as a result of SARs. In support of its claim ONA argued that the Ontario Government was a "supervisor" under the Act as the result of various directives it issued to Hospitals during the SARs crisis. In answering this question the Court of Appeal reviewed the meaning of "supervisor" under the *OHS* and concluded that being "in charge of the workplace" required hands-on authority; and that "authority over a worker" suggests the authority to promote, discipline, schedule work, deal with employee complaints, grant leaves of absence, and determine how an employee is to be paid.

In more recent decision, however, the OLRB interpreted the list of supervisory authorities set out by the Ontario Court of Appeal in the *Albarquez* case as not necessarily being a prerequisite to a finding that a person is a supervisor under the Act. In *Ontario (Health and Long Term Care, Land Ambulance Programs) v. CUPE Local 2974*.¹³ the Board ruled that a supervisor may not have the managerial authority described in the *Albarquez* case and still be a supervisor for the purpose of the Act. To that end, the Board stated that the definition of "supervisor" in the *OHS* does not reference managerial functions as defined in the *Labour Relations Act*. The Board concluded that to be supervisor under the *OHS* a person must simply have sufficient authority over a worker or control of the workplace such that they may affect the health and safety of workers.

Given the case law, it is not so clear that every charge nurse, or other nurse, on a Hospital unit would have sufficient control over the workplace or authority over workers to meet the definition of a supervisor under the Act. This determination by a court or tribunal would be dependent on the specific fact scenario. On the other hand, it is clearer that a registered nurse who is left in charge of a long-term care home or a small Hospital on evenings, nights or weekend shifts would likely meet the test given the level of control and authority that vests in their position.

Training for Supervisors

If it is found that certain ONA members fall within the meaning of supervisor under the Act then it is important that those members receive proper training from their employers. This issue was discussed in *OPSEU v. Ministry of Solicitor General and Correctional Services (Whitby Jail)*⁴ whereby the Ontario Labour Relations Board upheld a complaint by the Union that the employer in this case, the Whitby Jail failed to provide adequate training to prison guards who worked in acting manager positions. The Board held that at a minimum, persons in supervisory positions should be provided training to ensure their competence in understanding:

- how the *OHS* and Regulations apply to their specific workplace;
- how to deal with work refusals;
- functioning of the Joint Occupational Health and Safety Committee;
- duties imposed on employers, supervisors, and employees under the Act;
- what are the emergency contingency plans for a fire, bomb threat, hostage taking;
- how to delegate authority in cases of emergency;

- specific safety procedures in the workplace; and,
- their specific duties as supervisors.

The Board concluded that the employer's training was lacking in all of these areas and ordered the employer to develop and implement an appropriate training program.

ONA members are receiving supervisor competency training in some workplaces. In June, 2014, St. Joseph's Health Care London was convicted of infractions of the Occupational Health and Safety Act (OHSA) and fined \$50,000. The charges arose when a nurse sustained a fractured arm after entangling her foot in a cable attached to a patient bed, losing her balance and falling. "Dangling cords were a known hazard in the workplace and had been documented in the inspection records of the workplace joint health and safety committee. In this incident, the cord in question had not been secured by any means, although hooks, clips or Velcro had been previously identified as methods of securing cords."¹ Such hazards are easy to control, and in workplaces with robust internal responsibility systems, supervisors on a day-to-day basis would easily and regularly eliminate them. Since that incident, the employer has begun providing all RNs supervisor competency training.

As mentioned, we know that in industrial workplaces, long familiar with occupational health and safety law, supervisor competency training can be very extensive.

Criminal Negligence

Section 217.1 of the *Criminal Code* imposes a legal duty on employers and anyone who has authority, or undertakes to direct another person's work, to take reasonable steps to ensure the health and safety of workers. If such a person is negligent in his or her duties causing injury or death to a worker then criminal charges can be laid under this provision against the owners, directors, and supervisors who have authority or undertake to direct the work of others. The language of the s. 217.1 provides:

Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

A person convicted under this provision may be subject to life in prison in the case of death of a worker and up to 10 years in prison for injury. This section of the Criminal Code was introduced following a lengthy inquiry into the Westray Mine disaster in Nova Scotia in the 1990s. It appears that this provision is rarely invoked by the Crown. In ONA's experience, police officers do not appear to be familiar with these sections and how to apply them. For example, in the case of Lori Dupont, it was only after significant pressure from ONA, that the police re-visited the workplace to investigate whether the employer had violated these sections of the Criminal Code. In the end, charges were not laid.

It is important that ONA members who assume supervisory roles be made aware that their responsibilities in the workplace attract not only liability under the *OHSA* but may have criminal consequences.

¹MOL Court Bulletin, June 5, 2014.

http://www.ona.org/documents/File/healthandsafety/msd_ergonomics/ONA_ProsecutionStJosephsHealth_care_20140617.pdf

Conclusion

Whether a member is found to be supervisor under the *OHSA* is a factual determination that can only finally be decided when a complaint is made to the Ministry of Labour or the OLRB; or a prosecution is made before a Provincial Court. If possible, ONA should advocate that its members not take on roles that potentially place them within the definition of supervisor under the *OHSA*. To that end, ONA should ask employer's to reassign duties to members of management to avoid situations where ONA members are found to be "*in charge of the workplace*" or have "*authority over workers*". In some cases, this may be impossible (e.g. RNs scheduled on evenings, nights and weekend shifts at nursing homes, certain charge nurses, or nurses in a small hospital); therefore, **training, "to the same competency level as any supervisor" is required.** Particularly in such an instance, ONA should be advocating for role clarity and proper training to ensure that members are competent to carry out their responsibilities under the *OHSA*.

Competent supervisors who are skilled and knowledgeable in occupational health and safety law and principles address and resolve health and safety issues daily and take all precautions to protect workers. They are essential to the successful functioning of the internal responsibility system. It is ONA's experience that there are very few competent supervisors in the health care sector, which has some of the highest injury rates in the workforce. We encourage our JHSCs to press employers to make all supervisors in your workplace, including our members, competent.

Sample Template - Hazards and Recommendations to Employer

Page 2

Date: _____ Hand delivered to: _____

(Insert name of Employer)

(Insert address of Employer)

Pursuant to Section 9 (18) of the *Occupational Health and Safety Act, (OHS)* among our functions as a Joint Health and Safety Committee we are to

- “identify situations that may be a source of danger or hazard to workers
- make recommendations to the employer and the workers for the improvement of their health and safety
- recommend to the employer and the workers the establishment, maintenance and monitoring of programs, measures and procedures respecting the health and safety of workers, and the trade union representing the workers.”

As such, we or I (*if no consensus reached by JHSC then worker cochair should replace “we” with “I”*) have identified the following source(s) of danger or hazard, and/or concern(s), at [insert address of employer] and/or provide the following recommendations:

Identified Hazards or Dangers and/or concerns and their associated Recommendations

Hazard/Concern Recommendations

Risk posed by supervisors who are not “competent” as defined in the *Occupational Health and Safety Act*.

Permanent supervisors, workers acting as charge nurses, physicians and others who may have “charge of a workplace or authority over a worker”, are not trained in the *Occupational Health and Safety Act* and how it applies to the work. They are not trained to identify hazards or in how to take every precaution reasonable to protect workers.

The employer to demonstrate how it will ensure that all supervisors (including any nurses in charge) are “competent” as defined in the *OHS*.

As a minimum they should receive and be able to demonstrate their knowledge of

- the *OHS* and regulations;
- roles of workplace parties and duties and powers of those parties
- their personal duties to protect workers and their personal liabilities if they fail in their duties
- potential or actual dangers to health and safety in the workplace
- how to identify a hazard to workers (which, as the SARS Commission identified, may also constitute a hazard to patients)
- how to respond to a worker concern/report
- the reporting requirements for illness/injury
- how to investigate hazard/injury/illness and the legal need to determine and

¹ [2004] O.J. No. 5032 (Ontario Superior Court)

² [2009] O.J. No. 1814 (Ont. C.A.)

³ 2010 Can LII 11302 (OLRB)

⁴ [1998] OLRB May Rep