

HOUSER, HENRY & SYRON LLP

EMPLOYMENT LAW BULLETIN

Violence and Harassment in the Workplace

In December of 2009 Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)*, 2009 became law. **Employers have until June 15th, 2010 to comply with the new provisions of the *Occupational Health and Safety Act (the "OHSA")*.**

These new provisions require employers to develop policies regarding violence and harassment in the workplace, to conduct a risk assessment with respect to violence in the workplace and to inform employees if a person with whom they may come in contact is known to have a history of violence.

Workplace harassment is defined in the OHSA as "engaging in a course of vexatious comment or conduct against an employee in a workplace that is known or ought to be known to be unwelcome". This definition of harassment is broader than under the *Ontario Human Rights Code*, because it is not confined to matters of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, age, record of offences, marital status, family status or disability. For example, under the OHSA, harassment will include psychological harassment that is unrelated to the any of the above mentioned grounds for workplace harassment.

Workplace violence is defined in the OHSA as "(a) the exercise of physical force by a person against an employee, in a workplace, that causes or could cause physical injury to the employee; (b) an attempt to exercise physical force against an employee, in a workplace, that could cause physical injury to the employee, (c) a statement or behaviour that it is reasonable for an employee to interpret as a threat to exercise physical force against an employee, in a workplace, that could cause physical injury to the employee". This definition encompasses threats as well as conduct. It also includes violence that may happen due to risks or dangers that exist in the workplace

environmental. The workplace is not limited to the employer's premises, but includes anywhere the employee may be during his or her working hours.

Employers will now be required to take specific steps to prevent and address workplace harassment and workplace violence. These steps include:

- a) An assessment of the risk that workplace violence may occur based on the nature of the workplace, the type of work, and the conditions of work. In order for employers to do an assessment it may be prudent to involve employees, human resources personnel, management and others so that the risk assessment is broadly based. 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 must then be provided to the employer's health and safety committee or health and safety representative, if such a committee or representative exists. Where there is no committee or representative, the employees must be advised of the results of the assessment. Employers must reassess the risk of workplace violence "as often as necessary". Employers are required to provide a copy of the assessment to Ministry of Labour inspectors on request.
- b) Developing and implementing written policies dealing with workplace violence and harassment. These policies must be reviewed annually. They must include measures to control identified risks, provide immediate assistance when workplace violence occurs or is likely to occur, require the reporting of incidents of workplace violence to the employer or supervisor, and for the investigation of and dealing with workplace violence. Employers must provide training and information to employees regarding these policies and programs. **These policies must be posted in a prominent area in the workplace.**
- c) Where an employer becomes aware, or ought reasonably to be aware, that domestic violence may occur in the workplace, the employer is required to take reasonable precautions to protect the employee. Domestic violence is

violence by someone the employee has a personal relationship with, such as a relative or spouse.

- d) Employers are required to provide information to employees, including personal information, of a person with a history of violent behaviour. This information must be provided to the employee if the employee is expected to encounter that person in the course of his or her work, and the risk of workplace violence is likely to expose the employee to physical injury. The employer must disclose only as much information as “is reasonably necessary to protect the employee from physical injury”. Where the source of the risk is a co-worker the employer will be faced with a difficult choice. On the one hand the *Ontario Human Rights Code* prohibits discrimination on the basis of a “record of offences” and on the other hand, not disclosing the information may render the employer liable for penalties for violation of the OHS Act if an employee is injured. Failure to disclose may also be used as evidence of employer negligence in a lawsuit brought by an injured employee.
- e) Employers must accept an employee’s refusal to work or perform particular tasks where the work believes that workplace violence is likely to occur. Where an employee reports an unsafe condition or other risk of violence, an investigation must be immediately conducted. If the risk of violence results from workplace conditions prompt remedial action may be required. If the employee has reasonable grounds to believe that the work conditions remain unsafe, the employer or the employee must request that an inspector from the Ministry of Labour attend at the workplace to conduct an investigation.

We have attached to this memorandum a chart that breaks down the requirements of this new law to separate the legal requirement as to workplace harassment from those related to workplace violence.

The penalties for each violation of the OSHA can result in a fine of up to \$25,000 for an individual and/or up to 12 months imprisonment and a fine of up to \$500,000 for a corporation.

This memorandum is intended as information and not as legal advice and is an overview of the changes that have occurred in the OSHA that come into effect on June 15, 2010. For further information or legal advice please contact your lawyer at Houser Henry and Syron LLP.

	Workplace Violence	Workplace Harassment
Definitions	s. 1(1) workplace violence includes a threat , an attempt , or an exercise of physical force	s. 1(1) workplace harassment means vexatious comments or conduct that is known or ought reasonably to be known to be unwelcome .
Assessment	s.32.0.3 assess the risk of workplace violence advise the joint health and safety committee, the health and safety representative, or the employees (as applicable) of the results of the assessment reassess as often as necessary	
Policy	s/32.0.1 prepare and post a written policy review the policy not less than annually [policy need not be in writing in workplaces with 5 or few employees unless inspector orders otherwise]	s.32.0.1 prepare and post a written policy review the policy not less than annually [policy need not be in writing in workplaces with 5 or few employees unless inspector orders otherwise]
Program	s. 32.0.2 develop a program to implement the policy the program must cover controlling risk, summoning immediate assistance, and reporting, investigating and dealing with incidents.	s. 32.0.6 develop a program to implement the policy the program must cover reporting, investigating and dealing with incidents
Domestic Violence	s. 32.0.4 the employer must take every reasonable precaution to protect employees for domestic violence in the workplace	

	Workplace Violence	Workplace Harassment
Duties	<p>s. 32.0.5 (1)</p> <p>the employer, supervisor and employee duties (ss. 25, 27 & 28) apply, as applicable, with respect to workplace violence</p>	
Information	<p>ss. 32.0.5 (2) – (4)</p> <p>the employer must provide the employee with appropriate information on the policy and the program</p> <p>the employer and the supervisor have a duty, in certain circumstances, to provide a employee with information (including Personal information) about the risk of workplace violence from a person with a history of violent behavior</p> <p>the employer and the supervisor shall not disclose more personal information than is reasonably necessary.</p>	<p>s. 32.0.7</p> <p>the employer must provide the employee with appropriate information on the policy and the program</p>
Right to Refuse	<p>s. 43 (3) (b.1)</p> <p>an employee may refuse to work where he or she believes that workplace violence is likely to endanger himself or herself</p> <p>ss.43 (5) and (10)</p> <p>until the employer’s investigation or an inspector’s investigation is complete, the employee must remain in a safe place near his or her work station and be available to the employer, supervisor or inspector for the purposes of the investigation</p>	