



Worker Definition under OHSA (Bill 18)

Guideline

October 31, 2016

PREAMBLE:

Background

In 2014 the Ministry of Labour updated the Occupational Health and Safety Act to broaden the definition of a worker for employers in Ontario, with the exception of Federal employers. The definition now includes:

“A person who performs work or supplies services for no monetary compensation under a program approved by a college of applied arts and technology, university or other post-secondary institution.”
The complete revised worker definition can be found on page 2.

Since the new definition came into force on November 20, 2014, it has created a number of challenges, both for employers and post-secondary institutions.

There is a diversity of terms used throughout the sector to categorize types of activities students may engage in as part of their course experience. This is especially important to recognize that the student who engages in an internship, practicum, experiential learning, elective, or student placement falls under the new definition of a worker under the OHSA. The term "placement" used throughout the Guideline refers to the breadth of terms used within the sector. As such both the student and the placement location needs to accept their roles in the OHSA responsibility structure.

Challenges

Over the past few years, Universities in Ontario have been striving to offer more and more employment opportunities for their students, so much so that the concept of providing experiential learning is now imbedded within each of the mandate letters approved by the Government of Ontario. This is on top of placements that are required as a mandatory element of a large number of professional degrees, such as Nursing, Audiology, Rehab, Medicine, etc.

With the onset of the new worker definition, Universities now face a number of compliance challenges, such as:

- The basic concept that employers must be responsible for providing training to their workers has taken a number of employers apparently by surprise. Several Universities have experienced push-back, even from some larger employers such as hospitals, indicating that they do not have the capacity to either train or maintain records of training.
- There are expectations to train workers regardless of the length of the placement.
- What is considered “shadowing” vs being a “worker”? Some students in Nursing or Medicine “shadow” a nurse or physician without performing any hands on activities.
- Several programs place students with small employers (individual physicians, clinics, visiting health care workers). There is a high probability that many of these employers have no knowledge of the Occupational Health and Safety Act, let alone their obligations towards an unpaid “worker”.
- Employers are challenging Universities to assume responsibility for training and tracking on their behalf. This creates significant liability for Universities who take on accountability on behalf of the employer.
- Within Universities the decentralized structure of the placement process causes a number of challenges, including contractual inconsistencies, competition for employers, and relaxation of mandatory requirements in order to avoid losing employers.

The Risks

- Employers are creating a competitive environment between universities in order to assume the least responsibility
- Inconsistency amongst the 20 institutions in Ontario, potentially using the same employers (e.g., hospitals)
- Assumption of increased liability
- Sending placement students to employers without appropriate health and safety orientation by the employer

WHAT IS A WORKER:

Definition

In November of 2014, Bill 18 was passed, *Stronger Workplaces for a Stronger Economy Act, 2014*. This Bill amends a number of Ontario’s labour and employment statutes to include the definition of worker under the OHSA.

Previous to this Bill the definition of “worker” under the OHSA has been “a person who performs work or supplies services for monetary compensation.”

Bill 18 replaced and expanded this definition to include persons performing work such as students on placements.

The new definition of a worker includes:

- Individuals who are currently included as workers under the OHSA, that is, persons performing work or supplying services for monetary compensation. This part of the definition retains the existing language in the OHSA;
- High school students volunteering as part of a work experience program authorized by the school board operating the student’s school;
- Persons performing work or supplying services without compensation as part of an approved post-secondary program (i.e. co-op programs);
- Persons receiving training but that are not considered employees under the ESA because they fall within a specific exclusion set out in the ESA. (This exclusion captures some unpaid internships); and
- Such other persons as may be prescribed who perform work or supply services to an employer for no monetary compensation; (“travailleur”)

Who at the University is a Worker?

The expansion of the worker definition as per Bill 18 not only has considerations for placement employers of students on unpaid placements but also on the University as an employer. The following chart provides scenarios and their associated analysis of whether worker status would be applicable for students on university campuses.

SCENARIO	WORKER STATUS ARGUABLE?	ANALYSIS
High School Placement students performing placement at University	Yes	The high school student is a worker in the placement employer location. In this case the University. As such they need to receive health and safety training and supervision similar to a regular worker in our workplace.
Take Our Kids to Work Day	No	Grade 9 students participating in TOKTW program are visitors or guests at a workplace. They are observers and are not performing work or supplying services in a work experience program authorized by a school board. https://www.labour.gov.on.ca/english/hs/faqs/worker.php?source=postsecondary

SCENARIO	WORKER STATUS ARGUABLE?	ANALYSIS
School trip to pool	No	Students are not working and are not receiving training from an employer. The university is an employer, but not in this context. There is learning activity, but no learning activity in an outside workplace. The purpose of the OHSA is not engaged.
Research on street	No	Students are not working and are not receiving training from an employer. The university is an employer, but not in this context. There is learning activity, but no learning activity in an outside workplace. The purpose of the OHSA is not engaged.
Students who participate in research towards their thesis	Yes	<p>Unpaid students may be working under the direction of a faculty member, participating in a research project, visiting community based settings. This research would also be used towards their thesis. This is technically not an unpaid placement, but the students are still learning at an external organization. The students are arguably “workers” as it falls under part three of the definition of worker as they are performing work or supplying services to their university.</p> <p>https://www.labour.gov.on.ca/english/hs/faqs/worker.php?source=postsecondary</p>
Unpaid undergraduate student doing research for a university faculty member	Yes	The unpaid undergraduate student would be a worker under the OHSA if the research being carried out as part of a program approved by the university. The student would not be considered a worker if the research was carried out, for example, on a voluntary basis to assist the faculty member, or as part of an optional course and not under a program approved by the university.

SCENARIO	WORKER STATUS ARGUABLE?	ANALYSIS
Graduate Students who conduct research in a University facility	Yes	<p>These students are compensated, but it is not typically processed as pay. They are doing research in pursuit of their degree, which is approved by the university. The research could also be used by a Principal Investigator (PI) or they could be researching as part of a larger research project in the lab, but the university is not typically considered a placement employer. Whether or not a graduate student receiving a stipend is a worker under the OHSA would be an objective assessment made on a case-by-case basis. A MOL inspector would make the determination based on the facts as s/he finds them in the workplace.</p> <p>If “the research could also be used by a Principal Investigator (PI) or they could be researching as part of a larger research project in the lab,” these students are likely workers under part one of the definition of worker: “a person who performs work or supplies services for monetary compensation.”</p>
Students who participate in research on campus	Yes	<p>These unpaid students may be working under the direction of a faculty member, participating in a research project that takes place on a University campus. The location in which the students are working does not dictate their status. They are arguably “workers” while conducting research on campus and at an outside workplace under part three of the definition of worker.</p>
Unpaid students enrolled in a non-credit, non-graded Research Practicum course that would not attract a course fee and would be volunteering in labs or other areas over the summer and during the term	Yes	<p>The student would meet the definition of a person who received training from an employer, but who, under the ESA, is not an employee for the purposes of the ESA because the training conditions set out under both the ESA and the OHS Act apply.</p>
Volunteers (<i>not enrolled in a program</i>)	No	<p>Volunteers are not covered by this new definition of worker.</p>

WHO IS AN EMPLOYER:

Definition

An “employer” is:

- a person who employs one or more workers or contracts for the services of one or more workers and includes a contractor or subcontractor who performs work or supplies services & a contractor or subcontractor who undertakes with an owner, constructor, contractor or subcontractor to perform work or supply services.

Attracting/Avoiding Employer Duties

This definition of employer is meant to capture organizations in relationships with individuals that bind individuals to provide service – either as an employee (contract of service) or contractor (contract for service). For a university to owe a student duties as an employer, the student must ordinarily provide some service to the university (and not merely a third-party employer). It is assumed that students who attend at a workplace for the purpose of engaging in experiential learning do not provide their university any service at all.

Universities are unlikely to attract “employer” duties to students merely by supporting experiential learning in outside workplaces, but there is a risk of attraction that is most acute when:

- Universities assume a responsibility for controlling work in an outside workplace, and
- Universities endorse, sponsor or otherwise associate with “training” (i.e. activity other than work) in a workplace. Universities who chose to provide H&S training to placement students do not face a significantly greater risk of attracting employer duties to placement students. The primary duties under the Occupational Health & Safety Act (OHSA) continue to be owned by employers.

University control of work in an outside workplace therefore invites potential university liability for duties of an employer.

WHO IS A SUPERVISOR:

Definition

A “supervisor” is:

- a person who has control over a worker or activity being performed by a worker in a workplace.

Where a faculty or staff member of the university provides direct control or supervision of a placement student in an outside workplace they may assume “supervisor duties”.

“Supervisor Duties”:

- A supervisor shall ensure that a worker works in the manner and with the protective devices, measures and procedures required by the OHS Act and the regulations; and uses or wears the equipment, protective devices or clothing that the worker’s employer requires to be used or worn.
- advise a worker of the existence of any potential or actual danger to the health or safety of the worker of which the supervisor is aware;
- where so prescribed, provide a worker with written instructions as to the measures and procedures to be taken for protection of the worker; and
- take every precaution reasonable in the circumstances for the protection of the worker.

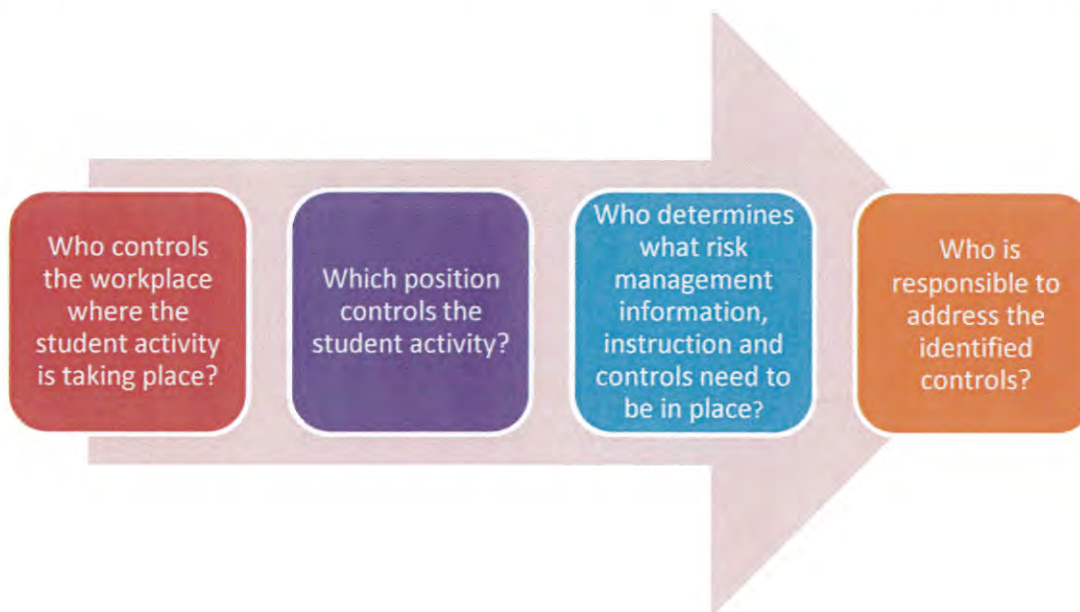
Who May Be Considered a “Supervisor”

Factors set out in Ministry of Labour guidelines, suggest that a faculty or staff member will be a supervisor when they:

1. determine the tasks to be done by a particular placement student;
2. direct and monitor how work is performed on an ongoing basis;
3. decide and schedule hours of work; and
4. deals directly with placement students’ occupational health and safety concerns and complaints.

These functions and who is responsible for each should be clearly outlined in related EL agreements.

In circumstances where these functions may be shared between the agreement partners (*this is not recommended*), the following set of questions should inform which position is the student’s supervisor with respect to particular aspects under control of either the Placement Employer or the University:



In summary, if a university faculty or staff member provides direct and ongoing supervision of a student at an outside workplace (such as in a placement), that person may be a supervisor under the OHSA. If the University determines a particular position to be supervisory, the University, as the employer (of the Supervisor), would have to appoint a “competent person” (as defined in the OHSA) to that position and ensure that the person receives supervisor awareness training as required by Ontario Regulation 297/13 (Occupational Health and Safety Awareness and Training).

University control of work in an outside workplace invites potential university liability for the duties of an employer.

Minimizing the Risk of Attracting “Supervisor Duties” in Outside Workplaces

If all of the supervisor functions noted above can be clearly assigned to the external workplace (eg for clinical placements, to the hospital via university-hospital agreement), leaving some “hands off” academic oversight role for the university instructor, then the attraction of supervisory responsibility may be avoided. Again, this may not be possible or desirable in light of academic delivery needs (*see question matrix above*).

TRAINING

Training is the responsibility of the placement employer under the OHSA.

It can be arranged by the University for the student to enroll in training at the University or for Faculty of Health Sciences placement students to enroll in training through HSPnet however it is the responsibility of the placement employer to ensure training was completed. It is also the responsibility of the placement employer to ensure site specific training is conducted at the placement location.

The risk associated with assuming responsibility for controlling work in an outside workplace and the risk of providing training in an outside workplace seem to be associated with role-related ambiguity. Although the risk is minimal, a training engagement could be something that creates role ambiguity. Due diligence should start with making each organization’s responsibility for workplace supervision and safety clear and is not suggestive of any control over work in an outside workplace. This may entail asking a placement employer to sign an acknowledgment of their supervisory and safety-related responsibilities. If universities provide training for placement employers who want certain content to be incorporated into the training, they should do so pursuant to a written training contract that (a) defines the university’s role as trainer alone, and (b) includes an express disclaimer of any ongoing responsibility for health & safety.

Below is a template that sets out, in the most basic language, how universities may establish that they are responsible for delivering training services and not responsible for controlling or supervising work or maintaining a safe facility or facilities. Universities may wish to be more specific, and should consult with legal counsel in using and modifying this language:

- **Template Language for University as a trainer and not an employer:**

This agreement is for the design and delivery of the Training Services to individuals who will be or who are employed by the Company (Trainees). Company acknowledges and agrees that this agreement gives the University no responsibility for controlling or supervising the work of

Trainees and no control over or responsibility for the facility or facilities at which the Trainees will ordinarily work. Conversely, Company acknowledges that it is responsible for controlling and supervising the work of Trainees and that it has control over and responsibility for the facility or facilities at which the Trainees will ordinarily work.

Asking placement students to sign waivers is an appropriate way of limiting the risk of civil liability. The use of waivers will not insulate universities from liability under the OHSA, so waivers should not be used as the only or even primary means of risk management.

AGREEMENTS

Ministry of Advanced Education & Skills Development (MAESD) applicable student placements need to include:

- Placement employer letter (this language can be implemented into an agreement or appendix). This language as approved by COU needs to be present in order to comply with MAESD standards for WSIB/ACE INA coverage
- Reference to the student safety checklist, component of evaluation required by MAESD for WSIB/ACE INA coverage
- Pre placement checklist

All other types of student unpaid placement agreements need to include:

- Reference to the student safety checklist (component of evaluation required by MAESD for WSIB/ACE INA coverage)
- Pre placement checklist
- The placement employer agrees that it will provide the Student Trainee with health and safety training and take appropriate precautions to ensure that the Student Trainee is supervised in order to protect the Student Trainee from health and safety hazards that may be encountered at the placement organization as per the OHSA.
- The placement employer agrees to provide written confirmation that the Student Trainee has received the appropriate health and safety training.
- Assurance of medical coverage for the student during the placement period

All agreements between the parties must be reviewed by legal counsel. Not all student placement scenarios will be covered within this document. Students on placements have the same rights as workers under the OHSA.