



GARDINER ROBERTS

March, 2010

## **BILL 168 – WORKPLACE VIOLENCE and HARASSMENT: BUREAUCRATIC “BIG BROTHER” or FOSTERING A BETTER WORK ENVIRONMENT?**

### **Gardiner Roberts LLP**

Scotia Plaza  
40 King St. West  
Suite 3100  
Toronto, ON  
M5H 3Y2

Tel: 416-865-6600  
Fax: 416-865-6636

[www.gardiner-roberts.com](http://www.gardiner-roberts.com)

This article was prepared by  
Warren Rapoport and Bob  
Nahiddi.



Mr. Rapoport is a partner in  
our litigation department and  
can be reached at  
416-865-6776 or  
[wrapoport@gardiner-  
roberts.com](mailto:wrapoport@gardiner-<br/>roberts.com)



Mr. Nahiddi is an associate in  
our litigation department and  
can be reached at  
416-865-4017 or  
[bnahiddi@gardiner-  
roberts.com](mailto:bnahiddi@gardiner-<br/>roberts.com)

On June 15, 2010 amendments to the *Occupational Health and Safety Act* will come into force; imposing new obligations on employers with respect to workplace violence and harassment. The amendments, purposed via Bill 168, are applicable to the vast majority of employers in Ontario and will impact both employers and employees.

Most notably the new law mandates that employers create workplace violence and harassment policies, programs to implement such policies, along with programs of assessment and reassessment to continually measure the risk of violence in the workplace. Given the broad ambit of the obligations, employers with existing workplace violence and/or harassment policies should be wary of ignoring the new law as existing policies may fall short of the new obligations.

The following is a brief overview of the highlights of the legislation, as well as a checklist of what an effective workplace violence and harassment policy should include.

### **Defining Workplace Violence and Harassment**

New definitions of “workplace violence” and “workplace harassment” are part of the changes. “Workplace harassment” is defined as follows:

“Workplace harassment” means 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.

The key word being “course” – that is, when does some “conduct” or “comment” change from being isolated to occasional to frequent, and which of those will be deemed a “course” of prohibited action – many reasonable persons could interpret those words very differently.

Also the definition is broader than the definition of “harassment” in the *Ontario Human Rights Code* in that “workplace harassment” needs not be related to a prohibited ground of discrimination, i.e. race, ethnic origin, age, sex, etc.

“Workplace violence” is defined as follows:

“Workplace violence” means (a) **the exercise of physical force** by a person against a worker, in a workplace, that causes or could cause physical injury to the worker; and/or (b) **an attempt to exercise physical force** against a worker, in a workplace, that could cause physical injury to the worker; and/or (c) **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 to the worker.

It is noteworthy that the definition of “workplace violence” is restricted to physical injury (or threat thereof) and does not specifically extend to psychological harm or injury as a form of workplace violence, although one would expect that may be the outcome of “**a threat to exercise physical force.**”



GARDINER ROBERTS

### **Workplace Violence and Harassment Policies**

Employers are required to create policies pertaining to workplace violence and harassment. For employers **with more than five regular employees**, these policies must be in writing and must be posted at a conspicuous place in the workplace. Employers are required to review such policies to ensure their effectiveness as often as necessary, and at a minimum annually. It is unclear at this time what resources, if any, the government will budget for such enforcement.

### **Program of Implementation**

Employers are required to develop and maintain a program of implementation with respect to their created policies of workplace violence and harassment. In regards to workplace harassment the program must contain measures and procedures:

- to be used by workers in reporting incidents of workplace harassment to their employer or supervisor; and
- to set out how the employer will investigate and deal with incidents or complaints of workplace harassment.

In regards to workplace violence the program must contain measures and procedures:

- to be used in controlling the risks identified in the workplace violence assessment that employers are obligated to conduct;
- involved in calling for immediate assistance when workplace violence occurs, or is likely to occur;
- to be used by workers in reporting incidents of workplace violence to their employer or supervisor; and
- to set out how the employer will investigate and deal with incidents or complaints of workplace violence.

Again what is unclear is to what extent the government will enforce these guidelines with inspectors, and whether they will take a conciliatory approach in the first couple years or whether they will crack down on initial complaints.

### **Workplace Violence Assessments**

Employers are required to assess the risk for violence in the workplace that may arise given the nature and condition of the workplace. Such assessments should take into account circumstances common to similar workplaces and circumstances specific to the particular workplace in question. Of course, the legislation is vague as to what this means. Does it require an independent assessment or can the employer develop the assessment itself? Don't be surprised if a cottage industry of experts suddenly develops in this area over the next few months.

An employer must express the results of the assessment to the company's health and safety committee or representative, or if lacking such representative, to advise the workers directly of the results of the assessment.

### **Workplace Violence Reassessments**

An employer must reassess the risk for workplace violence "as often as necessary" to ensure that their policies and programs continue to protect workers from workplace violence. Great words for these experts!



GARDINER ROBERTS

### **Domestic Violence**

If an employer is aware, or ought to be aware, that domestic violence that is likely to expose a worker to physical injury may occur in the workplace, the employer must take every reasonable precaution to protect the worker. The concept of “domestic violence,” however, is not defined in the legislation.

### **Disclosure of a Person with a Violent History**

Employers have a duty to provide information, including personal information, related to a risk of workplace violence posed by a person with a history of violent behaviour if: (i) the worker can be expected to encounter that person in the course of employment; and (ii) the risk of workplace violence is likely to expose the worker to physical injury. A “history of violent behaviour” is not defined in the legislation. Moreover it is unclear why anyone who would have exhibited such behaviour to an employer would still be working, unless the legislation intends to mean violent ex-convicts. How else would one reasonably know?

### **Work Refusals**

An employee’s right to refuse work has been broadened to include circumstances where the employee has reason to believe that he/she is in danger of being a victim of workplace violence. In such circumstance the employee is required to report the situation to their employer and the employer is obligated to conduct an investigation while the employee is kept in a “safe place that is as near as reasonably possible to his or her work station.” Naturally these types of work refusals are likely to occur if an employee is advised that they will be working with an individual with a history of violent behaviour.

### **Enforcement & Penalties**

The *Occupational Health and Safety Act* allows Ministry of Labour inspectors to “enter in or upon any workplace at any time without warrant or notice” for enforcement purposes. Aside from minor enforcement measures, such as the authority to mandate a written assessment when one would not otherwise be necessary, the amendments do not add much in the way of enforcement and/or penalty provisions. Accordingly, the enforcement and penalty clauses that currently exist in the *Occupational Health and Safety Act* will also be applicable to the new law. An individual employer who is convicted of contravening a provision, or an order of an inspector, may face a fine of not more than \$25,000 and/or imprisonment for a term of not more than twelve months. Employers that are corporations may face fines of up to \$500,000 if convicted.

### **Check List: What to include in Workplace Violence and Harassment Policies**

Employers should consider seeking legal advice when constructing their workplace violence and harassment policies. This is also why lawyers like these changes, but we are here to give you a free head start.

Each policy should be tailored to be specific to the workplace in question, but as a general outline, policies should include the following:

- *Statement of Purpose:* to clarify the purpose and intention of the document and provide an outline of the contents;
- *Policy Statements:* explicitly stating the employer’s stance on workplace violence and harassment and its potential negative impact in the workplace;
- *The Legal Definitions of Workplace Violence and Harassment as set out in the Bill;*



GARDINER ROBERTS

- *Commitment Statement:* to express the ideals of the employer/company in respect of workplace violence and harassment;
- *Risk Assessment Statement:* stating that workplace violence assessments will be conducted as often as necessary (best not to say by whom);
- *Workplace Violence Program:* i) to include the employer's risk control measures as per the workplace assessment; ii) to include any workplace violence assistance measures set up by the employer; iii) to include any workplace violence reporting measures set up by the employer; iv) to include the employer's specific response procedure to incidents and complaints of workplace violence;
- *Workplace Harassment Program:* i) to include any workplace violence reporting measures set up by the employer; ii) to include the employer's specific response procedure to incidents and complaints of workplace violence;
- *Education and Training Statements:* to express the employer's intention on educating and training all employees with respect to the new workplace violence and harassment policies, and then following through with it;
- *Statement of Roles and Responsibilities for Violence Prevention:* to clarify the persons responsible for ensuring policies and procedures are followed and enforced, including responsibilities of managers/supervisors, employees/workers, and members of the health and safety committee or representative (if applicable);
- *Statement of Program Evaluation:* stating that the effectiveness of the workplace violence prevention program will be evaluated at least annually.

In amending the *Occupational Health and Safety Act* the legislature has attempted to limit the incidents of workplace violence and harassment by compelling employers to prepare for and contemplate potential incidents of violence and harassment before they transpire. Whether this approach will be effective remains to be seen as the amendments are not without their problems.

The legislature's hesitation in defining certain key terms and the practical dilemma that arises in the context of enforcing the legislation are issues that remain to be resolved. Clarification is also required as to the degree of necessary detail that company violence and harassment policies must contain, and how far the Ministry of Labour is willing to go to review the workplace policies and assessments. Nevertheless, employers should be aware of their obligations and make best efforts to be in full compliance before June 15, 2010.



GARDINER ROBERTS