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*Workplace Responsibilities and Trends
(Human Rights and Health and Safety Legislation)*

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Presentation
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Boundaries on Management Rights

- Common Law
- Statute
- Collective Agreements
- Internal Policies and Procedures (self-imposed boundaries)

Statutory Duties

Two sources of statutory duties impacting management rights include:

- *Ontario Human Rights Code*
- *Occupational Health and Safety Act*

PART A -
Human Rights Obligations

Human Rights Obligations

The *Human Rights Code* requires that employers:

- a. Provide a workplace free of harassment.
- b. Refrain from discriminatory practices.

Human Rights Obligations

Preventing Harassment

Human Rights Code

Section 5(2)

Harassment in Employment – Every person who is an employee has a right to freedom from harassment in the workplace by the employer or agent of the employer or by another employee because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age record of offences, marital status, family status or disability.

Human Rights Obligations

Preventing Harassment

Human Rights Code

Section 10(1)

...

“harassment” means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome.

Human Rights Obligations

Discrimination Free Workplace

Human Rights Code

Section 5(1)

Every person has a right to equal treatment with respect to employment without discrimination because of...

race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status, or handicap (disability)

Legal Responsibility for Human Rights

- Employers have the primary obligation to make sure their workplace is free from discrimination and harassment.
- Employers are expected to proactively provide a workplace where human rights are respected and employees afforded equal opportunities.
- Employers must respond to allegations of human rights complaints, human rights violations in a timely and effective manner.

Duties of Employers

In order for an employer to show that it met the legal responsibility, the employer must demonstrate that:

- It does not consent to harassment or inappropriate conduct in the workplace;
- It exercised due diligence to prevent such conduct from being committed; and
- It exercised due diligence in responding to complaints of inappropriate conduct and harassment.

Legal Responsibilities for Human Rights

If an employee believes the employer has not met its obligation, a claim can be made to/under the following avenues:

- 1) Human Rights Tribunal
- 2) The Courts
- 3) Collective Agreement Grievances
- 4) Internal Employer Policies

Legal Responsibility for Human Rights

Employers violate the *Code* when they:

1. Directly or indirectly, intentionally or unintentionally infringe the *Code*;
2. Constructively discriminate;
3. Do not directly infringe the *Code* but rather authorize, condone, adopt or ratify behaviour that is contrary to the *Code*.

Legal Responsibility for Human Rights

(i) Direct Liability

- The employer is liable for the acts of an employee who is a “directing mind” of a corporation, who discriminates against or harasses an employee in a way contrary to the *Code*, or who knew of the harassment and did not take steps to remedy the situation.

Legal Responsibility for Human Rights

... Direct Liability

- In general terms, an employee who performs management duties is part of the “directing mind” of an employer.
- Senior managers are part of the “directing mind” of the employer, and their actions are considered to be those of the organization.
- Therefore, an employer is liable for any breach of the *Code* committed by a senior manager.

Senior Managers

... Direct Liability

- If a senior manager knew of workplace harassment or a “poisoned environment” and did not take steps to remedy the situation, the organization could also be held liable.
- Upon becoming aware of harassment, a senior manager should take prompt and appropriate steps to remedy the situation.

Senior Managers

... Direct Liability

- This may involve arranging for an independent professional to mediate, to set up dialogue between the parties or to conduct an investigation and, if warranted, to suggest appropriate discipline.

Legal Responsibility for Human Rights

... Direct Liability

- Even employees with limited supervisory authority may be viewed as part of a company's "directing mind" if they function, or are seen to function, as representatives of the organization.
- Non-supervisors may be considered part of the "directing mind" if they have assumed supervisory authority. For example, a member of the bargaining unit who acts as a lead hand may be considered to be part of the "directing mind".

Legal Responsibility for Human Rights

(ii) Vicarious Liability

- The employer may be liable when an employee contravenes the *Code* in the course of employment.
- Under section 45 of the *Code*, this only applies to discriminatory conduct and not to cases of harassment.

Legal Responsibility for Human Rights

... Vicarious Liability

- The employer can be responsible even if it did not know of the discriminatory conduct or did not condone it, and even if it actively discouraged that conduct under this “vicarious liability” provision in the *Code*.

Legal Responsibility for Human Rights

... Vicarious Liability

- Proactive steps on the part of an employer will be taken into account by a tribunal when ordering remedies. This can result in the employer having to pay less in damages even when it is deemed to be “vicariously liable”.
- Also, an employer may be vicariously liable for the acts of third parties, such as consumers, visitors and customers, who discriminate against its employees.

Anonymous Vandalism

Graffiti that is tolerated by an employer who does nothing to remove it may be creating a “poisoned environment”. Depending on the circumstances, some persons may be humiliated or may experience feelings of hurt, anger and resentment because of a prohibited ground (i.e., sexual orientation, race) are not experienced by others in the same setting.

Employees

- Employees have a legal responsibility to treat fellow employees in a way that is consistent with the *Code*.
- A co-worker who infringes a right of another employee can be named as a personal respondent in a human rights complaint.
- An employee who seeks accommodation for a need related to a ground in the *Code* must give enough information to the employer to verify the need, and must specify what accommodation is required.

Unions

- Unions and employers have a joint duty to make sure that workplaces are free of discrimination and harassment.
- Unions have a joint responsibility to ensure that workplace rules/policies do not infringe an employee's rights under the *Code*.

PART B -
Health and Safety Obligations

Health and Safety Obligations

- (i) General
- (ii) Criminalization of Workplace Safety
- (iii) Workplace Violence and Harassment (Bill 168)

Occupational Health & Safety Legal Background

- Outlines the general duties and responsibilities of employers and workers
- Set standards and establish regulations on technical requirements
- Prescribe procedures to reduce risks and proceedings to enforce rights

General Health and Safety Considerations

1. Internal Responsibility System
2. Duties of Employers and Employees
3. Right to Refuse Work
4. Right to Stop Work
5. Critical Accidents & Investigations
6. Coroner's Inquests & Investigations

Internal Responsibility System

- The *OHSA* is based on a system where everyone in an organization has direct responsibility for health and safety as an essential part of the job
- Indirect responsibility:
 - Joint Health & Safety Committee
 - Health & Safety Staff
- External, indirect responsibility:
 - Safe Workplace Associations
 - MOL provides education and support, as well as direct authority through issuing orders

Duties of Employers

- Definition of Employer (s. 1(1))
- General Duties (s. 25)
 - Appoint competent supervisors (s. 1(1))
- Prescribed Duties (ss. 25 & 26)
- Reprisals Prohibited (s. 50)
- Notices Required from Employers (ss. 51-53)

Duties of Supervisors

- Definition of Supervisor (s. 1(1))
- Duties of a Supervisor (s. 27)
- No Reprisals (s. 50)

Duties of Constructors & Owners

- Definition of Constructor and Owner (s. 1(1))
- Duties of Constructors (s. 23)
- Duties of Owner (s. 29)
- Duties of Owners & Constructors re: Designated Substances (s. 30)

Corporate Officers, Directors, Suppliers and Licensees

- Duties of Corporate Officers and Directors (s. 32)
- Duties of Suppliers (s. 31)
- Duties of Licensees (s. 24)
- Liability of Architects and Engineers (s. 32(2))

Duties of Workers

- Definition of Worker (s. 1(1))
- Duties of Workers (s. 28)
- Duties of everyone in the Workplace (ss. 50(2), 62(4) and 62(5))

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Since March 31, 2004:

- Addition of Section 217.1 of the *Criminal Code of Canada* creating a specific duty with respect to occupational health and safety
- Establishment of rules for attributing to “organizations”, criminal liability for the acts of their representatives

... and also

- Setting out of factors to consider when sentencing an organization
- Identification of optional conditions or probation a court may impose on an organization

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Section 217.1 of the *Criminal Code of Canada*

“Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.”

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Section 217.1 of the *Criminal Code of Canada*

- New duty dove-tails with s. 219 (Criminal Negligence), creating a new crime of occupational health and safety negligence.
- Applies to both individuals and organizations through the revised definition of “everyone”.
- Applies to all who “direct” or “have the authority to direct”.
- Introduction to the concept of “reasonable steps”.
- Seeks to prevent “bodily harm”.
- Protection of the public and of workers.

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Criminal Liability of individuals with respect to OH & S

In order for an individual to be found guilty of occupational health and safety criminal negligence, the prosecution will have to establish, beyond a reasonable doubt, that:

1. The accused individual directed how another person did work or performed a task or had the authority to do so
2. The accused individual failed to take reasonable steps to prevent bodily harm to another party arising from the work or task
3. And in doing so, he showed wanton or reckless disregard for the lives or safety of other persons.

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Criminal Liability of individuals with respect to OH & S

Organization:

- Public body, body corporate, society, company, firm, partnership, trade union or municipality, and, under certain conditions, an association of persons.

Representative:

- Any director, partner, employee, member, agent or contractor or organization.

Senior Officer:

- Any director, partner, employee, member, agent or contractor of the organization playing an important role in the establishment of the organization's activities, including a director, the chief executive officer and the chief financial officer.

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Criminal Liability of Organizations with Respect to OH & S

In order for an organization to be found guilty of occupational health and safety criminal negligence, the prosecution must establish, beyond a reasonable doubt, that

1. A representative of the organization (acting within the scope of his authority)
 - Directed how another person did work or performed a task **OR**
 - Had the authority to do so
2. That the same representative of the organization
 - Failed to take reasonable steps to prevent bodily harm to another party arising from the work or task

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Criminal Liability of Organizations with Respect to OH & S

3. In doing so, that the representative of the organization showed wanton or reckless disregard for the lives or safety of other persons;
4. AND that the behaviour of the senior officer(s) responsible for the aspect of the organization's activities that is relevant to the offence departed markedly from the standard of care that, in the circumstances, could reasonably be expected to prevent the commission of the infraction.

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Penalties for Individuals

An individual found guilty of criminal negligence (an indictable offence) may be subject to:

- In case of death: imprisonment for life
- In case of injury: imprisonment for a term not exceeding 10 years

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Penalties for Organizations

An organization found guilty of criminal negligence (an indictable offence) may be subject to:

- In case of death or in case of injury to a fine (unlimited amount).

An organization may be convicted even though no individual is found guilty

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Fictitious Example

- A supervisor observes that certain employees are not wearing their required security equipment while performing risky duties. He decides not to intervene because the work has to be finished within a short time period. One of the workers suffers a serious injury which the safety equipment was designed to prevent. Due to his inaction, the supervisor most likely violated his obligation under Article 217.1 of the *Criminal Code*.

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Laying the Ground for Due Diligence/Reasonable Steps

- Informing and educating senior management and line management about their OH&S duties and responsibilities
- Complying with applicable laws and norms
- Establishing a proper and up to date OH&S management system
- Ensuring consistent application of OH&S standards, procedures and practices
- Establishing and applying sanctions to employees not complying with their obligations

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Laying the Ground for Due Diligence/Reasonable Steps

- Reacting promptly to violations of norms and applicable laws
- Recording and reporting all inspections or inquiries, lawsuits, orders or notices from governmental authorities and all incidents that could have an impact on OH&S
- Ensuring adequate allocation of resources with regard to OH&S
- Documenting all of the above mentioned steps and actions, including in the Board minutes

Criminalization of Workplace Safety: Potential Liability for Employers, Managers and Workers

Summary: Principal Elements of Differentiation

Occupational Health & Safety Legislation	Section 217.1 of the <i>Criminal Code</i>
<ul style="list-style-type: none">• provincial scope	<ul style="list-style-type: none">• national scope
<ul style="list-style-type: none">• protects employees	<ul style="list-style-type: none">• protects employees and the public in general
<ul style="list-style-type: none">• enforcement means: orders and quasi criminal prosecution	<ul style="list-style-type: none">• enforcement means: criminal proceedings
<ul style="list-style-type: none">• due diligence defence available to the accused	<ul style="list-style-type: none">• due diligence (“reasonable steps”) = element of the crime to be proven by the prosecution
<ul style="list-style-type: none">• consequences of a declaration of guilt: sentencing as per legislation	<ul style="list-style-type: none">• consequences of a declaration of guilt: sentencing as per legislation and criminal record
<ul style="list-style-type: none">• short limitation period	<ul style="list-style-type: none">• no limitation period

Workplace Violence and Harassment: Employer obligations under the *Occupational Health and Safety Act* in the wake of Bill 168.

Introduction

- Bill 168 is an act amending the *Occupational Health and Safety Act* to address workplace violence and harassment.
- Effective date: **June 15, 2010.**

Workplace Violence Defined

Workplace violence is:

- a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker;
- b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker; or,
- c) a statement or behaviour that a worker could reasonably interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.

Workplace Harassment Defined

Workplace Harassment is:

“engaging in a course of vexatious comments or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome”

Expansion of Existing *OHS*A Duties

The *Act* sets out general duties for an:

- employer (s. 25)
- supervisor (s. 27)
- worker (s. 28)

Employer Obligations under Bill 168

There are four main areas of employer obligations:

1. Policies;
2. Risk Assessment (violence only);
3. Programs; and,
4. General Duties.

Policies

- Every employer must prepare a workplace violence policy *and* a workplace harassment policy.
- The policies must be reviewed at least annually.
- Must be in writing and posted in a conspicuous place in workplaces of six or more employees.

Risk Assessment

Must consider:

1. Nature of the workplace
2. Type of work
3. Conditions of work
4. Risks common to similar workplaces

**Report conclusion to JHSC

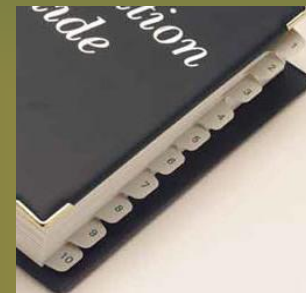
Risk Assessment

How to Conduct a Risk Assessment:

1. Review history of incidents
2. Do an employee survey
3. Do a physical survey
4. Investigate experience of your peers
5. Create an inventory of all risks and corresponding controls
6. Rate the risks and control
7. Determine what new controls are necessary

Programs

Every employer must develop comprehensive programs to implement both the workplace violence and workplace harassment policy.



Workplace Harassment Program

The program must include measures and procedures to:

- a) report incidents of workplace harassment;
- b) investigate and respond to such incidents or complaints; and,
- c) address any prescribed elements set out in the regulations.

Workplace Violence Program

The program must include measure and procedures to:

- a) control risks;
- b) summon immediate assistance;
- c) report incidents and threats of violence;
- d) investigate and respond to incidents or complaints; and,
- e) address any other elements prescribed by regulation.

Investigation

- Gather statements from anyone who is identified as having knowledge.
- Acknowledge need for sensitivity but do not guarantee confidentiality - remind all of your policy on not discussing the complaint.
- Consider the safety of the complainant during the investigation and after.

Information and Instruction

Under the *Act*, Employers and Supervisors must provide:

information and instruction that is appropriate for the worker on the contents of the policy and program as well as any other information prescribed by regulation

Providing Instruction

Instruction means training, this includes:

- Basic Training for All
- Training by Occupation

Providing Information

Employers and Supervisors are obligated to provide information, including personal information, to a worker about a person with a history of violent behaviour if:

- the worker could be expected to encounter that person in the course of his/her employment; and,
- there is a risk of workplace violence *likely to expose the worker to physical injury*.

Domestic Violence

From s. 32.0.4 of the Act:

“If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker”



Identifying Domestic Violence

When is domestic violence workplace violence?

A person who has a personal relationship with a worker – such as a spouse or former spouse, current or former intimate partner or a family member – may physically harm or attempt or threaten to physically harm that worker at work. In such situation, domestic violence is considered workplace violence.

Work Refusals - Violence

- Under s. 43(3)(b.1) of the *Act*, a worker can refuse work if he or she has reason to believe that “*workplace violence is likely to endanger himself or herself*”.
- Workplace harassment is not a grounds for a work refusal.

Public Safety Exception

Under s. 43(2) of the *Act*, certain workers who protect public safety cannot refuse to work if:

- the danger is an inherent or normal part of their job; or,
- the refusal would endanger the life, health or safety of another person.

Notices

When an incident of workplace violence takes place, the employer should:

- First, notify the police or emergency responders for immediate assistance.
- Then, *OHSA* has a number of obligations/requirements if violence results in someone being critically injured.
- No notice required in case of harassment.

Enforcement

- Bill 168 does not create a new basis for employees to claim compensation for workplace harassment or violence as under the *Human Rights Code*.
- The duties placed upon employers are procedural – implement programs, take precautions, etc.

Enforcement

- A failure to do these acts can be the subject of normal inspection/enforcement proceedings.
- Fines for infringement of the *Act* are up to \$25,000 for individuals (and/or 12 months in jail) and \$500,000 for corporations.
- Police may also investigate violent incidents and complaints.

Final Thoughts/Tips

- Ensure proper security measures are in place.
- Train staff appropriately.
- Practice violence response procedures.
- Be prepared to put time and energy into the investigation.
- Keep detailed records.
- Consider external resources for investigations and/or training.
- Discipline employees for violations of the policies.

Thank you for coming!

For further assistance contact:

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or visit our website at

www.evansphilp.com