

OHS & WORKERS' COMPENSATION ADVISOR

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Ontario's Action Plan: Expansion of Occupational Health and Safety Act to Include Sexual Harassment

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The recent incident in which a male spectator at a soccer match in Toronto uttered a vulgar phrase into the microphone of a female television reporter has, again, generated intense public discussion regarding the issue of sexual harassment. This incident has added to the recent list of allegations of sexual harassment and violence made against public figures such as Jian Gimeshi and Bill Cosby and those in positions of power such as a Durham Region Justice of the Peace¹ (against whom the allegations were proven and were sufficient to warrant his removal from his position). Regrettably, sexual harassment is not a new issue. However, the Ontario government recently signalled that it will be taking new steps to ensure employers have new, specific OHS legal obligations to prevent sexual harassment and sexual violence, and respond to sexual harassment complaints.

On March 6, 2015 an Action Plan titled "It's Never OK: An Action Plan To Stop Sexual Violence and Harassment" was announced. The Plan appears to include proposals to amend the *Ontario Occupational Health and Safety Act* ("OHSA") to include a specific definition of "sexual harassment" and impose specific investigation obligations on employers. The proposed Action Plan also details

the government's intentions to bring about other systemic changes, involving the Ontario OHSA and its enforcement to comprehensively address sexual harassment. These intentions may include the creation of a Code of Practice pursuant to the OHSA, the establishment of workplace inspection teams to enforce amended OHSA sexual harassment provisions, and various other possibilities. These proposed changes would dovetail with current *Human Rights Code* obligations for employers, and remedies, as well as *Criminal Code* sanctions applicable to certain behaviours.

This Advisor examines the potential changes to the Ontario OHSA and how these potential changes could build on or alter existing obligations regarding workplace harassment. Candidly, the scope of prospective changes remains unclear. Yet, one question that immediately arises from the content of the Action Plan is whether policy and procedure, training-related and investigative changes specific to one type of harassment are needed or would assist given existing OHS harassment laws. Other changes, which could include new harassment-related employer or supervisory duties, work refusal rights, or enforcement provisions for employers who fail to protect workers from sexual harassment might effect more significant workplace change and would certainly change the OHS landscape for

¹ Source: The Toronto Star, May 1, 2015.

employers. For context, this advisor also references more expansive harassment-related provisions already existing in Canada.

The Ontario Announcement

The Action Plan indicates that the government intends to do its part to establish an Ontario where everyone lives in safety and is free from the threat, fear or experience of sexual violence and harassment. The Action Plan includes a number of commitments that are OHS specific and some that go far beyond commitments related to OHS legislation and enforcement. Amongst the most important commitments are the plan to:

- Introduce legislation to strengthen provisions related to sexual violence and harassment in the workplace, on campus, in housing and through the civil claim process. No details of whether this will be restricted to OHS or human rights legislation or other measures have been provided;
- Enhance workplace laws to strengthen enforcement under the Ontario OHSA, including enactment of a definition of sexual harassment, a specific employer duty respecting harassment, and establishing a Code of Practice to help employers develop stronger sexual harassment policies (the announcement so far is limited to harassment not violence); and
- Engage in numerous additional initiatives to create public education and awareness to challenge current attitudes and behaviours; update health and physical education curriculum for students; develop tools and best practices to support compassionate response from law enforcement authorities; strengthen supports provided by hospitals; create a pilot program to provide free independent legal advice to sexual assault survivors whose cases are proceeding toward a criminal trial, and many other broad-based initiatives.

The government committed to monitoring progress and will provide an update on the Action Plan on its first anniversary. So what will the new OHS-related provisions look like? Unfortunately, attempts to obtain information from Ontario Ministry of Labour contacts have yet to yield any definitive information. The Ontario government anticipates investing \$41 million in its Action Plan. Independent reports indicate that \$5.8 million will be spent to support amendments to the OHSA and on workplace inspection teams to support OHSA amendments². At the time of writing, the precise nature of the proposed legislative changes to the OHSA and timing remains unclear.

Current Ontario OHS Obligations Respecting Harassment in the Workplace

As some readers may know, Ontario was one of the last Canadian jurisdictions to add “workplace violence” prevention provisions to its OHS legislation, but one of the leaders in adding “workplace harassment” provisions into the OHSA. Effective June 15, 2010, provisions, known colloquially as “Bill 168”, added definitions of workplace violence and harassment into the Ontario OHSA (this Advisor will not deal with violence given the apparent focus of the Action Plan on harassment). Workplace harassment has been defined broadly in the OHSA since 2010 as “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”. Harassment is a matter for which Ontario employers must take several steps including:

- Developing a written harassment policy and review the harassment policy at least annually;
- Developing and implementing a workplace harassment program (program minimums require a procedure for workers to report incidents of harassment to a supervisor or the employer; and set out means by which the employer will investigate and deal with

² Source: The National Post, March 6, 2015.

complaints or incidents of workplace harassment); and

- Providing training to workers on the harassment policy and program.

The term harassment to date remains broadly defined as encompassing any kind of course of conduct unwelcome to a worker in the workplace. Notably, it is not tied to personal characteristics or grounds such as sex, race, sexual orientation or other matters that are protected grounds under human rights legislation. Consequently, the OHSA already includes a broad and all-encompassing harassment definition that, arguably, includes sexual or any other type of personal harassment.

What Ontario has not done to date in harassment-related OHS provisions is create a clear employer prevention obligation. This is a matter that has given rise to some interesting case law—where workers have complained they suffered employment-related reprisals because they “sought to enforce the OHSA” by complaining about harassment. The Ontario Labour Relations Board has wrestled with this issue. Earlier decisions ruled that the harassment-related content of the Ontario OHSA is procedural only (i.e. consisting only of an obligation to create a policy, program and train). More recently, though, the Board has stated that there must be more than procedural content; that there is an active obligation on employers to enable workers to make complaints and it cannot be correct that there is no worker remedy if an employer terminates a worker for doing so. While it may be premature to believe that the issue has now been finalized, it does appear that the latter approach has taken hold.

Anticipating Change: Potential Developments in Employer Obligations, Worker Rights and Enforcement

Gazing into a crystal ball is always difficult. It seems clear, however, that certain amendments to the Ontario OHSA are likely, and several others are possible. These amendments could include:

a) **New Definition of Sexual Harassment.** It seems likely from the Action Plan announcement that we will see a new and specific definition of “sexual harassment” added to the OHSA. It is not certain how a clear definition will be achieved. Further, unless new rights or remedies relate to this particular type of workplace harassment, it remains to be seen how the inclusion of a specific definition will improve upon the obligations of employers or future worker rights, when Ontario already has the most expansive definition of harassment possible. For comparative purposes, it is worth noting that two jurisdictions, Saskatchewan and Manitoba, define harassment as related to prohibited grounds such as race, creed, religion, color, sex, sexual orientation (without defining sex or sexual harassment).

b) **New OHS Duty to Protect Workers from Harassment or Sexual Harassment.** Only one jurisdiction in Canada, Saskatchewan, clearly sets out an obligation to ensure, as far as is reasonably practicable, that workers are not exposed to harassment respecting any matter or circumstance arising out of the worker's employment. The Action Plan suggests the OHSA amendments could include a new employer obligation to “make every reasonable effort to protect workers from harassment, including sexual harassment in the workplace”. It still remains unclear how a specific OHS obligation to protect workers from sexual harassment would be an improvement on a general duty to protect all workers from all types of harassment. No mention is made of supervisory duties to protect workers, or worker duties not to harass fellow workers but it is reasonable to anticipate that such duties would be components of a more proactive obligation to protect workers.

c) **Right to Refuse Work for Harassment.** This has not been mentioned in the Action Plan. It will no doubt arise as an issue because there is, currently, a difference in the right to refuse work between matters involving workplace violence and those involving workplace harassment. More particularly, the Ontario OHSA contains a specific right to refuse to work if a worker reasonably

believes that workplace violence is likely to endanger them. No corresponding refusal right exists in Ontario or elsewhere for a worker who reasonably believes they are subject of an unwanted course of conduct including any type of harassment.

d) Enforcement Provisions Relating to Harassment. The Action Plan suggests that an enforcement team of inspectors, trained to address complaints of workplace harassment, including sexual harassment, will enforce the new harassment provisions. This has the potential to result in a number of significant changes in how workplace harassment is addressed in Ontario.

i) Ministry of Labour Investigations of Workplace Harassment Complaints:

Currently, Ministry of Labour inspectors do not investigate the merits of a complaint of workplace harassment. Consistent with the current OHS provisions relating to workplace harassment, the investigation of the details of harassment allegation is left to the employer. However, the changes suggested in the Action Plan make it reasonable to anticipate that Ministry of Labour inspectors may carry out workplace harassment investigations involving the same detailed collection of information as is currently gathered during other OHS investigations. Further, it raises the question of whether Ministry of Labour inspectors might have a role in the resolution of workplace harassment complaints or issues. This could happen if Ontario is influenced by the system in Saskatchewan. There, in addition to the general duty for employers to prevent harassment, OHS legislation expressly involves OHS officers in complaint resolution as an option. The right to request assistance of an OHS officer to resolve a complaint must be stated in harassment policies. In addition to the entitlement to bring an internal complaint pursuant to employer policies or commence a human rights complaint, a worker may complain to an OHS officer who will determine the matter, and endeavour to mediate an acceptable resolution.

If a resolution cannot be arrived at, in addition to giving a written decision that the matter cannot be resolved, the officer may issue a notice of contravention to the employer. An appeal may be made to an adjudicator respecting any decision of the officer on a matter of harassment.

ii) Remedial Measures Required by Order:

OHS inspectors have broad powers to issue compliance orders requiring the workplace parties to address health and safety issues. Importantly, these powers include the authority to issue stop work orders and the production of compliance plans. If such powers can be exercised by inspectors addressing issues of workplace harassment, there could be a significant evolution in the types of orders that could be issued under the OHS. If Ministry of Labour inspectors are issuing orders that substantively address workplace harassment issues, will employers see orders that impact staffing or work assignments (such as an order requiring a supervisor or worker to be reassigned to different job, shift, or work location)? Will employers be ordered to provide workers or supervisors with sensitivity, respectful workplace, or other training to address harassing behaviour? These questions cannot be answered now but highlight the kinds of orders that may be issued under the OHS.

iii) Prosecution for Workplace Harassment:

Prosecution, the most serious enforcement mechanism, has not yet been utilized in relation to workplace harassment, although several Canadian employers have faced prosecution now for failure to protect workers from workplace violence. However, expanded provisions relating to workplace harassment may be supported through prosecution. If this happens, employers may be facing prosecution under the OHS in addition to any remedies that may be sought by workers in other forums – such as through a grievance, civil claim or complaint under the Ontario *Human Rights Code*.

It remains early days as, to date, there have been no steps taken to implement any of the potential OHS changes that are contained in the Action Plan. With a stated commitment to provide an update on the Action Plan after twelve months, we anticipate that developments will soon begin to unfold. We will monitor any developments and continue to inform readers as this initiative evolves.

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Cheryl is a senior partner in our Occupational Health and Safety (OHS) and Workers' Compensation practice. A former Ontario OHS Prosecutor, Cheryl has nearly 30 years of experience in advising on strategic and practical approaches for management of workplace safety issues including the complexities of OHS due diligence, contractor management, accident response strategies, and discipline for safety matters.

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Jeremy is a partner in our Occupational Health and Safety (OHS) and Workers' Compensation practice. A former Ontario OHS Prosecutor and co-author of the Annotated Occupational Health and Safety Act – a leading text – Jeremy has been practicing OHS law for more than a decade. He is an experienced and successful litigator who represents management in trials, appeals, hearings, arbitrations and inquests. He is listed in the Canadian Legal Expert Directory and The Best Lawyers in Canada as a leading OHS lawyer.

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Complimentary Briefing **Ontario's Action Plan on Sexual Violence and Harassment – OHS and Workplace Implications for Employers**

When: Thursday, June 4, 2015 | 8:00 - 9:30 am EST
Speakers: Cheryl A. Edwards, Elizabeth Keenan and Jeremy Warning, Partners

The Ontario government recently signaled its commitment to ensure employers have new, specific OHS legal obligations to prevent sexual harassment and sexual violence, and respond to sexual harassment complaints. The "It's Never Ok: An Action Plan To Stop Sexual Violence And Harassment" was announced in March, 2015. This session examines what we expect new Ontario OHS provisions could look like, and how these changes will be expected to interplay with current human rights obligations, as well civil and criminal claims, remedies and prosecutions.

The session will cover:

- Current Ontario OHS obligations respecting harassment in the workplace and their current limits;
- Current human rights obligations respecting harassment and how OHS and human rights obligations and remedies work together;
- Other steps expected as part of the Action Plan – increased support for victims of assault or harassment in commencing civil claims, and through the criminal process, public education and awareness and other relevant changes of interest to employers;
- What to expect as OHS changes – new definitions, new duties, right to refuse, enforcement?; and
- Practical aspects of preparing policies, programs, managing and investigating alleged harassment and workplace violence, whether involving sexual or other harassment or violence.

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