FTR Now

Bill 168 – Assessing Students as Risks

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The new provisions incorporated into the *Occupational Health and Safety Act* ("*OHSA*") by Bill 168 came into force on June 15, 2010. These provisions make clear that colleges must take every precaution reasonable in the circumstances to protect their workers from workplace violence. In this bulletin, we focus on the college duty to manage the threat of violence posed by students, an always-challenging task given competing concerns about student privacy. Our key message is that student privacy, though important to respect, does not prevail over the health and safety duties reinforced by Bill 168.

WHAT BILL 168 MEANS FOR COLLEGES

The risk of students causing "catastrophic violence" has been highlighted by recent high-profile violent events in Canada and the United States. Bill 168 compliance should be approached with these events in mind, though colleges should not ignore the existence of more common, yet very real, day-to-day risks. Students often have disabilities that prompt inappropriate and sometimes dangerous behaviours in classrooms, labs, residences and other parts of the college workplace. These and other threatening behaviours are encompassed by Bill 168 insofar as they require "workers" to be protected from "workplace violence".

"Workplace violence" includes:

1. the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,
2. an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,
3. a statement or behaviour that it 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 to the worker.

The *OHSA* now expressly requires colleges to implement measures and procedures to control the risk of workplace violence. It also requires colleges to assess and respond appropriately to student behaviours that are known and that indicate a risk of workplace violence.

BILL 168 MAKES THREAT ASSESSMENT VERY IMPORTANT

This latter duty – a duty to assess threats – is not clearly spelled out in Bill 168, but is very important.

The challenge for colleges, given their size and administrative complexity, will be to develop a means of assessing and responding to threats based on all known facts and all facts that ought reasonably to be gathered in the assessment process. Subject to certain limitations related to the provision of health care and other confidential services, a college's knowledge of facts that relate to a threat of violence will be judged without any allowance for "silos" of information. It is therefore important for colleges to stress to all community members the importance of reporting behaviours of concern to a college authority who is responsible for initiating and following through with an assessment.

Most colleges are familiar with the threat assessment process and have informal procedures for assessing and responding to students who demonstrate troubling behaviour. Bill 168 requires these procedures to be formalized and (with reasonable specificity) described in a workplace violence program.

PRIVACY LAWS DO NOT PRECLUDE DILIGENT THREAT ASSESSMENT

Does student privacy weigh against reporting of behaviours? What student records can a college look at in assessing a student?

We have long advised our college clients that student privacy should be recognized and respected but does not prevent managing the risk of violence. The *Freedom of Information and Protection of Privacy Act* permits colleges to collect student personal information as is reasonably necessary to support a lawfully authorized activity, including managing the risk of workplace violence. *FIPPA* also includes exceptions that allow colleges to use and disclose information in existing student records to manage the risk of workplace violence and to respond to health and safety emergencies. As stressed by the Information and Privacy Commissioner herself, *FIPPA* incorporates a balance that favours human life over privacy.

THE SCOPE OF THREAT ASSESSMENT SHOULD BE REASONABLE

Bill 168 has been criticized as privacy-invasive because it imposes accountability for preventing workplace violence that is based on knowledge of a person's "history of violent behaviour" and based on knowledge of risks of which employers "ought to be aware."

These key phrases in Bill 168 are the means by which the Legislature has indicated that employers must engage in reasonable threat assessment. They do not require employers to be omniscient, but, as we explained above, require effective systems for encouraging and receiving threat reports and effective systems for gathering relevant and reasonably available information to assess identified threats. In addition to encouraging centralized reporting and recording of incidents of violence involving students and others, colleges should focus on responding to reports by assessing information known by academic departments, residence administrators, security and other disparate administrative units that may have relevant information about a student's history of violence.

WARNING INDIVIDUALS IS ONLY ONE MEANS OF MITIGATING THE RISK OF VIOLENCE

Bill 168 has also been criticized as privacy-invasive because it includes a "duty to warn". Section 32.0.5(3) of the *OHSA* requires an employer to provide information to a worker that is reasonably necessary to protect the worker from physical injury. Three conditions must be present to trigger the duty: (1) a worker must be exposed to a risk of workplace violence from a person with a "history of violent behaviour"; (2) the worker must be expected to encounter that person in the course of his or her work; and (3) the risk of violence must be "likely" to expose the worker to physical injury.

Warning individuals is only one means of mitigating a risk of workplace violence. The duty to warn now embedded in the *OHSA* is triggered only when "the risk of workplace violence is likely to expose [a] worker to physical injury". This threshold is arguably high, and it will often be open to colleges to control exposure to physical injury through means other than warning. Ultimately, exclusion of a student who is likely to expose a worker to physical injury may be an appropriate and lawful step. If a college takes such a step or otherwise eliminates the likelihood of physical injury to a worker, it will not have a duty to warn.

While we raise the possibility of exclusion as a means of controlling the risk of workplace violence, colleges must keep in mind their obligations under the *Human Rights Code* at all times. This means that students with disabilities which give rise to behaviours that would meet the definition of workplace violence must be provided with reasonable accommodation to the point of undue hardship before exclusion will be permitted.

For colleges, the duty to warn may be particularly relevant to workers in security positions and other college workers who are required to confront individuals who pose a specific threat of physical violence but who cannot be controlled through other means due to either legal or practical restrictions. We foresee colleges being required, for example, to warn security staff

about individuals with a history of violence who are likely to return to a building or other space on campus despite receiving a trespass notice. There may be other college workers who are also required to encounter individuals who have demonstrated violent behaviour, for example, in the course of teaching in a practice setting that requires exposure to patients or clients who pose a threat of violence.

In the event warning is necessary because a student who is likely to expose a worker to physical injury will remain in the college environment, the *OHSA* requires colleges to provide a worker who needs to be warned with no more information than is “reasonably necessary to protect the worker from physical injury”. Those workers who are warned must be instructed to maintain the information they receive in strict confidence in order to protect student privacy and to minimize the risk of an adverse reaction against the student by others. Workers must also be instructed that, while the student is to be observed by them with caution, they must not treat the student any differently than any other student in order to ensure that the student’s right to equal treatment in the receipt of services is not violated.

PRACTICAL CONSIDERATIONS

Many colleges have already implemented workplace violence policies and have begun to formalize their workplace violence programs as required by the *OHSA*. In working on programs, we encourage colleges to give particular consideration to threat reporting, assessment and response. Colleges will benefit by developing and implementing supportive and clear procedures on threat assessment, including procedures that contemplate regular communication with the community to ensure that available information about potential threats is reported and assessed. Such policies will help ensure that the Bill 168 violence-prevention duties are met, and, by encouraging the application of valid, objective and non-stereotypical criteria for assessing threats, protect against claims that threat assessment activity infringes student human rights and personal privacy.

If you have any questions about this article or wish to ask questions about assessing students as “risks of workplace violence”, please contact your regular Hicks Morley lawyer.

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