

## **Self-Regulation and Occupational Safety and Health Act (OSHA) 1994**

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On the 23<sup>rd</sup> of April 2016 representatives from the Society of Occupational and Environmental Medicine of the Malaysian Medical Association (SOEM-MMA) and the Malaysia Medical Association (MMA) were invited to attend a dinner talk by Datuk Hj. Shamsuddin Bardan, the Executive Director of Malaysian Employers Federation (MEF). MEF is a central organization of private sector employers which was established in 1959 to promote and safeguard the rights and interests of employers and currently has over 4,900 members (<http://www.mef.org.my>). The talk was on self-regulation and Occupational Safety and Health Act (OSHA) 1994 and organized by the Academy of Occupational and Environmental Medicine Malaysia (AOEMM) at the Royal Lake Club Kuala Lumpur. Dr Marzuki Isahak and Associate Professor Dr Victor Hoe represented SOEM-MMA and Dr Ravindran Naidu represented MMA. Other stakeholders present at the event included representatives from the Ministry of Health (MOH) Malaysia, Department of Occupational Safety and Health (DOSH), Social Security Organization (SOCSCO), Malaysia Trade Union Congress (MTUC) and academia.

An important concept in OSHA 1994 is self-regulation which was based on the Robens' Report. This report states that the responsibility for managing safety and health lies with those who create the risks and those who work with the risks. Gunningham (2011) defined self-regulation as the controlling of a process or activity by the people or organization that are involved in it rather than by an outside organization such as government.

There are three possible ways of implementing self-regulation which are (a) voluntary self-regulation, (b) mandated full self-regulation and (c) mandated partial self-regulation.

In voluntary self-regulation, the private firm or industry makes the rules and enforces, independent of direct government involvement.

In mandated full self-regulation, both rulemaking and enforcement are conducted by the firm or industry, but it is also officially sanctioned by the government, which monitors the program, and, if necessary, will take steps to ensure its effectiveness.

In mandated partial self-regulation, the firm or industry either makes the rules or enforces them but not both, i.e. either public enforcement of privately written rules, or governmentally mandated internal enforcement of publicly written rules.

The first of these examples is a form of 'pure' self-regulation, while the second and third are examples of co-regulation.

Important legal terms related to prosecution in OSH are (a) negligence, (b) contributory negligence and (c) vicarious liability.

Negligence is failure to take reasonable care to avoid causing foreseeable harm to another and which failure caused the harm.

Contributory negligence is failure of a person to take care of himself which caused his injury.

Vicarious liability in general means the employer is responsible for actions by his employees while performing the task (Law Dictionary, 2008).

Datuk Shamsuddin stated that although the OSH statistics indicate an improvement in standards, the authorities have increased site inspection and prosecution. Was it because one of their Key Performance Indicators was to achieve a targeted number of prosecutions a year? He felt that the authorities should carefully consider whether there was contributory negligence and negligence in cases of non-compliance especially under section 15 (General Duties of Employer) and section 17 (General Duties of Employers to persons other than their employees) under OSHA 1994. The authorities should also provide more guidance. Breaches that did not cause harm should result in issuance of notice of improvement instead of prosecution. Company Directors should not be held personally responsible for breaches of OSHA 1994. Employers should be allowed to perform self-auditing and companies that were cooperative should be treated differently from those that were recalcitrant. Funds should be allocated to enable industry to develop their own OSH best practice and guidelines.

The presentation generated a lot of interest and discussion. Dr Ahmad Fitri who represented DOSH clarified that DOSH's strategy is not to hunt for faults of employers and prosecute them. Site inspections are often done after significant incidents such as fatalities or complaints. In such cases significant breaches of law were often identified and prosecution was necessary. He also highlighted that DOSH has already conducted many educational programs to assist employers including small and medium enterprises such as the mentor-mentee program to comply with OSHA 1994.

The audience argued that since the main principle of OSH is prevention then it would be inappropriate to only prosecute employers for breaches of OSH law only after harm had occurred. Company directors should be personally liable for breaches of the law because they have control over their workplace and should take OSH seriously. Since good safety and health practices improve the bottom line and are also a moral obligation employers should be more proactive and aggressive in promoting safety and health.

The lack of employer developed OSH codes of practice, guidelines and self-auditing in Malaysia is an indication that self-regulation is not working and a review of this approach is required.