

Bill 132 — Ontario's New Sexual Violence and Harassment Legislation

What Employers Need to Know

10 June 2016

Presented by:
Sabrina Serino, Associate
Dentons Canada LLP

Agenda

1. Overview of Bill 132
2. Amendments to the *Occupational Health and Safety Act* (the “**OHSA**”)
3. Employer Obligations – What you need to do by September 8, 2016
4. Consequences of Non-Compliance
5. Key Takeaways

Overview

Bill 132: In a Nutshell

- Introduced in October, 2015
- Received Royal Assent on March 8, 2016: *The Sexual Violence and Harassment Action Plan Act, 2015*
- Amends various acts, including the OHSA
- Amendments to the OHSA come into force on **September 8, 2016**
- Amendments apply to all workplaces of provincially-regulated businesses in Ontario

Background

- March, 2015: The Ontario Government introduces “**It’s Never Okay: An Action Plan to Stop Sexual Violence and Harassment**”
- The Action Plan includes:
 - Creating sexual assault and domestic violence treatment services and centers
 - A permanent roundtable on Violence Against Women providing advice to government
 - Introduction of legislation to strengthen provisions related to sexual violence and harassment in the workplace, on campus, in housing and through the civil claim process: ***The Sexual Violence and Harassment Action Plan Act, 2015 (Bill 132)***

Amendments to Legislation

- Bill 132 amends:

1. *The Compensation for Victims of Crime Act*

- The current limitation period of two years for applications for compensation is removed for applications resulting from the commission of a crime of sexual violence or of violence that occurred within a relationship of intimacy or dependency

2. *The Limitations Act, 2002*

- Amended to provide that there is no limitation period in respect of proceedings based on sexual assault or, in specified circumstances, on other misconduct of a sexual nature or on assault

3. *The Ministry of Training, Colleges and University Act*

4. *The Private Career Colleges Act, 2005*

- Colleges, Universities and Private career colleges required to have sexual violence policies that set out the process that will apply when incidents and complaints of sexual violence are reported

5. *The Residential Tenancies Act, 2006*

- Amended to provide new timelines for termination of tenancies in situations where the tenant or a child residing with the tenant is/are deemed to have experienced violence or another form of abuse, including cases where: a restraining order relating to the tenant, the child or the rental unit has been made against specified persons; or the tenant alleges that sexual violence has been committed against the tenant or the child and where the allegation is made in a statement that complies with specified requirements

6. **The OHSA**

OHSA Amendments

Overview

- Bill 132's amendments to the OHSA come into force on **September 8, 2016**
 - Employers must take **proactive steps** to ensure OHSA compliance before the Bill comes into force
- Bill 132 amends the OHSA by:
 - Expanding the current definition of “workplace harassment”
 - Imposing additional requirements for employer’s workplace harassment policies and programs
 - Outlining the requirements for investigations relating to workplace harassment
 - Granting further powers to inspectors to order investigations regarding incidents and complaints of workplace harassment

Definitions – “Workplace Harassment”

- The OHSA’s definition of “**workplace harassment**” is expanded to include “workplace sexual harassment”

OHSA, s.1 (1)

“workplace harassment” means:

- a) 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, or
- b) workplace sexual harassment

Definitions — “Workplace Sexual Harassment”

- The OHSA is further amended to include a definition of “workplace sexual harassment”
- New definition in the OHSA but familiar language: similar to the Ontario *Human Rights Code*’s (the “**Code**”) Sexual Harassment provisions

OHSA, s.1 (1)

“workplace sexual harassment” means:

- 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 reasonable to know that the solicitation or advance is unwelcome

Definitions — Limitation: “Reasonable Action”

- Bill 132 clarifies that not all actions taken by employers are considered “workplace harassment”
- Employers’ actions relating to the management and direction of the workplace that are **reasonable** are **not** “workplace harassment”

OHSA, s.1(4)

A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment

Employer Obligations

What must you do by September 8th?

- Employers must take the following steps to be in compliance with the OHSA:
 1. Review and revise existing policies and programs to include Bill 132's new requirements
 2. Ensure that policies and programs specifically address “workplace sexual harassment”
 3. Develop resources to provide incoming and existing employees with information and instruction on updated workplace harassment policies and programs
 4. Be in a position to appropriately investigate incidents and complaints of workplace harassment

1. Update Workplace Harassment Policies and Programs

- Currently, the OHSA requires employers to:
 - prepare a policy with respect to workplace violence and harassment; and
 - develop and maintain programs to implement said policies
- Bill 132 imposes **additional requirements** for existing workplace harassment policies and programs

Workplace Harassment Program – New Requirements

Bill 132 requires employers to:

- Develop and maintain a written Workplace Harassment Program (the “**Program**”) to implement its Workplace Harassment Policy
- Work in consultation with the joint health and safety committee or health and safety representative, if any, to develop and maintain the written Program
- Review the Program as often as necessary, but at least annually to ensure that it effectively implements the Workplace Harassment Policy

Program Requirements – cont'd

- In addition to existing Program requirements, the Program must now set out:
 1. Alternative reporting procedures for instances in which the alleged harasser is the worker's employer or supervisor
 2. A process for how incidents or complaints of workplace harassment will be investigated and dealt with
 3. How information obtained about the incident or complaint will not be disclosed, unless necessary
 4. The process for how the employer will appropriately investigate both incidents and complaints of workplace harassment
 5. How the results of the investigation, or any corrective action that will be taken, will be shared with the worker who reported the complaint and the alleged harasser

2. Provide Workers with Information & Instruction

- Provide workers with appropriate instruction and information on the contents of the policy and program
- Possible options include:
 - Webinar
 - Distribution of written documents regarding the updated policy and program
 - Distribution of the updated policy and program
 - Department meetings

3. Protect Workers from Workplace Harassment: Investigations

- The Bill imposes **positive duties** on employers to **protect workers** from workplace harassment
- Employers must:
 - Conduct investigations into all incidents and complaints of workplace harassment
 - Inform the parties in writing of the results of the investigation and/or of resulting corrective action
 - Review Program as often as necessary but at least annually

Consequences of Non-Compliance

Existing OHSA Penalties

Failure to comply with the OHSA or an Order of an inspector, Director or Minister results in a fine of:

- Up to \$25,000 or imprisonment for a term of up to 12 months, or both; or
- For Corporations, up to \$500,000

Section 55.3 – Bill 132's New Enforcement Mechanism

- Bill 132 grants inspectors the power to order:
 - An employer to arrange for an **appropriate investigation** to be conducted by an **impartial person** who possesses knowledge, experience or qualifications as **specified by the inspector**; and
 - Obtain, **at the employer's expense**, a written report by the impartial person
- Bill 132 does not indicate situations in which inspectors will issue a Section 55.3 Order, but could likely include:
 - In response to an incident or complaint reported to the Ministry of Labour by an employee; or
 - As a result of a workplace blitz inspection conducted by the Ministry of Labour

Key Takeaways

- 1. Bill 132 imposes positive duties on employers to protect workers from workplace harassment**
- 2. September 8, 2016 is fast approaching – employers must take steps to ensure compliance by then**
- 3. New employer obligations:**
 - Review and revise existing workplace harassment policies and programs to meet the new OHSA requirements
 - Set up a timeline to revisit workplace harassment policies and programs at least annually
 - Set up new reporting processes and procedures for both incidents and complaints of workplace harassment
 - Ensure that workers are given appropriate information and instruction on workplace harassment policies and programs
 - Appropriately investigate incidents and complaints of workplace harassment
- 4. Non-compliance comes with a price!**
 - Increased enforcement powers granted to inspectors, at the employer's expense
 - Upward trend in damage awards against employers for sexual harassment occurring in the workplace

Questions?



Contact:

Sabrina Serino, Associate

Dentons Canada LLP

Phone: (416) 863-4385

Email: sabrina.serino@dentons.com

OUTLINE OF SAMPLE ANTI-HARASSMENT POLICY AND PROGRAM

Introduction

The purpose of this Policy and Program is to make all employees aware of [Insert Organization Name's] position on harassment in the workplace. Ontario legislation makes it unlawful for anyone in the course of his or her employment to harass anyone on the basis of age, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, marital status, family status, disability, record of offences or for any other reason.

[Insert Organization Name] is firmly committed to providing a work environment that is free from harassment and where the dignity and self-esteem of every employee is respected. It is the responsibility of each member of staff and management to foster and encourage such an environment, and to take appropriate steps in the event of a contravention of this policy. [Insert Organization Name] will investigate and respond to incidents and complaints of workplace harassment and will take remedial action as necessary and appropriate, including disciplinary action up to and including dismissal.

What is Workplace Harassment?

Workplace Harassment means:

- (a) engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome; or
- (b) workplace sexual harassment.

Workplace Sexual Harassment means:

- (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.

There could be circumstances in which a single incident of inappropriate behaviour may be substantial enough to constitute harassment by creating a "poisoned environment". Even if the comments or conduct are not directed at any one person, someone may still experience a poisoned environment. Every employee is entitled to be free of personal invitations, advances or sexual solicitations.

Responsibilities of Employees

Employees are responsible for complying with this Policy in their dealings with employees and third parties while in the course of their employment. This applies to conduct while at work, during business meetings, on business trips and at company events.

In the event that an incident of workplace harassment arises, employees are asked to bring the incident to the attention of their immediate supervisor or Human Resources.

Responsibilities of Employers

[Insert Organization Name] must ensure, as much as reasonably possible, that employees are not subject to workplace harassment.

Management at [Insert Organization Name] will take corrective action with anyone under their direction who subjects an employee to workplace harassment.

[Insert Organization Name] will not disclose any information obtained about a reported incident or complaint of workplace harassment, including any identifying information about the individuals involved, to anyone other than the individuals involved in the incident or complaint, except where disclosure is:

- necessary to investigate the incident or complaint;
- required to take corrective action; or
- otherwise required by law.

[Insert Organization Name], its managers and supervisors are responsible for creating a safe work environment, free from workplace harassment. Anyone aware of workplace harassment must bring it to the attention of management and/or Human Resources so that the issue can be addressed immediately.

How to Report an Incident of Workplace Harassment

[Insert Organization Name] will treat harassment as a serious contravention of the conditions of employment.

All incidents and complaints of workplace harassment should be reported in writing to their immediate supervisor and/or Human Resources.

Where there is an incident of workplace harassment, to the extent that they feel comfortable, complainants are also encouraged to confront the harasser personally or in writing pointing out the unwelcome behaviour and requesting that it stop. If an employee becomes aware of an incident, complaint or a contravention of this Policy, whether formally or informally, the employee should refer the complaint in writing to Human Resources.

In the event that the complainant's supervisor or manager is the alleged harasser, the complainant shall promptly report the incident to Human Resources. In the event that a member of the Human Resources Department or Management is the alleged harasser, the complainant

should report the harassment in writing to [Insert any other applicable individuals/groups of individuals who can receive and deal with workplace harassment complaints].

How Incidents of Workplace Violence and Harassment will be Investigated

[Insert Organization Name] will promptly investigate all complaints and incidents of workplace harassment in a fair and timely manner.

Upon being notified of an incident or complaint of workplace harassment, [Insert Organization Name] will conduct an investigation that is appropriate in the circumstances. [Insert Organization Name] will not disclose any details about the complaint or the related investigation except where such disclosure is necessary to investigate the incident; take corrective action or that is otherwise required by law. Both the complainant and the alleged harasser may be interviewed by an appropriate investigator, as will any individuals who may be able to provide relevant information.

Upon the completion of the investigation, Human Resources will notify the complainant and the alleged harasser (if s/he is an employee of [Insert Organization Name]) of the results of the investigation in writing. The results of the investigation will not be disclosed further, unless such disclosure is necessary or otherwise required by law.

If the investigator finds that harassment has occurred, appropriate remedial action will be taken as well as steps to prevent any recurrence. Any employee that breaches this Policy and Program will be subject to disciplinary action, up to and including termination of employment.

Human Resources will inform the employee who experienced the workplace harassment and the harasser (if s/he is an employee of [Insert Organization Name]) in writing of any remedial action taken in response to the workplace harassment.

No Retaliation

Regardless of the outcome of a harassment complaint made in good faith, the employee lodging the complaint, as well as anyone providing information, will be protected from any form of reprisal.

Posting

This Policy and Program will be posted at a conspicuous place in the workplace (such as the staff bulletin board).

Policy and Program Review

[Insert Organization Name] will review this Policy and Program at least annually or as often as is necessary to reduce the risk of workplace harassment. Individuals who have questions or concerns about this Policy should speak with Human Resources.