

ONTARIO MOVES TO JOIN OTHER JURISDICTIONS WITH OHS VIOLENCE AND HARASSMENT PROVISIONS

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By: Cheryl A. Edwards

Ontario employers, managers, and advisors have been watching and waiting as the Ontario government experiences a ground swell of pressure to add workplace violence-related provisions to its *Occupational Health and Safety Act* (OHSA). Ontario has remained one of the few jurisdictions in Canada yet to define workplace violence and incorporate employer and supervisory obligations, and worker rights within OH&S legislation.

The addition of workplace violence to the protections in the OHSA has been seen by some as a final piece of the violence protection puzzle that has been missing in Ontario.

Ontario Follows Up On Violence Consultation With Legislation

Readers may recall that in 2008, the Ontario MOL released a consultation paper requesting submissions from stakeholders regarding the content of potential workplace violence legislation.

The Ontario government has now responded with Bill 168, the *Occupational Health and Safety Amendment Act (Violence And Harassment In The Workplace) 2009*. The Bill received first reading in the Legislature April 20, 2009. Bill 168 creates a web of different rights and obligations depending upon whether the conduct at issue under the OHSA is “workplace violence” or “workplace harassment”.

Definition of Workplace Violence and Harassment

The definition of “violence” in Bill 168 is key. Important rights and obligations that flow from the manner in which violence is defined include employer obligations to prepare policies and programs, the trigger for the ability to refuse work, and new requirements to prepare a report of a workplace injury due to violence. Understanding what is and is not workplace violence for the purposes of the OHSA is key to understanding the requirements and obligations proposed by Bill 168.

Bill 168 defines “workplace violence” to mean:

- (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.

Notably, the definition of workplace violence does not include threatened violence. This distinguishes the proposed Ontario legislation from that of a number of other Canadian jurisdictions. However, in defining workplace violence as the attempted or actual application of physical force, the definition is in keeping with the traditional role of occupational health and safety legislation – preventing physical risks to workers.

Bill 168 also includes a definition of “workplace harassment”. This is defined to mean “a course of vexatious conduct or comment against a worker in a workplace that is known or ought reasonably to be known to be unwelcome”. As such, Bill 168 incorporates the non-physical types of conduct that have, historically, not been considered a proper subject of regulation by the OHS or litigation under the OHS, but rather found their resolution through the civil courts, and workplace safety and insurance and human rights regimes.

Workplace Violence Prevention Program

Under Bill 168, where more than five workers are regularly employed at a workplace, an employer is required to prepare written policies regarding each of workplace violence and harassment. These policies are to be posted in a conspicuous place in the workplace and are to be reviewed at least annually. The legislation as worded suggests that these ought to be separate policies.

Bill 168 requires an employer to prepare a violence program as a means to implement the violence policy. However, prior to preparing the program, an employer is expected to conduct a risk assessment for workplace violence risks that may arise from the nature of the workplace, the type of work or the conditions of work, and craft the program to reflect risks that could cause physical injury. The results of this assessment must be shared with the Joint Health and Safety Committee or safety representative, or to workers directly if there is no committee or representative, either verbally or in written form if that exists. An employer must also perform periodic reassessments to ensure that the policy and program continue to protect workers. Bill 168 does not provide a specific expectation regarding the frequency of reassessments.

The violence program itself must address issues such as how the risks identified in the assessment will be controlled; the summoning of immediate assistance if workplace violence occurs or is likely to occur; methods for workers to report incidents or threats of workplace violence; and how the employer will investigate and deal with incidents, complaints or threats of workplace violence. An employer is required to provide adequate training in the violence policy and program to workers.

Workplace Harassment Prevention Program

A workplace harassment program to implement the workplace harassment policy is also mandated by Bill 168. However, in preparing the program, an employer is not required to assess its workplace for workplace harassment. Rather, the program must include reporting procedures for workers and set out how the employer will investigate and deal with incidents and complaints of workplace harassment. Presumably, this could be coordinated with, or even included within, other harassment prevention procedures of the employer.

Domestic Violence

Bill 168 contains a unique proposed requirement that employers respond to domestic violence. We are unaware of any such provision in OH&S legislation that currently exists in Canada. However, unlike the employer's obligation to assess its workplace for workplace violence risks that may be inherent in the day-to-day work performed, an employer is not required to assess its workplace for potential domestic violence risks. The proposals in Bill 168 would require an employer to take "every precaution reasonable in the circumstances for the protection of a worker", if the employer becomes aware, or ought reasonably to be aware, of a domestic violence risk to the worker. As such, domestic violence is treated as a stand alone obligation that requires employer response to a specific risk that arises, or that they ought reasonably be aware of. Indicia of domestic violence that ought to trigger employer awareness are not specified.

The Right to Refuse Work

Bill 168 would amend the existing work refusal provisions of the OHS Act to permit a worker to refuse work if "workplace violence is likely to endanger himself or herself", in addition to other longstanding grounds upon which a work refusal may occur. Therefore, if Bill 168 is passed in its current form, workers would have the right to refuse to work where they believe (section 43(3) and 43(6)) that their physical well-being is at risk because of the actual or attempted application of physical force. There is no proposed right to refuse where "harassment" is believed likely to endanger.

Bill 168 does not alter the current limited right to refuse to work that applies to public sector occupations and workplaces such as police services, firefighters, correctional facilities and workers, defined health care facilities, residential facilities for the disabled, ambulance services. The Bill does, however, alter the worker's obligation to remain near his or her workstation to allow workers to remove themselves from alleged harmful situations. The proposed amendment would insert the words "as reasonably possible" into the current wording of subsection 43(5) and 43(10) of the OHS Act so that the worker would remain at a safe place near the work station if and as reasonably possible, until the

investigation is complete. However a worker must remain available to the employer or supervisor for the purposes of the investigation.

Employer Obligations to Protect Workers From Violence and Harassment

The least clear aspect of the proposed amendments relates to employer obligations to protect workers from workplace violence and harassment. The Bill *does not* provide for an express employer duty to protect workers from harassment; an employer's obligation is to prepare a policy, program, ensure training, reporting and response mechanisms. Bill 168 *does* provide for an employer duty (under section 25 OHSA duties as applicable), and supervisor and worker duties (under their duties as applicable), with respect to workplace violence.

This wording creates some uncertainty, but it does appear that the MOL could prosecute for a failure to protect workers from workplace violence in addition to its power to prosecute for failing to create and implement the required policies and programs.

Disclosure of Information About Persons With Violent History

Interestingly and controversially, Bill 168 proposes that an employer or supervisor would have a duty to provide to a worker (as part of training and information to worker obligations) personal information related to a risk of workplace violence from a person with a history of violent behaviour if: (1) the worker will encounter the person in the course of their work; and (2) the risk of workplace violence is likely to expose the worker to physical injury. Bill 168 does not provide specific guidance on the type or amount of personal information which may be provided in such circumstances. However, it does place a limitation on the amount of information that may be provided as it stipulates that no employer or supervisor shall disclose more information than is necessary to protect the worker from physical injury.

Reporting of Workplace Violence to MOL

Bill 168 requires an employer to prepare a notice under section 52 of the OHSA in the event that a worker is disabled from regular duties, or requires medical attention, as a result of workplace violence. The content of the report would be dictated by the requirements set out in the regulation applicable to the workplace.

Phase In of Proposed Violence and Harassment Provisions

If Bill 168 is passed, it will not require immediate compliance by employers. The provisions will come into force six months after passage.

While some aspects of Bill 168 are consistent with current approaches in Ontario to workplace violence under the OHSA, by including issues such as harassment, domestic violence and duties to provide personal information about potentially violent persons as set out above, Bill 168 does contain significant departures from the traditional approach to workplace violence protections seen a number of Canadian jurisdictions.

Cheryl A. Edwards is a former Ontario Ministry of Labour Occupational Health and Safety Prosecutor and now heads up Heenan Blaikie's national Occupational Health and Safety and Workplace Safety and Insurance Practice Group. She has more than 20 years of experience providing strategic, focused, practical advice and in-house training for public and private sector organizations. Cheryl also has extensive experience representing clients at trials, complaints, inquests and appeals
For more information, you can contact Cheryl at: Email: cedwards@heenan.ca, Direct Line: 416 360.2897.

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