

# BILL 168

## VIOLENCE AND HARASSMENT IN THE WORKPLACE

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On April 20, 2009, the Ontario Minister of Labour introduced Bill 168, *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009* (the Bill). The Bill follows the Ministry's consultation paper requesting feedback on potential workplace violence legislation from the fall of 2008. On October 5 and 20, 2009, the Bill passed its second reading. If passed in its current form, it would amend parts of the *Occupational Health and Safety Act* (OHSA). These amendments impose new duties on employers, including school boards and independent schools, to address violence and harassment in the workplace in the form of policies, programs, risk assessments and the provision of information to workers where a person has a history of violence.

### ***Key Provisions: Definitions of Workplace Violence and Workplace Harassment***

The Bill defines “workplace harassment” and “workplace violence” in the following manner:

“Workplace harassment” means 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.

“Workplace violence” means:

- 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.

The definition of harassment includes both “comment” and “conduct”. This creates a broad standard that includes unwelcome physical or psychological harassment. The definition of workplace violence, however, is limited to actual or attempted physical harm.

### ***Policies and Programs***

The Bill requires that employers develop workplace violence and harassment policies, which are to be reviewed annually. In addition, employers have to develop programs to implement these policies. These programs must include measures and procedures to:

- control identified risks;
- summon immediate assistance when 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
- investigate and deal with incidents, complaints or threats of workplace violence.

### ***Assessment of Workplace Violence***

The Bill requires employers 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 must take into account circumstances common to similar workplaces and circumstances specific to the employer's workplace. A copy of the risk assessment and its results must then be provided to the joint health and safety committee or the health and safety representative. Where there is no committee or representative, employees must be advised of the results of the assessment.

The Bill does not specify how an assessment should be done, or exactly what factors should be taken into account when it is conducted. It also requires that employers reassess the risk of workplace violence “as often as necessary” to protect workers but without specific guidance as to how often reassessment should occur. Specific to a school setting, this may include risks to staff members from students and parents. For example, the presence of gangs within a specific school would form part of the risk assessment that must be communicated to employees.

### ***Addressing Domestic Violence***

Where an employer becomes aware, or ought reasonably to be aware, that domestic violence likely to expose a worker to physical injury may occur in the workplace, the Bill requires that the employer take every reasonable precaution in the circumstances for the protection of the worker. This provision specifies that employers must only become involved when domestic violence may occur “in the workplace,” which, in practice, may be a very difficult line to draw. In addition, the requirement of “ought reasonably to be aware” of domestic violence will likely be difficult to determine. Finally, there may also be concerns regarding a worker's privacy and when an employer ought to become involved in a worker's private life.

### **Disclosing Persons with a History of Violence**

The Bill requires employers to provide information to workers, including personal information, of a person with a history of violent behaviour. An employer must provide this information 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.

While the Bill provides that employers must not disclose “more information than is reasonably necessary to protect the worker from physical injury,” there are no specific provisions regarding the type and amount of personal information that must be provided.

If the source of the risk is a co-worker, there will also be concerns about the worker’s privacy and the appropriate limits for disclosure. The employer’s obligations under the Ontario Human Rights Code (OHRC) will have to be considered as it prohibits discrimination on the basis of record of offences. For example, if an employer is aware of and chooses to disclose an employee’s criminal conviction relating to physical violence for which a pardon has been granted and not revoked, there is a risk that the employer could be faced with an OHRC application on the basis of the protected ground of record of offences. On the other hand, if they do not disclose such information and an employee is injured, the employer may be in violation of the OHSA.

### **Refusing Work**

The Bill permits a worker to refuse to work or perform particular work where he or she has reason to believe that workplace violence is likely to occur. However, the OHSA currently prohibits certain workers, for example, hospital employees, from refusing work when unsafe conditions are inherent in the work or are a normal condition of employment. The Bill allows for a regulation to define when an unsafe condition is inherent in the work or is a normal condition of employment.

The OHSA gives a worker the right to refuse work that he or she believes is unsafe. The OHSA sets out a specific procedure that must be followed in a work refusal. Namely, where the worker reports the unsafe conditions to the employer, an investigation must be immediately conducted. Where the worker has reasonable grounds to believe that the work conditions remain unsafe, the employer or the worker shall cause an inspector from the Ministry of Labour to attend at the workplace to conduct an investigation. It is important that principals, vice-principals and all staff, including any health and safety representatives understand this procedure.

### **Co-op Students**

Many secondary schools offer a co-operative education program (co-op). This program is designed to give high school students a variety of actual experiences in which they can put into practice the academics learned in the classroom. In this way, students can also test the waters to see if they would enjoy a future career in the type of work environment offered through their co-op placement. In most cases, students provide unpaid services as part of the co-op placement and receive certain credits from the school. The question arises as to whether Bill 168 will impact students in a co-op placement.

Under the OHSA, a “worker” is defined as:

*a person who performs work or supplies services for monetary compensation but does not include an inmate of a correctional institution or like institution or facility who participates inside the institution or facility in a work project or rehabilitation program.*

Based on this definition, it appears that a co-op student in a school would not qualify as a “worker” as they receive school credits, as opposed to monetary compensation, for their services. In this regard, this new legislation would likely not apply to co-op students providing unpaid services in return for high school credits.

### **Corporate and Personal Penalties for Violations of OHSA**

The maximum penalties for a contravention of OHSA or its regulations are set out in OHSA Section 66. A successful prosecution could, for each conviction, result in:

- a fine of up to \$25,000 for an individual person and/or up to 12 months imprisonment; or
- a fine of up to \$500,000 for a corporation.

### **Conclusion**

Bill 168 sets out important new obligations and responsibilities on employers, such as school boards and independent schools. Following its second reading, the Bill has been referred to the Standing Committee on Social Policy. Once it has received its final reading, boards will have six months to update their policies, develop programs and conduct risk assessments. Principals and vice-principals need to make sure they have been properly trained in this area and that the policies are posted in a prominent area in their schools.

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