

Breakfast Seminar Series
New Legal Requirements for
Preventing and Investigating
Workplace Sexual Harassment:
ARE YOU COMPLIANT?

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Session Overview

- Overview: Bill 132 and the changes it introduced
- How to revise workplace policies and programs
- How to investigate a complaint
- Employer liability
- Additional responsibilities for colleges and universities

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Overview:
Bill 132's Changes to the
Occupational Health Safety Act

Why Bill 132?

- The Backdrop: Ontario government introduced “It’s Never Okay: An Action Plan to Stop Sexual Violence and Harassment” in March 2015
- The Response: Bill 132, the *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, 2016, received Royal Assent March 8, 2016; comes into force today, September 8, 2016

Expanded Definition

- Workplace harassment now expressly includes sexual harassment:

(a) engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome, or

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome;

Reasonable Actions Excluded

- The definition of workplace harassment will expressly exclude reasonable actions by management relating to the management and direction of workers or the workplace:

A reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment

Changes to Programs to Prevent Harassment

- JHSC or HS representative must be involved in the development and maintenance of programs
- Programs must be in writing
- Programs must include certain prescribed elements:
 - Making complaints
 - How investigations will be conducted
 - How information will be protected against disclosure
 - How results of investigations and corrective action will be communicated

Changes to Investigation Requirements

- A new, positive obligation on employers to investigate **all** incidents and complaints of workplace harassment:
 - [...] an employer shall ensure that [...] an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances*
- If the employer does not investigate (or does not investigate sufficiently), an inspector may order the employer to retain an investigator

How to Revise Workplace Policies and Programs

Policy Revisions

- Who: HR practitioners, executives, corporate counsel or others responsible for HR
- What: Update definition of “workplace harassment”
- Where: In all workplace harassment policies, programs, and training materials
- When: Immediately
- Why: To ensure definition reflects Bill 132 changes

Policy Revisions

- How:
 - Involve JHSC or HS representative
 - Put everything in writing
 - Define and include “sexual harassment”
 - Define and exclude reasonable management actions

Program Revisions

- As with policy revisions:
 - Involve JHSC or HS representative
 - Put everything in writing
- Include:
 - How employees may report harassment
 - How employer will investigate
 - Non-disclosure and disclosure obligations
 - How complainant and alleged harasser will be informed of investigation results

Program Revisions: Reporting Harassment

- To whom should employees report harassment when the employer/supervisor is the alleged harasser?
 - Designate an alternate
 - Consider going external

How to Investigate a Complaint

What Needs to be Investigated?

- **All** complaints, allegations and incidents of harassment
- What to do about:
 - Indirect information?
 - Anonymous complaints?

Who Should Investigate?

- The investigator (internal or external) must be:
 - Objective
 - Competent:
 - Impartial and credible
 - Have knowledge, training and experience relating to workplace harassment
 - Have knowledge of the *OHSA* and the requirements of procedural fairness
 - Compassionate and empathetic

Step 1: Ensure Confidentiality

- Keep confidential all information disclosed to you
- Disclose information only if:
 - a) It is necessary to conduct the investigation; or
 - b) Disclosure is required by law
- Remind the complainant, alleged harasser, and all witnesses of their confidentiality obligations

Step 2: Interview Parties

- Interview:
 - The complainant
 - The alleged harasser
- See for example:
 - Wells v. Car-Dale Transportation Ltd.*, [2016]
 - C.L.A.D. No. 167

Step 3: Provide Opportunity for Response

- The alleged harasser must “know the case to meet” against her/him, and must be given an opportunity to respond
- In some cases, the complainant should be given an opportunity to reply to the alleged harasser’s response

Step 4: Interview Witnesses

- Interview all **relevant** witnesses named by the complainant or alleged harasser
- Interview any other witnesses as necessary to conduct a thorough investigation

Step 5: Review Documents

- Review all relevant documents:
 - Provided by the parties or another witness; and
 - As necessary to conduct a thorough investigation

Step 6: Document, Document, Document

- Take thorough notes during all interviews
- At the end of each interview, prepare a summary for the individual to review and sign
- Proper documentation is essential to ensure that the evidence is accurate and can support the findings

Step 7: Write a Report

- An investigation report should include:
 - The steps taken during the investigation
 - The complaint
 - The allegations
 - The alleged harasser's response
 - The evidence of all witnesses
 - All documentary evidence gathered
 - Findings of fact
 - Conclusion: was workplace harassment found?

Post-Investigation

- Send letters to the complainant and the alleged harasser
 - Advise of the investigation results: the investigation is complete and either the allegations were substantiated or not
 - Warn them about retaliation and its implications
- Where the complaint was substantiated:
 - Assure the complainant that particular steps will/have been taken to ensure the behaviour will not happen again

Employer Liability

Potential Sources

- Fines under the *OHS*A
 - Max. fine for individuals: \$25,000 (or imprisonment up to 12 months)
 - Max. fine for corporations: \$500,000
- Constructive dismissal damages
- Human rights damages and potential reinstatement for:
 - Harassment
 - Discrimination/poisoned work environment

The Price of a Poor Investigation

Case	Error	Consequences
<i>Saumur v. Commissionaires Ottawa</i> (2015-OLRB)	Investigation “bore no relationship to the complaint that [the respondent] was subjecting [the complainant] to workplace harassment”; allegation never put to the respondent and the respondent was not interviewed; results not communicated to parties	Reinstatement + compensation for 13 months’ wages and benefits

The Price of a Poor Investigation cont’d

Case	Error	Consequences
<i>Boucher v. Wal-Mart</i> (2014-Ontario CA)	“Wal-Mart’s actions and its inaction were reprehensible”; failed to interview relevant witnesses; failed to enforce its workplace policies	\$410,000 + 20 weeks’ salary

Colleges and Universities: Additional Responsibilities

Ministry of Training, Colleges and Universities Act Amendments

- Amendments come into force January 1, 2017
- Ontario colleges and universities will be required to:
 - Develop a sexual violence policy with certain mandatory content
 - Develop a process, in consultation with the student government, to ensure input into the policy by a diverse selection of students
 - Secure board/council approval of the policy prior to implementation
 - Publish the policy online
 - Provide training on the policy

Ministry of Training, Colleges and Universities Act Amendments

- Colleges and universities must provide the Minister and their boards of governors with annual reports containing:
 - Information about supports, services and accommodations relating to sexual violence, including the number of times they were requested and obtained
 - Information about any initiatives to promote awareness of such supports and services
 - The number of incidents and complaints of sexual violence
 - The implementation and effectiveness of the sexual violence policy
- The Minister may conduct or direct a survey of students and others regarding sexual violence and the effectiveness of its policy

Questions?

<https://www.labour.gov.on.ca/english/hs/pubs/harassment/index.php>