

To: Local Coordinators, Bargaining Unit Presidents, Health and Safety Network Leads and Joint Health and Safety Committee Members

From: Linda Haslam-Stroud, RN, President 

Date: October 25, 2016

Re: **Updates to Occupational Health and Safety Act (OHSA) and Regulations – WHMIS, Noise and “Harassment, including sexual harassment”**

C: Board of Directors, District Service Teams, Provincial Services Team, Litigation Team

Recent Amendments

Significant changes to the *Occupational Health and Safety Act (OHSA)* and regulations recently came into effect in September regarding the Workplace Hazardous Materials Information System (WHMIS), noise and workplace harassment.

WHMIS

All Canadian jurisdictions have joined the global effort to harmonize standards relating to hazardous materials, their labeling and handling. Ontario is aligning with the Globally Harmonized System of Classification and Labelling of Chemicals (GHS) by changing the *OHSA* and WHMIS regulation effective July 1, 2016. The new requirements affect labels, safety data sheets (SDS) -- formerly known as material safety data sheets (MSDS) -- definitions and terminology. There is a phase-in period to let parties adjust to changes, with completion of transition to the new WHMIS labels and SDSs effective December 1, 2018. The Ministry of Labour says, “During the transition, employers must ensure workers are trained on both the old and new labels for as long as both are present in the workplace.”

Noise

On July 1, a new noise regulation came into effect. Previously, there were only explicit noise control requirements in specific sections of the *Regulations for Industrial Establishments*, *Regulations for Mines and Mining Plants*, and the *Regulations for Oil and Gas-Offshore*. The *Regulation for Health Care and Residential Facilities* has always been silent with respect to control of noise in our workplaces.

The new *Regulation for Noise (Regulation 381)* replaces the noise provisions in the above regulations and extends specific noise control duties to workplaces, including health-care facilities. The regulation requires employers to, “...take all measures reasonably necessary in the circumstances to protect workers from exposure to hazardous sound levels” and in any case, ensure that workers are not exposed to levels exceeding 85 decibels averaged over eight hours.

Harassment

Changes to the OHSA

Effective September 8, 2016, changes to the OHSA expand employer duties to respond to workplace harassment.

- The definition of harassment is expanded to include “sexual harassment,” which is newly defined.
- Reasonable management actions are excluded as “harassment.”
- Employers are now required to consult Joint Health and Safety Committees (JHSCs) to develop and maintain written harassment programs.
- Employers have to ensure appropriate investigations of incidents and complaints of workplace harassment, including a mechanism for victims to report to a person other than the supervisor/employer if they are the alleged harasser.
- Employers need to preserve confidentiality of information obtained, “unless the disclosure is necessary for the purposes of investigating or taking corrective action, or is otherwise required by law.”
- Results of harassment complaints and investigations, and corrective actions must be shared with the complainant and the alleged harasser.
- Workplace harassment investigation reports are explicitly excluded as occupational health and safety reports that the employer must provide to the JHSC.
- An inspector can order the employer to pay for a harassment investigation and report by an “impartial person.”
- Employers need to provide information and instruction on the contents of the harassment policy and program.

New Code of Practice

Instead of an accompanying enforceable regulation, the amendments are backed up by a new voluntary “Code of Practice.” Complying with the Code of Practice can protect employers from prosecution. The Code provides more detail about policies, programs and guidelines for a harassment investigation and is available on the Ministry of Labour (MOL) website at www.labour.gov.on.ca/english/hs/pubs/harassment/

Points of Interest

Prevention?

Neither the amendments nor the Code address a need for the employer to prevent harassment or assess risks. Explicit reactive duties are triggered after there is a complaint or an incident. However, in another MOL document, “Workplace Violence and Harassment: Understanding the Law” (www.labour.gov.on.ca/english/hs/pubs/wpvh/), the MOL acknowledges that harassment can be part of a continuum of behaviours that, left unchecked, may escalate to violence:

“It is important for employers to recognize these behaviours and to deal with them promptly. Addressing incidents of harassment not only helps the targeted worker, but their co-workers as well. Taking action can also prevent harassment from escalating in the workplace and possibly resulting in physical violence by either the harasser or the targeted worker.”

Confidentiality and the right to know and duty to protect

There is heavy emphasis on maintaining confidentiality of complaints and investigations of workplace violence and harassment, but there is some debate about the limits of that confidentiality. The new sections do not reiterate the legal requirement of the employer/supervisor to acquaint workers with hazards and take measures to protect workers from hazards. However, it is ONA’s view that if at any point during an investigation, there is corroboration of a harassment or violence hazard to any worker(s), that knowledge activates the employer/supervisor duties required by law, to acquaint potentially affected worker(s) with the hazard, and take steps to control the hazard and protect the worker(s).

The Act and the Code are not entirely clear. The new sections explicitly require the employer to share results of the investigation and corrective actions with the complainant and the alleged harasser, but not explicitly with the JHSC or anyone else. ONA feels a victim of harassment must not be isolated and burdened to deal with the issue alone. ONA members are reminded that ONA is recognized as the exclusive bargaining agent for our members, and many collective agreements, including the CCAC and hospital central agreements, recognize our right to represent members during a harassment investigation e.g.:

Article 3.04(f) Hospital Central: Where a nurse requests the assistance and support of the Union in dealing with harassment or discrimination issues, such representation shall be allowed.

Also, while there is no explicit duty in the *OHSA* to provide any information to the JHSC, the Code of Practice sample policy suggests there be a clause about “other resources for a worker to seek help” to address workplace harassment (e.g. union representative, JHSC member, etc.). It also suggests the written program address the role of the union during an investigation.

Again, the MOL guide, “Workplace Violence and Harassment: Understanding the Law,” is actually more helpful than the Code in this regard. The guide answers the question about support for a complainant “during the investigation:”

“Support for workers during workplace harassment investigations may be available from a number of sources, including unions, peer support networks, Joint Health and Safety Committee members, employee assistance networks or the worker’s lawyer or legal representative. **The workplace harassment program should set out clear roles for all parties**” (emphasis added).

Thus, it is ONA’s position that the law, our collective agreements and the MOL guide provide for union support and involvement in harassment complaints and investigations. Members should not sign agreements that limit disclosure to ONA, other supports (counselor, physician) and family.

The guide is also helpful with respect to addressing the need to keep complainants safe during an investigation, similar to the legal duty to keep a worker who has refused unsafe work safe during that investigation. While the Act and Code don’t address protection for harassment complainants, the guide says:

“Employers should also take appropriate interim measures (such as temporary reassignments or shift changes) to protect workers and witnesses while the incident or complaint is being investigated, as may be appropriate.”

Next Steps

These are all important new changes to occupational health and safety law. It is important that employers advise workers of these changes, and provide sufficient training for workers and their supervisors to understand and apply these changes. Remember, in addition to its many general duties to provide information and instruction to workers to protect them from hazards, the employer is specifically required by law to consult with the JHSC about:

1. Aspects of the WHMIS program, including instruction (38 (6), 42 (2), 42 (3)).
2. Development and maintenance of a harassment program (32.0.6).
3. Development and delivery of health and safety related measures and training in workplaces covered by the *Regulation for Health Care and Residential Establishments* (8, 9(4)).

By being proactive in developing programs and training etc., our JHSCs may be able to pre-empt any confusion and/or difficulties that the new legislation, particularly with respect to harassment, may trigger.

We suggest JHSCs:

1. Put the new Noise regulation, the revised WHMIS provisions, the revised harassment provisions and the new Code of Practice on the agenda of the next JHSC meeting. Ask the employer its plans for training and implementation, and involvement of the JHSC.
2. Seek quick consultation with your employer in developing the workplace harassment program to establish early on the need for the program to be clear:
 - a. Quick action must be taken to prevent harassment from escalating.
 - b. Appropriate interim measures, such as temporary reassignments or shift changes to protect workers and witnesses during the investigation, may be needed.
 - c. There are clear roles for the involvement of the union and JHSCs in supporting the complainant and/or respondent throughout the investigation.
 - d. When evidence of a hazard is revealed at any point, the employer must ensure all potentially affected workers are advised and steps taken to protect them from the hazard.
 - e. The JHSC can request high-level anonymized information, such as number of complaints, investigations, safety plans, etc.
 - f. Designated investigators need to be impartial. As the MOL guide says:

A person whose work primarily consists of conducting investigations into the character or actions of a person may be required to have licence under the Private Security and Investigative Services Act, 2005.

If necessary, JHSCs should exercise their power to make written recommendations directly to the employer, suggesting program, training and other details. Keep in mind the new amendments empower an MOL inspector to order the employer to engage and pay for someone qualified to conduct an impartial investigation.

If you have any questions, please consult your Labour Relations Officer.