

Be Prepared! Bill 168 amends Occupational Health and Safety Act

February 19, 2010

By Farah Malik

Bill 168, which amends the *Occupational Health and Safety Act* (the “OHSA”), received Royal Assent on December 15, 2009, and will come into force on June 15, 2010. These amendments apply to Ontario employers and workers, including the Crown.

For the first time, Ontario will add legal definitions of “workplace violence” and “workplace harassment” to the OHSA. The OHSA will also provide heightened health and safety protections for workers against physical violence, threatening behaviour, verbal or written threats of violence, harassment, and psychological abuse at work.

These amendments will be of particular interest to employers whose workers are at an increased risk of workplace violence, including workers who:

- exchange money
- deliver passengers, goods or services (e.g. bus drivers)
- have a mobile workspace such as a vehicle (e.g. taxi drivers)
- work alone or in small numbers (e.g. home care workers), and
- guard valuable property or possessions (e.g. security guards).

With a number of new obligations and June 15, 2010, fast approaching, it is critical to take steps now to ensure compliance with these new rules. Here is an overview of the key provisions of the legislation.

“Workplace Harassment” and “Workplace Violence” Now Defined

“**Workplace harassment**” is defined broadly 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.”

Although this definition is similar to the definition in s. 10 of Ontario’s *Human Rights Code*, it differs from the *Code* definition in that it includes conduct unrelated to prohibited *Code* grounds of discrimination such as sex and race. The OHSA’s definition of “**workplace harassment**” could capture bullying and psychological abuse.

“**Workplace violence**” is also defined broadly as follows:

- (a) the exercise of physical force by a person against a worker that causes or could cause physical injury to the worker;
- (b) an attempt to exercise physical force against a worker that could cause physical injury to the worker; or

(c) a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker that could cause physical injury to that worker.

The definition in (a) covers physical attacks such as hitting, shoving, pushing or kicking. The definitions in (b) and (c) are related and, combined, can cover verbal and written threats to inflict physical harm, as well as throwing objects and shaking fists.

Employers Must Develop Workplace Violence and Harassment Policies and Programs

Most of the amendments to the OHSA will not only require employers to prepare, review annually and post written policies in conspicuous places to prevent workplace violence and harassment, they will also require employers to develop and maintain programs to implement such policies.

For **workplace violence programs**, employers will be required to include the following “bare minimum” measures and procedures under the statute:

- control the risks identified in a mandatory workplace violence assessment;
- summon “immediate assistance” when workplace violence occurs or is likely to occur;
- require workers to report incidents of workplace violence to a supervisor; and
- set out ways in which the employer will investigate and deal with incidents or complaints of workplace violence.

Because “**workplace violence**” includes threats of violence, the requirement to summon immediate assistance arguably includes the moment when verbal or written threats of physical violence are made against a worker.

Likewise, for **workplace harassment programs**, employers will be required to include the following minimum measures and procedures:

- require workers to report incidents of workplace harassment to a supervisor; and
- set out ways in which the employer will investigate and deal with incidents or complaints of workplace harassment.

Employers Must Carry Out Risk Assessments for Workplace Violence

The new legislation also requires employers to assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work. This assessment must take into account:

- circumstances that would be common to similar workplaces; and
- circumstances specific to the workplace.

Once this assessment is complete, an employer must provide a written copy of the assessment, together with its results, to a joint health and safety committee or a health and safety representative. If there is no committee or health and safety representative, workers must be advised directly of the results and must be provided with a written copy of the assessment.

Workplace violence risk assessments must be reassessed as often as is necessary to ensure that an employer’s policy and related program continue to protect workers from workplace violence.

No similar risk assessment is required in respect of workplace harassment.

Workers May Refuse Work on Grounds of Workplace Violence

Bill 168 also expands a worker's right to refuse or stop work where he or she has reason to believe that workplace violence is likely to endanger himself or herself.

Section 43 of the OHSA outlines an investigatory procedure that employers must follow upon receipt of such a report. The amendments make it clear that until the employer's investigation is complete, the worker must remain in a safe place that is as near as reasonably possible to his or her work station. The worker must also remain available to his or her employer for the purposes of the investigation.

If, following the employer's investigation, a worker still has reasonable grounds to believe that workplace violence continues to be likely to endanger himself or herself, the employer must inform an inspector from the Ministry of Labour, who will then carry out a further investigation. A worker must still remain, during the worker's normal working hours, in a safe place that is as near as reasonably possible to his or her work station and be available to the inspector for the purposes of the Ministry of Labour's investigation.

The amendments do not authorize a worker to refuse work if he or she has good reason to believe that workplace harassment will occur.

Employers Must Provide Training and Information About Workplace Violence and Harassment

The amendments to the OHSA require employers to provide a worker with information and instruction on the contents of its workplace violence and harassment policies and programs.

Notably, an employer's duty includes a duty to provide information, including 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.

This duty may arise in the context of providing hospital and community workers with personal information of patients with a history of violent behaviour. This duty may also arise if an employer is aware that another worker has a history of violent behaviour that could potentially endanger the health or safety of other workers.

An employer's disclosure of personal information in these circumstances must be limited to that which is reasonably necessary to protect a worker from physical injury.

Employers Must Also Address Domestic Violence

An employer must also "take every precaution reasonable in the circumstances" to protect a worker if an employer becomes aware or ought to be aware that domestic violence that would likely expose a worker to physical injury may occur in the workplace.

The extent of this rather expansive obligation remains to be seen. In the meantime, employers should, at the very least, be supportive of employees who have disclosed to them their situations of domestic violence. Employers should also develop policies and programs to address this unique form of violence in the workplace.

Action Steps Be Ready for June 15, 2010

If you are an Ontario employer not exempted from the application of the OHSA, you must comply with the requirements of Bill 168

by June 15, 2010 or face potential fines and/or other penalties under the OHSA. With less than five months left to comply, here are some steps you should consider taking:

- **Review existing policies.** Review your existing workplace policies and amend or replace them to address workplace violence and workplace harassment as occupational health and safety issues. It may be necessary to create one policy addressing violence and another addressing harassment. You should then post the new policies and review them on an annual basis at the very least.
- **Develop programs.** You should develop, maintain and implement workplace violence and harassment programs, consistent with your posted policies. These programs should include the “bare minimum” measures and procedures imposed by the new legislation as described above
- **Assess risks.** Perform risk assessments for workplace violence on a regular basis and provide written copies of such assessments, together with the results, to a joint health and safety committee or a health and safety representative.
- **Provide training and information.** You should provide training and information to workers on the prevention of workplace violence and harassment.

In addition, as described in the Section 43 discussion above, it is important to understand your investigatory obligations when a worker refuses work on account of workplace violence, as there are a number of steps that must be followed to comply with the legislation.

WeirFouldsLLP

www.weirfoulds.com

Toronto Office

4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office

1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035