

Occupational Health & Safety Law

AIRD & BERLIS LLP
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BILL 168 COMPLIANCE – A REMINDER

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In our March 2010 issue we outlined *Bill 168: An Act to amend the Occupational Health and Safety Act with respect to violence and harassment in the workplace and other matters*. Under Bill 168, employers were required to have conducted risk assessments for violence and harassment in the workplace and to have in place policies to meet the identified risks, as well as to have trained their staff on those policies.

Although there was a great deal of discussion about the Bill and the June 15, 2010, compliance date, recent reports suggest that many small and mid-size businesses have not yet conducted their assessments or implemented their required policies.

The Ministry of Labour has clearly stated that its inspectors will now question employers and employees on their knowledge of harassment and workplace violence policies as part of routine inspections. It has been reported that Wayne De L'Orme, a provincial coordinator with the Ministry of Labour, recently backed that up by saying that the Ministry has 430 inspectors, all of whom will enforce the Bill which is now law.

INSPECTION BLITZES AND ONTARIO'S WORKPLACES: WHAT TO DO BEFORE THE BLITZ COMES TO YOU...

In our inaugural issue we discussed Ontario's Safe at Work Program, under which the Ministry of Labour and the Workplace Safety and Insurance Board declared their commitment to promoting and ensuring workplace safety in the province.

When the program was announced, the Government made it clear that there would be increased enforcement of existing statutes and regulations. Now that two years have gone by, it appears that the Government meant what it said.

Since the implementation of the program in June 2008 the Ministry has announced a number of sector-specific and issue-specific inspection blitzes. During these blitzes, inspectors regularly attend, unannounced, at various businesses and workplaces to inspect for statutory compliance.

Inspectors generally apply a zero tolerance policy for noncompliance, with enforcement steps ranging from statutory orders to prosecution. The approach has produced very real results. Between June 2008 and April 2010, 39,595 safety

related orders have been issued, 2,000 businesses have had operations shut down by stop work orders, 225 provincial offences tickets have been issued and 167 provincial offences summonses have been served. For the period 2008-2009, the Courts imposed more than \$14,000,000 in fines for OHS breaches.

Ontario businesses should expect that these numbers may well rise. Orders can lead to prosecutions so long as charges are laid within one year of the breach. The Ministry of Labour has indicated that these blitzes will continue well into the foreseeable future, and at least until February 2011.

In the last six months alone, more than 40 businesses have been hit with fines of \$50,000 or higher. For serious injuries or fatalities, fines are understandably higher.

More information on past and upcoming blitzes can be found on the Ministry of Labour's website at www.labour.gov.on.ca/english/hs/sawo/blitzes.

The Inspector is at the Door...

Employers, owners, constructors, supervisors and anyone with obligations under the OHS Act should ensure that they have a clear and well understood plan for reacting to these blitzes and, indeed, to any visit by an inspector.

An inspector attending at your workplace, including a construction site, is generally not there to investigate a specific incident. He or she is there to inquire into and assess specific aspects of the operation. In that process, the inspector may also inspect the workplace as a whole. He or she will make inquiries and collect documents and records.

How do you and your people make sure you comply with your obligations during these inspections, while at the same time protecting any rights you and your workers may have?

Obligations During Inspections

The starting point on an inspection is always the same: Businesses and individuals must cooperate and provide complete, accurate and truthful information in response to an inspector's inquiries. Failure to do so is itself a breach of the OHS Act. However, businesses and individuals may also have rights available to them that enable them to control the manner and the circumstances in which information is provided. If businesses and their people are trained on their rights, they can legally protect themselves.

Rights During Inspections

Corporations do not have the same rights and protections as individuals. In most instances corporations must provide all of the information and produce all of the records that an inspector requests. Practically speaking of course, such requests are generally made to an individual worker who is present at the worksite. An individual worker may have valid legal protections which must be addressed.

For example, while an individual is required to assist an inspector (see for example section 62(2) of the OSHA), he or she need only do so in circumstances where this does not infringe on the rights of the individual. If an individual faces potential personal liability (which is often the case as workers and supervisors can be charged under the statute), he or she may legitimately choose to stand silent in the face of a request for an interview or statement. He or she may also be entitled to seek legal advice (from an independent lawyer and not the company's lawyer). In order to make an informed decision, an individual needs to understand his or her rights in a given fact situation.

A Practical Way to Protect Your Rights During Inspections

Though inspectors may take different approaches in the manner of their requests, they are generally businesslike and professional. The Ministry has published a Code of Professionalism which sets out the expectations for the conduct of their Inspectors. See www.labour.gov.on.ca/english/hs/sawo/codeprof.php.

As lawyers are all too fond of saying, each case turns on its own facts. However, there are some general guidelines which businesses and their people should understand in advance of any visit:

1. If a dangerous situation can or does exist, workers should always cooperate with inspectors to make the situation safe.
2. If an inspector asks to speak with an individual during an inspection, the individual should ask the inspector if he or she is at risk of being charged personally.
3. If the inspector says that the individual is at risk, or if the inspector cannot rule that out (because the inspector does not yet know the circumstances), the individual should ask the inspector for an opportunity to speak with someone and obtain the benefit of legal advice before speaking with the inspector.

4. If the inspector says that the individual is not at risk, the individual cannot legally refuse to cooperate. The individual should only answer what he or she knows and should never speculate.
5. Once the inspector leaves, the individual should (on his or her own) prepare detailed notes of the interaction with the inspector and provide those notes to the person in the business responsible for dealing with regulatory inspections.

Conclusion

Inspection blitzes have been around for two years, and it looks like they will be around for many more years to come. These blitzes have already had a significant impact on business operations in Ontario, and there is every reason to think that that impact will continue as time goes on.

The focus of this article is how to deal with an inspection and preserve legal rights. This is of course important. However, the best money the business can spend is on upfront prevention so that every blitz inspection is a point of pride to show the inspector just how safe you really are.

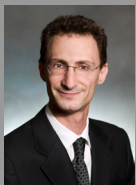
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