

MARCH 14, 2016

Canada: Ontario Employers Have New Workplace Sexual Harassment Obligations

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Bill 132, entitled “*Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2015*” (hereinafter the “Bill”) has now been passed into law in Ontario and will be in force September 8, 2016. The Bill amends various statutes with respect to sexual violence, sexual harassment, domestic violence and other matters. It amends various provisions of the *Ontario Occupational Health and Safety Act* (the “Act”) and creates new obligations for employers surrounding the prevention, training, investigation and resolution of workplace harassment, particularly workplace sexual harassment.

New Definition of Sexual Harassment

The previous definition of “workplace harassment” in the Act has been repealed and the following substituted:

“workplace harassment” now means:

- a. *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, or*
- b. *workplace sexual harassment[.]*

In other words, “workplace sexual harassment” is now specifically protected by the Act. The following definition of workplace sexual harassment has been added:

“workplace sexual harassment” means:

- a. *engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or*

- b. making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome[.]*

Reasonable Management of Employees

The Bill makes it clear that workplace harassment does not include “a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace.” This is an important distinction that recognizes that an employer’s reasonable management of workers based on their workplace performance and conduct should not be considered harassment of an employee.

Written Workplace Management Program

The Bill now requires that employers, in consultation with the health and safety committee or a health and safety representative, implement a specific written program in the workplace. This program must include a specific reporting mechanism for employers, procedures for investigation of incidents or complaints, the extent to which privacy of individuals can be maintained, and the manner in which the results of an investigation will be communicated to the alleged harasser and victim. Specifically, the Bill states that the written program shall:

- a. include measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the alleged harasser;*
- b. set out how incidents or complaints of workplace harassment will be investigated and dealt with;*
- c. set out how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the purposes of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law; and*
- d. set out how a worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation.*

Specific Employer Obligations in the Event of Harassment

It is not enough to have a written program on workplace harassment. The new Bill confirms that it must also be implemented appropriately. An employer must now ensure:

- a. an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;*
- b. the worker who has allegedly experienced workplace harassment and the alleged harasser, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation; and*
- c. the program developed is reviewed as often as necessary, but at least annually, to ensure that it adequately implements the policy with respect to workplace harassment.*

A Ministry of Labour inspector now has the power to order an impartial investigation, paid for by the employer, into any incidents or complaints of workplace harassment and to prepare a written report. The new Bill states:

An inspector may in writing order an employer to cause an investigation described in clause 32.0.7 (1) (a) to be conducted, at the expense of the employer, by an impartial person possessing such knowledge, experience or qualifications as are specified by the inspector and to obtain, at the expense of the employer, a written report by that person.

While the Bill is not clear regarding the circumstances that would trigger implementation of the inspector's powers, the inspector can presumably act before or after an employer has conducted an investigation.

Workplace Harassment Training

Employers are required to provide adequate training and instruction on the program with respect to workplace harassment. Previous training provided by an employer may be out of date.

Summary

As a result of the new Bill, employers should consider the following:

1. update their current written policies and programs relating to workplace harassment to now include workplace sexual harassment;
2. ensure the written policy contains adequate investigation, reporting, communication and resolution of complaints and incidents;
3. ensure information in the course of an investigation is properly handled and disclosed in order to recognize the privacy of complainants; and
4. ensure employees are properly trained on the Bill's new requirements for both managers and employees.

Please also join us for an in-depth discussion of this topic at the Littler Breakfast Briefing, "Maintaining and Managing a Respect-Based Workplace and Preparing for Bill 132." Click [here](#) for more information.