

WORKPLACE SEXUAL HARASSMENT LAWS SOON TO BE IN FORCE

By Barry W. Kwasniewski*

A. INTRODUCTION

On March 8, 2016, [*Sexual Violence and Harassment Action Plan Act \(Supporting Survivors and Challenging Violence and Harassment\), 2016*](#) (“the Act”), formerly Bill 132, received Royal Assent.¹ The Act amends various Ontario statutes, including the *Compensation for Victims of Crime Act, Limitations Act, 2002, Ministry of Training, Colleges and Universities Act, Private Career Colleges Act, 2005* and the *Residential Tenancies Act, 2006*, as part of the Ontario government’s plans to address sexual harassment. For employers, the most significant changes are contained in Schedule 4² of the Act, as there are important amendments to the [*Occupational Health and Safety Act*](#) (“OHSA”) to specifically define and address sexual harassment in the workplace.³ This *Bulletin* reviews these changes to the OHSA, which will come into force on September 8, 2016.⁴

B. CHANGES TO DEFINITIONS

The OSHA was amended in 2010 to address the issues of workplace violence and harassment.⁵ The Act changes the definition of “workplace harassment” in the OHSA to “(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

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¹ *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Violence and Harassment), 2016*, SO 2016 c 2.

² *Ibid* at Schedule. 4.

³ *Occupational Health and Safety Act*, RSO 1990, c O.1.

⁴ *Supra* note 1 at Schedule 4, s 5.

⁵ Charity Law Bulletin No. 189, online: <http://www.carters.ca/pub/bulletin/charity/2010/chylb189.pdf>.

be unwelcome, or (b) workplace sexual harassment.”⁶ Since 2010, the OHSA defined workplace harassment 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”, with no specific reference to workplace sexual harassment.⁷ The OHSA amendments pursuant to the Act will also add a definition of “workplace sexual harassment” to clarify the meaning of this term. Workplace sexual harassment is defined as:

- (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;⁸

The amendments to the OHSA also state that “a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.”⁹ The purpose of this amendment is to protect employers from legitimate managerial decisions affecting workers.

C. CHANGES TO WORKPLACE HARASSMENT POLICIES AND PROGRAMS

The Act will also result in amendments to the OHSA with respect to workplace harassment policies and programs. Harassment policies and programs have been mandatory for employers since June 2010. As of September 8, 2016, there will be additional obligations on employers. These obligations include the requirement to develop, maintain and review at least annually, in consultation with the joint health and safety committee or representative, if any, a written program that implements the workplace harassment policy. That workplace harassment program must:

⁶ *Ibid* at Schedule 4, s1(1).

⁷ *Supra* note 3 at s 1(1).

⁸ *Supra* note 1 at Schedule 4, s 1(2).

⁹ *Ibid* at Schedule 4, s 1(3)

- ◆ 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;
- ◆ 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.¹⁰

D. CHANGES TO EMPLOYER'S DUTIES – PROTECTING WORKERS FROM HARASSMENT

The Act changes the employer's duties in regard to protecting workers from harassment. Section 32.0.7 of the current OHS Act is repealed and replaced by the Act.¹¹ The new section 32.0.7 provides that to protect workers from harassment employers must ensure that “an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances.”¹² Employers must also ensure that a “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 of any corrective action that has been taken or that will be taken as a result of the investigation.”¹³

¹⁰ *Ibid.*

¹¹ *Supra* note 3 at s 32.0.7.

¹² *Supra* note 1 at Schedule 4 s 3.

¹³ *Ibid.*

E. CHANGES TO THE POWERS OF INVESTIGATORS

The Act adds a section 55.3 to the OHSA.¹⁴ The new section gives the power to inspectors with authority under the OHSA to order an investigation at the expense of the employer. The new section 55.3(1) reads:

Order for workplace harassment investigation

An inspector may in writing order an employer to cause an investigation described in clause 32.0.7 (1) (a) 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.

F. MINISTRY OF LABOUR CODE OF PRACTICE TO ADDRESS WORKPLACE HARASSMENT UNDER OHSA

On August 12, 2016, the Ontario Ministry of Labour issued the [*Code of Practice to Address Workplace Harassment under Ontario's Occupational Health and Safety Act*](#) (“Code of Practice”).¹⁵ This document is intended to “to help employers meet their obligations with respect to the workplace harassment provisions under the OHSA.”¹⁶ The Code of Practice includes templates for a [workplace harassment policy](#), a [workplace harassment program](#), and an [investigation plan](#).¹⁷ Part 1 provides a detailed list of requirements for the contents of a Workplace Harassment Policy. Part 2 provides a list of components for a Workplace Harassment Program. Part 3 is a discussion of an Employer’s duties concerning workplace harassment. Part 4 gives instructions on providing information on a workplace harassment policy and program to all manner of people. The Code of Practice also includes all of the Workplace Harassment provisions of the OHSA, and key definitions. The Code of Practice will provide helpful guidance for employers to be compliant with their OHSA obligations with respect to workplace harassment.

¹⁴ *Supra* note 1 at Schedule 4, s 4.

¹⁵ Ontario, Ministry of Labour, *Code of Practice to Address Workplace Harassment under Ontario's Occupational Health and Safety Act*, effective September 8, 2016, online: <https://www.labour.gov.on.ca/english/hs/pubs/harassment/index.php>.

¹⁶ *Ibid* at Preface.

¹⁷ *Ibid* at Schedules C-E.

G. CONCLUSION

While workplace harassment policies and programs have been the law in Ontario pursuant to the OHSA since 2010, changes to the OHSA as a result of the legislation discussed in this *Bulletin* will require employers to revise their policies and programs with respect to workplace harassment. Charities and not-for profits as employers should prepare now for the coming into force of the Act. Workplace harassment issues can and do arise in the charitable and not for profit sectors. As such, organizations must have the appropriate policies and programs in place to protect workers from harassment and respond if a complaint is made.



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