

Labour and Employment Law

November 2009

Bill 168: Cracking down on Violence and Harassment in the Workplace

"Violence and harassment have no place in the workplace".¹ This message from the Ontario government accompanies proposed amendments to the *Occupational Health and Safety Act* (the "OHSA").

Bill 168, the *Occupational Health and Safety Act (Violence and Harassment in the Workplace) 2009*, passed second reading on October 20, 2009 and has been referred to the Standing Committee on Social Policy, which will hold public hearings on the Bill later this month. If passed, Bill 168 would impose positive duties on employers to prevent and manage workplace violence and harassment. Although Bill 168 must work its way through the balance of the legislative process, employers should prepare now for its passage.

Existing Standards and Proposed Amendments

The current *OHSA* imposes an obligation on employers, supervisors and workers to take reasonable precautions to protect the health and safety of workers, which includes preventing workplace violence. Workplace violence and objectionable workplace behaviours may also fall within the scope of the *Criminal Code* or the Ontario *Human Rights Code* (the "HRC"). Unionized employees may find legal remedies in their collective agreements.

The Bill imposes specific duties on employers to: prepare and implement workplace violence and harassment policies and programs; conduct workplace violence assessments and report the results; and provide training and information for workers.

What is Workplace Violence and Harassment?

The Bill provides broad definitions of workplace violence and harassment which focus on the outcome to the worker, regardless of the assailant. The definitions include both the exercise and the attempt to exercise physical force. Employers will be obliged to address workplace violence from *anyone* who enters the workplace. The proposed definition of "workplace harassment" broadens the current protection found in the *HRC* because the conduct does not have to be linked to any prohibited ground of discrimination.

Workplace Violence and Harassment Policies

Bill 168 requires all employers to prepare policies addressing workplace violence and harassment. These policies must be reviewed as often as necessary, but at least annually. In workplaces with more than five employees, the policies must be in written form and posted at a conspicuous place.

Workplace Violence and Harassment Programs

It isn't enough to draft a policy; Bill 168 requires employers to implement their policies by developing and maintaining workplace violence and harassment programs that meet the needs and risk levels of their particular workplaces. Workplace violence programs must include measures and procedures:

- to control the risks identified in the risk assessment as likely to expose a worker to physical injury;
- for summoning immediate assistance when workplace violence occurs, is likely to occur, or when a threat of workplace violence is made;
- for workers to report incidents or threats of workplace violence to the employer or supervisor; and
- for investigating and dealing with incidents, complaints or threats of workplace violence.

Workplace Violence Risk Assessments

Bill 168 obligates employers to assess the potential for workplace violence that could arise from the nature of the workplace, the type of work or the conditions of work and to implement controls to address the hazards. The assessment must take into consideration common risks at similar workplaces, as well as risks specific to the employer's workplace. For example, a health care worker would likely be subject to a greater risk of workplace violence than an office worker. Employers are obliged to reassess the risk of workplace violence as often as necessary to ensure that the policies and programs protect workers. The results of the assessment must be provided to the employer's joint health and safety committee or health and safety representative. If there is no representative, the results must be provided directly to workers.

¹ News Release, April 20, 2009 "New Legislation to Tackle Workplace Violence McGuinty Government Working to Strengthen Protection for Workers"

Protection of Workers in Situations of Domestic Violence

The proposed amendments will, for the first time in any Canadian jurisdiction, address domestic violence under occupational health and safety legislation. Bill 168 requires employers to take reasonable precautions to protect the worker where they are aware, or ought reasonably to be aware, that an act of domestic violence is likely to endanger a worker at the workplace.

Disclosure of Persons with a History of Violence

Bill 168 imposes a duty on employers and supervisors to provide workers with information related to a workplace violence risk from persons with a history of violent behaviour. The duty is triggered if the worker can be expected to encounter that person in the course of his or her work, and if the risk of workplace violence is likely to expose the worker to physical injury. The disclosure of such information is limited to that which is reasonably necessary to protect workers from physical injury.

Right of Employee to Refuse Unsafe Work

Bill 168 extends Section 43 of the *OHSA*, which gives workers the right to refuse work in various circumstances, to include the right to refuse or stop work in situations of workplace violence. The usual work refusal process would be initiated, including an investigation by the employer and, potentially, a Ministry of Labour inspector.

What does Bill 168 Mean for Employers?

Bill 168 will apply to all companies regardless of the number

of employees, the nature of the industry or the level of risk of violence in the workplace. Employers and supervisors have a stake in ensuring that the proposed statutory workplace violence and harassment requirements are discharged. Compliance with these mandatory obligations will assist employers in establishing a due diligence defence should an incident of workplace violence occur.

Bill 168 leaves a number of troubling issues and questions for employers. Most significantly, it places proactive obligations on employers who will be required to exercise discretion in discharging these mandatory duties. For example, disclosing personal information about persons with a history of violence clearly raises privacy concerns. Employers will also have to take steps to discharge their duty to become reasonably aware of the potential for domestic violence spillover in the workplace. It is unclear what an employer must do to properly discharge this duty, given that situations of domestic violence originate outside of the workplace and the intended scope of “domestic violence” is not defined in the Bill.

Prudent employers should consider reviewing and revising their existing harassment policies and procedures in anticipation of the passage of the proposed amendments. Crafting appropriate mandatory workplace violence policies and programs will require employers to seriously think about how to undertake an appropriate risk assessment and maintain detailed records of any workplace violence or harassment investigation or work refusal.

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Pallett Valo LLP Labour and Employment Practice

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