

Workplace Violence & Harassment: A Compliance Guide for Ontario Employers



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A. INTRODUCTION

Bill 168 came into effect on June 15, 2010. Bill 168 amended the Ontario *Occupational Health and Safety Act* R.S.O. 1990 C.O-1 (“OHSA”) and imposed sweeping new duties on employers aimed at reducing the risk of violence and harassment in the workplace. Prior to Bill 168 there was no specific legislation in Ontario that addressed employers’ specific duties to prevent workplace violence.

Then, in 2016, Bill 132 introduced further amendments into the OHSA that more robustly address workplace violence and harassment.

This practical guide explains what Ontario employers need to know about workplace violence and harassment and their new obligations under OHSA.

B. DUTIES ON EMPLOYERS

The OHSA now sets out the following express duties and obligations on employers:

- Conduct an assessment of the risk of violence in the workplace;
- Implement policies and programs to deal with workplace violence and harassment and review them at least annually;
- Instruct and inform employees as appropriate on the contents of the policies and programs;
- Warn employees about the risk of violence in the workplace; and
- Take measures in certain circumstances to protect employees from domestic violence occurring in the workplace.

Before we review in more detail the nature of these duties, we will review the definitions of workplace violence and harassment now set out in the OHSA.

C. DEFINITIONS OF WORKPLACE VIOLENCE AND HARASSMENT

1. Workplace Violence

The OHSA sets out a broadly worded three-part definition of workplace violence¹:

- 1) The exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker;
 - Note: The exercise of physical force, without injury, still constitutes workplace violence.
- 2) An attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker; and

¹ Section 1(1) OHSA.

- Note: a failed attempt to exercise physical force against a worker in a workplace still constitutes workplace violence.
- 3) 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.
- Note: Front line managers may be asked to discern whether a statement or behaviour could reasonably be interpreted as 1) threatening and 2) could cause physical injury.
 - As a general rule, managers should follow the procedure set out in the employer's workplace violence and harassment policy and program unless they can unequivocally say that the statement or behaviour could not be construed as a threat to exercise physical force and there is no chance of physical harm.

Examples of Workplace Violence can include but not be limited to:

- Verbally threatening to attack a worker;
- Leaving threatening notes or sending threatening emails;
- Shaking a fist in a worker's face;
- Wielding a weapon at work;
- Hitting or trying to hit a worker;
- Throwing an object at a worker;
- Sexual violence against a worker;
- Trying to run down a worker using a vehicle or equipment such as a forklift.

The definition of workplace violence is not meant to capture accidental situations that may result in the application of physical force. Further, the definition does not extend to psychological harm or injury as a form of workplace violence.

2. Workplace Harassment

In the past, the definition of harassment was legally tied to a prohibited ground of discrimination under the Ontario *Human Rights Code* R.S.O. 1990, CHAPTER H.19 ("Code") i.e. race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability.

Under the OHSA, legally prohibited harassment is not limited to a prohibited ground under the Code. It can apply to any "*course of vexatious comment or conduct against a worker in the workplace that is known or ought reasonably to be known as unwelcome.*"²

² Section 1(1) OHSA.

So, what does this legal definition mean in practice?

- 1) It has to be a “*course of comment or conduct*” i.e. typically more than one incident;
- 2) It has to be “*vexatious*” i.e. demeaning, offensive, insulting, intimidating, embarrassing, humiliating, or bullying; and
- 3) It has to be “*unwelcome*” e.g. someone cannot instigate a practical joke and then complain about it if someone reciprocates in a similar manner.

Workplace harassment includes, but is not limited:

- Communication that is demeaning, offensive, insulting, intimidating, embarrassing, humiliating, or bullying;
- Targeting an individual with differential treatment of an annoying nature;
- Excluding/shunning;
- Impeding work performance/sabotaging;
- Spreading gossip and rumours, including negative blogging, or cyberbullying;
- Inappropriate sexual touching, advances, suggestions or requests;
- Displaying or circulating offensive pictures or materials in electronic or print form that are known or ought to be known to be offensive to an employee.

Workplace harassment is not meant to prevent employers from disciplining or managing employees. Workplace harassment does **not** include:

- Performance management;
- Exercise and delegation of management authority;
- Operational requirements or directives;
- A disagreement or misunderstanding;
- Work related change e.g. change of location, co-workers, job assignment;
- Discipline;
- Less than optimal management;
- A single comment or action, unless it has serious, harmful and lasting effects;
- Rudeness, unless it is extreme and repetitive.

D. DEVELOPING WORKPLACE VIOLENCE AND HARASSMENT POLICIES AND PROGRAMS

The OHSA requires that employers implement both policies and programs to deal with workplace violence and harassment. A policy is as a general statement of principle, whereas a program sets out the measures used to implement these policies.

Basic Requirements for the Policies

Under the OHSA, every employer in Ontario must prepare and review, at least annually, a policy on workplace violence and harassment.³ These policies should be signed and dated by the highest level of management at the workplace.

Workplace harassment and violence policies are required regardless of the size of the workplace⁴ or number of employees. If six or more employees are regularly employed at a workplace, the policy must be in writing and posted in a conspicuous place. If fewer than six employees are regularly employed in the workplace, policies do not have to be in writing and posted in a conspicuous place.⁵ However, a Ministry Inspector may ultimately order these employers to produce a written policy. As such, it is advisable for all employers, regardless of size, to produce a written violence and harassment policy.

OHSA provides employers with a great deal of discretion with respect to the form of these policies. For instance, employers are free to combine these policies together in one document, with existing policies, or programs.

1. Workplace Violence Policy

The workplace violence policy should include:

- A statement of commitment against workplace violence;
- Address violence from all possible sources (e.g. customers, clients, employers, supervisors, workers, strangers and domestic/intimate partners); and
- Roles and responsibilities of workplace parties.

2. Harassment Policy

The workplace harassment policy should include:

- A statement of commitment against workplace harassment;
- Address workplace harassment from all possible sources (e.g. customers, clients, employers, supervisors, workers, strangers and domestic/intimate partners); and
- Roles and responsibilities of workplace parties in supporting the policy and program.

³ Sections 32.01(a)(b)(c) OHSA.

⁴ Section 1 of the OHSA defines a workplace as any land, premises, location or thing that at, upon, in or near which a worker works. In other words, if the worker is being directed and paid to be at a location or near that location, the location will likely constitute a workplace.

⁵ Sections 32.01(2) and (3) OHSA.

Basic Requirements for the Programs

Under OHSA, an employer must develop and maintain a program to implement the workplace violence and harassment policies.⁶

1. Workplace Violence Program

The workplace violence program must be specifically tailored to the workplace in question and must include measures and procedures to:

- 1) Conduct a workplace violence risk assessment and control the risks identified in the assessment (*see step-by-step guide to workplace violence risk assessments in section E below*);
- 2) Summons immediate assistance when workplace violence occurs or is likely to occur;
 - This requirement may include:
 - Identifying a specific contact person and phone number (e.g. direct supervisor/manager, security, and/or the police);
 - Providing readily available equipment to summons assistance such as fixed or personal alarms, phones, cell phones etc.; and
 - Identifying emergency procedures.
- 3) Report incidents or threats of workplace violence; and
 - This requirement may include identifying:
 - Forms or other reporting mechanisms i.e. in writing or verbal;
 - How, when and to whom a worker should report incidents or threats to;
 - Roles and responsibilities of employers, supervisors, employees, Joint Health and Safety Committees, health and safety representatives and others involved in the incident reporting process; and
 - When incidents require external reporting i.e. police, Workers Safety and Insurance Board, Ministry etc.
- 4) Investigate and deal with incidents, complaints or threats of workplace violence.
 - This requirement may include identifying:
 - How and when investigations will be conducted;
 - What will be included in the investigation;

⁶ Section 32.06(1) OHSA.

- Roles and responsibilities of employers, supervisors, employees, Joint Health and Safety Committees, health and safety representatives and others involved in the process;
- Follow-up to the investigation e.g. a provision for corrective action arising from findings of workplace violence, bad faith claims, failure to participate in the investigation process etc.; and
- Record keeping requirements.

2. Workplace Harassment Program

Developing a workplace harassment program is less time consuming for employers than the workplace violence program. In particular, employers are not required to conduct a risk assessment of workplace harassment.

Under the OHSA, employers must implement a workplace harassment program specifically tailored to the workplace in question which includes measures and procedures to:

1) Report incidents of workplace harassment;

- This requirement should/must include identifying:
 - Forms or other reporting mechanisms i.e. in writing or verbal;
 - How, when and to whom a worker should report incidents, including to a person other than the employer/supervisor; and
 - Roles and responsibilities of employers, supervisors, employees, Joint Health and Safety Committees, health and safety representative and others involved in the incident reporting process.

2) Investigate and deal with incidents, complaints or threats of workplace harassment.

- This requirement should/must include identifying:
 - How and when investigations will be conducted;
 - What will be included in the investigation;
 - How information will be obtained and how information and records will be treated in terms of confidentiality;
 - Roles and responsibilities of employers, supervisors, employees, Joint Health and Safety Committees, health and safety representative and others involved in the process;
 - Follow-up to the investigation e.g. what the complainant and alleged harasser will be told about the results of the investigation and any remedial measures, and a provision for corrective action arising from findings of workplace harassment, bad faith claims, failure to participate in the investigation process etc.; and

- Record keeping requirements.

E. WORKPLACE VIOLENCE RISK ASSESSMENTS

Employers are required to conduct a workplace violence risk assessment prior to implementing their workplace violence programs. This requirement includes assessing:

- 1) Circumstances specific to the workplace such as the nature of the work, type of work and conditions of work. This includes assessing the:
 - Layout and design of the workplace e.g. lighting, lines of sight, entrances exits etc.;
 - Geographic location of the workplace;
 - Type of work and conditions of work, including activities or circumstances associated with a higher risk of violence e.g. handling cash, protecting or securing valuables, transporting people and goods, mobile workplace, public or community contact, working with unstable or volatile people, working alone, working later nights or early mornings etc.
 - Security measures already in place; and
 - Past violent incidents in the workplace.

- 2) Circumstances common to similar workplaces.
 - This requires identifying similar workplace, e.g. by sector/industry, and assessing the common risks.

From a practical standpoint, employers will want to assess the foregoing factors and consult with employees, security staff and other employers in the industry. Once the results of the risk assessment are complete, employers are then required to share their findings with the Joint Health and Safety Committee, if any, or employees.

F. DUTIES TO INFORM AND INSTRUCT EMPLOYEES ON WORKPLACE VIOLENCE AND HARASSMENT

There is a general duty under OHSA for employers to provide information, instruction and supervision to a worker to protect the health and safety of that worker. ⁷Bill 168 stretches this duty a step further with respect to workplace violence and harassment.

1. Workplace Violence

The duty to inform and instruct employees on workplace violence includes:

⁷ Section 25(2)(a) OHSA.

- 1) Providing appropriate information and instruction to workers on the contents of the workplace violence policy and program.⁸
 - This may include training employees on the policy and program or simply providing employees with a copy of the policy and program and designating a contact person from management to speak to its contents.
 - Some employees may need more instruction and/or training than others e.g. supervisors/ front line management who are required to respond to and address incidences of workplace violence.

- 2) Providing employees with information, including personal information, related to a risk of workplace violence from a person with a known history of violent behaviour if:
 - i. The employee can be expected to encounter that person in the course of his or her work; and
 - ii. The risk of violence is likely to expose the employee to physical injury.⁹
 - In assessing whether an employee is exposed to physical injury employers may assess whether:
 - The history of violence was associated with the workplace or work?
 - The history of violence was directed at a particular employee or employees in general?
 - How long ago did the incident/s occur?
 - The disclosure of employee information, including personal information, is limited to the information that is reasonably necessary to protect the employee i.e. to identify the person and triggers for potential aggression. Employers are not required to disclose personal medical information or specifics of past incidents to employees to achieve this goal.

- 3) Report incidents of workplace violence to the Joint Health and Safety Committee, Health and Safety representative or Union, if any, if:
 - i. A person is disabled from performing his or her duties because of workplace violence; or
 - ii. A person requires medical attention because of workplace violence.

⁸ Section 32.05(2) OHSA.

⁹ Section 32.0.5(3) OHSA.

- 4) Immediately notify a Ministry Inspector, the Joint Health and Safety Committee, Health and Safety representative and Union, if any, where an incident of workplace violence results in a person being killed or critically injured. Employers must provide written notice to a director of the Ministry within 48 hours of the incident outlining the circumstances of the occurrence and any other information prescribed by the OHS regulations.¹⁰

2. Workplace Harassment

The duty to inform and instruct employees on workplace harassment includes:

- 1) Providing appropriate information and instruction to workers on the contents of the workplace harassment policy and program.¹¹
 - This may include training employees on the policy and program or simply providing employees with a copy of the policy and program and designating a contact person from management to speak to its contents.
 - Some employees may need more instruction and/or training than others e.g. supervisors/ front line management who are required to respond to and address incidence of workplace harassment.
- 2) Employers, supervisors and unions all need to be aware of their responsibilities to prevent and address harassment under the Code.

G. DOMESTIC VIOLENCE

Under the OHS, an employer must take every precaution reasonable in the circumstances for the protection of workers when they are aware, or ought reasonably to be aware, that:

- 1) Domestic violence may occur in the workplace; and
- 2) That it will likely expose a worker to physical injury.¹²

This provision is not a license for employers to delve into the personal affairs of their employees. However, if an incident of domestic abuse comes to management's attention vis-a-vis the targeted employee, co-workers, a workplace incident, threatening emails/calls received at work etc., a designated member of management should approach the employee and explain their concern. If the employee denies the claim, employers should simply make a note of the conversation and advise security to be extra vigilant about strangers on the premises. If the employee candidly admits to the incident,

¹⁰ Section 51(1) OHS.

¹¹ Section 32.0.7 OHS.

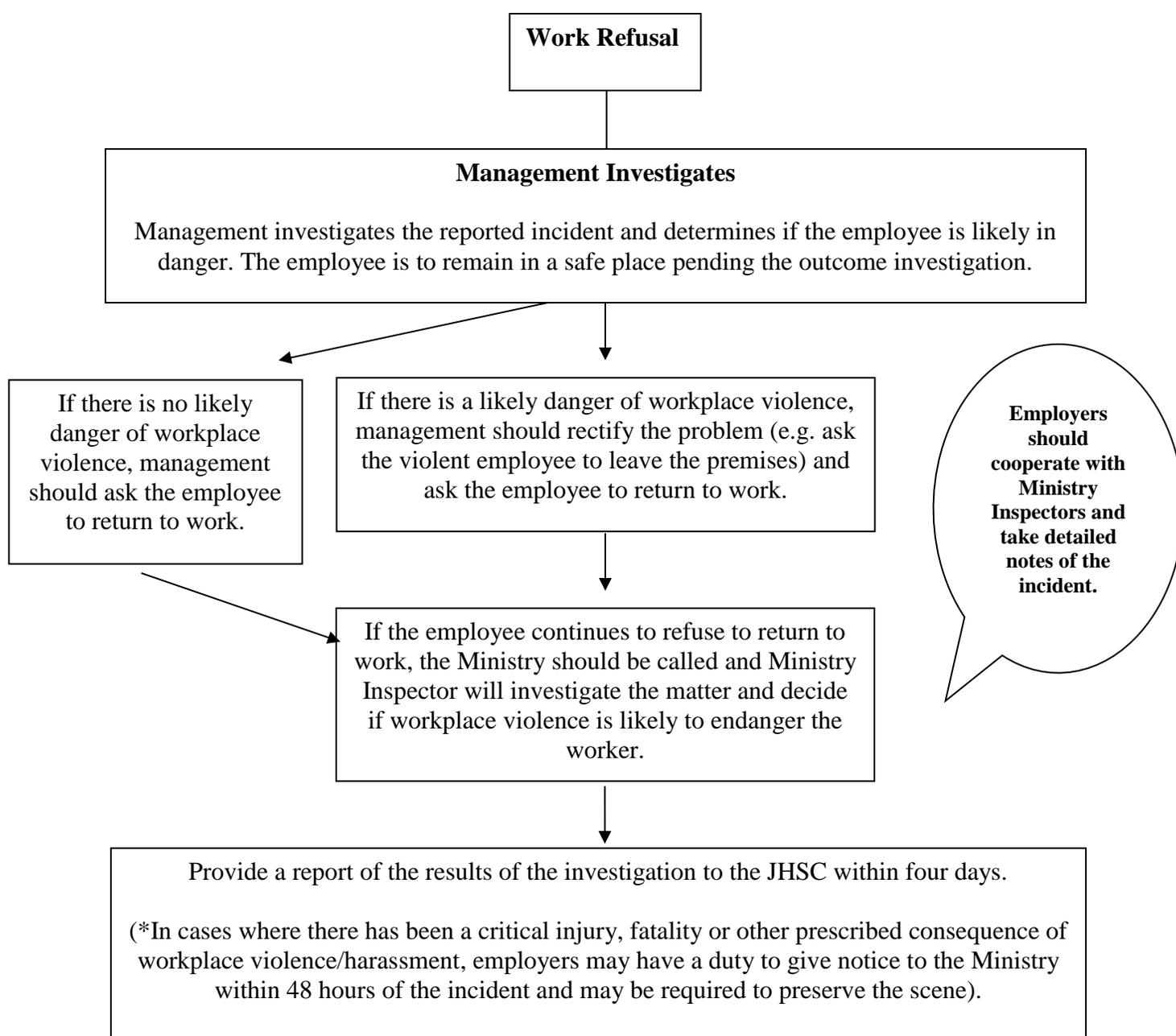
¹² Section 32.04 OHS.

management should consult its workplace violence policy and program in effect and create an individual safety plan for the worker while he or she is in the workplace e.g. set up security measures to ensure the spouse, partner or relative is kept off the premises, obtain a peace bond preventing them from coming to the workplace etc.

H. WORK REFUSALS

Under the OHSA, employees will have the right to refuse work if workplace violence is likely to endanger them.¹³ Employees cannot refuse work on the grounds of workplace harassment.

OHSA sets out specific procedures that must be followed when an employee refuses to work:



I. REASSESSMENT OF POLICIES AND PROGRAMS

Under OHSA, employers should reassess their existing workplace violence policy and program as often as is necessary to protect workers from workplace violence.¹⁴ In practice, a reassessment should be undertaken if:

- The workplace moves or the existing workplace is renovated or reconfigured;
- There are significant changes to the type of work;
- There are significant changes to the conditions of work;
- There is new information of the risk of violence in the workplace; or
- A violent incident occurs.

From a due diligence perspective, employers should review their workplace violence and harassment policies, programs and risk assessments on an annual basis. Employers should designate a file to workplace violence and harassment compliance and make a note of the:

- 1) Date of the review;
- 2) Who reviewed it; and
- 3) What, if any, changes were made.

J. ENFORCEMENT

Aside from minor enforcement measures, such as the authority to mandate a written policy when one would not otherwise be required,¹⁵ Bill 168 and Bill 132 do not add much in the way of enforcement and/or penalty provisions to the OHSA. Accordingly, the enforcement and penalty clauses that currently exist in the OHSA remain applicable. In other words, an individual employer, who is convicted of contravening a provision, or an order of a Ministry Inspector, may face a fine of not more than \$25,000 and/or imprisonment for a term of not more than twelve months. Employers that are corporations may face fines of up to \$500,000 if convicted.

Bill 132 introduced new provisions empowering Ministry Inspectors to compel employers to retain, at their own cost, an “impartial person” to conduct an investigation into alleged workplace violence and/or harassment. Notably, the provisions do not expressly say the individual must be a third party. But implicitly Ministry Inspectors may direct that a third party be retained where in their view an internal investigator selected by the employer is not “impartial”. That determination may be challenged by appealing such order to the Ontario Labour Relations Board.

Despite the foregoing, the Ministry has indicated that Ministry Inspectors will be issuing compliance orders prior to laying charges or fines as this new law develops.

¹⁴ Section 32.03(4) OHSA.

¹⁵ Section 55.1 OHSA.

K. PREPARING FOR A VISIT FROM THE MINISTRY

The OHSA grants Ministry Inspectors very wide powers including the power to “*enter in or upon any workplace at any time without warrant or notice*” for enforcement purposes.¹⁶ In other words, they do not need warrants to come on to an employer’s premises to review employee files and personal information, policies, programs and assessments.

Ministry Inspectors have a great deal of discretion in exercising their statutory powers. As such, employers should be prepared and cooperative when a Ministry Inspector shows up at its door. In particular, employers may want to designate a point person/s who:

- 1) are familiar with all of the OHSA (including Bill 168 and new Bill 132) compliance measures the employer has undertaken; and
- 2) has access to the compliance files, policies and programs.

Ministry Inspectors are now routinely asking employers to produce their workplace violence and harassment policies and programs for inspection when visiting workplace even for matters completely unrelated to workplace violence and harassment.

L. CONCLUSION

While it remains to be seen how this area of the law will develop, we hope that this guide will be a valuable resource to assist employers understand its obligations and prepare for potential incidents of workplace violence and harassment before they happen.

¹⁶ Section 54(1)(a) OHSA.