

# INVESTIGATING WORKPLACE HARASSMENT:

*Legal Obligations & Guiding Principles*

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# Statutory Obligations to Investigate

- *Long Term Care Homes Act*
  - Complaints
  - Allegations of abuse and neglect
- *Human Rights Code*
  - “[A]n employer [cannot] sit idly when a complaint of discrimination/harassment was made and not have to investigate it”
- *Occupational Health & Safety Act*
  - Requires employers to investigate and respond to complaints of workplace violence and harassment (including sexual harassment)
  - Need not be tied to a prohibited ground (e.g. bullying)

# Occupational Health & Safety Act

- Bill 168 (June 2010)
  - Protections against workplace violence and harassment
  - Required policies and a workplace violence program
    - Investigate complaints of violence and harassment
- Bill 132 (September 2016)
  - New obligations regarding workplace harassment (including sexual harassment)
  - Duty to investigate all incidents/complaints of harassment
  - Investigation must be “appropriate in the circumstances”
  - MOL can mandate employers to hire an external investigator at the employer’s expense

# Code of Practice

- Part I – Workplace Harassment Policy
- Part II – Workplace Harassment Program
- **Part III – Employer’s Duties Concerning Workplace Harassment**
- Part IV – Providing Information and Instruction on a Workplace Harassment Policy and Program

# Employer's Duties Concerning Workplace Harassment

- Must investigate incidents and complaints
  - Formal complaint (verbal or written)
  - Otherwise aware of incident
- Appropriate and objective investigation
  - Investigator must have knowledge of how to conduct an appropriate investigation

# Employer's Duties Concerning Workplace Harassment

- Investigation must be completed within 90 calendar days or less, unless there are extenuating circumstances
- Seven investigative steps must be completed:
  - Investigation must be kept confidential and identifying information is not disclosed unless necessary to conduct investigation or required by law – remind parties and witnesses of confidentiality requirements
  - Thoroughly interview alleged worker being harassed and alleged harasser
  - Alleged harasser must be given the opportunity to respond to specific allegations, and the worker allegedly harassed is given an opportunity to reply

# Employer's Duties Concerning Workplace Harassment

- Separately interview any relevant witnesses
- Collect and review any relevant documents (e.g. e-mails, texts, recordings, etc.)
- Take appropriate notes and statements during interviews with the parties and witnesses
- Prepare a written report containing:
  - Steps taken during investigation
  - Complaint
  - Allegations
  - Alleged harasser's response
  - Evidence of witnesses and other evidence gathered
  - Findings of fact
  - Conclusion

# Employer's Duties Concerning Workplace Harassment

- Investigative report must be provided to the employer, supervisor or designated person to take appropriate action
- Results of investigation and any corrective action must be communicated in writing to the worker allegedly harassed and the alleged harasser within 10 calendar days of the completion of the investigation
  - Outline steps employer has taken or will take to prevent a similar incident



# Guiding Principles for Conducting Investigations

## #1 – Decision to Conduct an Investigation

- A workplace investigation should occur when it is required by law or policy
  - Violence
  - Harassment
  - Discrimination

# Guiding Principles for Conducting Investigations

## #2 – Select an Investigator

- Impartial and objective
  - Not involved in the incident
  - Not in chain of command
  - Role not to protect the employer
- Possess the necessary skills and experience
- Have the time to complete a timely investigation
- Other considerations (e.g. severity of incident, media/public scrutiny, maintaining privilege)

# Guiding Principles for Conducting Investigations

## #3 – Scope of Investigation

- Home and investigator should have a mutual understanding of the scope of the investigation
  - What are the allegations to be investigated?
    - Not too narrow

# Guiding Principles for Conducting Investigations

## #4 – Plan the Investigation

- Investigator plans for a timely and effective investigation
  - Review legislation and relevant workplace policies
    - Union involved?
  - Review of documents (e.g. written complaint, emails, personnel records, etc.)
  - Location – neutral, private, comfortable
  - Who to interview (start with complainant and then...)
  - Draft questions or subject areas
  - Initial communication with parties and witnesses
  - Experts needed?

# Guiding Principles for Conducting Investigations

## #5 – Witness Interviews

- Standard admonitions – purpose, role, expectations, reprisals policy
- Open-ended questions – who, what, where, when, how, why
  - Let witness tell the story!
- Personal knowledge and hearsay
  - Weigh hearsay appropriately
- Wrap up questions
  - Anything else I should be aware of?
  - Anyone else that I should speak to?

# Guiding Principles for Conducting Investigations

## #5 – Witness Interviews

- Document the interview
  - Witness summary
  - Sign investigator's notes
  - Affidavit
  - Audio recording
  - Second person to take notes
- In-person v. phone

# Guiding Principles for Conducting Investigations

## #6 – Gather and Preserve Evidence

- Gather all relevant evidence
  - Hard copy documents (e.g. witness statements)
  - Physical evidence (e.g. photos, site visit)
  - Electronically stored information
    - Email/SMS/IM
    - Social media
    - Video surveillance
    - Card access data
    - Log-in data

# Guiding Principles for Conducting Investigations

## #7 – Investigation Findings

- Assess and weigh the evidence
  - Reliability (e.g. personal knowledge or hearsay)
  - Credibility
    - Past history
    - Consistency of evidence
    - Motivation to lie
    - Plausibility
    - Corroboration
- Balance of probabilities (i.e. what is more likely than not to have occurred)



# Guiding Principles for Conducting Investigations

## #8 – Reports

- Introduction and scope
- Investigative background
  - Initial contact (e.g. date, summary of allegations, advisories)
  - Interim actions
  - Witnesses and dates of interviews
  - Documents
  - Laws and policies
  - Evidentiary standard
  - Timeline

# Guiding Principles for Conducting Investigations

## #8 – Reports

- Factual background
  - Employer
  - Parties
  - Prior claims
- Allegations
  - Complaint
  - Response
  - Witness statements
- Analysis and Findings
- Recommendations

# Guiding Principles for Conducting Investigations

## #8 – Reports

- Acknowledge both points of view
- Analysis supports reasoned conclusion
- Do not use “loaded” language
- Evidence needs to tip in favour of one party
- Do the hard work

# Guiding Principles for Conducting Investigations

## **#9 – Communicate Outcome**

- Provide report to employer, supervisor, head office
- Communicate results of investigation and any corrective action in writing to complainant and alleged harasser within 10 calendar days of the completion of the investigation

# Guiding Principles for Conducting Investigations

## #10 – Implement Corrective Action

- Steps employer has taken or will take to prevent a similar incident
  - Implementation of new policies
  - Training on new or existing policies
  - Sensitivity training or other courses
  - Discipline
  - Risk assessment and safety measures

# Mock Investigation

- Let's practice!!!

# Analysis of the Evidence

**Substantiated**

**Unsubstantiated**

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