

# Bill 168: Workplace Violence and Harassment Amendments to OHS

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On April 20, 2009, the Ontario Government introduced Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009* which amends the *Occupational Health and Safety Act* (“OHS”) to impose new obligations on employers with respect to workplace violence and harassment. Bill 168 passed third and final reading in the Ontario legislature on December 9, 2009 with few substantive changes from the original Bill and received royal assent on December 15, 2009. The Bill will come into force and become law on June 15, 2010.

Under Bill 168, employers must devise workplace violence and harassment policies, develop programs to implement such policies, and engage in assessments to measure the risk of workplace violence. In addition, work refusal rights and the duties of employers and supervisors under *OHS* have both been clarified to specifically apply to workplace violence.

The main features of Bill 168 are summarized below:

## **Definitions of Workplace Violence and Harassment**

The most significant change made to the original Bill is the inclusion of a new, expanded definition of “workplace violence”. Prior to third reading, only actual and attempted physical violence was included in the definition. Now, under the expanded definition, workplace violence includes not just actual and attempted physical violence but also *threats* of physical violence. Under Bill 168, “workplace violence” 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 the worker; or
- (c) a statement or behaviour that it 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.

With subsection (c) now included, "statements" or "behaviours" that could reasonably be interpreted as a *threat* of physical violence will now be covered under the "workplace violence" definition.

Under Bill 168, "workplace harassment" means "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." Perhaps the most notable aspect of this definition is that, unlike "harassment" as defined in the *Human Rights Code*, the definition of "workplace harassment" under Bill 168 includes conduct that is *not* related to a prohibited ground of discrimination, e.g., sex, age, ethnicity, disability, religion, etc.

Case-law from other jurisdictions has broadly interpreted what constitutes "workplace violence" and "workplace harassment". However, such case-law has also found that performance management and normal supervision and direction of employees will not generally be found to be "harassment." It remains to be seen if this approach will be followed in Ontario.

### **Workplace Violence and Harassment Policies**

Bill 168 requires employers with more than 5 employees to prepare written policies dealing with workplace violence and harassment. Workers must be trained on these policies, which must be posted in conspicuous places in the workplace and reviewed by the employer annually.

### **Workplace Violence Assessments**

Bill 168 requires employers to assess the risk of workplace violence that may arise. In addition to taking into account its own workplace conditions, an employer's assessments must also take into account the conditions of other similar workplaces.

The employer must advise the joint health and safety committee (or the health and safety representative in smaller workplaces) of the results of the assessment. If the assessment is in writing, a copy must be provided. If the workplace does not have a joint health and safety committee or a health and safety representative, the workers must be advised of the results of the assessments and of how to obtain a copy of the assessment (if the assessment is in writing). It is important to note that there is no strict obligation to conduct assessments on the risk of workplace harassment. However, as a best practice, employers should still assess whether harassment may be occurring the workplace.

### **Workplace Violence Reassessments**

Bill 168 requires that employers reassess the workplace for workplace violence risks "as often as is necessary" to ensure the workplace violence policy and program

protects workers. Although there is no specification as to the frequency of such reassessments, it is suggested that employers conduct such reassessments after an incident of workplace violence or annually (whichever occurs first).

Risk assessments should be conducted by competent individuals who have broad experience and understanding of the workplace. Detailed documentation of the assessment should be maintained.

### **A Program to Implement the Policies**

Under Bill 168, employers are required to develop and maintain a program to implement workplace violence and harassment policies.

The workplace violence program must include measures and procedures to:

- control the risks identified in the workplace violence assessment;
- call for immediate assistance when workplace violence occurs or is likely to occur, or when a threat of workplace violence is made;
- report incidents or threats of workplace violence to the employer or supervisor; and
- establish how the employer investigates and manages incidents, complaints or threats of workplace violence.

The workplace harassment program must include procedures for reporting, investigating and dealing with incidents of workplace harassment.

The requirement to establish and implement such programs is an expansion of the long-standing duty of employers under s. 25 of the *OHSA* to “develop, maintain, and post” programs to implement occupational health and safety policies.

### **Employee Training**

Employers are required to provide information and instruction on the contents of the policy and program with respect to workplace violence and harassment. The information and instruction must be appropriate and relevant for the individual worker and should be individualized to be most effective. The training should be “in person”. In other words, electronic acknowledgements of a workplace violence and harassment policy will likely not be sufficient.

## Domestic Violence

Bill 168 specifically addresses the issue of domestic violence in the workplace by requiring employers to "take every precaution reasonable in the circumstances" to protect workers from domestic violence that would likely cause physical injury to workers in the workplace. This obligation on the employer arises only if the employer is aware, or ought reasonably to be aware, of the situation. What constitutes "domestic violence" is not defined.

## Disclosure of Persons with a Violent History

One aspect of Bill 168 that may prove contentious is the obligation on employers and supervisors to provide information, including personal information, to a worker about a person with "a history of violent behaviour" if:

- the worker could be expected to encounter that person in the course of his/her work; *and*
- there is a risk of workplace violence likely to expose the worker to physical injury.

Bill 168 contains no guidance on who would be a person with a "history of violent behaviour" or what types of information should be disclosed. However, it is interesting to note that the person must have a history of "violent" behaviour (and not necessarily "harassing" behaviour) in order for the disclosure obligation to be triggered. Also, the "violent" behaviour does not necessarily have to be behaviour for which the individual was criminally charged.

## Work Refusals

Bill 168 clarifies that a worker may refuse to work where he/she has reason to believe that he/she is in danger of being a victim of workplace violence. The normal work refusal process would be triggered (i.e., the employer would investigate the refusal, followed by a Ministry of Labour inspector if necessary).

There is no corresponding right to refuse work where "harassment" is believed likely to endanger the health and safety of a worker. Further, *OHS*A will continue to prohibit workers in certain public and broader public sector workplaces from refusing work where the unsafe condition is "inherent in the work" or is a "normal condition of employment".

## What Should Employers Do?

Bill 168 will become law on June 15, 2010. The legislature provided a 6 month period from Royal Assent for employers to organize their affairs and review their existing policies and procedures. With June 15, 2010 approaching, employers need to be diligent and develop/implement a plan to ensure compliance and to address the risk of workplace violence and harassment in the workplace. For example, Employers should:

- Create written workplace violence and harassment policies. Such policies should:
  - be brief and simple;
  - convey that all employees are responsible for maintaining a safe workplace;
  - provide clear definitions and/or examples of prohibited conduct;
  - cover incidents involving co-workers as well as incidents involving outside individuals;
  - send a strong message that workplace violence and harassment is not tolerated;
  - provide a reporting and complaint procedure as well as the steps to be taken to deal with or investigate any complaint;
- Train employees on such policies.
- Undertake risk assessments to determine the possibility or prevalence of workplace violence or harassment and keep appropriate documentation of the process. The assessment process should include interviews with a sample of workers, a review of the physical workplace, a comparison of similar workplaces, a review of any previous incidents and the likelihood of interactions with the public which could lead to danger or confrontation.
- Disclose incidents of workplace violence and harassment with the joint health and safety committee and any risk assessments undertaken;
- Provide ways for employees to report instances or risks of workplace violence and harassment (e.g. in the policy);

- Discipline employees for not following workplace violence and harassment policies or for committing workplace violence or harassment;
- Offer a confidential employee assistance program to allow employees subject to workplace violence or harassment, or those with personal problems, to seek help;
- Ensure that proper security measures are in place at the workplace to protect workers from members of the public or customers; and

Keep detailed records of any workplace violence or harassment, investigation or work refusal.

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