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Countdown to Bill 168

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Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)* 2009 (the “Act”), received Royal Assent on December 15, 2009. The Act, which comes into force on June 15, 2010, requires all provincially-regulated employers in Ontario to protect workers against violence and harassment in the workplace. Now that the clock is ticking, employers

should move quickly to review their obligations and ensure compliance.

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What is Workplace Violence and Harassment?

“Workplace violence” is defined broadly in the Act to include:

- The exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury.
- An attempt to exercise physical force against a worker in a workplace that could cause physical injury.
- A statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury.

“Workplace harassment” means 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 used in the Ontario *Human Rights Code*. However, the provisions in the *Code* prohibit harassment in employment on the basis of specifically prohibited grounds of discrimination, namely: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. The new law against workplace violence and harassment has no such restriction, and as such offers broader protection for employees than currently available under the *Code*.

Employer Obligations

Every employer governed by the Act will be obliged to:

- Undertake a risk assessment process to measure the risk of workplace violence.
- Develop a workplace violence and harassment policy to address the risks identified.
- Develop programs and procedures to implement the policy.

What is A Risk Assessment?

An employer’s obligation to assess the potential for violence and harassment in the workplace goes beyond an employer’s current obligations under the *Occupational Health and Safety Act*.

The risk assessment obligation requires an employer to consider risks of violence and harassment within the employer’s own workplace and beyond. This includes the physical security of each employee during every aspect of work performed inside and outside the employer’s facility, in parking lots, during work-related travel and while workers are at off-site locations. Sources of violence may include co-workers, supervisors, customers, members of the public and unauthorized trespassers.

Significantly, the risk assessment obligation requires an employer to assess and address *domestic* violence where the employer is aware or ought reasonably to be aware of the possibility that domestic violence could take place at the workplace.

The results of the assessment must be in written form and, once completed, presented to the employer’s health and safety representative or committee, or alternatively, directly to the workers.

Finally, the Act requires employers to reassess the risk of workplace violence as often as necessary, and in any event, annually. This includes following a *bona fide* complaint or inci-

dent, or a significant business change affecting the workplace (i.e., an acquisition, restructuring, facility relocation or renovation, etc.).

Policy Development and Implementation

Every employer must develop and implement a violence and harassment policy (or two separate policies) prior to June 15, 2010. To carry out this obligation, an employer must designate a workplace coordinator to manage the policy development process. The policy(ies) created must include measures and procedures to:

- Control the risk of workplace violence and harassment identified through the assessment process.
- Enable workers to:
 - Obtain emergency assistance in the event of a violent incident, or the risk or threat of violence.
 - Report incidents or threats of violence or harassment to the employer.
- Demonstrate how the employer will investigate and deal with incidents and complaints of workplace violence and harassment.

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Workers must then be trained to ensure compliance, and for an employer with more than five workers, the policy(ies) must be in writing and posted in the workplace.

Disclosure Obligations

The Act is not without controversy. Under the new law, where the worker is anticipated to encounter an individual who has a history of violence, and where the individual may pose a threat of physical harm to a worker, the employer has a positive obligation to warn the worker with sufficient information to protect the worker. This obligation only arises in respect of an individual with a history of violent behaviour, not a history of harassment. Precisely what information must be disclosed, privacy considerations, and the steps an employer must take to fulfill its obligations under this part of the Act remain unanswered and the subject of debate.

Refusal to Work

The Act gives to a worker the right to refuse to work where the worker has reason to believe he or she may be at risk of workplace violence. Such a refusal will trigger existing investigation procedures already in force under the *Occupational Health and Safety Act*.

What Should an Employer do **Now**?

There are a number of steps an employer should consider now, to prepare for June 15, 2010:

- Appoint a workplace coordinator to manage the development and implementation of policies, training and accountability.
- Develop a risk assessment tool.
- Conduct a risk assessment.
- Address issues identified in the risk assessment.
- Review existing workplace violence and harassment policies to ensure compliance with the new obligations.
- Update or develop new workplace violence and harassment policies.
- Review existing complaint and incident reporting policies to ensure compliance with the new obligations.
- Update or develop new complaint and incident reporting policies.
- Establish procedures to comply with disclosure obligations where a worker may come into contact with an individual with a history of violence.
- Develop and implement a record keeping protocol to document assessments, complaints, remedial action, etc.
- Review and update discipline and other workplace policies to ensure they comply and are consistent with new or revised violence and harassment policies.
- Plan and implement education and training programs for employees.
- In a unionized workplace:
 - Review the terms of any collective agreements to determine if provisions are affected by the Act.
 - Where possible, communicate with union representatives regarding proposed policy changes and compliance with the Act. This ongoing communication may reduce the risk of a future grievance directed at whether the employer has met its obligations under the Act.

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