

Ont to amend OHSA with workplace violence, harassment provisions

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Violence and harassment in the workplace will no longer be tolerated in Ontario if amendments to the province's Occupational Health and Safety Act (OHSA) introduced recently in the Legislature are passed. Though Ontario will not be the first province to explicitly address workplace violence and harassment, it will be the first to address domestic violence at work. (See also "Ont pushed to address workplace violence, harassment" in this month's issue of EHScpliance.ca newsletter.)

Ontario Labour Minister Peter Fonseca announced the amendments to OHSA on April 20, 2009 at the Health and Safety Canada 2009 IAPA (Industrial Accident Prevention Association) Conference & Trade Show. Later that day, he introduced the amendments as Bill 168, the Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009, in the Legislature. The amendments are expected to come into force six months after Royal Assent.

The proposed amendments would:

- * require employers in all sectors to prepare policies and programs to help prevent workplace violence and harassment
- * require employers in all sectors to take reasonable precaution to protect an employee from domestic violence that enters the workplace
- * allow workers to remove themselves from harmful situations if they have reason to believe they are at risk of imminent danger due to workplace violence
- * require employers to disclose personal information about a worker with a history of violent behaviour
- * require employers in all sectors to prepare reports of workplace injuries due to workplace violence.

The amendments follow a discussion paper released in September 2008 for public comment (see the September 2008 issue of EHScpliance.ca newsletter under "Ontario consulting on workplace violence" as well as the Legal Perspective column in the October 2008 issue under

"New workplace violence initiatives"). Fonseca said the government heard comments from employers, workers, and health and safety groups.

Currently, workplace violence is not defined in OHSA or its regulations. However, the general duty clause 25(2)(h) of OHSA requires an employer to take every reasonable precaution to protect workers from harm, which includes preventing workplace violence.

Bill 168 defines 'workplace violence' to mean:

* the exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker,

* an attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker.

Under Bill 168, an employer with more than five regularly employed workers must prepare a written policy for workplace violence and one for workplace harassment. An employer must post the policies at a conspicuous place in the workplace and must review the policies at least annually.

Workplace violence program

The Bill requires an employer to develop a workplace violence program to implement the workplace violence policy. The employer must first assess the risk of workplace violence and report the results of the assessment to the joint health and safety committee (JHSC) or to a health and safety representative. If there is no JHSC or health and safety representative, then the results must be reported to the workers. The risk must be reassessed as often as necessary to protect workers from workplace violence.

The workplace violence program must include measures to control risks of workplace violence identified in the risk assessment, measures to summon immediate assistance when workplace violence occurs, and measures for workers to report incidents or threats of workplace violence. The program must also set out how the employer will deal with incidents, complaints and threats of workplace violence.

An employer must provide workers with information and instruction on the contents of the workplace violence policy and program.

If an employer is aware or ought to be aware that domestic violence that is likely to expose a worker to physical injury may occur in the workplace, the employer must take every reasonable

precaution to protect the worker. However, an employer is not required to assess the workplace for the risk of domestic violence.

As well, Bill 168 requires an employer or a supervisor to provide to a worker personal information related to a risk of workplace violence from a person with a history of violent behaviour, if "the worker can be expected to encounter that person in the course of his or her work; and the risk of workplace violence is likely to expose the worker to physical injury."

Cheryl A. Edwards and Jeremy Warning, respectively partner and senior associate at Heenan Blaikie LLP, say in a release that the personal information requirement is controversial, as the Bill "does not provide specific guidance on the type or amount of personal information which may be provided in such circumstances." The Bill says only that "no employer or supervisor shall disclose more personal information in the circumstances ... than is reasonably necessary to protect the worker from physical injury."

Bill 168 also defines 'workplace harassment' 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". The definition goes further than harassment in Ontario's Human Rights Code, which relates to sexual or racial harassment.

Workplace harassment program

Under Bill 168, an employer must also develop a workplace harassment program to implement the workplace harassment policy. The program must include measures for workers to report incidents of workplace harassment and set out how the employer will deal with incidents and complaints of workplace harassment. An assessment of the risk of workplace harassment is not required.

As with the workplace violence policy and program, an employer must provide workers with information and instruction on the contents of the workplace harassment policy and program.

The Bill amends a worker's right to refuse unsafe work to include the right to refuse work if workplace violence is likely.

As well, the Bill provides authority to make regulations, including

* requiring an employer to designate a workplace coordinator with respect to workplace violence and harassment, and prescribing the duties of the coordinator

* in the case of a worker with a limited right to refuse work, specifying situations in which a danger to health or safety is inherent in the worker's work or a normal condition of employment.

With respect to an employer's obligations to protect workers from workplace violence and harassment, Edwards and Warning say that the Bill "does not provide for an express employer duty to protect workers from harassment; an employer's obligation is to prepare a policy, program, ensure training, reporting and response mechanisms. Bill 168 does provide for an employer duty (under section 25 OHSAs as applicable), and supervisor and worker duties (under their duties as applicable), with respect to workplace violence."

Though the wording is not clear, Edwards and Warning say that the Ministry of Labour "could prosecute for a failure to protect workers from workplace violence in addition to its power to prosecute for failing to create and implement the required policies and programs."

They also say that Bill 168 "may open the door to a broader range of reprisal complaints than currently permitted." They point out that the Ontario Labour Relations Board, when considering reprisal complaints, "has expressed strong doubt that the current OHSAs covers non-physical forms of violence. The Board has prevented workers complaining of a reprisal related to 'harassment' to seek a remedy under the OHSAs for that reprisal."

The Ontario government is also launching specific measures to tackle workplace violence in the health care sector. Two newly appointed 'healthy work environments champions' - Rob Devitt, president and CEO of Toronto East General Hospital, and Dr. Heather Laschinger, professor and associate director of nursing research at the University of Western Ontario - will work to build workplace safety in health care workplaces across the province.

The government added that Bill 168 will enhance the Safe at Work Ontario strategy, which focuses on improving workplace health and safety practices through education, training, and enforcement of provincial legislation with prevention and education partners - Ontario's Workplace Safety and Insurance Board (WSIB) and health and safety associations, respectively.

From April 1, 2008 to September 30, 2008, inspectors made 198 field visits and issued 185 orders related to workplace violence, using the general duty clause 25(2)(h) of OHSAs requiring employers to "take every precaution reasonable in the circumstances for the protection of a worker".