

STAYING AHEAD OF BILL 168: WHAT YOU NEED TO DO BEFORE JUNE 15TH

By: Kevin Robinson

Introduction

Bill 168 received Royal Assent last month. As a result, amendments to the *Occupational Health and Safety Act* (“OHS”) will come into force effective June 15, 2010.

These amendments impose significant obligations on virtually all Ontario employers in respect of workplace violence and, for the first time in Ontario, workplace harassment.

Presently, the Ontario Human Rights Code (“Code”) prohibits harassment in the workplace based on the prohibited grounds (e.g., sex, race, religion, sexual orientation, etc.). However, the Code does not apply if the harassment is not related to one of those prohibited grounds (e.g., workplace bullying). Although some employers have created policies dealing with psychological/personal harassment and bullying, until now, there has been no legislation in Ontario which has required them to do so.

The OHS will define workplace harassment as,

...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 is the same definition as the Code, absent the requirement that the harassment be related to a prohibited ground of discrimination.

Despite the lack of specific legislation to date, we have always recommended that employers include personal/psychological harassment in their harassment policies and conduct respect in the workplace training with their employees. Now it seems that there will be a legislative obligation to do so. This also has the advantage of improving employee well-being and retention, reducing the risk of stress leaves and related absences, reducing “presenteeism” and reducing the risk of a constructive dismissal claim based on bullying or a poisoned work environment.

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What This Means to You

Effective June 15, you will have to do several things.

1. Assessing and Advising on the Risk of Workplace Violence

First, you must perform a risk assessment to determine the risk of workplace violence.

Under the *OHSA* “workplace violence” will be defined as,

- (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 the 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.

Although the manner in which this assessment must be conducted is not outlined in Bill 168, it does say that the assessment should take into account circumstances that would be common to similar workplaces, as well as circumstances specific to your workplace. You are also required to distribute the results of this assessment to your health and safety committee or representative.

Workplace violence will come under the “work refusal” procedures of the *OHSA*, meaning that employees could refuse to perform work when there is a risk of workplace violence. You will also be required to notify the Director of Occupational Health and Safety if there are any incidents of workplace violence.

You will also be required to protect employees from “domestic violence that would likely expose a worker to physical injury [that] may occur in the workplace”. This is a significant development as it will extend not only to those situations when you are actually aware of domestic violence but also to occasions when you “ought reasonably to be aware”. How far this will extend remains to be seen.

Equally challenging is the new requirement that employers provide workers with information, *including personal information*, related to a risk of workplace violence from a person with a history of violent behaviour. This causes considerable concern as it will require a delicate balancing of your duty to provide this information and your duty to protect the privacy of your employees.

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2. *Developing Policies and Investigating Complaints*

In addition to assessing and advising workers of the risk of workplace violence, you must also develop policies with respect to both violence and harassment, and create a “program” for dealing with them.

With respect to *workplace violence*, the policy must:

- (a) include measures to control the risks identified in the assessment,
- (b) identify the processes by which immediate assistance can be summoned when workplace violence occurs or is likely to occur,
- (c) describe the method by which violence should be reported and describe how the employer will investigate and deal with those complaints.

If you included personal or psychological harassment in your policy before Bill 168, you would be well-advised to review it to ensure that it meets the requirements set out in Bill 168, including the methods by which complaints will be received, investigated and dealt with.

These new policies must be in writing and reviewed at least once per year. They must also be posted “in a conspicuous place in the workplace”.

You will also need to ensure that you have a “program” in place that

- (a) includes measures for reporting harassment; and
- (b) sets out how you will investigate and respond to workplace harassment.

Given recent cases in which employers have been sued for negligent investigations, it is important to implement a legally sound and appropriate investigation procedure.

3. *Training Employees*

Third, you will be obligated to provide information and instruction to your employees about your policies and their rights and obligations regarding workplace harassment and violence. In our view, you would be well-served to train your employees and management team not only on workplace harassment and violence as per the *OHSA*, but also on harassment under the *Code*. Employees rarely make the distinction between discriminatory and personal harassment and a broader explanation would assist you in meeting your requirements under both pieces of legislation.

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Conclusion

With Bill 168 coming into force, you would be wise to take the following steps, *before* June 15:

- (a) develop written policies;
- (b) revise your existing procedure if necessary, or develop a new one, for managing workplace harassment and violence complaints;
- (c) conduct a risk assessment in respect of potential workplace violence; and
- (d) train employees and managers on their rights and obligations regarding workplace harassment and violence.

Although the requirements may seem onerous, we believe that implementing these measures will assist you in creating a harassment-free and productive workplace.

If you require any further information regarding your obligations under Bill 168, please contact any of our lawyers.

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