General Duties Under the Ontario Occupational Health and Safety Act (the "Policy")

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This document provides a general informational overview of the Ontario *Occupational Health and Safety Act,* R.S.O. 1990, c. O.1 (the "***OHSA***") and of the role of the Ministry of Labour, Training and Skills Development (the "**Ministry**"). The *OHSA* and its regulations are detailed and thorough. Given the nuances that can be involved in health and safety matters, legal advice should be sought to address specific concerns.

APPLICATION OF THE *OCCUPATIONAL HEALTH AND SAFETY ACT*

Public welfare legislation like the *OHSA* must be interpreted broadly and consistently with the purposes and objectives of the legislation. Narrow or technical interpretations that interfere with the *OHSA*'s objectives must be avoided.[1]

An employer's obligations may vary with respect to employees of an Ontario employer who work exclusively outside of Ontario. The issue as to whether the *OHSA* applies to such employees who work remotely in other provinces is unsettled, and there is caselaw that suggests that local jurisdictions' legislation could apply.[2] While each jurisdiction has its own legislation, many of the obligations set out in the *OHSA* mirror other provinces' legislative schemes.

ACCESSIBILITY OF THE POLICY

Policies ought to be made available to all workers and posted in employers' workplaces, along with essential safety information, any orders made by provincial regulators or authorities, and a copy of the *OHSA* and relevant regulations.

THE JOINT HEALTH AND SAFETY COMMITTEE (Section 9)

A Joint Health and Safety Committee ("**JHSC**") is a workplace committee composed of representatives of both workers and the management. Its purpose is to facilitate a safe workplace. Companies that have 20 or more workers in the workplace must have a JHSC with at least two members. Companies with 50 or more workers need a JHSC of four members. A JHSC is required to have at least half of its members be comprised of workers who do not exercise management functions, who are selected by the workers that they are to represent, with the remaining members being from management, who are selected by the employer. Operating cautiously, employees who work at multiple or dispersed workplaces should be included in JHSC calculations.[3]

Further information regarding JHSC responsibility and authority is set out in "The Joint Health and Safety Committee" section below.

AN EMPLOYER'S OBLIGATIONS (Section 25)

An employer is responsible for maintaining a healthy and safe workplace for anyone who attends the employer's workplace. In general, an employer's responsibilities include, among other things:

- taking every precaution reasonable to protect workers, including identifying potential hazards through regular inspections and eliminating or controlling such hazards without delay;

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[1] See: *Ontario (Ministry of Labour) v. Hamilton (City)*, 2002 CanLII 16893 (Ont. C.A.).
[2] See: *Shu Zhang v IBM Canada Limited*, 2019 CanLII 79641 (Ont. Labour Relations Board).
[3] See: *Ontario (Ministry of Labour) v. United Independent Operators Ltd.*, 2011 ONCA 33.

- providing workers with information, instruction and supervision regarding health and safety, including ensuring that workers are aware of their health and safety rights and responsibilities;
- establishing a health and safety policy, which must be reviewed annually at minimum, and a health and safety program to implement such a policy;
- working with the JHSC and workers to improve health and safety within the workplace;
- ensuring that proper equipment and supplies, including first aid, are provided to workers; and
- complying with all reporting obligations regarding workplace accidents and cooperating with Ministry investigations and orders, as will be described below.

In addition to the above, the *OHSA* includes various other obligations prescribed by the regulations. It should be considered whether these, or any of these, apply to the employer's workplace.

SUPERVISOR OBLIGATIONS (Section 27)

The *OHSA* defines a supervisor as a person who has charge over the workplace or authority over workers. Supervisors have their own obligations under the *OHSA.* An employer must ensure its supervisors are competent to perform such obligations. In general, supervisors are responsible for, among other things:

- ensuring that the workplace is safe, that workers follow the requirements of the *OHSA*, the employer's health and safety procedures and the Policy, and that they use required protective equipment;
- knowing of and informing workers about potential or actual dangers in the workplace; and
- taking every precaution reasonable to protect workers.

WORKER OBLIGATIONS (Section28)

Workers must also help foster a healthy and safe workplace. In general, workers are required to, among other things:

- work in a safe manner at all times, in compliance with the *OHSA*, including using equipment in a safe manner and never engaging in dangerous behaviour, such as pranks, feats of strength or rough conduct;
- use and maintain the protective equipment that the employer supplies; and
- report issues regarding protective equipment, contraventions of the *OHSA,* or hazards.

THE RIGHT TO REFUSE UNSAFE WORK (Sections 43 to 50)

Workers have the right to refuse unsafe work when they believe that there is likely a danger due to (i) any equipment, machine, device or thing that they use; (ii) the physical condition of the workplace; (iii) workplace violence; or (iv) any aspect of the worker's role contravening the *OHSA*.

Upon refusing work, the workers must report the circumstances to the employer or a supervisor who will investigate with the worker and a member of the JHSC. If the workers still believe that there remains a danger after the investigation, then the employer or the workers must notify a Ministry inspector of the danger for an inspection.

An employer is prohibited from disciplining any worker for refusing unsafe work.

WORKPLACE HARASSMENT AND VIOLENCE (Sections 32.0.1 to 32.0.8)

As outlined below in the "Workplace Violence and Harassment" section, an employer must create policies, which are to be reviewed at least annually, and a program to implement those policies, on workplace violence and workplace harassment.

THE REPORTING REQUIREMENTS (Sections 51 to 53.1)

An employer is obligated to notify the Ministry and the JHSC in some circumstances where there has been an accident, such as a person being injured, workplace violence, or an occupational illness as a result of the workplace, as soon as possible. Notice periods range from immediate to four days depending on the circumstances. Additionally, in cases of a fatality or critical injury, an employer must (with limited exceptions) preserve the scene of the incident for inspection.

***OHSA* ENFORCEMENT (Sections 54 to 66).**

Ministry inspectors have various powers in order to enforce the *OHSA*. For instance, an inspector may:

- enter a workplace without notice;
- use or test any equipment at the workplace;
- demand for production/inspection and copy any documents, specifications or licences; and
- interview any relevant persons in the workplace.

A JHSC member is entitled to accompany the inspector during an inspection of a workplace.

An inspector may issue orders requiring an employer to comply with its *OHSA* obligations. Such orders can also:

- prohibit the use of a place, equipment or process at the workplace until the order is complied with;
- stop all work at the workplace until the order is withdrawn or cancelled by an inspector; or
- require an employer to submit to the Ministry a plan as to how it will achieve compliance with the *OHSA.*

After receiving a Ministry order, an employer must, within three days after compliance has been achieved, submit to the Ministry a notice of compliance, which includes either (i) a statement of agreement or disagreement from a JHSC member or (ii) a statement that the JHSC member declined to sign such a statement. An employer must post the notice and the order for 14 days following its submission. An inspector may then attend to verify compliance.

The Ministry can also charge an employer, its supervisors or workers for contravening the *OHSA* with a provincial offence. Upon a successful prosecution and conviction:

- an individual may be liable for a fine up to $500,000 or to imprisonment up to 12 months, or both;
- a corporation may be liable for maximum fine of $1,500,000; and
- a director or officer of a corporation may be liable for a fine up to $1,500,000 or to imprisonment up to 12 months, or both.

Basic Awareness Training

PURPOSE

Under O. Reg. 297/13: Occupational Health and Safety Awareness and Training, the *OHSA* requires an employer to ensure that its workers and supervisors complete a mandatory occupational health and safety awareness training program on key workplace concerns, including rights and responsibilities. The training should occur as soon as possible.

CONTENT OF TRAINING FOR SUPERVISORS AND WORKERS

An employer must ensure that its supervisors and workers complete basic awareness training, which includes instruction on:

- the duties and rights of employers, supervisors and workers;
- the roles of the JHSC, the Ministry and the Workplace Safety Insurance Board ("**WSIB**");
- common workplace hazards and, for supervisors, how to recognize, assess and control such hazards;
- Workplace Hazardous Materials Information System and controlled products;
- occupational illness, including latency; and
- sources of information on occupational health and safety (for supervisors).

The Ministry has online materials for basic awareness training programs for both workers and supervisors.

RECORD KEEPING REQUIREMENTS

An employer must maintain records of all basic awareness training, including training materials, which a Ministry inspector may request. Such records should include:

- written proof that each worker and supervisor completed the training;
- written proof of any worker or supervisor being exempt from training;
- the date that the worker or supervisor completed the training; and
- if relevant, the name or a description of the training course or program that was completed.

The *OHSA* requires an employer to provide training records to a worker or supervisor, if requested, within six months of the worker or supervisor ceasing work for an employer.

The Joint Health and Safety Committee

PURPOSE

A JHSC is comprised of both workers and managers to facilitate a safe workplace. The JHSC is intended to work with an employer and its workers in order to receive and address any health and safety concerns, complaints or recommendations. In addition, the JHSC is responsible for, among other things:

- identifying actual and potential hazards in the workplace;
- obtaining information from an employer relating to health and safety in the workplace;
- inspecting the workplace on a regular basis;
- consulting with an employer on, and having a worker member at, health and safety-related testing in the workplace; and
- recommending health and safety improvements in the workplace.

Any work undertaken by members of the JHSC is considered paid work.

OPERATION OF THE JHSC

The JHSC may establish its own operational rules and procedures, but should not vote to make decisions. Rather, it should work to reach a consensus or address all perspectives, including dissenting opinions.

The JHSC must hold meetings at least every three months to address workplace health and safety issues or initiatives. These meetings are to be co-chaired by one worker member and one managerial member. The JHSC must maintain minutes of these meetings, which should be available to workers and the Ministry on request. The Ministry has provided a sample template for meeting minutes.

WORKPLACE INSPECTIONS

One of the primary responsibilities of the JHSC is for its worker member(s) to inspect the workplace at least once per month, where practical. Where not practical, the JHSC must inspect the entire workplace at least once a year and inspect portions of the workplace on a monthly basis. A JHSC should rely on a checklist for inspection, such as the sample checklist prepared specifically for office workspaces here.

If the JHSC discovers a hazard, it must consider it within a reasonable period of time and make written recommendations to the employer, who in turn must respond, in writing, within 21 days, giving either a timetable for implementing the recommendations or reasons for disagreement.

The law regarding the workplaces of remote workers has yet to definitively evolve. Nonetheless, an employer should educate workers on various issues relating to remote work, such as musculoskeletal disorders due to poor ergonomics, physical hazards such as loose wires and mental health issues associated with remote work.

CERTIFICATION TRAINING FOR JHSC MEMBERS

An employer must also provide training programs necessary to enable at least one worker member and one managerial member of the JHSC to become certified members. This is done through a Ministry-approved training program.

AN EMPLOYER'S OBLIGATION TO WORK WITH THE JHSC

In addition to establishing and maintaining a JHSC, including selecting the managerial members, an employer's obligations relating to its JHSC include:

- assisting and cooperating with the JHSC members in the carrying out of their functions;

- informing the JHSC about workplace health and safety issues, such as hazards, work practices and standards in similar industries, or incidents involving injury, death or occupational illness;
- providing the JHSC with a copy of all orders or reports issued to it by the Ministry;
- consulting with the JHSC to develop health and safety programs, policies and training; and
- providing a JHSC worker member with the opportunity to accompany a Ministry inspector on the physical inspection of the workplace.

Notably, it is an offence for any person, including an employer, to knowingly hinder, interfere with or give false information to the JHSC or any of its member performing duties under the *OHSA*.

Workplace Violence and Harassment

The *OSHA* requires employers to create policies and programs on workplace violence and workplace harassment. Policies must be reviewed at least annually, written and posted at the workplace, and provided to workers as necessary.

Under the *OHSA, w*orkplace violence includes the exercise of, or attempt to exercise, physical force against a worker in the workplace that does or could physically injure the worker, as well as any statement or behaviour that is reasonably interpreted as a threat to exercise such physical force against the worker.

Workplace harassment includes comments or conduct in relation to a worker in the workplace that is known or ought reasonably to be known to be unwelcome, which includes unwelcome comments or conduct regarding sex, sexual orientation, gender identity, gender expression or sexual activities.

An employer must assess the workplace to determine what risks of violence could occur. An employer must provide the JHSC with the results of that assessments and work with the JHSC to develop a responsive workplace violence and harassment policy and program. Specifically, the policy and program must include:

- measures and procedures to control risks detected during a risk assessment;
- measures and procedures for summoning immediate assistance when violence occurs;
- measures and procedures on how incidents of violence and harassment are to be reported, including when the alleged harasser is the employer or is in a supervisor position;
- the protocol to investigate and address incidents or complaints of workplace violence and harassment;
- how information gained about an incident of harassment, including identifying information about the parties involved, will not be disclosed unless it is essential for investigating the incident, taking corrective action or is otherwise required by law; and
- how workers will be informed of the results of harassment-based investigations and of remedial action.

In addition, once an employer becomes aware that a worker has experienced domestic violence that could expose a worker to physical injury in the workplace, an employer must take every reasonable precaution to protect workers from such violence in the workplace.

Once an employer receives a complaint or allegation of an incident workplace violence or harassment, it must:

- investigate the incident as is appropriate in the circumstances; and
- inform, in writing, the worker who has allegedly experienced harassment and the alleged harasser, if he or she is also a worker, of the investigation results and corrective actions.

All employees must be aware of the provisions of workplace violence and harassment policies and programs. Further, an employer and its supervisors are required to provide a worker with information, including personal details, related to a risk of workplace violence from a person with a history of violent behaviour.

The Industrial Establishments Regulation

Regulation R.R.O. 1990, Reg. 851: Industrial Establishments outlines various obligations with which an employer must comply in an office workplace. For example:

- workplace floors must: (i) be kept free of any obstructions or hazards that could pose a danger and (ii) not have any finish that is likely to make the surface slippery;
- when using or moving large equipment, the workplace must have adequate clearances to ensure that anyone in the area is not endangered;
- workplaces must also have guardrails, where necessary, such as around the perimeter of an uncovered opening in a floor, roof or other surface that workers can access; raised surfaces, mezzanines, balconies, galleries, platforms, ramps or any other similar surface; and around a machine, electrical installation, place or thing that is likely to endanger the safety of any worker;
- the workplace must have adequate lighting for workers to safely work, whether that be natural or artificial lighting; and
- the workplace must also safely store any flammable liquids. Typically, such materials must be stored in sealed containers and located in a safe place outdoors, in a dedicated storage building or a dedicated storage room with prescribed fireproofing and ventilation.

A specific, site-focussed review of the prescribed requirements in the *Industrial Establishments Regulation* should be conducted for each workplace.

Remote Work

The *OHSA* defines "workplace" broadly to include any place where a worker works, but Section 3 provides that the *OHSA* "does not apply to work performed by the owner or occupant or a servant of the owner or occupant to, in or about a private residence or the lands and appurtenances used in connection therewith." However, currently no definitive statement of law speaks to how Section 3 applies to remote at-home work.

Nevertheless, and as noted above, the *OHSA* is public welfare legislation. Until the point has been addressed by the Courts or Legislature, an employer should proceed cautiously and assume that workers' residences, in the current (post) pandemic reality, are workplaces under the *OHSA*.

This approach is consistent with decisions that have been issued under the Ontario *Human Rights Code* and the WSIB regimes, which respectively require employers to accommodate workers who need to work from home, and for which coverage benefits and associated reporting requirements have been extended to workers who work from home. Notably, the WSIB has taken the position that a worker and an employer have the same rights and responsibilities in the event of a workplace injury or illness, whether the worker is working from home or at the regular workplace.

Accordingly, an employer should, in addition to other steps as may be appropriate, develop a plan or checklist that remote workers can use to ensure a healthy and safe remote workplace. This should provide the workers with information on, amongst other points as may be appropriate:

- information on best ergonomic practices, physical hazards, such as wires, and mental health issues as a result of remote work;
- the role of the JHSC to assist with ensuring the at-home workplace is safe;
- how an employer will respond to any incidents of workplace violence and harassment (including online incidents) that occur and how those incidents will be investigated;
- fire protection, such as recommending smoke alarms, fire extinguishers, carbon monoxide detectors and exit plans;
- emergency procedures, such as evacuation plans and first aid supplies, as well as requiring workers to provide emergency contact information; and
- electrical safety, including requiring safety equipment like grounded outlets and surge protectors.

Disclaimer: This article offers general comments on legal developments of concern to business organizations and individuals and is not intended to provide legal advice. Readers should seek professional legal advice on the particular issues that concern them.

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Fiona has extensive experience advising international businesses entering the Canadian market. To date, she has advised more than 100 companies expanding into Canada. Fiona advises clients in this space all day, every day. She has been practising for more than a decade and is a regular speaker and writer on market expansion matters. Fiona is proud to have been recognized by *The Best Lawyers in Canada, The Canadian Legal Lexpert Directory* and *Benchmark Litigation Canada.*

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Fiona takes great care to understand her clients' businesses and deliver advice that is tailored to meeting their specific needs. Her responsiveness, dedication to clear communication and hands-on approach show that she is personally invested in the success of her clients.



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On the civil side, David regularly assists clients with respect to claims stemming from incidents and other operational liabilities, and with respect to the development and implementation of strategies aimed at managing and mitigating ongoing exposure. On the quasi-criminal side, David represents clients involved in investigations, prosecutions and appeals.

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David has acted as lead counsel in dozens of trials and applications before various courts and tribunals in Ontario. He has also acted as lead counsel with respect to investigations, defences and/or prosecutions under a variety of statutes including, amongst others, the *Occupational Health & Safety Act*, the *Building Code Act*, the *Competition Act* and the *Criminal Code*.