

The HR Space

Your weekly e-bulletin on labour and employment law issues

January 12, 2010

Fasken Martineau DuMoulin LLP

Ontario Follows Quebec And The Federal Sector With New Anti-Harassment/ Violence Law

Author: Alix P. Herber

Canada's two largest provinces now have laws requiring employers to seek to provide workplaces free of certain forms of "harassment". No longer limited to human rights-related harassment, that term is broadly defined in these laws. Further, Ontario's new law extends beyond "harassment". It, like the federal law, also will require anti-violence policies and programs. These laws will apply regardless of whether a workplace has any prior history of such problems.

Ontario's Bill 168, [*The Occupational Health and Safety Amendment Act*](#) will come into force in June 2010.

With Canada's two largest provinces and the federal jurisdiction now having such laws, it may well be that other provinces and territories will soon follow.

Requirements in Ontario

Under Bill 168, employers will be required to develop written *policies* with respect to both workplace violence and workplace harassment. If you are an employer, you must review these policies at least once a year, even if you have not had any incidences of violence or harassment. These policies must be

posted in any workplace that has more than five (5) employees.

In addition, employers will be required to implement *programs* to prevent workplace violence and harassment.

Workplace Violence Programs

As of June 2010, Ontario employers will be responsible for developing and implementing a workplace violence program.

"Workplace violence" is broadly defined in the new legislation as including the actual, attempted or threatened use of physical force that could injure a worker.

Prior to implementing such a program, employers must *assess the risks of workplace violence* that may arise from the nature of the workplace, the type of work or the conditions of work. The results of this assessment must be reported to the joint health and safety committee or worker representative or alternatively, to the workers directly.

No guidance has been provided as to how you should "assess" the risks of violence in your workplace.

Vancouver

Calgary

Toronto

Ottawa

Montréal

Québec City

London

Paris

Johannesburg

The Workplace Violence Program must include measures and procedures to:

- control the identified risks;
- get immediate help when violence happens or is likely;
- report incidents or threats of violence; and
- investigate and deal with incidents and complaints.

The policies and program must even include measures to deal with *domestic violence* that may erupt in the workplace. Bill 168 says that if an employer "...ought reasonably to be aware, that domestic violence... may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker".

Ontario's law also contains new disclosure requirements where there is a risk of violence from a person with a *history of violent behaviour*. This obligation will exist if the worker can be expected to encounter such a person in the course of his/her work and may therefore be exposed to the risk of physical injury. This disclosure obligation may include personal information about the person with the violent history. The law contains no guidance on how such persons are to be identified. But it would seem to include fellow employees, patients or customers. The law then says that an employer should not disclose more confidential information than is reasonably necessary to protect the worker from physical injury. The application of these rules will no doubt be contentious.

Workplace Harassment Programs in Ontario

"Workplace harassment" is broadly 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".

An employer's program must include measures and procedures for workers to report incidents of workplace harassment. It must also set out how you, as the employer, will investigate and deal with incidents and complaints of harassment.

Ontario employers' existing policies will need to be reviewed and refined to meet the requirements of this new law. It is important to note that while harassment is already prohibited under the *Ontario Human Rights Code*, the new law defines harassment much more broadly than the *Code*.

Workplace Refusals

Bill 168 also amends the work refusal section of the *Occupational Health and Safety Act*. Workers will have a right to refuse to work if they believe workplace violence is likely to endanger them. The law sets out rules governing the investigation of such work refusals.

What this means for Canadian Employers?

For a number of years Quebec employers have been required to deal with the broad prohibition against "psychological harassment" in the workplace contained in the *Act Respecting Labour Standards*. That law defines harassment as "any vexatious behaviour in the form of repeated and hostile or unwanted conduct, verbal comments, actions or gestures, that affects an employee's dignity or psychological or physical integrity and that results in a harmful work environment for the employee." A considerable body of case law has been developed in Quebec applying this broad definition to actual situations. One must understand that body of case law to appreciate the scope and limits of Quebec's law.

Similarly, since 2008, the federal Occupational Health and Safety Regulation - Violence Prevention in the Workplace obliges federally-regulated employers to adopt anti-violence policies. Violence for that purpose includes the concepts of bullying, teasing, abusive or other aggressive behaviour. Federal employers must assess the potential for workplace violence. They must then implement systematic controls to eliminate or minimize such risks.

Ontario may also see the development of regulations providing more detailed requirements for certain parts of Bill 168. But it is expected that, as in Quebec, the true scope of Ontario's Bill 168 will be better understood only with the development of case law.

In any event, it is advisable for employers to now review existing policies and procedures. Ontario employers should ensure compliance with Bill 168's requirements effective June 2010. Prudent Quebec and federal employers should already have policies regarding harassment and/or workplace violence in place. In other Canadian jurisdictions, it may be reasonable to expect legal changes along these lines in the months and years ahead. If you operate in those other jurisdictions, it may be prudent to review your policies and procedures for those locations as well.

For more information on the subject of this bulletin, please contact the author.

Alix P. Herber

416 868 3367

aherber@fasken.com

*The HR Space weekly bulletins are edited by:
Dominique Launay, Karen M. Sargeant, and Brian Smeenk*

Editor's note: Re "Termination of Employment – Is Quebec a Distinct Society?"

December 29, 2009

Following an article written on individual and collective notice of termination across Canada, we wish to make the following clarification with respect to the application of the Quebec *Labour Standards Act*.

As previously indicated in that article, under Quebec law, the termination (without cause) of not fewer than 10 employees at the same establishment in the course of 2 consecutive months constitutes a collective dismissal and requires that the employer give a minimum notice that varies according to the number of affected employees.

In such circumstances, the employer must also give to each affected employee an individual notice of termination. Both the individual and the collective notice of termination may be given simultaneously. When an employer fails to give the collective notice, he must pay to each dismissed employee an indemnity equal to the time period (or remainder of the time period) within which the employer was required to give notice. However, an employee may not cumulate both the indemnities provided by the individual and the collective notice. He is only entitled to the greater of the two.

For More Information About Our Labour, Employment and Human Rights Group

Vancouver

Kevin P. O'Neill
604 631 3147
koneill@fasken.com

Charles G. Harrison
604 631 3132
charrison@fasken.com

Calgary

Katie Clayton
403 261 5376
kclayton@fasken.com

Toronto

Karen Sargeant
416 868 3475
ksargeant@fasken.com

Brian Smeenk
416 868 3438
bsmeenk@fasken.com

Ottawa

Stephen B. Acker
613 236 3882
sacker@fasken.com

Montréal

Dominique Monet
514 397 7425
dmonet@fasken.com

Dominique Launay
514 397 5240
dlaunay@fasken.com

Québec City

Jasmin Marcotte
418 640 2030
jmarcotte@fasken.com

London

Cerys Williams
+44 207 917 8599
cwilliams@fasken.co.uk

This publication is intended to provide information to clients on recent developments in provincial, national and international law. Articles in this bulletin are not legal opinions and readers should not act on the basis of these articles without first consulting a lawyer who will provide analysis and advice on a specific matter. Fasken Martineau DuMoulin LLP is a limited liability partnership and includes law corporations.

© 2009 Fasken Martineau DuMoulin LLP

Vancouver

604 631 3131
vancouver@fasken.com

Ottawa

613 236 3882
ottawa@fasken.com

London

+44 (0) 20 7929 2894
london@fasken.co.uk

Calgary

403 261 5350
calgary@fasken.com

Montréal

514 397 7400
montreal@fasken.com

Paris

+33 (0) 1 44 94 96 98
paris@fasken.com

Toronto

416 366 8381
toronto@fasken.com

Québec City

418 640 2000
quebec@fasken.com

Johannesburg

+27 (11) 685 0800
johannesburg@fasken.com