

NEW WORKPLACE VIOLENCE DUTIES COMING SOON

Landon P. Young

Sweeping new duties on Ontario employers to address workplace violence and harassment will take effect on June 15, 2010. Bill 168, which proposed these new duties, has been passed into law and will amend the *Occupational Health and Safety Act*. These duties will apply to workplaces with five or more employees.

Employers will be required to take specific, preventative action to address the risk of workplace violence and harassment in their workplaces. The thrust of bill 168 is not to impose legal liabilities or penalties on employers in the event of incidents of workplace violence or harassment – although the risk of liability will be higher if an employer has an incident has not met the minimum requirements soon to be law.

These duties will apply to any potential acts of violence, threats of violence or harassment in the workplace whether by an employee against a fellow employee or by a member of the public.

Set out below is an overview of these new duties.

New Policies and Programs

Employers will be required to implement policies with respect to workplace violence and harassment. These policies must be reviewed at least annually.

Bill 168 is unclear as to what the content of these workplace violence and harassment policies must be. A general statement that the employer is committed to preventing workplace violence and harassment may be sufficient, but it will remain to be seen if the Ministry of Labour's Inspectors, who will have power to enforce the new duties, will be expecting the policies to be more specific or to contain certain elements.

The Ministry of Labour's position is already that employers should have a policy to address workplace violence. Inspectors do routinely ask to see such policies. So far, the Ministry has not been particularly stringent on employers as to what the policy must say.

Workplace Violence and Harassment: Getting Ready for the New Duties

Presenter: Landon Young

Half Day Workshop

Thursday, March 11

9:00 a.m. – 12:30 p.m.

Check-In and Breakfast 8:30 a.m.

Delta Toronto Airport, Mississauga
5444 Dixie Road

**For More Information and/or to
Register:**

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416-862-1616**

New Definitions of “Workplace Harassment” and “Workplace Violence”

The definition of “workplace harassment” in bill 168 goes beyond the prohibition against harassment currently found in the Ontario *Human Rights Code*. The *Code* prohibits harassment based on certain prohibited grounds such as sex, age, race, religion and marital status.

Bill 168 defines “workplace harassment” broadly to mean 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 conduct need not be directed against an employee based on a specific characteristic that is prohibited by the *Code*.

This new definition may mean that employers will now be faced with more complaints from employees of workplace bullying or poisoned work environments. Such complaints can be very difficult for employers to respond to as there can be a fine line between, for example, a tough management style and perceived harassment.

To minimize the risk of a deluge of harassment complaints, employers should consider training employees on what constitutes harassment. Employers should also consider educating employees, particularly managers and supervisors, on how to avoid behaviour in the workplace that may be considered harassing.

“Workplace violence” is defined as the exercise of physical force against a worker in a workplace that causes or could cause physical injury or an attempt to exercise such force. The definition does not require there to be any intention to exercise such force or to cause injury. This definition could cover accidental application of force that causes or could cause injury.

This definition of workplace violence also covers threats of violence.

Assessment of Risk of Violence

Employers will be required to assess the risk of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work.

The assessment will have to take into account circumstances that would be common to similar workplaces, circumstances specific to the workplace and any elements that future regulations may require employers to consider. Beyond that, bill 168 is vague as to what an assessment must cover.

The employer will have to report the results of the assessment to its joint health and safety committee or a health and safety representative and to provide a copy of the assessment, if it is in writing, to the committee.

Reassessments will need to be conducted “as often as is necessary” to ensure that the workplace violence policy and program continue to protect employees.

Development of a Program to Address Workplace Violence and Harassment

In addition to requiring employers to have policies to address workplace violence, employers will also be required to develop programs to implement the workplace violence and harassment policies.

The program to address workplace violence at a minimum will need to include measures and procedures to:

- Control any risks of workplace violence identified in the workplace upon an assessment;
- Summon immediate assistance when workplace violence occurs or is likely to occur or when a threat is made;
- Report incidents or threats of workplace violence to the employer or supervisor; and
- Set out how the employer will investigate and deal with incidents, complaints or threats of workplace violence.

The program to implement the workplace harassment policy must also include measures for a) how workers are to report incidents of workplace harassment, and b) how the employer will investigate and deal with the incidents and complaints of workplace harassment.

The employer will also be required to provide workers with information and instruction that is appropriate on the contents of the workplace policy and program. Bill 168 does not specify what exactly this instruction must entail.

Domestic Violence in the Workplace

Employers will be required to take every precaution reasonable in the circumstances to protect an employee if domestic violence would likely expose the worker to physical injury in the workplace.

There is little guidance in the legislation as to how far an employer must go to protect employees if the employer learns of a risk of domestic violence occurring in the workplace. At a minimum, however, employers will likely be expected to alert any security or fellow employees of the risk a family member entering the workplace as well as to consider moving the employee, if possible to a more protected work area. The action required by the new legislation will depend very much on the specific circumstances of each case.

Duty to Inform Employees

Employers will have a duty to provide employees with information related to a risk of workplace violence from a person with a history of violent behaviour if a) the employee can be expected to encounter that person in the course of his or her employment, and b) the risk of workplace violence is likely to expose the employee to physical injury.

These duties could give rise to a variety of complex questions for employers, particularly in unionized workplaces where unions are often quick to assert employee privacy rights.

Work Refusals

Employees will have the right to refuse to perform work in the event of workplace violence or a reasonable risk of workplace violence.

Where an employee asserts a right to refuse work on the basis of workplace violence and the issue cannot be resolved with the employee and his or her joint health and safety committee or union representative, a Ministry of Labour Inspector must be called in. The Inspector will then have the power to decide if the employee's work refusal is valid. Inspectors have broad powers to order employers to take whatever action may be considered necessary to protect worker safety in the event of a worker refusal.

Significantly, the right to refuse work will not extend to workplace harassment.

Getting Ready For These New Duties

Employers should start preparing now, if they haven't already, to make sure they are compliant with the new duties come June 15.

Some essential questions to consider when deciding what will need to be done to comply with the new duties include:

- Are there specific workplace violence risks in the workplace?
- How detailed should the policies and programs be?
- Who should conduct investigations into incidents of workplace violence or complaints of harassment and how should they be conducted?
- How much training of employees and management will be required?
- How will make the tough decisions on issues such as the appropriate responses to incidents, the balancing of employee rights to information against privacy and how to protect employees from the risk of domestic violence?
- Who will deal with Ministry of Labour Inspectors on workplace violence and harassment issues.

The amount of work required to be compliant will vary considerably depending on the nature of an employer's workplace, the size of the workforce and the existence of current policies and procedures. For some employers, compliance may be relatively straightforward. For others it will require a complex reworking of existing policies and procedures and the balancing of employee rights and interests.

Employers who have not complied with these new duties by June 15 could face orders from Ministry of Labour Inspectors to take whatever actions are considered appropriate to achieve compliance.

Failure to be compliant could also potentially expose employers to a risk of charges under the Occupational Health and Safety Act, particularly if an incident of workplace violence occurs that results in serious injury.

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