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Feature

# Workplace Investigations in the #MeToo Era

*Time to update your internal policies*

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The #MeToo era has officially hit Canada – and it entered with the force of a hurricane. In January 2018, a number of Canadian politicians were forced to resign from provincial and federal politics as a result of sexual misconduct or harassment allegations. It is likely that this trend will continue and more high-profile resignations will come.

The #MeToo hashtag emerged as a movement in the fall of 2017 following a wave of American high-profile celebrities being accused of inappropriate sexual behaviour in the workplace. According to an article posted on Forbes Human Resources Council, the hashtag took off with haste on social media – with 12 million posts during the first 24 hours on Facebook. The same article asked the following question: "As we become more sensitive to the topic, are employers at more risk of being called to task for something that happens under their watch? The consensus seems to be yes." We agree and encourage employers to review their obligations to employees when it comes to workplace sexual harassment.

## (1) Employers' Obligations Regarding Workplace Harassment

In most if not all Canadian jurisdictions, employers have been legally obliged to take sexual harassment allegations in the workplace seriously for some time. We refer to the Ontario example in this article.

The Occupational Health and Safety Act (OHSA) sets out the rights and duties for occupational health and safety of all parties in the workplace. The requirements for violence and harassment in the workplace establish minimum standards and set out the rights and duties of all those who have a role in dealing with workplace violence and workplace harassment – including sexual harassment.

The OHSA defines workplace sexual harassment broadly as:

- 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
- making a sexual solicitation or advance where the person making it 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 the solicitation or advance is unwelcome.

Employers are required by the OHSA to have a policy in place regarding workplace harassment and to establish a program to implement the terms of the policy. The program must contain a number of components, including: (1) how incidents will be reported generally; (2) how incidents involving the conduct of the employees' employer or supervisor are to be reported and to whom.

Employers are required to investigate incidents and complaints of workplace harassment. Employers are also required to inform employees in writing of the results of the investigation and of any corrective action that has or will be taken as a result of the investigation. Employers must also continually review their workplace harassment program – at least annually – to ensure that it is adequately implementing the workplace harassment policy. If an employee fails to comply with its obligations under the OHSA, it may face a fine of up to $500,000 (for corporations), $25,000 for individuals and (in extreme circumstances) up to 12 months imprisonment for individuals. Employers also would be vulnerable to complaints made against the employer by a harassed employee under the Ontario Human Rights Code to the Human Rights Tribunal.

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## Feature continued

### (2) What is an Appropriate Investigation?

Good workplace harassment investigations have at least three components. They should be (1) timely, (2) fair, and (3) comprehensive in scope. Workplace harassment investigations can be time consuming for employers and the staff tasked with managing the investigation. For that reason, a number of employers will retain outside assistance from a lawyer or another investigator to assist with the investigation and with compiling a report.

Not all investigations require the same amount of time and expense. An allegation involving a single incident of misconduct can often be dealt with expeditiously.

However, some allegations of misconduct involve incidents that date back a number of years and include a number of allegedly inappropriate actions. In these more complex investigations, the Ministry of Labour recommends the following steps be taken:

- a review of details of the incident or complaint, including any relevant documents;
- an interview or interviews with the worker alleging harassment;
- an interview or interviews with the alleged harasser, if he or she works for the same employer;
- an interview or interviews with the alleged harasser, if he or she is not a worker and if it is possible and appropriate;
- separate interviews with relevant witnesses;
- examination of relevant documents or other evidence that pertains to the investigation (such as emails, notes, photographs or videos);
- a decision about whether a complaint or incident is workplace harassment; and
- preparation of a report summarizing the incident or complaint, the steps taken during the investigation, the evidence gathered, and findings (such as whether workplace harassment occurred, did not occur, or that it was not possible to make a determination).

### (3) The Way Forward

The #MeToo movement has empowered vulnerable workers to come forward with complaints of sexual misconduct in the workplace. Employers need to be prepared and educated on how to respond and investigate these complaints. We suggest that now is an ideal time for employers to review their internal policies and practices regarding workplace harassment and ensure that they are prepared before a complaint is made.

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