

Workplace Violence and Harassment

New OHS Requirements

By J. Robert Gardiner *

The government strikes again. Condominium corporations, like other business entities, are now subject to Ontario's new workplace violence and harassment obligations. On December 15, 2009 the *Occupational Health and Safety Act* was amended by Bill 168 to introduce new definitions for "workplace harassment" and "workplace violence". Ontario employers have until June 15, 2010 to ensure that their workplace risk assessment, employee training, policies and procedures comply with the new obligations to address various workplace harassment and violence scenarios.

Harassment/Violence Definitions

"Workplace harassment" is defined to mean engaging in a course of vexatious comment or conduct against a worker in a workplace, which is known or ought reasonably to be known to be unwelcome. "Workplace violence" means the exercise or attempt to exercise physical force by a person against a worker in a workplace that causes or could cause physical injury to the worker. Moreover, "workplace violence" includes a statement or behaviour that is reasonable for a worker to interpret as a threat to exercise such physical force and potential injury in a workplace.

Domestic Violence

A new provision requires employers who become aware, or who ought to be aware, that a domestic violence situation is likely to expose a worker to physical injury in the work place, to take all reasonable precautions to protect their workers. In condo world, a manager who encounters the bruised spouse of a live-in superintendent couple should document efforts to investigate and address any reasonable workplace precautionary measures.

Known Violent Offenders

Employers must also inform their workers about a person who has a history of violent behaviour, even if that involves disclosing personal and private information. Such disclosure is required if a worker is likely to encounter that person in the course of his or her work, and if the risk of workplace violence is likely to expose the worker to physical injury. Disclosure of such personal information must be limited so as only to be reasonably necessary to protect the worker from physical injury. This new obligation calls for an appropriate adjustment to the condominium corporation's Privacy Policy. At the same time, an employer has to be careful to avoid discrimination with respect to hiring and employment of a known violent offender pursuant to the *Ontario Human Rights Code* on the basis of a "record of offences". For instance, an employer should not disclose an employee's criminal conviction relating to physical violence for which a pardon has been granted.

Conduct Risk Assessment

Employers (such as a condominium corporation) which have a workplace must conduct a risk assessment to determine if any part of the employer's operation is vulnerable to acts of violence. Consider how your condominium operates. Evaluate perceptible risks of violence or harassment to employees and any past incidents. The risk assessment must take into account circumstances that would be common to similar workplaces, as well as those specific to the workplace. Once

complete, the employer must advise the Health and Safety Committee or (if there are less than 20 workers in the workplace), the Health and Safety Representative of the results of the assessment and provide a written copy of the assessment.

Make Necessary Changes

Vulnerabilities evaluated by the risk assessment must be addressed by necessary changes to reduce exposure to violence in the workplace. For example, it has been suggested that emergency security buttons be installed in places where employees in the retail, bar and restaurant industry might be susceptible to client outbursts, so that employees can call security and/or the police when they experience suspicious, escalating or illegal behaviour. If dangers are perceived, consider whether it is appropriate to increase security on a nighttime shift, install panic buttons or improved lighting in an underground garage or parking lot.

Establish Policies

Where more than five workers are regularly employed at a workplace, Ontario employers will now be required to prepare and post a Workplace Violence and Harassment Policy. Many condominiums regularly employ more than five workers, such as a manager, administrator, superintendent, cleaner(s), security guard(s), concierge(s), landscaper, snow remover, window cleaner, elevator maintainer and any other contractors and their employees (whether it is the President of an engineering company or a sub-contractor working on scaffolding, or a superintendent undertaking a required semi-annual inspection of smoke detectors within units as required by the *City of Toronto v. YCC 60* case). Each of those persons constitutes a “worker”. Employers must adopt workplace violence and harassment policies which address the concerns raised by the risk assessment. Such policies may give employees guidance as to the appropriate protocol to follow when faced with unruly or violent unit owners, visitors, contractors or fellow employees. The policy must address the procedures used to report and investigate a workplace harassment complaint. Policies are required to be reviewed as often as is necessary; that might occur when significant changes in the workplace take effect, or when violent or harassing behaviour is encountered. Policies must be reviewed at least annually. Failure to develop a policy can result in a penalty from the Ministry of Labour. The policy must contain a reporting and complaint investigation mechanism. The policy must be posted in a conspicuous location within the workplace. Condo boards would be well advised to involve the corporation’s Health and Safety Representative or Committee and any relevant employees in conducting the risk assessment and developing and reviewing policies.

Related Policies

When developing a precedent condominium Workplace Violence and Harassment Policy, our firm simply used our existing precedent condominium Harassment and Sexual Harassment Policy to implement the specific Workplace Violence and Harassment criteria, cross-referenced into our precedent condominium Occupational Health and Safety Policy, coordinated with our precedent condominium Privacy Policy.

Maintain Programs to Implement Policies

Employers are obligated to establish programs containing measures and procedures to implement the Workplace Violence and Harassment Policy. The program must control the risks identified in the risk assessment. Employees must be able to summon immediate assistance when or if

workplace violence is likely to occur. Workers must be required to report incidents of workplace violence or harassment. The program must state how the employer will investigate and deal with workplace violence or harassment incidents or complaints.

Train Employees

Employers are also obligated to provide information and instruction to their employees on the contents of the policies and programs. Employees should be instructed as to what they must do to minimize risk of workplace violence and harassment situations and they should be informed of their obligations and consequences for non-compliance. It is suggested that employers demonstrate to employees how the policy and program relates to such situations. An employer-appointed supervisor has a duty to advise workers of any potential hazard (including risks of workplace violence from a person with a history of violent behaviour).

Workplace Refusal

A worker has the right to refuse work if workplace violence is likely to endanger the worker. There is no requirement for an employee to prove that workplace harassment or violence created a harmful workplace environment, nor is the employee obligated to prove that the employee's dignity or her psychological or physical integrity was damaged. A refusing worker must remain in a safe place that is as near as is reasonably possible to his or her work station and must remain available to the employer or supervisor for the purpose of a workplace investigation.

Workplace Investigation

Where a worker reports unsafe working conditions to the employer, an investigation must immediately be conducted. If the worker has reasonable grounds to believe that the work conditions remain unsafe, the employer or the worker must cause an inspector from the Ministry of Labour to attend at the workplace to conduct an investigation. Now, s. 52 of the *Occupational Health and Safety Act* also requires an employer to prepare a notice to the Ministry of Labour in the event that a worker is disabled from her regular duties, or requires medical attention, or has suffered workplace violence.

Occupational Health and Safety Act

Pursuant to s. 32 of Ontario's *Occupational Health and Safety Act*, condo directors and officers (and other businesses) are personally liable to take all reasonable care to ensure that the corporation has undertaken every measure reasonable in the circumstances to protect the health and safety of workers working in the condominium's workplace. Shockingly, many condominium corporations still do not have a Health and Safety Representative or Committee, or even an Occupational Health and Safety Policy; as a result, many volunteer directors are personally in breach of their statutory obligations. A successful prosecution could result in a fine of up to \$25,000 for an individual person and/or up to 12 months imprisonment, or a fine of up to \$500,000 for a corporation for each conviction.

Other Violence/Harassment Constraints

These Workplace Violence and Harassment concepts are only one facet which add to the existing arsenal of legal criteria governing violence and harassment, as may be addressed in the *Human Rights Code*, the *Criminal Code*, the *Occupier's Liability Act*, the *Condominium Act*, a condominium corporation's rules and various common law remedies applicable to constructive

and wrongful dismissal, threats of violence, assault and various other tort claims, which we will address in a subsequent article.

Ironic Failures to Comply

It seems ironic that condo directors and managers work hard to protect the condominium corporation and its unit owners' interests, but often fail to take the basic steps to protect themselves from personal liability. Ask your condo's lawyer to advise the board with respect to other facets of violence and harassment, as well as directors' liabilities pursuant to the above legislation. Condos which lack an Occupational Health and Safety Policy, a Workplace Violence and Harassment Policy, a Sexual Harassment Policy and a Privacy Policy, as well as a Non-Harassment Rule, a Human Rights Rule and a Health and Safety Committee or Representative should ask for appropriate policies and rules to be prepared by the corporation's lawyer. Otherwise, a condominium's directors and managers are sitting ducks.

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