

**“ONTARIO’S BULLY-BUSTING BILL:  
WHAT IT MEANS FOR EMPLOYERS”**

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This paper is for general discussion purposes and does not constitute legal advice or an opinion.  
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## TABLE OF CONTENTS

INTRODUCTION .....	1
BACKGROUND .....	1
REQUIREMENTS SET OUT IN BILL 168.....	3
1. Preparation of Policies with respect to Workplace Violence and Workplace Harassment.....	3
2. Risk of Violence Assessment.....	5
3. Employers must Develop and Maintain a Workplace Violence Program .....	6
4. Employer Obligations with respect to Domestic Violence .....	6
5. Duties of Employers, Supervisors and Workers with respect to Workplace Violence .....	8
6. Employers required to Provide Instruction and Information on the Workplace Violence Policy and Program .....	8
7. Employers will be required to Develop and Maintain a Workplace Harassment Program .....	9
8. Employer must Provide Training and Information on the Harassment Policy and Program .....	10
9. New Work Refusal Procedures .....	10
10. Employer must give Notice of an Incident of Workplace Violence 11	
11. Inspectors Empowered to Order Written Policies for Small Workplaces .....	12
12. Expanded Regulation-Making Power.....	12
CONCLUSION .....	12
WORKPLACE SAFETY AND INSURANCE BOARD CHECKLIST ....	14
RESOURCES AVAILABLE TO EMPLOYERS.....	15

## **INTRODUCTION**

On April 20, 2009, the Ontario government introduced Bill 168 in the legislature. If passed, the legislation will amend the *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (“the *OHS*”) with respect to violence and harassment in the workplace. Although in some respects the proposed legislation simply clarifies current law and Ministry of Labour policies and practices, in other respects it may have a significant impact on employers. The introduction of this Bill, coupled with other initiatives undertaken by the Ontario government clearly indicate that employers must act and ensure that they are taking appropriate steps to protect employees from workplace violence.

## **BACKGROUND**

Workplace violence and bullying continue to be subjects of great interest and concern to employers and employees. The issues have attracted significant media attention, and attention from governments in various Canadian jurisdictions. Ontario is no exception. Prior to the introduction of Bill 168, the Ontario government was already undertaking initiatives aimed at combating workplace violence.

For example, in June 2008, the Ontario Ministry of Labour announced its “Safe at Work Ontario” strategy. The focus of Safe at Work Ontario was improved health and safety at work through training, education and enforcement of provincial legislation.

Under this strategy, the Ministry identified new criteria to identify workplaces to be targeted for inspection. The criteria included specific events or incidents of violence at the workplace.

The Ministry of Labour has announced that between April 1, 2008 and September 30, 2008, its inspectors made 198 field visits and issued 185 orders relating to violence in the workplace.

On September 17, 2008, the Ministry of Labour issued a consultation paper on workplace violence prevention. The consultation paper sought input on whether the *OHS* and its Regulations should be clarified or enhanced to further prevent and address workplace violence.

As the consultation paper noted, under current *OHS* provisions, employers must take every precaution reasonable in the circumstances for the protection of workers. This requirement has been in place for many

years, and is broad enough to require employers to take reasonable precautions to protect workers from workplace violence. However, the consultation paper expressly stated the government's expectation that employers protect their workers from violence at the workplace and indicated that Ministry of Labour inspectors proactively check for procedures to deal with workplace violence in workplaces with a higher risk of this occurring.

The consultation paper also indicated that workplace violence is a growing concern. The paper cited a 2004 Statistics Canada survey "Criminal Victimization in the Workplace." According to this survey, 17 percent of violent victimization incidents in Canada occur at the workplace and this represents approximately 356,000 workplace violence incidents in a 12-month period across Canada. In 33 percent of workplace violence incidents, the victim worked in either healthcare or social assistance services, 14 percent of the workplace incidents involved victims in accommodation or food services, and 11 percent involved victims working in the education field.<sup>1</sup>

Even if only a small percentage of the 356,000 annual workplace incidents result in a serious injury or death, this is nonetheless a staggering number. The consultation paper also noted the higher risk of violence in particular sectors as well as the increased risk of violence associated with certain types of work such as handling cash, protecting and securing valuables, transporting people and goods, and with certain work features such as a mobile workplace, public or community contact, working with unstable or volatile people, working alone or with just a few people, and working late nights or early mornings.

Against this background, the Ministry of Labour sought public input on whether the *OHS*A should be enhanced and clarified in relation to:

- definition of workplace violence;
- workplace violence prevention requirements;
- sector-specific requirements;

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<sup>1</sup> Source: Statistics Canada, Criminal Victimization in the Workplace 2004, Catalogue No. 85F0033MIE, ISSN: 1496-4562, February 2007, p. 6

- domestic violence in the workplace; and
- work refusals.

A number of stakeholders submitted comments in response to the consultation and on April 20, 2009 the government announced it was introducing new legislation to “tackle” workplace violence.

### **REQUIREMENTS SET OUT IN BILL 168**

If the Bill is passed, the *OHS*A will be amended to outline specific requirements that an employer must comply with, as follows.

#### **1. Preparation of Policies with respect to Workplace Violence and Workplace Harassment**

Under the Bill, employers would be required to prepare written policies with respect to (a) workplace violence and (b) workplace harassment. The policies would have to be posted in a conspicuous location in the workplace, although small workplaces (those with five or fewer employees regularly employed at the workplace) would generally be exempt from the posting requirement. An inspector could, however, order a small employer with five or fewer employees to post the policy.

In addition, employers would be required to review the policies “as often as is necessary,” but at least annually.

The terms “workplace violence” and “workplace harassment” are broadly defined in the proposed legislation.

“Workplace violence” is defined in the Bill as:

- “(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,
- (b) An attempt to exercise physical force against a worker in a workplace that could cause physical injury to the worker.”

“Workplace harassment” is defined as:

“... 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.”

This definition would capture an infinite variety of behaviours.

The proposed definitions of “workplace violence” and “harassment” are new in the sense that the *OHSA* currently does not define either of these terms.

However, the concept of having policies aimed at workplace violence and workplace harassment is not new. The Ministry of Labour has already developed an operational policy that defines workplace violence as:

“... the attempted or actual exercise, by a person, of any intentional physical force that causes or may cause injury to a worker, and includes any threats which give a worker reasonable cause to believe he or she is at risk of physical injury.”

Both the operational policy definition of workplace violence and the proposed definition in Bill 168 are broad enough to cover violence not only by employees but by other persons as well. It is interesting to note that the proposed definition of workplace violence in Bill 168 does not appear to encompass threats of violence, although threats would undoubtedly be covered by the definition of “workplace harassment” that is proposed in the Bill.

With regard to workplace harassment, as a practical matter, many employers already have policies aimed at workplace harassment that go beyond simply prohibiting harassment based on prohibited grounds under the *Human Rights Code*.

Although employers may already have policies aimed at workplace violence and harassment, employers will need to ensure that their policies are suitable under the *OHSA*. For example, the definitions of workplace violence and workplace harassment will need to be consistent with the

definitions found in the legislation. Workplace harassment and violence policies are discussed in more detail below.

## **2. Risk of Violence Assessment**

Under the Bill, employers would be expressly required to carry out an assessment of the risk of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work. The assessment would have to take account of circumstances that would be common to similar workplaces, circumstances specific to the workplace as well as any other elements prescribed by regulation.

Employers would be required to advise the joint health and safety committee or representative of the results of the assessment and provide a copy of the assessment. If there is no joint health and safety committee or health and safety representative, the employer would be required to advise the workers of the results of the assessment and, if the assessment is in writing, provide copies on request or advise the workers how to obtain copies.

Employers would be required to reassess the risk of violence “as often as is necessary” to ensure that the workplace violence policy and the workplace violence program (discussed below) continues to protect workers from workplace violence.

The results of the reassessment would have to be shared in the same manner as the results of the initial assessment.

The concept of a workplace violence risk assessment being carried out is not new to all employers. Under the current legislation, inspectors can order an employer to do a risk assessment with respect to workplace violence. The obligation to perform such a risk assessment even absent an order by an inspector may arise under other *OHS*A provisions that exist already. (For example, under the duty to acquaint a worker with any hazard in the work, to provide information to a worker to protect his or her health and safety, or under the general duty to take every reasonable precaution in the circumstances to protect the worker’s health and safety.)

However, under the proposed legislation even employers at minimal risk would be subject to the express requirement to carry out an assessment of the risks of workplace violence, to reassess the risk as often as necessary, and to share the assessment results. Employers will not only need to take

these steps; they will also need to be able to prove that they have taken these steps.

The Workplace Safety and Insurance Board has developed and published a checklist to assist employers in carrying out a risk assessment, and other checklists can be obtained through various safety associations. A copy of the Workplace Safety and Insurance Board's checklist is attached at the end of this paper.

### **3. Employers must Develop and Maintain a Workplace Violence Program**

Under the Bill, employers would be required to develop and maintain a program to implement the workplace violence policy. Required elements of the program would include:

- measures and procedures to control the risks identified in the workplace violence assessment;
- measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur, or when a threat of workplace violence is made;
- measures and procedures for workers to report incidents or threats of workplace violence to the employer or supervisor;
- how the employer will investigate and deal with incidents, complaints or threats of workplace violence.

Additional elements may be prescribed by regulation.

The requirement to develop and implement a workplace violence prevention program may be implicit in the employer duties contained in the current legislation, although it is not expressly stated.

### **4. Employer Obligations with respect to Domestic Violence**

A particularly interesting feature of the Bill is the requirement that employers take precautions to protect workers from domestic violence.

Under the Bill, employers would be specifically required to take every precaution reasonable in the circumstances for the protection of the worker if an employer becomes aware, or ought reasonably to be aware,

that domestic violence that would likely expose a worker to physical injury may occur in the workplace.

Employers need to give careful consideration as to how they would meet these requirements. Actual awareness that domestic violence may occur is one thing, but in what circumstances ought an employer to be aware? In the absence of an understanding about domestic violence, there is a substantial risk that workplace colleagues, supervisors and managers will overlook signs that an employee is at risk. There is also a substantial risk that people will not know how to respond even if they are aware of the risk.

Although domestic violence in the workplace accounts for a relatively small percentage of workplace violence, there have been incidents where employees have been killed at work as a result of it. It is not uncommon to have situations of domestic strife where both partners work for the same employer or where a worker gets involved with another employee, and the conflict spills into the workplace to some degree. In some situations, a disgruntled partner may show up at an employee's workplace, with the result being a potentially dangerous situation.

Employers need to educate employees about domestic violence, including signs of it, recognizing situations where a person is at risk, and how they can help and respond. Employers not only need to undertake the training, they need to be able to prove that they have undertaken this training.

Employers should also be aware that the duty to take every precaution reasonable in the circumstances for the protection of the worker against domestic violence will not necessarily be confined to a single location.

The term "workplace" is currently defined in the *OHSA* as:

"... any land, premises, location or thing at, upon, in or near which a worker works."

Accordingly, an employer's duties to take reasonable precautions to protect a worker from domestic violence would not necessarily be confined to the employer's main place of business, but would extend to anywhere that the worker works with the possible exception of the worker's

residence. In that regard, subsection 3(1) of the current *OHS*A restricts the application of the *OHS*A as follows:

“3. (1) This Act does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith.”

## **5. Duties of Employers, Supervisors and Workers with respect to Workplace Violence**

Under section 25 of the *OHS*A, employers have extensive duties to protect the health and safety of a worker. Some of the duties are very specific and others are more general. Among the employer duties listed in section 25 is a general duty to “take every precaution reasonable in the circumstances for the protection of a worker.” Under the proposed legislation, this and other duties listed in section 25 would apply to employers with respect to workplace violence.

Similarly, section 27 of the *OHS*A lists a number of supervisor duties including the duty to take every precaution reasonable in the circumstances for the protection of a worker. Under the proposed legislation, the duties imposed on a supervisor under section 27 would apply, as appropriate, with respect to workplace violence.

Under section 28 of the current *OHS*A, workers have certain duties to protect their own health and safety. These include, for example, the duty to report to the employer or supervisor the existence of any hazard which the worker is aware of.

Under the proposed legislation, the worker duties apply as appropriate, with respect to workplace violence.

## **6. Employers required to Provide Instruction and Information on the Workplace Violence Policy and Program**

Employers will be required under the proposed legislation to provide appropriate information and instruction for workers on the contents of the workplace violence policy and program along with any other information or instruction prescribed by regulation.

Although currently an inspector can order an employer to provide training to employees on violence prevention, the proposed legislation will subject employers generally to these requirements, and specific training requirements may be prescribed by Regulation.

In addition, the duties that employers and supervisors currently have to provide information to a worker would specifically include the duty to provide information, including personal information, related to a risk of workplace violence from a person with a history of violent behaviour if (a) the worker can be expected to encounter that person in the course of his or her work and (b) the risk of workplace violence is likely to expose the worker to physical injury. So, if an employee can be expected to encounter a volatile person in his or her work, and there is a risk of workplace violence likely to injure the worker then the employee must be given relevant information about the person, including personal information.

Although employers and supervisors would be required to disclose personal information related to a risk of workplace violence, they are prohibited from disclosing more personal information than is “reasonably necessary to protect the worker from physical injury.” The extent of disclosure that is “reasonably necessary” in any given case can be expected to be a matter of judgment, and where the line should be drawn may not be clear in any given case.

## **7. Employers will be required to Develop and Maintain a Workplace Harassment Program**

Under the proposed legislation, an employer will be required to develop and maintain a workplace harassment program. Elements that would be required under the program include:

- measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor; and
- a process setting out how the employer will investigate and deal with incidents and complaints of workplace harassment.

Although many employers already have workplace harassment policies which include processes for reporting, investigating and resolving workplace harassment complaints, the inclusion of this requirement in the *OHSA* is significant. If this requirement comes into effect, and employers do not comply with it, they are exposed to enforcement mechanisms under

the *OHSA*. These may potentially involve inspectors' orders to comply, stop work orders, posting of orders and prosecutions.

In addition, failure to have a harassment program in accordance with the *OHSA* could form the basis of a grievance in a unionized environment even in the absence of any contractual term requiring such a program. In short, this requirement will be an addition to the arsenal of a disgruntled employee who feels that he or she is being harassed.

#### **8. Employer must Provide Training and Information on the Harassment Policy and Program**

If the Bill is passed, employers will have to let employees learn about the harassment policy and program. Employers would be required, under the proposed legislation, to provide appropriate information and instruction for workers on the contents of the harassment policy and program as well as any other information prescribed by regulation.

#### **9. New Work Refusal Procedures**

Under current *OHSA* provisions, the circumstances in which a worker can refuse to work do not necessarily encompass workplace violence situations. Worker refusals can occur presently when a worker has reason to believe that:

“... any equipment, machine, device or thing the worker is to use or operate is likely to endanger the worker or another worker, or the physical condition of the workplace or the part where the worker works is likely to endanger the worker, or any equipment, machine, device or thing he or she is to use or operate or the physical location of the workplace or the part thereof where the worker works, is in contravention of the Act or Regulations and is likely to endanger the worker or another worker.”

The provisions of the *OHSA* dealing with work refusal would be amended under the proposed legislation to add workplace violence likely to endanger a worker to the list of circumstances under which a worker may refuse to work.

The Bill would also change the current requirement that a worker remain near his or her workstation pending completion of the investigation. The Bill proposes instead that a worker remain in a safe place as near as reasonably possible to his or her workstation and available to the employer or supervisor for the purposes of the investigation.

The circumstances under which a worker can refuse to work following an investigation are also expanded under the proposed legislation to include the circumstance where the worker has reasonable grounds to believe that workplace violence continues to be likely to endanger himself or herself.

Inspectors would be empowered to decide, following investigation, whether workplace violence is likely to endanger the worker or another person.

Under the proposed legislation, a worker would be required to remain, during the worker's normal working hours, in a safe place as near as reasonably possible to his or her workstation and available to the inspector for purposes of the investigation pending investigation and decision of the inspector. However, the employer may, subject to the provisions of a collective agreement, assign reasonable alternative work during normal working hours or, where assignment of reasonable alternate worker is not practicable, give other directions to the worker. The employer's ability to assign alternate work would be subject to the prohibition contained in the *OHSA* against reprisals.

#### **10. Employer must give Notice of an Incident of Workplace Violence**

Section 52 of the *OHSA* currently requires the employer to give written notice to the health and safety committee, health and safety representative and trade union, if any, and to the Director of Occupational Health and Safety if required by an inspector, of certain workplace events. Currently, these events include accidents, explosions or fires at the workplace which disable a worker or require medical attention but there is no death or critical injury because of that occurrence. Under these circumstances, the employer must give the requisite notice within four days of the occurrence. Under the proposed legislation, the notice would be required to be given in the event of an incident of workplace violence.

### **11. Inspectors Empowered to Order Written Policies for Small Workplaces**

Under the proposed legislation, inspectors would be empowered to issue written orders that require an employer with five or fewer employees in a workplace to order that workplace violence and workplace harassment policies be posted in written form in a conspicuous workplace location.

### **12. Expanded Regulation-Making Power**

Under the proposed legislation, regulations could be promulgated to:

- prescribe elements that any policy required under the *OHS*A must contain;
- prescribing restrictions, prohibitions or conditions with respect to workers or workplaces relating to the risk of workplace violence;
- requiring that employers designate a person to act as a workplace coordinator with respect to workplace violence and workplace harassment, and prescribing the functions and duties of the coordinator;
- specifying situations in which dangerous circumstances (including workplace violence) shall be considered to be inherent in the worker's work or a normal condition of employment;
- varying or supplementing work refusal provisions with respect to certain workers who presently have a limited right to refuse to work, for example, police, fire fighters and persons employed in correctional facilities and hospitals;
- the proposed legislation would also authorize special regulations pertaining to the taxi industry.

## **CONCLUSION**

At the time of writing, Bill 168 has only recently been introduced, and the final form of the legislation remains to be seen. However, it is clear that protecting workers from workplace violence and harassment is a significant priority of the Ontario government and the Ministry of Labour in particular. Current provisions of the *OHS*A as well as developments in the common law related to harassment and bullying would suggest that employers should not wait for the new legislation to be passed but should immediately undertake measures if they have not done so already to protect

employees from workplace violence and harassment. Employers wishing legal advice with respect to preventing and addressing workplace violence and harassment are encouraged to contact members of the firm for further information. A list of some other resources which may be of assistance to employers in undertaking these initiatives is attached to this paper.

## WORKPLACE SAFETY AND INSURANCE BOARD CHECKLIST

**Use this checklist** to help you control the risk of violence in your workplace:

### 1. Violence prevention policy and standards

- My workplace has a written violence prevention policy developed by management and worker representatives and signed by senior management.
- My workplace has clearly established standards and expectations for violence prevention.

### 2. Risk assessment

- I have reviewed records and reports, e.g. security reports, employee incident reports, staff perception surveys, health and safety inspection reports, first aid records or other related records.
- I have reviewed factors at my workplace that may contribute to risk of violence, e.g. contact with public, exchange of money, working alone or at night, etc.
- I have asked workers if they have concerns about work practices, public interactions, or any other violence-related issues.
- I have researched the history of violence in workplaces similar to mine.
- I have reviewed my legal responsibilities.

### 3. Control violence hazards

- I have reviewed workplace design to minimize the risk of violence: for example, use of signs, locks, physical barriers, lighting and electronic surveillance.
- I have considered improvements such as placing the reception area in view of other workers, improving lighting in the parking lot or using fences to control access to the workplace.
- I have reviewed work practices such as keeping cash on hand to a minimum, varying the time of day that the cash register is emptied, checking the credentials of clients, or using a 'buddy' system.

### 4. Education and training

- Education and training are provided to workers so they are aware of potential violence risks and procedures for controlling them.

### 5. Inspect your workplace and review your program

- I regularly inspect my workplace and look for signs of violence such as broken items or holes in walls.
- I conduct an annual review of the violence prevention program and make revisions where needed.

## **RESOURCES AVAILABLE TO EMPLOYERS**

### **Workplace Violence**

1. Workplace Safety and Insurance Board Ontario: [www.wsib.on.ca](http://www.wsib.on.ca)  
  
(General information on workplace violence, who is at risk, steps that can be taken to prevent it, workplace violence checklist.)
2. Canadian Centre for Occupational Health and Safety: [www.ccohs.ca](http://www.ccohs.ca)  
  
(General information on workplace violence, factors increasing the risk of violence, occupational groups tending to be most at risk, factors to consider in analysing if a workplace is at risk, sources of information about history of violence at similar workplaces, strategies to prevent violence in a workplace, examples of preventative measures, E-learning courses on workplace violence.)
3. Ontario Ministry of Labour:  
  
[www.labour.gov.on.ca/english/hs/workplace\\_violence.html](http://www.labour.gov.on.ca/english/hs/workplace_violence.html)  
  
(General information on workplace violence, harassment, risk factors, when to call police and other resources.)

### **Domestic Violence in the Workplace**

1. YWCA Toronto (offers support for victims of domestic abuse, employee information sessions on a fee-for-service basis). Contact: Heather McGregor, CEO, for further information at 416-961-8100.
2. Assaulted Women's Help Line (support for victims of domestic violence): 1-866-863-0511.
3. FEMAIDE (support for victims for domestic violence): 1-877-FEMAIDE (336-2433).
4. Neighbours, Friends and Families' website: [www.neighboursfriendsandfamilies.ca](http://www.neighboursfriendsandfamilies.ca) (information about domestic abuse including identification of warning signs of abuse and high risk situations).

**Other**

1. Productive Leadership Institute (offers management training services on a fee-for-service basis to help managers and supervisors provide effective leadership without resorting to harassment and bullying techniques). Contact: Rob Seguin, President, for further information at 905-713-1525.