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Featured Articles

Bill 132 Workplace Sexual Harassment Legislation – What's Next?

By: Nadine S. Zacks

On September 8, 2016, the Bill 132 amendments to the *Occupational Health and Safety Act* (Act) came into force. These amendments revised and expanded the definition of "workplace harassment" in the Act to include "workplace sexual harassment" and introduced new requirements for workplace harassment programs.

Specifically, the program must now, among other things:

- be developed and maintained in consultation with the joint health and safety committee (JHSC) or health and safety representative within the workplace
- include a reporting mechanism for incidents of workplace harassment, including a reporting mechanism for when the alleged harasser is the employer or supervisor
- ensure that all complaints and allegations are investigated
- set out how the complainant and respondent will be informed in writing of the results of the investigation and any corrective action taken.

Shortly before the amendments came into force, the Ministry of Labour released a Code of Practice to Address Workplace Harassment under the Act (Code of Practice) which, if followed, is one way in which employers can meet the legal requirements for workplace harassment in the Act.

While the coming into force date has now passed and workplace policies and programs have been updated, many employers are now asking what exactly these amendments mean for their businesses. We have set out below some of the most common questions we are receiving regarding the new provisions.

Do I need to create a separate workplace sexual harassment policy?

No. Employers are not required to create a standalone workplace sexual harassment policy, or even a standalone workplace

harassment policy. The policy may be incorporated within another policy, such as a workplace violence policy or a respectful workplace policy.

Moreover, the policy and program need not be separate documents, although employers should be aware that there are some different requirements for the policy and program. For example, the policy (but not the program) must be posted in workplaces with more than five workers**,** and the program (but not the policy) must be developed and maintained in consultation with the JHSC or health and safety representative.

Do I now need to conduct a full investigation for every complaint of workplace harassment, no matter how frivolous?

Many employers are confused about the new “duty to investigate” that is now included in the Act. The Act now requires an employer to ensure that “an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances.” This obligation is triggered not only when a worker makes a “formal” complaint pursuant to the policy or program, but also whenever an employer becomes aware of an incident of workplace harassment (for example, by viewing the incident or hearing about it from a third party).

However, the scope of that investigation may vary based on the type of complaint or incident. The Ministry of Labour has acknowledged in commentary in the Code of Practice that some matters will not require a lengthy investigation (such as a complaint that does not, on its face, pertain to workplace harassment) whereas other situations may necessitate a complex investigation. It will depend on the circumstances. What is clear, however, is that some form of “investigation” by the employer is required. Employers should review their program carefully to ensure that it provides for an investigation of all incidents or complaints and not, for example, informal resolution with no investigation in some circumstances.

Do my policy and program need to meet all of the requirements of the Code of Practice?

The Ministry of Labour approved and released a Code of Practice on August 12, 2016. Compliance with the Code of Practice is one way in which employers can meet the legal requirements regarding workplace harassment in the Act – but it is not the only way. Failure to comply with all or part of the Code of Practice is not, in and of itself, a breach of the Act.

The Code of Practice has four parts and employers can choose to adhere to one or all of the parts of the Code of Practice. In order to benefit from the Code of Practice and be deemed compliant with the Act, employers must follow the entire practice under the part of the Code of Practice they choose to follow.

Many of the practices set out in the Code of Practice go beyond the minimum requirements in the Act and there may be valid reasons why employers would not want to follow the practices contained therein. As long as the employer otherwise complies with the provisions in the Act, it need not follow the more onerous Code of Practice requirements.

How much information do I have to provide to the parties to a complaint following the investigation?

One provision which has garnered a lot of attention is the new requirement for an employer to inform the complainant and respondent in writing of the results of the investigation and any corrective action taken.

The results of the investigation are not the same as the investigation report, and may simply be a summary of the result that the investigator reached. For corrective action, the amount of information provided will depend on the circumstances but should at a minimum indicate what steps the employer has taken or will take to prevent a similar incident of workplace harassment, if workplace harassment was found. The amount of detail that is provided to a complainant regarding disciplinary penalties imposed upon a respondent will likely now need to be more detailed than simply indicating that corrective action was taken.

What’s next?

The Bill 132 amendments to the Act are still in their infancy, so we expect to see many of the above issues (and more) evolve over the next months and years as the relevant case law evolves. Hicks Morley will continue to keep you informed of any developments that affect employers.

WSIB Rate Group Reform: Five Ways It Will Impact Your Business

By: Joseph Cohen-Lyons and Samantha C. Seabrook

In March 2015, the Workplace Safety and Insurance Board (WSIB) proposed a new rate framework (the Proposed Framework) that, if adopted, would fundamentally change the way it classifies Schedule 1 employers and sets their premium rates. For information on the Proposed Framework, see our prior *FTR Now* of April, 2015, An Update on WSIB Rate Framework Reform.

Following the initial announcement, the WSIB invited stakeholders, including employer and worker groups, to make submissions concerning the WSIB's Proposed Framework. These submissions resulted in revisions to the Proposed Framework that are set out in our earlier publications.

With the consultation period complete and a revised Proposed Framework in place, the WSIB intends to present its recommendations to its Board of Directors for approval, with the goal of implementing the Proposed Framework by January, 2019 at the earliest.

How will these changes impact your organization? Here are the top five ways that the Proposed Framework is likely to impact the business of Schedule 1 employers.

1. New Rate Group Classification

The WSIB's Proposed Framework would streamline the classification process used to determine employer premium rates. The number of Rate Groups is set to be reduced from over 800 to only 34. The new rate groups will be adapted from the North American Industry Classification System (NAICS). Each Rate Group contains several risk bands, delineated based on employers' individual recent claims history.

An employer will generally be classified in a single Rate Group based on its predominant business activity. This Rate Group, along with the applicable risk, will determine the applicable premium rate for all covered workers. Employers will be permitted to be classified in multiple Rate Groups based on separate business activities where:

1. The business activity in question does not "form an integrated operation" with the other business activity (or activities) of the employer; and
2. The business activity in question is "significant."

There is no official word yet on what constitutes a "significant" business activity for the purposes of the Proposed Framework.

2. Change in Premium Rates

Every employer will likely have a different premium rate following the implementation of the Proposed Framework. Prospective premium rates can be found in the Updated Class-Level Premium Rates, which identifies:

- the applicable premium rate for each industry class
- the range of risk bands
- the actual risk band rates
- the number of risk bands for each class.

3. Prospective Rate Setting

The WSIB's Proposed Framework implements a prospective approach to rate-setting that differs greatly from the present rebate and surcharge system.

Under the current system, employers pay a set premium that is common to all employers in a particular Rate Group. Employers are then either levied surcharges or issued rebates based on their claims history in previous years (four for NEER and five for CAD-7). Where an employer's claims experience is better than the average employer in its Rate Group, a rebate is issued. Where the claims experience is worse, the employer is levied a surcharge. These surcharges and levies are generally issued near the end of the year following the applicable review period.

The Proposed Framework will create risk bands in each Rate Group based on relative claims experience. Employers with higher claims costs over the applicable review period will be placed in a higher risk band and charged a higher premium. Those with low claims costs over the review period will be placed in lower risk bands and charged lower premiums.

The prospective setting of premium rates means that employers will either get credit for or incur the cost of their relative claims experience following each year.

4. Increased Claims Exposure

Employers will have to wait longer before a claim ceases to have financial implications. The Proposed Framework will use a six-year review window to determine risk band placing, increasing potential claim exposure from four years in the case of NEER employers and five years in the case of CAD-7 employers.

The WSIB has announced that it will implement a weighted rating system that will value the most recent three years of claims experience at two-thirds (66.6%), and the remaining three years at one-third (33.3%). While these later years will have less impact on an employer's bottom line, they will still need to be taken into account in determining the potential cost of coverage.

5. Greater Employer Accountability

The WSIB has proposed an approach to address employers with excessive claims costs that focuses on awareness and prevention above increased premium rates or surcharges. Employers falling within this group would include those which "'ought' to be paying a premium rate […] that is greater than the Maximum Risk Band identified for their industry"; or, those that "have a difference between their projected risk band and their actual risk band that is greater than 20 risk bands (approximately 100%)."

Identified employers would be given an opportunity to correct their claims costs experience, with support from the WSIB and systems partners, prior to any risk band increases. This proposed gradual approach would be structured as follows:

- **Year 1: Awareness.** The employer would be informed of its position to ensure it understood the extent that its experience was out of step with its industry, or its current rate.
- **Year 1 – 2: WSIB H&S services engagement.** If the employer does not make improvements or demonstrates worse performance than Year 1, the employer would be offered support from the WSIB and system partners.
- **Year 3: Risk band increases.** If the employer continues to not make improvements or demonstrates worse performance than in prior years, or based on the consideration of other occupational health and safety factors (e.g. potential leading indicators, or compliance outcomes under the *Occupational Health and Safety Act* or the *Workplace Safety and Insurance Act, 1997*) it would see progressive increases in its risk band and rates.

Regardless of your current WSIB experience, the implementation of the Proposed Framework is certain to change the manner in which your WSIB costs are calculated. The prospective rate-setting model means that employers will feel the

impact of their claims experience sooner and the increased review period means that the impact of each claim will be felt for longer.

While the Proposed Framework will not be implemented until January, 2019, now is the time to assess the potential impact it will have on your business – and to structure your programs and procedures accordingly. In the meantime, should you have any questions or require further information about the Proposed Framework, please contact Jodi Gallagher-Healy at 519.931.5605, Ed O'Dwyer at 416.864.7483 or your regular Hicks Morley lawyer.

Featured Lawyer

Nadine S. Zacks, a lawyer in Hicks Morley's Occupational Health practice group, advises private and public sector organizations on all aspects of workplace health and safety. In addition to providing compliance and "best practices" advice on hot-button issues, she regularly appears before courts and tribunals on health and safety matters. Nadine frequently conducts workshops, tailored on-site training and policy implementation for her clients, most recently focused on Ontario's new sexual violence and harassment legislation.Read More

Featured Group

Occupational Health

Hicks Morley is your one-stop shop for all matters relating to occupational health and safety in the workplace. Our advocacy expertise in this area – whether in respect of charges, appeals of orders, or arbitrations – provides you with the support you need to minimize liability and manage outcomes. With strategic and practical advice, we've got you covered on topics as diverse as the implementation of new health and safety policies, such as those relating to workplace sexual harassment, to hands-on training workshops and tailored "health checks" of your risk management protocols.Read More

Did You Know?

Ontario Launches Targeted Sexual Violence and Harassment Intervention Training for Frontline Hospitality Industry Employees

On September 8, 2016, significant amendments to Ontario's *Occupational Health and Safety Act* (Act) outlined in the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)* came into force.

In accordance with commitments made in its 2015 Action Plan to Stop Sexual Violence and Harassment, the Ontario government announced the launch of frontline training projects for bartender and server employees in the hospitality industry. These projects will be developed by the Ontario Restaurant Hotel & Motel Association (ORHMA).

The initiative – one of six sexual violence and harassment training projects to be funded and developed over the next three years – is intended to train workers in the hospitality industry "to recognize and intervene when they witness sexual violence or harassment in the workplace or among patrons."

ORHMA will further collaborate with Tourism HR Canada on the development of online training for servers, bartenders and management in the food and beverage industry, intended to "improve safety for workers and patrons in establishments serving alcohol."

For more details, please read our *FTR Now* of September 9, 2016, Ontario Announces New Sexual Violence and Harassment Intervention Training for Bartenders and Servers, or contact your regular Hicks Morley lawyer.

Cautionary Tale: *Occupational Health and Safety Act* Work Refusal Leads to Employee's Termination – and "Emotional Distress" Damages

By: Hicks Morley

In Leah Podobnik v Society of St. Vincent de Paul Stores (Ottawa) Incorporated, the Ontario Labour Relations Board found that the discipline, unceremonious demotion and termination of an employee who reported health and safety hazards to the Ministry of Labour (MOL) and refused to perform work without assistance from another employee was a reprisal under s. 50(1) of the *Occupational Health and Safety Act* (Act) warranting damages for emotional pain and suffering.

The applicant had been employed as a book room supervisor at a charitable organization. Her regular work duties included processing donated books in the basement of a building. After previously expressing concerns over basement air quality, the applicant had contacted the MOL, precipitating multiple inspections and orders. Subsequently, an unusually large 30-box book donation was received. The applicant refused to process the boxes without support, describing the task of processing 30 boxes as "insurmountable," "back-breaking" and a safety hazard. The applicant was given a written warning, advised to "quit" if she really felt unsafe, unexpectedly demoted the very next day in front of her colleagues, and terminated one month later due to a purported "restructuring."

Among other things, the Board ruled that:

- Sections 43(3)(a) and (b) of the Act allow a work refusal that is unrelated to unsafe equipment or the physical condition of the workplace. Despite their wording, these sections apply to a work refusal where it is the performance of the work alone and unassisted that is at issue – such as processing an unusually large quantity of books without help from another employee.
- It was common knowledge that the applicant had made several prior attempts to exercise her rights under the Act and was an instrumental, elected member of the Joint Health and Safety Committee. Any of these factors would be sufficient to taint the reason for her termination, particularly given that the purported "restructuring" of the enterprise in fact entailed an expansion of its facilities and require the hiring of additional employees.
- Upon receiving the applicant's work refusal, the employer should have followed the protocol set out in section 43(4) and (5) of the Act and inquired into the matter.

Finding that the employer failed to discharge its s. 50(5) onus by establishing that the discipline and termination of the applicant was not contrary to the Act, the Board awarded $15,062 in damages, including $3,500 for emotional distress resulting from the insensitive, demeaning and humiliating circumstances of her dismissal.
