MANAGEMENT COUNSEL
Employment and Labour Law Update

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An employer's obligation to assess the potential for violence and harassment in the workplace goes beyond an employer's current obligations under the Occupational Health and Safety Act.

June 15, 2010 - Countdown to Bill 168

Bill 168, the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace)* 2009 (the "Act"), received Royal Assent on December 15, 2009. The Act, which comes into force on June 15, 2010, requires all provincially-regulated employers in Ontario to protect workers against violence and harassment in the workplace. Now that the clock is ticking, employers should move quickly to review their obligations and ensure compliance.

What is Workplace Violence and Harassment?

"Workplace violence" is defined broadly in the Act to include:

- The exercise of physical force by a person against a worker in a workplace that causes or could cause physical injury.
- An attempt to exercise physical force against a worker in a workplace that could cause physical injury.
- A statement or behaviour that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury.

"Workplace harassment" means 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. This is the same definition used in the Ontario *Human Rights Code*. However, the provisions in the *Code* prohibit harassment in employment on the basis of specifically prohibited grounds of discrimination, namely: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability. The new law against workplace violence and harassment has no such restriction, and as such offers broader protection for employees than currently available under the *Code*.

Employer Obligations

Every employer governed by the Act will be obliged to:

- Undertake a risk assessment process to measure the risk of workplace violence.
- Develop a workplace violence and harassment policy to address the risks identified.
- Develop programs and procedures to implement the policy.

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What Is A Risk Assessment?

An employer's obligation to assess the potential for violence and harassment in the workplace goes beyond an employer's current obligations under the *Occupational Health and Safety Act.*

The risk assessment obligation requires an employer to consider risks of violence and harassment within the employer's own workplace and beyond. This includes the physical security of each employee during every aspect of work performed inside and outside of the employer's facility, in parking lots, during work-related travel and while workers are at off-site locations. Sources of violence may include co-workers, supervisors, customers, members of the public and unauthorized trespassers.

Significantly, the risk assessment obligation requires an employer to assess and address *domestic* violence where the employer is aware of or ought reasonably to be aware of the possibility that domestic violence could take place at the workplace.

The results of the assessment must be in written form and, once completed, must be presented to the employer's health and safety representative or committee, or alternatively, directly to the workers.

Finally, the Act requires employers to reassess the risk of workplace violence as often as necessary, and in any event, annually. Examples of the former might include following a *bona fide* complaint or incident, or a significant business change that affects the workplace (*i.e.*, an acquisition, restructuring, facility relocation or renovation, *etc.*).

Policy Development and Implementation

Every employer must develop and implement a violence and harassment policy (or two separate policies) prior to June 15, 2010. To carry out this obligation an employer must designate a workplace coordinator to manage the policy development process. The policy(ies) created must include measures and procedures to:

- Control the risk of workplace violence and harassment identified through the assessment process.
- Enable workers to:
  - o Obtain emergency assistance in the event of a violent incident, or the risk or threat of violence.
  - o Report incidents or threats of violence or harassment to the employer.
- Demonstrate how the employer will investigate and deal with incidents and complaints of workplace violence and harassment.

Workers must then be trained to ensure compliance, and for an employer with more than five workers, the policy(ies) must be in writing and posted in the workplace.

Disclosure Obligations

The Act is not without controversy. Under the new law, an employer has a positive obligation to warn a worker about another individual who has a history of violence, where the worker is anticipated to encounter the individual and where the individual may pose a threat of physical harm to the worker. In that instance an employer must provide the worker with sufficient information about the individual as necessary to protect the worker. This obligation only arises in respect of an individual with a history of violent behaviour, not a history of harassment. Precisely what information must be disclosed, privacy considerations, and the steps an employer must take to fulfill its obligations under this part of the Act remain unanswered and the subject of much debate.

Refusal to Work

The Act gives to a worker the right to refuse to work where the worker has reason to believe he or she may be at risk of workplace violence. Such a refusal will trigger existing investigation procedures already in force under the *Occupational Health and Safety Act.*

What Should An Employer Do Now?

There are a number of steps an employer might consider now, to prepare for June 15, 2010:

- Appoint a workplace coordinator to manage the development and implementation of policies, training and accountability.
- Develop a risk assessment tool.
- Conduct a risk assessment.
- Address any issues identified in the risk assessment.
- Review existing workplace violence and harassment policies to ensure compliance with the new obligations.
- Update or develop new workplace violence and harassment policies.
- Review existing complaint and incident reporting policies to ensure compliance with the new obligations.
- Update or develop new complaint and incident reporting policies.
- Establish procedures to comply with disclosure obligations where a worker may come into contact with an individual with a history of violence.
- Develop and implement a record keeping protocol to document assessments, complaints, remedial action, *etc*.
- Review and update discipline and other workplace policies to ensure they comply and are consistent with new or revised violence and harassment policies.
- Plan and implement education and training programs for employees.
- In a unionized workplace:
  - o Review the terms of any collective agreements to determine if provisions are affected by the Act.
  - o Where possible, communicate with union representatives regarding proposed policy changes and compliance with the Act. This ongoing communication may reduce the risk of a future grievance directed at whether the employer has met its obligations under the Act.

To learn more about the new law, including the nuts and bolts of the required policies and procedures, please join us at our upcoming HReview Breakfast Seminar on Thursday March 25, 2010. Details can be found on the back page of this newsletter.

Unlawful Strike Not Saved by *Charter*

Late in 2008, the Canada Industrial Relations Board ("Board") affirmed that a refusal to cross a picket line by federally regulated employees, not themselves in a legal strike position, constitutes an illegal strike. The Board also found that the provision of the *Canadian Industrial Relations Code* (the "*Code*") that prohibits a mid-contract strike does not violate an employee's freedom of expression or association under the *Canadian Charter of Rights and Freedoms* (the "*Charter*").

This is a significant decision for two types of employers: (i) any federally regulated employer whose employees engage in a refusal to cross a picket line or politically motivated picketing during the life of a collective agreement; and (ii) any employer that is, or may be, adversely affected by this conduct.

Background

In 2004, employees represented by the Public Service Alliance of Canada ("PSAC") commenced a lawful strike against their employer, the Canadian Grain Commission. They set up a picket line at a port terminal in British Columbia's Lower Mainland.

In a show of solidarity with the striking workers, employees of other employers involved in the transportation of grain refused to cross the PSAC picket lines. These employees relied on a clause in their own collective agreements which stated that a refusal to cross a picket line was not a violation of their agreements.

A group of employers affected by the refusal applied to the Board for a declaration that this work stoppage constituted an illegal strike.

Under the *Code*, a strike is defined to include a "*cessation of work or a refusal to work or to continue to work by employees in combination, in concert or in accordance with a common understanding, and a slowdown of work or other concerted activity*". The *Code* also states that a strike or lockout is prohibited during the term of a collective agreement unless a notice to bargain collectively has been given.

At the time of their refusal to cross the picket line, the employees were not in a legal strike position. They were in the mid-term of their own, respective collective agreements.

The Issues

The issues before the Board were two-fold:

1. Did the refusal to cross the PSAC picket line constitute an illegal strike?
2. If 'yes', did the *Code*'s prohibition against a mid-contract strike violate the employees' freedom of expression and association under the *Charter*?

The Board's Decision

The Board held that the employees' collective refusal to cross the PSAC picket line constituted an illegal strike. And further, that the legislative ban against a mid-contract strike did not violate freedom of association or expression under the *Charter*.

The respondent union requested that the Board reconsider its decision and, in November 2008, the Board released a second decision affirming its earlier ruling.

With respect issue #1, the Board held that the collective agreement provisions which permitted the employees to refuse to cross a picket line could not be read in a vacuum. The provisions had to be interpreted within the context of the prevailing law – in this case, the *Code* - which prohibited a mid-term strike. According to the Board "*the parties cannot bargain provisions into their collective agreement that permit or cause employees to violate the legislative prohibition against mid-contract work stoppages.*" And further *"the definition of strike is an objective one"* and that *"parties cannot, by negotiation, change the statutory definition of"* strike *"or contract out of the prohibition on mid-contract work stoppages*".

> *Even where a collective agreement of a federally regulated employer allows employees to refuse to cross a picket line, such a refusal will be illegal unless the employees are themselves in a legal strike position.*

With respect to issue #2, the Board rejected the union's argument that the *Code*'s prohibition against a mid-term strike violated an employee's freedom of association. The Board followed the 2007 decision of the Supreme Court of Canada in *B.C. Health Services* in which the Supreme Court held that freedom of association meant the freedom to associate in a process of collective action to achieve a workplace goal (*i.e.*, collective bargaining). It did not extend to the right to secure a particular outcome in a labour dispute, nor did it encompass the right to strike.

Lessons Learned

The Board's interpretation of the *Code* means that, even where a collective agreement of a federally regulated employer allows employees to refuse to cross a picket line, such a refusal will be illegal unless the employees are themselves in a legal strike position. The decision also confirms that freedom of association under the *Charter* does not create the right to strike.

The decision is significant for any federally regulated employer whose employees engage in a refusal to cross a picket line or politically motivated picketing during the life of a collective agreement, as well as any employer that is, or may be, adversely affected by this conduct.

To learn more about this important decision, and how it may affect your workplace, please contact a member of our team.

MANAGEMENT COUNSEL

DID YOU KNOW?

Daylight savings begins March 14, 2010. According to a study published in the Journal of Applied Psychology, workplace accidents, and those of greater severity, are more likely to occur on the Monday immediately following the "spring forward" time change.

***HReview* Seminar Series**

Please join us at our next HReview Breakfast Seminar:

Bill 168 - Violence and Harassment in the Workplace
A Practical Guide to Managing The New Law

Slated to become law on June 15, 2010, Bill 168 amends the *Occupational Health and Safety Act* and places obligations on employers never before seen in Ontario.

At this *HR*eview Seminar attendees will learn:

1. What are an employer's obligations under the new law?
2. The nuts and bolts of the policies and programs every employer must have in place.
3. What is a "risk assessment" and how is it performed?
4. What steps can be taken now to ensure workplace compliance before June 15, 2010?
5. What is at risk for a non-complaint employer?

DATE: **Thursday March 25, 2010; 7:30 – 9:30 a.m.** (Program at 8:00 a.m. - breakfast provided.)

VENUE: **Eagles Nest Golf Club,** 10,000 Dufferin Street, Maple, Ontario 905.417.2300

COST: Please be our guest

RSVP: By Monday March 15, 2010 to info@sherrardkuzz.com or 416.603.0700

HRPAO CHRP designated members should inquire at www.hrpao.org for certification eligibility guidelines regarding this *HReview Seminar*.

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