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## Bill 168: Violence and Harassment in the Workplace

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On December 15, 2009, Bill 168, an Act to amend the Occupational and Safety Act with respect to violence and harassment in the workplace (the “Bill”), received royal assent. Employers were given six months to prepare their workplaces before the Bill came into effect. As a result, on June 15, 2010, all workplaces in Ontario will be required to fulfil the obligations outlined in the Bill.

### Overview and Definitions

First, it is important to remember that this is an amendment to the *Occupational Health & Safety Act* (“OHSA”). This Bill amends OHSA by adding workplace harassment and workplace violence to the other obligations that are already covered by this Act (i.e. hazardous materials, unsafe equipment, machinery, work environments etc.).

“*Workplace Harassment*” is defined in the Bill 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.*” This is the same definition that currently exists under our Human Rights Code.

“*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 caused physical injury to the worker,*
- (c) *a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker.*”

After reviewing the legislation, it appears that this Bill is an attempt to codify what judges have been finding in their judgements. So, while the changes will force employers to take the proactive steps outlined below, these same steps are required to ensure that law suits do not result in large damage awards against employers.

## WHAT ARE AN EMPLOYER'S OBLIGATIONS UNDER THIS BILL?

### A. Workplace Violence

1. **Risk Assessment:** An employer is required to assess the risks of workplace violence that may arise due to the nature of their workplace, the type of work performed or the conditions of the workplace. This assessment will take into account:
  - (a) circumstances that would be common to similar workplaces; and
  - (b) circumstances specific to the workplace;
2. **Share Results of Assessment:** Once the employer has conducted the assessment, it must advise the Health & Safety Committee or the Health & Safety representatives of the results of the assessment and provide a copy of the assessment if it is in writing. If there is no Health & Safety representative or Committee, the workers should be advised of the results or provided with a copy of the report, if it is in writing.
3. **Re-Assess:** An employer must reassess the risks of the workplace as often as is necessary.
4. **Create Workplace Policies:** All employers will be required to prepare a policy with respect to workplace violence and a policy with respect to workplace harassment. These policies will have to be reviewed as often as is necessary to ensure they remain accurate but at least once a year.
5. **Policy to be Posted, if 5 or More Workers:** The written policy must be posted in a conspicuous place in the workplace if the employer regularly employs at the workplace five or more employees.
6. **Domestic Violence:** If an employer becomes aware or ought reasonably to be aware that domestic violence would likely expose a worker to physical injury in the workplace, the employer has to take every reasonable precaution to protect the worker. However, an employer shall not disclose more personal information than is reasonably necessary to protect workers from physical injury.
7. **Develop and Maintain a Program:** The employer must implement a program to include measures and procedures to:
  - (a) control the risk identified in an assessment;
  - (b) get immediate assistance when workplace violence occurs;
  - (c) report workplace violence;
  - (d) investigate and deal with complaints of workplace violence; and
  - (e) train staff on the program and the employer's expectations.

## **B. Workplace Harassment**

1. **Prepare a Harassment Policy:** An employer shall develop and maintain a policy with respect to workplace harassment in the workplace. This should already be in place under the Human Rights Code but it is always wise to review the policy to make sure that it captures all that is now required.
2. **Develop and Maintain a Program:** This program should include:
  - (a) a method for workers to report incidents of workplace harassment to an employer's supervisor;
  - (b) a method for the employer to investigate and deal with incidents and complaints of workplace harassment;
  - (c) the employer will be responsible for training employees on the policy and program with respect to workplace harassment.

### **WHY IS THIS IMPORTANT FOR EMPLOYERS TO DO?**

Canadians are experiencing more violence in their workplaces. As a result, employers are required, through this amendment to OHSA, to put systems in place to respond appropriately when violence or harassment occurs in their workplaces.

Google Trends indicate that Canadians lead the world with Internet searches for the term "workplace violence". A 2004 Statistics Canada report indicates that there were over 350,000 violent workplace incidents in Canada that year. Sixty-nine (69) employees were killed in violent incidents in workplaces between 2001 – 2005. Men tend to be the victim of physical violence in the workplace more often than women. Certain occupations face greater risks of violence than others (taxi drivers, security related positions, group home workers, restaurant employees). The following workplace factors often appear in circumstances where violence has occurred:

- Contact with the public
- Exchange of money
- Delivery of passengers, goods or services
- Having a mobile workplace, such as an automobile
- Working with unstable or volatile people
- Working alone or in small numbers
- Working late at night or during the early morning hours
- Guarding valuable property or possessions

*(Ontario Workplace Safety & Insurance Board website)*

Knowing that an occupation or a set of factors increases the risk of violence, employers can take positive steps to reduce the risks.

While information is still being gathered, it is clear that employees who have been subjected to violence in the workplace suffer from burnout, fatigue, depression, increased sickness, sleep disturbance and stress. All of this results in reduction in productivity in the workplace. According to some estimates, workplace productivity after a violent incident can fall by up to 80% and last up to two weeks. This is understandable following any such incident since:

- The victimized worker will become less productive with distractions, take time off etc.
- With an internal investigation, many employees will be affected either as witnesses, parties or part of the investigation
- Certain areas of the employer's facility may be closed pending an investigation, due to damaged equipment or facilities that may need to be fixed

Other costs include fines under the OSHA, litigation or settlement of litigation, increased insurance premiums or workplace safety compensation premiums, negative publicity for the employer which can affect customers, investors and future recruiting and negative morale for employees which can lead to higher turnover.

Any employer who has experienced a complaint of workplace harassment or a violent incident in the workplace knows these negative consequences well. As a result, it is easy to understand why this legislation was introduced and passed in a relatively short period of time (a nine month period).

## **STEPS TO COMPLIANCE**

### **A. Workplace Violence**

1. **Risk Assessment:** Between now and June 15<sup>th</sup> all employers must conduct a risk assessment of their workplace. Through this process, the employer will evaluate the risks arising from any hazard in the workplace taking into account the adequacy of existing controls and deciding whether or not the risk is acceptable. For instance, an employer may assess that it is a risk for their business to be opened in the evening to service customers with reduced staff. However, if there are controls in place that provide for the safety of the employee and a safe work environment, the employer may assess that the risk is acceptable.

Before you start with the risk assessment, a Risk Assessment Team should be created. This could include senior managers, a health and safety representative, human resources, security and possibly finance. The Bill includes a list of regulations that will come into effect eventually. One includes the appointment in the workplace of a workplace co-ordinator to oversee these issues. To date, we have not seen the actual regulations requiring this appointment but it would make sense to name a co-ordinator to head the Risk Assessment Team.

This Team should consider the following:

- Circumstances that would be common to similar workplaces - even if their workplace has not had a specific incident, it may be quite common in other similar workplaces.
- Circumstances specific to your workplace – review the history of the employer to determine whether there are patterns of violence to be reviewed. Look at past incidents and accident reports, police and security reports. Consider any orders from government agencies, such as the Ministry of Labour. If there is a union, look at grievances. If there is an internal investigation process, looking at complaints that have been filed in the past. Look at disciplinary notes or performance appraisals where violent issues or safety complaints have been raised.
- Compile and circulate a worker’s survey. This can either be circulated to all employees or at least a sampling of employees in each area of the employer’s operations. A survey should include the following:
  - Questions about previous physical or verbal forms of violence
  - Whether the incident was reported
  - Who the incident involved
  - Whether the employee works in the evenings or early morning
  - Whether the employee works alone or with a small number of workers
  - Whether the employee feels that they are susceptible to violence in the workplace
  - Whether the employee feels that the workplace is adequately protected
  - Whether the employee feels the company’s security measures are appropriate
  - Have the employee rate their comfort level in the building, outside of the building or other locations where they work
  - Where does the employee feel violence is most likely to occur
  - Ask whether the employee has ever missed work due to violence or a threat of violence in the workplace and whether the employee has reported the violence or threat to a manager in the past
  - Allow the employee to provide details or concerns on a no-name basis

After the review has been conducted and the survey results have been analyzed, the Risk Assessment Team should prepare a report. The report should outline the steps the team took to assess the risks, the identified risks and recommended responses to reduce the risks in the future. These results must be shared with the employees, and their representatives in the organization.

2. **Developing a Policy:** For a workplace violence policy, the following components should be included:

- a general statement that the employer will not tolerate violence or unacceptable behaviour in the workplace and that the employer will act quickly if it occurs
- outline the steps that the employer has taken to prevent violence (risk assessment, implementation of a policy, controls in place, communication and training on expectations and how to respond to a violent situation in the workplace, report and investigation process)
- who the policy applies to (employees, customers, service providers)
- responsibility of the employee to report violence, or threatened violence/unacceptable behaviour, to attend training, and co-operate in any investigation
- responsibility of managers to assess and reduce risks in their area, train employees to recognize risks, respond promptly to reports, follow procedures when a report is made to reduce risks, report and document incidents, ensuring proper medical care is provided and to co-operate with investigations and third parties
- definition of workplace violence should be included
- outline the steps available for an employee who has experienced workplace violence, a threat of violence or unacceptable behaviour and how the employer will respond to the complaint
- the employee's right to refuse to work if they feel their safety is at risk and the steps the employee and the supervisor will take

3. **Training:** Once the assessment is completed, the results are analyzed and the policy is drafted, the employees should be trained. The training is two fold:

- (a) Train the employee on the workplace risks, how to reduce them and what to do if there is violence or a threat of violence in the workplace;
- (b) Train the employee on the employer's expectation of its workers and the consequences of not meeting the expectations;

## **B. Workplace Harassment**

1. Develop or refresh your policy. We will not cover this in detail today but I am happy to discuss components if anyone is uncertain.

Most employers should already have a work harassment policy in effect in their workplace. This policy should define workplace harassment in accordance with the definition provided above. The policy should:

- Provide examples of harassment
- State the company's position with respect to its expectations of a workplace free from harassment
- Provide a mechanism for the employees to initiate a complaint
- State the employer's obligation to investigate the complaint and provide a resolution

2. Ensure complaint process operating properly. You may have a complaint and investigation system in place. Ensure that you review the process and the designated investigators to ensure up-to-date training and any issues that have arisen in the past have been resolved.

3. Train employees on expectations of a workplace free from harassment and how to obtain assistance if needed. Ideal to hold another training session to outline these points. Also, it is important to train management on receiving, investigating and resolving complaints.

4. **Implementation:** Make sure that what is in writing is actually used in the workplace.

### **All of this before June 15<sup>th</sup>?**

While the legislation takes affect on June 15, 2010, the government has already indicated that it will be lenient with employers while their systems are implemented in the workplace. This does not mean that employers will be allowed to procrastinate but it is better to take the proper steps to ensure that the policy and procedure that is implemented is correct, thorough and relevant to your workplace rather than to quickly implement something that will be flawed.

If you require further information or wish to discuss these matters in further detail, please do not hesitate to contact me.

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## INVESTIGATION CHECKLIST

Names, addresses, telephone numbers of complainant, alleged assailant and witnesses	<input type="checkbox"/>
Occupation of complainants, alleged assailant and witnesses	<input type="checkbox"/>
Date and time of Incident	<input type="checkbox"/>
Date and time incident reported to employer	<input type="checkbox"/>
Exact location of incident	<input type="checkbox"/>
Exact location of complainants, alleged assailants and witnesses	<input type="checkbox"/>
Activities of complainants, alleged assailants and witnesses before, during and after incident	<input type="checkbox"/>
Statements of witnesses and their locations	<input type="checkbox"/>
Detailed explanation of events in order of sequence of occurrence	<input type="checkbox"/>
Complainant's account of events	<input type="checkbox"/>
Alleged assailant's account of events	<input type="checkbox"/>
Description of assailant(s)	<input type="checkbox"/>
Description of any vehicles involved in incident	<input type="checkbox"/>
Description of any other items involved in the incident	<input type="checkbox"/>
What the complainant and the alleged assailant said and did immediately before and after incident	<input type="checkbox"/>
Physical conditions of work environment at time of incident	<input type="checkbox"/>
Assailant's physical and mental state prior to and at the time of incident	<input type="checkbox"/>
Complainant's physical and mental state prior to and at the time of incident	<input type="checkbox"/>
Unusual activity that may have contributed to incident	<input type="checkbox"/>
Substance use or abuse	<input type="checkbox"/>
Relationship between complainant and alleged assailant, if any	<input type="checkbox"/>
Investigator's relationship to complainant and alleged assailant, if any	<input type="checkbox"/>
Photographs of incident site, diagram of incident site with location of complainant and witnesses	<input type="checkbox"/>
Diagram of incident site with location of complainant, alleged assailant and witnesses	<input type="checkbox"/>

# INCIDENT REPORT FORM

## Complainant Information

Name:

Job Title

Department

Date of Incident:

Time of incident:

Type of Incident:

Physical

Verbal

Other

Description of Incident

Location of Incident

Medical Attention required (Please explain):

Police called?  Yes  No

If yes, give details:

WSIB report?  Yes  No

MOL report?  Yes  No

Provide details:

Investigation conducted?  Yes  No

Names of investigators involved:

Reported to Supervisor?  Yes  No

Name of Supervisor:

Results:

## INCIDENT REPORT FORM

### Alleged Assailant Information

Name (if known):

Employee  Customer  Visitor  Delivery Person  Ex-Employee

Other: \_\_\_\_\_

Male  Female

Department (if Employee)

Age of Alleged Assailant:

Description of Alleged Assailant:

Has the alleged assailant been involved in any previous incidents with employees? If so, provide details.

Did any working conditions contribute to the incidents?

Were there any witness? Names:

Please provide any other information you think is relevant:

Name of Investigator:

Signature of Investigator:

Date: