

LABOUR AND EMPLOYMENT

SEXUAL VIOLENCE AND HARASSMENT ACTION PLAN ACT

by W. Eric Kay and Andrew J. Skinner

Ontario's new sexual violence and harassment law, the "*Sexual Violence and Harassment Action Plan Act, 2015*" comes into force on September 8, 2016. The new law, which arises from the Ontario Government's report, "It's Never Okay: An Action Plan to Stop Sexual Violence and Harassment," amends various statutes relating to sexual violence, sexual harassment and domestic violence, and improves access to justice for victims of sexual harassment in Ontario. Most notably for employers, it amends several provisions of Ontario's *Occupational Health and Safety Act* (OHS) and imposes greater obligations on employers with respect to the prevention, training, investigation and resolution of workplace harassment. Employers should be aware that, as a result of the changes, they will have to revisit and update their workplace harassment policies.

Definition of Sexual Harassment

The new law expands the OHS's definition of "workplace harassment" to include "workplace sexual harassment," which is defined as:

- 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
- 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.

Employers can take comfort in the fact that the new law states that a "reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace" will not constitute "workplace harassment." This means that an employee cannot successfully bring a workplace harassment complaint against their employer based on the employee's performance review where that review was the result of the employer's reasonable management of the employee based on his workplace performance.

Workplace Harassment Policies/Program

The OHS currently requires employers to create workplace harassment programs. The new law expands this obligation and specifies that employers are required to develop and implement specific written programs relating to "workplace harassment" in consultation with the health and safety committee established under the OHS, or a health and safety representative selected under the OHS. These new workplace harassment programs must:

- 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;

- Set out how incidents or complaints of workplace harassment will be investigated and dealt with;
- 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
- 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.

Dealing with Workplace Harassment

The OHS currently imposes no specific obligations on employers apart from the requirement to develop a workplace harassment policy and to train staff in that respect. The new law expands the employers' obligations to include the proper implementation their workplace harassment programs. It specifies that employers must ensure that:

- An investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances;
- 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
- 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.

Ministry of Labour Inspection

The new law gives additional powers to Ministry of Labour (MOL) Inspectors, who will be authorized to order an impartial investigation into an incident or complaint of workplace harassment at the expense of the employer. The law states:

"An inspector may in writing order an employer to cause an investigation... 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".

This effectively allows MOL Inspectors to take workplace harassment issues out of the hands of an employer. The new law contains no clear guidelines as to the circumstances under which an Inspector's powers would be triggered. Until such guidelines are imposed, an Inspector is entitled to exercise its investigative powers at his/her own discretion.

Workplace Harassment Training

Consistent with the current OHSA, employers will be required to train and instruct employees on their workplace harassment programs. Employers should be aware that their current training programs may be out of date.

Implications For Employers

The changes require employers to update their workplace harassment policies to:

- specifically include “workplace sexual harassment”;
- include provisions relating to the adequate investigation, reporting, communication and resolution of complaints and incidents;
- include provisions ensuring that information obtained in the course of an investigation is properly handled to protect the privacy of complainants;
- expressly provide MOL Inspectors with the power to order impartial, third-party investigations; and
- ensure that employees are properly trained with respect to their new workplace harassment programs.

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