



December 10, 2009

Ontario Passes OHS Act Violence & Harassment-Related Provisions Into Law

On December 9, 2009, Bill 168, the Ontario government's detailed proposal to amend the *Ontario Occupational Health and Safety Act (OHS Act)* to require worker protection from violence and harassment, and establish new specific worker rights relating to violence, received third reading. The content of Bill 168 has now been finalized and Ontario workplaces will have a period of six months from the date of Royal Assent to ready their workplaces, policies, programs and practices to ensure compliance with these provisions. Bill 168 received robust debate, and was amended slightly before passage. This news letter provides highlights of new employer obligations and worker rights as they were amended and passed into law. The amendments contain seven key areas -- mandatory new employer policies, required programs, required training, required risk assessments, worker rights, obligations to respond to domestic violence in the workplace, and employer reporting requirements -- each of which is detailed in turn below.

1. EMPLOYER OBLIGATION TO PREPARE WRITTEN VIOLENCE AND HARASSMENT POLICIES

Where more than five workers are regularly employed at a workplace, Ontario employers will now be required to prepare and post a workplace violence policy. The specific definition of "workplace violence" enacted after debate has been slightly amended. "Workplace violence" under the OHS Act for purposes of employer obligations and exercise of worker rights means:

- (a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
- (b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to a worker;
- (c) a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

The third prong of the definition, defining violence as statements or behaviours threatening violence, was added after committee hearings regarding Bill 168.

With the passage of Bill 168 the OHS Act will also require employers to prepare and post a written policy respecting workplace harassment at every workplace where more than five workers are regularly employed. "Workplace harassment" is defined to mean "engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome." This very broad and encompassing definition of "workplace harassment" remains unchanged from the date that Bill 168 was first introduced in April, 2009.

2. WORKPLACE VIOLENCE AND WORKPLACE HARASSMENT PROGRAMS

Employers are to develop and maintain programs to implement both the workplace violence policy and the workplace harassment policy. Employers need to be aware that the specific and detailed requirements to prepare violence prevention programs and workplace harassment programs differ significantly under Bill 168.

Workplace violence programs require the following:

- measures and procedures to control risks identified in a violence risk assessment (discussed below);
- measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;
- measures and procedures for workers to report incidents of workplace violence to the employer or supervisor; and
- the means by which the employer will investigate and deal with incidents or complaints of workplace violence.

The program required to protect workers from workplace harassment may be more limited. Minimum mandatory requirements are that the program:

- include measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor; and
- set out the means by which the employer will investigate and deal with incidents and complaints of workplace harassment.

3. RISK ASSESSMENTS FOR POTENTIAL WORKPLACE VIOLENCE

Bill 168 requires that employers assess risks of workplace violence that may arise from the nature of the workplace, the type of work, or the conditions of work. No assessment is specifically required under the OHSA for risks of workplace harassment. The employer's risk assessment is required to take into account:

- circumstances that would be common to similar workplaces; and
- circumstances specific to the workplace.

Once complete, the employer must advise the joint health and safety committee, health and safety representative, or workers directly (if there is no committee or representative) of the results of the assessment and provide a copy of the assessment if in writing. Workplaces must be reassessed for risks of workplace violence as often as necessary to ensure that the policy and program continue to protect workers from workplace violence.

4. REQUIRED WORKER TRAINING RESPECTING VIOLENCE AND HARASSMENT

The amendments require that employers train workers in the contents of workplace violence and workplace harassment policies.

The employer's obligation to provide information and training under section 25 of the OHSA and a supervisor's duty to advise workers of any potential hazard under section 27 OHSA will also include a new and rather controversial obligation. The amendments will require the employer and supervisor to provide information, including personal information, related to risks of workplace violence from a person with a history of violent behaviour (for example a patient, customer or another worker) if the worker can be expected to encounter that person during the course of their work, and there is a risk of violence likely to expose the worker to physical injury. Disclosure of personal information must be limited to that information reasonably necessary to protect the worker from physical injury.

5. NEW WORKER RIGHTS TO REFUSE WORK FOR WORKPLACE VIOLENCE

The amendments contained in Bill 168 clarify the right to refuse work for conditions in the workplace that constitute "workplace violence." Historically, it has not been entirely clear that a worker may refuse work for workplace violence. The OHSA is now amended to permit a worker to refuse work if "workplace violence is likely to endanger himself or herself," in addition to other grounds upon which a worker may refuse work. There is no amendment to the OHSA to permit a worker to refuse work where they believe that workplace harassment is likely to endanger the worker.

Notably, Bill 168 changes the obligation of a worker to remain near his or her workstation until an investigation is completed. Once the amendments contained in Bill 168 take effect (six months after receiving Royal Assent), the work refusal provisions in the OHSA will require that the refusing worker remain in a safe place "that is as near as reasonably possible to his or her workstation and available to the employer or supervisor for the purposes of the investigation." As such, this change will apply to all work refusals, not just those exercised on the new ground of workplace violence. This change was not amended from the April 2009, introduction of Bill 168.

Bill 168 does not alter the limited right to refuse work for those employed in certain occupations such as police officers, firefighters, health care workers and workers in correctional institutions.

6. EMPLOYER OBLIGATIONS TO RESPOND TO DOMESTIC VIOLENCE

The most novel and controversial provisions of the proposed Bill 168 amendments to the Ontario OHSA are those related to domestic violence. The original proposals in the Bill 168 from April, 2009, have passed without amendment. The OHSA will now require an employer to take every precaution reasonable in the circumstances for the protection of a worker if the employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace. Ontario will be the only jurisdiction in Canada to have OH&S provisions specifically requiring that the employer react to domestic violence. No specific reasonable precautions have been outlined. Ordinarily the obligation to take every precaution reasonable in the circumstances requires that the employer have regard to available standards, guidance from public organizations, and engage in creative solutions to protect workers from novel or complex workplace risks.

7. REPORTING WORKPLACE VIOLENCE TO ONTARIO MINISTRY OF LABOUR

The amendments now require that employers prepare a notice under section 52 of the OHSA in the event that a worker is disabled from their regular duties, or requires medical attention, as a result of workplace violence. These provisions are added to section 52 of the OHSA.

SAVE THE DATE

JANUARY 19, 2010 8:00 A.M. – 10:30 A.M.

Heenan Blaikie Offices Toronto

Heenan Blaikie's Ontario Labour & Employment Group Presents – Complimentary Breakfast Seminar on the New OHSA Workplace Violence and Harassment Provisions

Amendments to the Ontario OHSA add to an already complex web of existing employment-related obligations, risks, worker rights and potential remedies for violence, bullying and harassment in the workplace. Human rights provisions, common law obligations, and now detailed OHSA provisions all require that employers create comprehensive policies and take specific ongoing action to prevent violence, bullying and harassment. Worker rights and potent remedies meted out by courts and tribunals have sent an ongoing message to workers that they need not tolerate such unwelcome behaviour in the workplace. This seminar will provide clear commentary on Bill 168 and the new obligations in the Ontario OHSA. Our OHS Group will provide practical and detailed guidance for preparing your workplace including precedent policies and risk assessment templates. The guidance provided will equip employers to meet the new OHSA requirements, and also to manage the multiple obligations and legal risks associated with this developing area. Further information on our breakfast seminar will follow by email within the next week. For further information in the meantime, please contact Cheryl A. Edwards: 416 360.2897, cedwards@heenan.ca or Jeremy Warning: 416 643.6946, jwarning@heenan.ca

Heenan Blaikie's Toronto Office is now at the Bay Adelaide Centre, a LEED Gold Standard building in the heart of Toronto's downtown business district. Our new address is 333 Bay Street, Suite 2900, PO Box 2900, Toronto, ON M5H2T4. All phone numbers and email addresses remain the same.

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