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# OHS & Workers' Compensation

M A N A G E M E N T U P D A T E

## Prepare For OHS Transformation: Ontario Passes Bill 160

Passage of Bill 160 on May 18, 2011, paves the way for a transformation of the structure and institutions governing and enforcing OHS, and of the bodies providing information, assistance and training on OHS to workplace parties in Ontario. Bill 160, which amends the Ontario *Occupational Health and Safety Act* (OHSA) and *Workplace Safety and Insurance Act* (WSIA), comes into force on a date to be determined shortly.

Many readers will already know that much of this Bill creates change derived from recommendations made by the Dean Panel. The Dean Panel was constituted to advise the Ontario Government on creating changes to further improve Ontario's OHS system. The passage of Bill 160 means a number of those recommendations will now have been implemented. We can also expect many further changes, based on the Dean Panel recommendations, as the Ministry of Labour takes on new prevention, education and public promotion responsibilities, and a new Chief Prevention Officer and Prevention Council begin to fulfill the mandate set out in the Bill.

In the short term, we expect that most change experienced by employers will arise from changes in Ministry of Labour (MOL) inspection and enforcement strategies encouraged by Dean. Keeping in mind that a construction sector tragedy was a key factor in the establishment of the Dean Panel, new enforcement strategies targeting key issues for the construction sector and other sectors where Dean specifically identified that vulnerable workers are employed (temporary staffing agencies, young workers, seasonal workers, hospitality) can be expected. Hopefully incentive programs encouraging and supporting employers with strong safety programs will also follow. Employers can expect the addition of compulsory training for new workers and supervisors, and the need to evaluate existing training programs once training standards are prescribed by the Chief Prevention Officer. Further, in the short term, employers may experience an increase in recommendations from their Joint Health and Safety Committee (JHSC) co-chairs and increased reprisal complaints. Employers should anticipate further and more significant changes when the Chief Prevention Officer and Prevention Council are operative, enforcement strategies supported by the Council are fully developed, and any and all supporting Regulations are created.

With that being said, here are the key Bill 160 changes:

### CHIEF PREVENTION OFFICER

The Minister of Labour will appoint a Chief Prevention Officer (CPO), responsible for developing a written provincial occupational health and safety strategy that sets out specific goals and key performance indicators for measuring the achievement of the goals. The CPO is also given a number of other specific responsibilities and powers under the OHSA amendments, including:

- 1) establishing standards for training programs required under the OHSA and Regulations, and collecting and maintaining information on individual worker training. For now, this training will include standards for JHSC certification training, and new health and safety representative training. Further prescribed training, as outlined by Dean, is expected;
- 2) approving training providers for certification training and OHS training in Ontario generally;
- 3) preparing an annual report to the Minister of Labour on occupational health and safety that measures achievements in OHS; and
- 4) providing advice to the Minister on the funding and delivery of services for prevention of workplace injuries and occupational diseases. A mechanism for proposing significant changes to the delivery system is set out in the amendments.

Many of these changes shift the prevention functions previously exercised by the WSIB to the Ontario MOL and the CPO is able to delegate some of these roles to employees of the MOL. Corresponding amendments to the WSIA, removing most prevention functions, including the functions associated with training and certification of JHSC members, were passed in Bill 160.

### PREVENTION COUNCIL

The role of the Prevention Council (Conseil de la prévention) will be advisory in nature. It will have a Chair, and its main focus will be to advise the Minister and the Chief Prevention Officer on the prevention of work-related injuries and occupational diseases in Ontario. The Council is authorized to advise on:

- 1) the prevention of workplace injuries and occupational diseases;
- 2) the provincial OHS strategy and annual report to the Minister;

3) any significant changes to the funding and delivery of services for the prevention of workplace injuries and occupational diseases;

4) appointment of the CPO by the Minister; and

5) any other matter specified by the Minister.

We would note that the composition of the Prevention Council changed significantly from introduction of Bill 160 to its passage, carving out a more significant role for representatives of organized labour. The Council will be composed of representatives from each of the following workplace groups: 1) trade unions and provincial labour organizations; 2) employers; and 3) non-unionized workers, the WSIB, and persons with occupational health and safety expertise. The Council must include equal number of members from the trade union and employer groups, while the third group may not comprise more than one-third of the Council members. With these Council appointment guidelines, we can expect organized labour to take a more significant role in shaping the future of Ontario's OHS system.

### REPRISALS

A significant change was made to the means by which a worker may enforce the prohibition against workplace reprisals for seeking to enforce the OHSA or a right under the OHSA, found in section 50 of the OHSA. Now, an MOL Inspector has the authority to refer a reprisal complaint of a worker (as long as the worker has not already filed a complaint or had the matter determined thorough arbitration under a collective agreement) directly to the Ontario Labour Relations Board. Inspectors must get the consent of the worker before referring reprisal complaints to the Board. This then triggers the reverse onus placed on an employer or person alleged to have committed a reprisal, to show that the reason for the actions constituting alleged reprisal were not due to the worker attempting to enforce the OHSA or a safety right.

### TRAINING FOR HEALTH AND SAFETY REPRESENTATIVES

Employers and constructors will now be required to ensure training of health and safety representatives. New subsection 8(5.1) requires that those parties ensure that a health and safety representative receives training to enable him or her to effectively exercise the powers and perform the duties of a health and safety representative. The training shall meet requirements that are still to be prescribed by Regulation. Safety representatives shall be paid for time spent in receiving this training, in the same manner that JHSC members are to be paid for time spent in becoming certified.

### SINGLE JHSC CO-CHAIR MAY MAKE RECOMMENDATIONS

An amendment to section 9 of the OHS Act will permit a single co-chair of a JHSC to submit written recommendations directly to the employer or constructor, triggering the obligation for the employer or constructor to respond in writing within 21 days. Previously, the power to make recommendations was given to the JHSC as a whole. Under the OHS Act amendments, a new section 9(19.1) provides that where the JHSC has failed to reach a consensus on a recommendation, after a good faith effort to do so, either the employer or worker co-chair can make the recommendation to the employer or constructor. Employers and constructors will have the same obligation to respond in writing to a recommendation from a single co-chair as they would to a recommendation from the committee as a whole.

We would note that the legislation, as passed, does not require the single co-chair recommendation to include the opposing positions of the JHSC members and how the JHSC attempted to reach consensus. This requirement was contained in the initial draft of Bill 160.

### MINISTER OF LABOUR GIVEN NEW POWERS AND DUTIES

Under the amendments, the Minister of Labour is now granted the following powers and duties in the administration of the OHS Act, to assist in clarifying some of the roles anticipated under the Dean Panel recommendations:

- 1) To promote occupational health and safety and to promote the prevention of workplace injuries and occupational diseases;
- 2) To promote public awareness of occupational health and safety;
- 3) To educate employers, workers and other persons about occupational health and safety;
- 4) To foster a commitment to occupational health and safety among employers, workers and others;
- 5) To make grants, in such amounts and on such terms as the Minister considers advisable, to support occupational health and safety.

These amendments and the future policy and regulatory changes we anticipate will follow shortly they will have a significant impact on the regulation and enforcement of OHS by the MOL, and the implementation of OHS in Ontario workplaces. This is a brief overview of these significant changes. Heenan Blaikie's OHS & Workers' Compensation Practice Group will provide more detailed information as these changes take effect. ■

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