

## OCCUPATIONAL HEALTH & SAFETY UPDATE

# Bill 168 – Ontario Employers to Face Onerous Obligations for the Prevention of “*Workplace Violence*” and “*Workplace Harassment*”

BARBARA G. HUMPHREY

### Alert!

Violence prevention in Canadian workplaces has emerged as a key priority across Canada. The McGuinty government has followed the lead of most provinces in Canada and the Federal government with the introduction of Bill 168. Bill 168 proposes comprehensive amendments to the *Occupational Health and Safety Act*. The proposed amendments will create serious and significant obligations for all Ontario workplaces with more than 5 employees to develop and implement comprehensive initiatives directed at preventing *Workplace Violence* and *Workplace Harassment* in Ontario workplaces.

The likelihood is that Bill 168 will be passed given the prioritizing of the issues of violence and harassment in the workplace. The details of the Bill defining employer obligations for violence prevention are no surprise. They reflect the legislative frameworks that have emerged in other provincial jurisdictions and Federally.

### **Obligations Beyond Violence Prevention: The Codification of Employer Responsibility for Harassment Prevention as a Health and Safety Matter**

Bill 168 would introduce statutory obligations on employers for *Workplace Harassment Prevention* beyond harassment rooted in equality rights status. The Bill would codify employer obligations with respect to what has been characterized in common law developments as “*personal harassment*” or “*psychological harassment*”.

The proposed statutory provisions addressing *workplace violence* and *workplace harassment* would significantly expand employer responsibility and accountability for ensuring workplace environments and interactions consistent with a worker’s health, safety and well-being.

### New Liability Risks

It is important to highlight that the proposed employer responsibilities for *workplace violence prevention* and *workplace harassment prevention* will arise under the *Occupational Health and Safety Act*. The significance in the context of liability risks is that employers and management will be exposed to the risks of the remedial provisions attending OHS in the event that employers or supervisors fail to meet the due diligence standards applicable to *workplace violence prevention* and *workplace harassment prevention*.

## Due Diligence in the Context of Violence Prevention and Harassment Prevention

Assumedly, the discharge of an employer's due diligence obligations in the context of **workplace violence prevention** and **workplace harassment prevention** will demand at a minimum that employers demonstrate that they have complied fully with the detailed requirements of the legislative provisions prescribing the required violence prevention programs and harassment prevention initiatives.

## Highlights: What is Required of Employers re: Violence Prevention

Bill 168 would require every employer in Ontario with more than five employees to develop and implement a comprehensive violence prevention program. Mandatory elements of the **Workplace Violence Prevention** program include the following:

1. The development and implementation of a workplace violence policy, to be posted at a conspicuous place in the workplace.
2. Initiatives to assess and identify the risks of workplace violence particular to the organization.
3. The development and implementation of measures and procedures to control or minimize the risks identified in the risk assessment process.
4. The development of procedures for workers to report incidents of workplace violence or threats of workplace violence; and appropriate investigative procedures.
5. The establishment and communication of procedures for workers to report incidents or threats of violence.
6. Developing and communicating procedures for the investigation and addressing of incidents of violence or threats of violence.
7. An obligation to provide a copy of the results of the risk assessment to the Joint Health and Safety committee (or safety representative or workers).
8. Training obligation: a training obligation with respect to the employer's violence prevention program.

## Highlights: Employer Obligations re: Workplace Harassment Prevention

Employer obligations under Bill 168 with respect to **workplace harassment prevention** include the following:

1. The development and implementation of a policy and prevention program with respect to workplace harassment.
2. At a minimum, the harassment prevention program is to include:
  - a. Procedures to report incidents of workplace harassment;
  - b. Procedures defining how the employer will investigate and address incidents and complaints of workplace harassment.

It is noteworthy that the Bill contemplates an obligation to investigate "*complaints*" and "*incidents*". This suggests the employer obligation to

investigate and address harassment is not limited to responding to complaints. The additional word “*incidents*” suggests a broader, more proactive obligation.

3. Training obligations. The provisions addressing information and instruction to workers disclose an obligation to train workers with respect to the details of the workplace harassment policy and program.

### Alert: Problematic Definition of “Workplace Harassment”

The definition of “*Workplace Harassment*” in Bill 168 will generate significant concern in employers.

*“Workplace Harassment...means engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or reasonably ought to be known to be unwelcome.”*

This definition has been borrowed from the human rights definition. The scope and subjectivity of the definition will import considerable uncertainty for employers as to what will be treated as “*workplace harassment*” under the *Occupational Health and Safety Act*.

### Employer Responsibility for Domestic Violence

Bill 168 will introduce a degree of responsibility and accountability on employers for the risk of violence in the workplace related to domestic violence issues. If the employer is aware or “*ought reasonably to be aware*” that a domestic violence matter could expose a worker to physical injury, the employer will be required to take reasonable precautions for the protection of the worker. At a minimum the provisions would require any employer with direct or indirect knowledge of a domestic abuse or dispute issue that suggests the potential for violence to pursue some degree of inquiry and develop a potential response, depending on the results of the inquiry.

### Right to Refuse to Work Where Risk of Violence

The Bill will extend the right to refuse to work where workplace violence or the risk of violence is likely to endanger a worker.

### Implications of Bill 168 for Ontario Employers

- Ontario employers can expect Bill 168 to become law in Ontario in 2009 given the high priority that workplace violence and prevention is attracting.
- Hopefully there will be some further consideration of the definition of “*workplace harassment*” if the Bill continues to create obligation for employers with respect to workplace harassment.

### ***Ontario Employers Interest in Proceeding to Develop and Implement Workplace Violence Prevention Programs and Workplace Harassment***

It is unlikely that the elements of the prevention programs identified in Bill 168 will be varied significantly for the following reasons:

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1. The elements of the violence prevention programs contemplated by Bill 168 are consistent with the elements identified to date in most Canadian jurisdictions as key elements of effective violence prevention programs and key elements of due diligence.
2. The workplace harassment program components identified in Bill 168 are consistent with the historical due diligence expectations associated with an employer's obligations for workplace harassment prevention in the equality rights context.

**Contact:** For support in managing the challenges discussed above, contact Barbara Humphrey at [bhumphrey@sbhlawyers.com](mailto:bhumphrey@sbhlawyers.com) or 416-862-1616.



MANAGEMENT  
LAWYERS

*UPDATE* is an electronic publication of **STRINGER BRISBIN HUMPHREY**

110 Yonge Street, Suite 1100, Toronto, Ontario M5C 1T4

T: 416-862-1616 Toll Free: 1-866-821-7306 F: 416-363-7358

65 Cedar Pointe Drive, Unit 806A, Barrie, Ontario L4N 5R7

T: 705-727-0808 Toll Free: 1-866-878-6253 F: 705-727-0323

E: [info@sbhlawyers.com](mailto:info@sbhlawyers.com) I: [www.sbhlawyers.com](http://www.sbhlawyers.com)

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