

May 14, 2010

What Bill 168 Means for Directors and Officers of a Corporation...

By Malcolm MacKillop and Meighan Ferris-Miles

By now you are well aware that changes to the *Occupational Health and Safety Act* (“OHSA”) are coming into force on June 15, 2010. With less than a month to go, your companies are well on their way to taking all the necessary steps to ensure compliance with the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace) 2009* (“Bill 168”). You may, however, be in need of some last minute encouragement to get over the remaining hurdles before the deadline. This article aims to provide you with that last burst of incentive needed at this time.

The obligations of Bill 168 have been covered in depth in numerous seminars in the recent months. Most, if not all, of the seminars on this topic have focused on an introduction to the employers’ obligations pursuant to Bill 168. The seminars have not situated the changes within the broader obligations under the OHSA. As we move closer to Bill 168 coming into force, it is appropriate to take a step back and look at the forest rather than focusing on the trees. This brings interesting considerations for directors and officers of a corporation.

Pursuant to section 32 of the OHSA, every director and officer of a corporation is required to take all reasonable steps to ensure that the corporation complies with the OHSA and the regulations. After Bill 168 comes into force, this will mean that every director of a corporation is required to take all **reasonable steps** to ensure that the corporation complies with the amendments to the OHSA including the following:

The employer shall prepare a policy with respect to workplace violence;

The employer shall prepare a policy with respect to workplace harassment;

The employer shall review the workplace violence and harassment policies as often as is necessary, but at least annually;

The employer shall develop and maintain a program with respect to workplace violence;

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The employer shall assess the risks of workplace violence that may arise from the nature of the workplace, the type of work or the conditions of work. The employer shall reassess the risks of workplace violence as often as is necessary;

The employer shall advise the committee or health and safety representative, if any, of the results of the assessment and if the assessment is in writing provide a copy of the assessment; or

If there is no committee or health and safety representative, the employer shall advise the workers of the results of the assessment and if the assessment is in writing provide copies on request or advise the workers how to obtain copies;

If an employer becomes aware, or ought reasonably to be aware, that domestic violence that would likely expose a worker to physical injury may occur in the workplace, the employer shall take every precaution reasonable in the circumstances for the protection of the worker;

The employer shall provide the worker with information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace violence;

The employer shall develop and maintain a program with respect to workplace harassment; and,

The employer shall provide the worker with information and instruction that is appropriate for the worker on the contents of the policy and program with respect to workplace harassment.

Failure by a director or officer of a corporation to take all *reasonable steps* to ensure that the corporation complies with the OHSA (including the changes of Bill 168) may result in personal liability for the director or officer. What is reasonable will, of course, depend on the circumstances of the case. Simply stating that the business has been in operation for a considerable number of years without having had a workplace accident, will not be sufficient to establish that all reasonable steps had been taken. The Workplace Safety and Insurance Board is likely to find that such evidence demonstrates merely good fortune,

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The logo features the word "Snap" in a white, cursive font with a blue outline, and "SHOT" in a bold, blue, sans-serif font with a white outline. The background is a photograph of a modern skyscraper with a glass facade, viewed from a low angle looking up.

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rather than good management. Some steps that a Board of Directors may take to satisfy their obligations under the OHSA are as follows:

Give specific directions to the Human Resources department to take immediate steps to comply with the OHSA obligations;

Request that the Human Resources department provide a copy of the written assessment and a report on what has been done;

Follow up on any issues raised in the written assessment to ensure they are being addressed;

Take accurate minutes at the Board meetings to ensure they reflect what the Board has directed the Human Resources department to do; and,

Review the issue of workplace violence and harassment at least annually. The annual reviews should be accurately documented in the minutes of the Board meetings and should include directions to the Human Resources department to take any necessary steps.

Going forward, however, it is prudent for a director or officer to concentrate their mind on the likely risks in a workplace, including violence and harassment. It is also prudent for a director or officer to ensure that a proper system is established to prevent those risks from arising and to provide adequate supervision to ensure that the system is properly carried out. The onus is on a director or officer to establish that they took all reasonable steps. If a director or officer is not successful in showing that all reasonable steps were taken, he or she may be convicted under the OHSA. Upon conviction of an offence, a director or officer may be personally liable for a fine of up to \$25,000 and/or imprisonment for a term of 12 months or less.

With that in mind, keep doing what you are doing to meet the obligations of Bill 168. It is in the best interests of both the corporation and the directors and officers, personally.

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