Bill 132 – Fresh Amendments to the *Occupational Health and Safety Act*

ANOTHER STEP INTO THE NEW FRONTIER OF HEALTH AND SAFETY IN THE WORKPLACE

By Jason Beeho

The *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment), 2016* – otherwise known as Bill 132 – came into force on Sept. 8, 2016 and introduced amendments to a number of statutes, including the Ontario *Occupational Health and Safety Act* (OHSA).

In that regard, Bill 132 builds on the Bill 168 amendments to OHSA, which in 2010 explicitly recognized workplace violence and harassment as occupational health and safety issues.

Pursuant to Bill 132, OHSA's definition of "workplace harassment" has been updated to expressly include "sexual harassment," which is now itself defined under OHSA as follows:

"(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."

Together with this new definition, a number of new obligations have also arrived for employers, including the following:

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- **A more stringent requirement to provide an effective complaint mechanism that will not directly or indirectly discourage workers from bringing issues forward.**

In particular, employers are required to update their anti-harassment policies and procedures to "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," and to "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."

■ **A requirement to conduct a mandatory investigation "that is appropriate in the circumstances" in response to any and all incidents and complaints of workplace harassment.**

This does not mean that each and every complaint will warrant a complicated and costly investigation by a third party investigator; however, it does place the onus on employers to take all issues and complaints seriously, and to invoke proper process.

Many employers are already equipped to meet those obligations; however, to the extent that many others are not, it's very important that they take steps to arrange appropriate training for members of their HR teams. Essentially, Bill 132 demands that employers be equipped to evaluate complaints, to determine the appropriate scope of enquiry in the circumstances and to conduct competent and objective investigations.

Adding to that urgency is the fact that, under the Bill 132 amendments, Ministry of Labour inspectors now have the power to order – on a case by case basis – that an employer retain a third party investigator at its own expense. In other words, if the Ministry is concerned that an employer cannot or will not conduct an effective investigation, the matter will be taken out of the employer's hands. Likewise, if an employer is found to have conducted a sloppy or otherwise unsatisfactory investigation, an inspector might order that an independent investigator "possessing such knowledge, experience or qualifications as are specified by the inspector" be called in for a "re-do."

■ **A requirement to advise both the complainant and the alleged harasser (unless he is not one of the employer's workers) of the results of the investigation, as well as the discipline or corrective action that is being administered to the alleged harasser.**

Although the obligation to disclose the results of an investigation will, in many cases, be consistent with employers' pre-existing protocols, the requirement for transparency regarding corrective action almost certainly represents a significant change for most employers. That change, coupled with the fact that an employee will be in a position to complain to the Ministry of Labour about any harassment investigation that is (or allegedly is) non-compliant with the Bill 132 amendments, now places added pressure on employers to "get it right" when assigning consequences for harassing behaviour.

■ **A requirement that employers consult with their workplace joint health and safety committees (or health and safety representatives, as the case may be in smaller workplaces) in revising their policies and procedures to include the new definitions and to reflect the new obligations.**

Hand-in-glove with the obligation to update policies and procedures is a further requirement to provide all workers with corresponding training regarding the updates.

CONTINUING THE TREND

Bill 132 represents an important continuation of the changes to OHSA that were ushered in by Bill 168. Moreover, it is also a significant new development in what is

emerging as the "next frontier" of occupational health and safety – namely, an approach to occupational health and safety that goes far beyond the traditional concepts of hardhats, machine-guarding and reducing threats to life and limb by industrial equipment, and which engages the overall wellness and safety of workers from a physical, psychological and emotional perspective.

We have seen a steady advancement of this trend since Bill 168 became law in 2010. For example:

- In 2013, the Canadian Standards Association (CSA) issued a National Standard on Psychological Health and Safety in the Workplace. Although that Standard is non-binding and adherence to it is voluntary, the fact that it was issued by a leading safety authority carries considerable weight.
- Significantly, the Standard contemplates very broad and ambitious concepts (including that of the "psychologically healthy and safe workplace," which is defined as "a workplace that promotes workers' psychological wellbeing and actively works to prevent harm to worker psychological health including in negligent, reckless or intentional ways"); additionally, as it encourages employers to consider "psychological job demands" and "work/life balance," the Standard directly challenges the conventional perspective on occupational health and safety.
- In late 2014, the Ontario Ministry of Labour released the report from its "Roundtable on Traumatic Mental Stress," which, as described by the Ministry, was an initiative that "brought together representatives from police, nursing, fire services, emergency medical services and transit services to discuss how to promote awareness and share best practices across sectors on work-related traumatic mental stress, which includes post-traumatic stress disorder."

Pursuant to recommendations set out in that report, the Ministry convened a day-long Summit on Work-Related Mental Stress in March 2015, which drew participation and input from stakeholders in a range of sectors; further to that dialogue, the legislature introduced the *Supporting Ontario's First Responders Act (Posttraumatic Stress Disorder), 2016* which came into force in April 2016, and has the effect of making WSIB benefits more accessible to first responders – i.e., by way of amending the *Workplace Safety and Insurance Act, 1997* to create a presumption that PTSD suffered by first responders is work-related.

Clearly, occupational health and safety is no longer just about preventing physical injury, and compliance is now an exercise that obliges employers to consider their workers' health and safety from multiple angles.

In that regard, Bill 132 – and the new obligations that come with it – represents the most recent step in the evolution of occupational health and safety. No doubt, there are more steps to come. ■

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