

## Bill 132: Significant Changes to the Laws in Ontario that Employers Need to Know Regarding Sexual Violence and Harassment in the Workplace

By Sheryl L. Johnson

On March 8, 2016 Bill 132: An Act to amend various statutes with respect to sexual violence, sexual harassment, domestic violence and related matters received Royal Assent. Specifically, six separate acts set out in the six schedules to Bill 132 have been amended.

With such assent, significant changes that every provincially regulated employer in Ontario needs to be aware of have come into force with retroactive effectiveness.

Significantly to most Ontario employers is the fact that Bill 132 effects important changes to:

1. Employer's duties and obligations under the *Occupational Health and Safety Act* ("**OHSA**");
2. Inspectors' powers under the OHSA; and
3. The certainty that once existed concerning limitation periods applicable to workplace issues involving sexual assault or "misconduct of a sexual nature" or if the relationship between the person with the claim" (read "**Complainant**") "and the person who committed the misconduct" (read "**Respondent**" or "**Alleged Harasser**") is one where: (i) the Respondent is in a position of trust or authority in relation to the Complainant; and (ii) the Complainant is financially or otherwise dependent on the Respondent given changes to the *Limitations Act*.

Employers in Education, including those who are colleges of applied arts and technology and universities who receive funds from the government for the purposes of post-secondary secondary education as well as those who are a private career colleges, will need to be aware of changes to their governing legislation in addition to those under the OHSA and the *Limitations Act* discussed in this update.

### New Employer Duties & Obligations under the OHSA

Ontario employers should immediately update the workplace anti-harassment and violence policies to include: (i) the expanded definition of "workplace harassment" (from Bill 168 definition) to include "workplace sexual harassment" as well as the clarification that "A reasonable action taken by an employer or supervisor relating to management and direction of workers or the workplace is not workplace harassment."; and (ii) the brand new legislated definition of "workplace sexual harassment" that incorporates the applicable enumerated employment grounds of harassment and discrimination set out in the *Ontario Human Rights Code*. Specifically, under Bill 132 "workplace sexual harassment" is defined as:

- a. Engaging in a course of vexatious comment or conduct against a worker in the 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, deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

Ontario employers now have the additional obligations in relation to their anti-harassment policies to:

- i. Consult with their health and safety committee or representative, if applicable, in developing and maintaining their written program to implement such policies (new from Bill 168);



Sheryl L. Johnson

Partner

t: 416.849.4104  
sjohnson@foglers.com

Fogler, Rubinoff LLP  
Lawyers  
77 King Street West  
Suite 3000, PO Box 95  
TD Centre North Tower  
Toronto, ON M5K 1G8  
t: 416.864.9700  
f: 416.941.8852  
foglers.com

- ii. Include measures and procedures in their written program 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 (although they don't say or give guidance as to whom such reports would be directed) (new from Bill 168 as Bill 168 required reporting measures and procedures to employer and supervisor);
- iii. Set out in their written program how incidents or complaints of workplace harassment will be investigated and dealt with (same as under Bill 168);
- iv. Set out in their written program 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 (new from Bill 168); and
- v. Set out how the Complainant and Respondent – if he or she is a worker of the employer – will be informed of: (1) the results of the investigation; and (2) of any corrective action that has been taken or that will be taken as a result of the investigation.

Ontario employers now also have the additional duties in relation to workplace harassment to ensure that:

- a. An investigation is conducted into incidents and complaints of workplace harassment that is "appropriate in the circumstances". In any event the resulting investigation report is expressly excluded by Bill 132 as a "report respecting occupational health and safety" under ss. 25(2) of ONSA (so no disclosure and sharing of an investigation report requirement);
- b. The Complainant and the Respondent – if 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 will be taken as a result of the investigation; and
- c. Review their anti-harassment programs as often as is necessary (including for example after a serious incident that shows a flaw or gap in the program), but at least annually to ensure that the anti-harassment policy is adequately implemented.

#### **Inspectors' New Powers to Order Third Party Investigations and Reports under OHSA**

OHSA Inspectors under Bill 132 have been provided with the discretion to provide a written order causing an employer at its expense to conduct an investigation resulting in a written report into incidents and complaints of workplace harassment "appropriate in the circumstances" by an "impartial person possessing such knowledge, experience or qualifications as are specified by the inspector". No regulations or guidelines have been provided under Bill 132 as to how Inspectors may exercise their apparently broad discretionary to determine an "knowledge, experience or qualifications" specifications.

#### **No Limitation Period**

Changes to the Limitations Act under Bill 132 mean that where any of the Offending Conduct has been engaged in – including where there is a claim for negligence, a breach fiduciary or other duties and/or vicarious liability - there is no applicable limitation period applicable to a proceeding regardless of the expiry of any previously applicable limitation period or the fact that the proceeding commenced prior to the passing of Bill 132 except if the proceeding was: (1) dismissed by a court and no further appeal is available; or (2) settled by the parties and the settlement is legally binding.

#### **Conclusion**

Criticisms of Bill 168 included the observation that while it was touted as anti-bullying legislation is that it had no "teeth" when it came to workplace harassment – only workplace violence and that it left uncertainty on the extent to which it required employers to prevent and/or address incidents of workplace harassment. Bill 132 appears to fill in some of the gaps and uncertainty involved in interpreting employers' workplace harassment obligations under Bill 168. For example, in addition to Ontario employers' Bill 168 obligations to provide their workers with the information and instruction (read training) on the contents of their anti-harassment programs and policies, details of the contents of such policies as well as the extent of the parties' privacy entitlements have now been legislated under Bill 132. An interpretation gap that still remains notwithstanding the inclusion of the definition of "workplace sexual harassment" in the definition of "workplace harassment" – is what does this inclusion mean? No specific duties or obligations relating to

workplace sexual harassment have been detailed. As such, as when Bill 168 was passed, there will be some uncertainty as to how employers are to navigate the exact intended interplay between Ontario employers' obligations the Code, civil and criminal claims, remedies and prosecutions.

If you have any questions about this topic or any other questions relating to workplace and human resources law, please do not hesitate to contact one of our employment lawyers at [sbernofsky@foglers.com](mailto:sbernofsky@foglers.com), [sjohnson@foglers.com](mailto:sjohnson@foglers.com) or [amarsland@foglers.com](mailto:amarsland@foglers.com).

This publication is intended for general information purposes only and should not be relied upon as legal advice.  
©FOGLER, RUBINOFF LLP. ALL RIGHTS RESERVED. 2015

[Update your contact information](#) | [Unsubscribe](#)