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New Workplace Harassment Laws Are Coming

On October 27, 2015 the Ontario Government introduced Bill 132, the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2015*. Bill 132 is the legislative action arising from the Government's March 6, 2015 report, "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment".

This article will only deal with Bill 132's proposed changes to the *Occupational Health and Safety Act* ("OHSA"). As these proposed changes will, at a minimum, require every employer to revise their workplace harassment policies, the requirements are set out in detail below.

The Status Quo

Most employers are aware of Bill 168, which came into force 5 years ago. Bill 168 created obligations on employers under OHSA to draft and design workplace violence and harassment policies/procedures, train employees on the policies/procedures, implement an employee complaint process, investigate complaints, complete a workplace violence risk assessment, warn employees of certain individuals with a violent history, and take reasonable precautions to protect employees from workplace violence as well as domestic violence.

Critics of Bill 168 have often noted that, while it was a good start, it did not go far enough to protect employees from harassment in the workplace. As a result of some high profile incidents in the news, these voices have become louder, leading to the "Action Plan", and now culminating in Bill 132.

The Proposed Changes

1. *Expanding What Constitutes "Workplace Harassment" to Include Sexual Harassment*

Bill 132 would revise the OHSA definition of "workplace harassment" to include "workplace sexual harassment", defined as follows:

- 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

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reasonably to be known to be unwelcome; or

- 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.

Interestingly, Bill 132 has confirmed that "reasonable" performance management and direction to workers will not be considered "workplace harassment". While this merely confirms the current state of the law, this is still good news for employers who, from time to time, are faced with frivolous harassment complaints from employees claiming that, for example, a poor performance appraisal constitutes harassment.

2. *Additional Requirements for Workplace Harassment Policies/ Program*

Currently, OHSA requires that employers create a workplace harassment program that includes measures and procedures on reporting incidents and investigating and dealing with incidents. Bill 132 would require that the workplace harassment program be expanded to:

- include measures and procedures for workers to report incidents to a person other than his/her employer/supervisor if that person is the alleged harasser;
- set out how information obtained about an incident or complaint (including any identifying information) will not be disclosed unless the disclosure is necessary for the purposes of investigating or taking corrective action or if required by law; and
- set out how the alleged victim and perpetrator (if a worker) will be informed of the results of the investigation and of any corrective action that has been taken as a result of the investigation.

3. *Specific Duties Added to OHSA Dealing with Workplace Harassment*

Currently, OHSA does not impose specific duties on employers related to workplace harassment apart from creating a policy/procedure and training staff. This is to be distinguished from the more fulsome and specific duties in OHSA in regards to "workplace violence". The Ontario Labour Relations Board has commented on this omission stating the following in one case:

> I also agree that the Act does not provide workers with a right to a harassment free workplace…the Legislature imposed substantial obligations on employers with respect to the prevention of workplace violence that do not exist with respect to workplace harassment. These include implementing measures and procedures to control the risk of workplace violence and summoning immediate assistance if workplace violence is even likely to occur… conducting a workplace violence risk assessment and subsequent reassessments… taking steps with respect to preventing domestic violence in the workplace…; and, expressly clarifying that the employer duties in section 25 (including subsection 25(2)(h)), the supervisor duties in section 27 and the worker duties in section 28 all apply as appropriate with respect to workplace violence...
>
> …[N]owhere in Part III.0.1 or elsewhere in the Act are employers explicitly obligated to provide a harassment free workplace, at least with respect to how broadly that term is defined in section 1 of the Act. Given the clear obligations the Legislature placed on employers with respect to workplace violence at the same time that the workplace harassment provisions were enacted, the omission of these obligations with respect to workplace harassment cannot be attributed to legislative oversight. Rather, the Legislature's omission of these obligations must have been deliberate.[1]

Bill 132 seeks to close this loophole by specifying that in order to protect a worker from workplace harassment, an employer shall ensure that:

- an investigation is conducted into incidents and complaints;
- the alleged victim and harasser (if a worker) must be informed

in writing of the results of the investigation and any corrective action taken as a result of the investigation; and

- the workplace harassment program is reviewed at least annually to ensure that it adequately implements the employer's workplace harassment policy.

4. *Increased Ministry of Labour Authority*

Bill 132 would add additional powers to Ministry of Labour ("MOL") inspectors to order an employer to investigate a workplace harassment incident and to engage an "impartial person" (who the inspector believes is qualified) to conduct the investigation and to issue a written report.

Notably, the inspector can order that the employer pay the costs involved of engaging the "impartial person". In practice, this can result in an inspector taking an issue out of the hands of an employer and outsourcing an investigation to a third party. There are currently no guidelines dealing with the circumstances in which an inspector may do this. Under the current provision, it would be up to the inspector's own discretion. Hopefully, some parameters are placed around such discretion.

One of the criticisms of the status quo is that OHSA does not provide inspectors with the tools to compel employers to take action to deal with workplace harassment. Bill 132 seeks to change that.

Next Steps

Bill 132 is in its infancy. It has only passed first reading and will go to committee for further study and debate. However, as this topic has been high on the Government's agenda, employers can expect that Bill 132 will pass – and probably with few changes.

What Does this Mean for Employers?

Bill 132 is significant.

Given the expanded definition of "workplace harassment", employers will now have to amend their policies and procedures to specifically include "workplace sexual harassment".

Bill 132 requires employers to "beef up" existing workplace harassment policies, procedures and training. By adding specific duties in relation to workplace harassment and by providing MOL inspectors with powers to order an external party to investigate, the MOL is signalling to employers that harassment issues in the workplace must be taken seriously and fully investigated.

Bill 132 confirms that sexual harassment is not only a human rights issue covered by the *Human Rights Code*, it is also a workplace safety issue covered by OHSA. As such, in addition to human rights liability, employers can face orders, fines and even prosecution under OHSA. It is important to keep in mind that just as the MOL can charge employers for more "traditional" safety incidents in the workplace (e.g. an arc flash or mechanical breakdown causing physical injury to an employee), employers may be charged for failing to abide by their, soon to be expanded, obligations in relation to workplace harassment.

In this changing climate, employers need to be diligent in dealing with harassment complaints in the workplace. At the very least, employers should be looking at their workplace harassment policies now with an eye to changing them once Bill 132 comes into force – currently set for July 1, 2016.

1 *Ljuboja v. Aim Group Inc.* 2013 CanLII 76529 at para 35 and 36