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Workplace sexual harassment

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Ontario's Sexual Violence and Harassment Action Plan Act means more intervention from government.

The first anniversary of Ontario's Sexual Violence and Harassment Action Plan Act recently passed, and labour and employment lawyers in the province are getting a taste of how Bill 132 plays out in reality.

"What we're seeing from the Ministry of Labour is more intervention than I thought we would see," says Shana French of Sherrard Kuzz LLP in Toronto.

difference with the new legislation "comes in its teeth and the positive obligation on employers."

The new obligations came into force on Sept. 8, 2016, and among other requirements, the bill amends the Occupational Health and Safety Act to state that: employers must have a written workplace harassment program and policy in place; clearly set out who would investigate claims if the alleged harasser is an employer or supervisor; and review the program at least once a year to ensure compliance. The bill also gives the Ministry of Labour the unprecedented authority to order an employer to hire — at the employer's expense — an outside investigator.

"Where we're really seeing enforcement focused is on whether an investigation was conducted," French says. "The Ministry of Labour is being highly interventionist in terms of compliance and appears to be defaulting to ordering a third-party investigation."

Pre-Bill 132, French categorized workplace harassment as more of a reactive regulation by the Ministry of Labour. In the post-Bill 132 world, it's a more proactive compliance monitoring. Although the system seems to still be complaint based, French says she's also seeing, in terms of routine audits, the element of compliance coming up.

Gillian Shearer, founding partner of Shearer Parnega LLP, says that over the last three to six months she's seen an increase in the number of sexual harassment investigations she's been asked to do and "more of an uptake or concern around, in particular, the need for investigators to be independent and to be seen to be independent."

Shearer attributes this increase to the life cycle of the process. The bill came into play, investigations begin to wrap up a few months later and employees unhappy with the results — rightly or wrongly — know they have another avenue. They go to the ministry, which comes in to investigate the employer's process and then might order an independent investigator to come in.

"To avoid all of that, I'm seeing more and more legal counsel where senior HR folks are advising the organization go external," she notes. "They don't want to have to do a redo."

French says the bill has “changed our practice primarily in how we’re handling investigations.”

Employers have always looked into situations of sexual harassment, she says, but “maybe not as formally as is required under the legislation, and knowing the Ministry of Labour is watching as carefully as they are certainly is compelling employers to be more formal and transparent in their investigation processes.

“It’s making sure an employer who has conducted the investigation is just really following the procedural steps, because once they’re on the ministry’s radar — they’re on the ministry’s radar,” says French.

Documentation of the process is absolutely fundamental, Shearer says, noting that’s what will be scrutinized in the event of a ministry investigation.

Shearer says she’s starting to see proactive employers bringing firms like hers in to take a look at their current policy and process and set themselves up to handle more investigations internally, as well as seeking training to improve the skillset of their internal people to ensure they’re complying with the ministry’s Code of Practice when they’re conducting their investigations and are in a strong position to withstand any challenges from an employee who goes to the ministry.

The firm has a project going on right now with an organization that’s saying set us up for success, Shearer says.

“Given the law and the Code of Practice, when can we do [investigations] internally and when should we be sending them externally? Make sure our processes comply and people know when it’s really offside the legislation to do it internally as opposed to when it’s just good practice.”

With the legislative changes in Ontario likely serving as one of the motivating factors, Alberta recently introduced Bill 2, An Act to Remove Barriers for Survivors of Sexual and Domestic Violence. Like Ontario, the bill, among other amendments not as applicable to the labour and employment context, removed the two-year limitation period on instances of sexual violence, and the changes — which came into force May 4 — apply retroactively. This means that employers could potentially be fielding accusations from many years ago.

Though the changes came about following Ontario’s Bill 132, the Alberta legislation “is much narrower in scope,” says Hugh McPhail, partner at the Edmonton office of McLennan Ross LLP.

There hasn’t been a discernable impact on his practice from Bill 2, he notes, but his general advice to employers is “amplified.”

He advises employers to “make sure they actively investigate and deal with any incidents when they occur and review and update all sexual violence and harassment policies.”

French says that as much as the legislative changes in Bill 132 focus on the workplace, “they sort of slid that one in, too, which I think is the more legitimate change to the legislation. That’s a different piece of Bill 132 that gets lost.”

Though it’s a small piece of the bill, and not what would generally be considered a workplace issue as it would be a civil action, French says it can’t hurt for employers to be prepared.

“You can have an employee who files a claim years later and if you haven’t done a good, sustainable investigation, the evidence might not be there to defend it down the road when your physical witnesses aren’t available to you.”

Tracey Epp, partner at Pitblado LLP in Winnipeg, says Manitoba has had no change so far to its legislation with respect to the limitation period — the province is still at two years. Any change would require attention being brought to the issue, whether from media, pressure from activist groups or even from the bar association or the law society.

Bill 132 came about in the wake of the case of former CBC radio broadcaster Jian Ghomeshi and the firestorm of media attention that surrounded the allegations of workplace sexual harassment and assault against him and the consequently highly publicized trial. He was eventually acquitted of criminal charges in March 2016.

“It was the post-Ghomeshi world . . . I think it was really political in terms of the Workplace Action Plan,” says French, adding that the changes reflect what was happening in the political sphere as opposed to what were blatant issues needing correction in the workplace.

“Putting sexual harassment under [the OHSA] umbrella certainly prioritizes it relative to the Ontario Human Rights Code,” she notes. “Do I think it was necessary? No. But does it create enhanced protections, obligations and liability? Absolutely.”

Harassment is harassment, whether it’s sexual or not, French says, adding that all Ontario did was change the definition of harassment to expressly call out sexual harassment — but it was already covered.

As to the question of other provinces going as far as Ontario with amendments to their respective occupational health and safety legislation, French says, if you get the right political platform, “people can be told protections aren’t there that are in fact already there and it can become an action item. It depends on how hot the topic gets again.”

Manitoba’s Workplace Safety and Health Act has had a very broad definition of harassment and violence and has required employers to have a policy and a procedure in place in order to deal with those situations for a number of years, says Epp. Prior to that, sexual harassment had fallen under the Manitoba Human Rights Code — similar to Ontario — but the code has a very narrow definition.

“They wanted to broaden the protections and the prohibitions in a much more efficient way of enforcing it,” Epp says. “Under our workplace safety and health legislation, if a complaint is filed, it’s a lot faster to send in a workplace safety and health officer . . . and they have very broad powers in terms of their ability to issue stop work orders or improvement orders.”

However, it doesn’t have anything that goes as far as Bill 132’s authority to appoint independent investigators at the employer’s cost and, to her knowledge, no one has suggested an amendment like that, says Epp.

The concern for Epp is that an independent investigator is not always the most appropriate way to deal with an allegation, and there are more cost-efficient options such as forms of alternative dispute resolution, which don’t always have to be face to face, depending on the circumstances.

If the option for Manitoba’s workplace safety and health people to have that power ever came up, “I think there would be a tremendous amount of pushback because not every employer can afford that kind of a cost,” Epp says.

French says that while Ontario’s mandate is to be proactive and interventionist, “the more practical investigators are realizing ordering a $15,000 investigation isn’t necessarily what’s warranted but what they’re looking for with that ‘third party’ is the independence to make sure the investigator is outside of the scope of authority of someone who is the subject of the investigation.”

Epp says she finds the principles behind the legislative changes — whether in Alberta, Manitoba or Ontario — are being incorporated into the common law in all jurisdictions, with or without specific legislation.

From a best practices standpoint, Epp recommends that her clients — whether or not the legislation applies to them — have strong policies in place.

Looking forward, French predicts that, in the next six to 12 months, “we’re going to see the ministry scrutinizing whether people are in fact undertaking their annual review of the policy as required and training.”

Even employers who have robust workplace harassment policies and a thorough enough program that would withstand the scrutiny of the ministry would be well advised to check again, she says. Employers need to understand it’s not a measure they can create, implement, put on a shelf and dust off as required.

“I can’t emphasize enough the importance of going back and making sure that the policy is in compliance with Bill 132 and that the annual training is being done accordingly. You don’t want to be in the throes of litigation or a serious incident when you realize you’re out of date or non-compliant.”