

## Feature

# Walking the Tight Rope: Workplace Harassment Investigations

*Follow the Code of Practice*

**I**n recent months there has undoubtedly been a surge of workplace harassment allegations in the media. It would appear no one is safe — not major corporations, not politicians and not even Hollywood. The result of such allegations often consists of pressure for those who find themselves in this unwanted spotlight to act swiftly and to decisively say “Time’s Up.”

Though an angry mob may be pounding at the door, employers who find themselves in the throes of a workplace harassment incident would do well to take pause and ensure they are complying with their obligations under Ontario’s *Occupational Health and Safety Act*, RSO 1990, c O.1 (the OHS), including recent amendments.

This article provides some guidance to assist employers in better understanding their duties pertaining to workplace harassment investigations. It does not address workplace harassment policies or programs.

## Workplace Harassment Investigations are Mandatory

The OHS requires employers to conduct an investigation into all incidents or complaints of workplace harassment that is appropriate in the circumstances. This includes informal complaints, as well as situations where no complaint is made but the employer learns of an incident. Investigation duties are even triggered where a supervisor learns of an incident but fails to pass it along to the employer.

### ***The takeaway: Training to report!***

In order to avoid instances where employers fail to investigate because they are not informed of an incident, employers should ensure that their OHS-compliant workplace harassment policies are in place. They must also train their employees, supervisors and managers on the importance of reporting workplace harassment every time they catch wind of an incident.

## Timing of Investigations

Generally speaking, the OHS requires workplace harassment investigations to be completed within 90 calendar days.

### ***The takeaway: Don’t wait!***

Employers should act on their workplace harassment policies, engage an investigator and facilitate the timely completion of harassment investigations right away. There are, of course, exceptional circumstances which may warrant an extended investigation. Examples might include instances involving numerous allegations, a greater number of witnesses, or where witnesses are unavailable due to illness, just to name a few.

Parties to a complaint or incident should always be updated periodically on the status of the investigation.



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#### Choosing an Investigator

The OHSA itself does not address the selection of investigators. Rather, all aspects of a workplace harassment investigation are subjected to the broader requirement of being "appropriate in the circumstances."

Employers can therefore choose an investigator who is internal or external to the workplace, so long as the individual (1) is not directly involved in the incident or complaint; and (2) is not under the direct control of the alleged harasser. They should be impartial, objective and have some knowledge of conducting appropriate investigations.

Possible internal candidates might include a supervisor or manager from another department, an employee from another office location or someone from human resources. External investigators, often recommended for smaller organizations or where the allegations involve numerous individuals or senior management, are often lawyers, licensed private investigators or human resource professionals.

#### ***The takeaway: Choose your investigator with care!***

The selection of an investigator should not be done haphazardly. The OHSA appears to permit Ministry of Labour inspectors to step in when they find that an employer fails to investigate, or if they conclude that the investigation undertaken was not "appropriate in the circumstances." This would likely include instances where the inspector is of the view that the employer did not select an appropriate investigator.

Ministry involvement in a workplace harassment investigation can be significant. Under section 55.3 of the OHSA, they have the authority to order employers to obtain a third party investigation. The inspector can even go so far as to select the investigator based on a criteria of skills, knowledge and qualifications that the inspector deems appropriate. If such an order is issued, the investigation and report are all at the employer's expense.

#### Recommendations for Appropriate Investigation

The Code of Practice to Address Workplace Harassment under Ontario's *Occupational Health and Safety Act*, available through the Ministry of Labour, provides a number of minimum requirements for the investigation procedure. They include, but are not limited to:

- Keeping the investigation confidential, disclosing information only to the extent necessary by law;
- Undertaking separate interviews of all parties involved, particularly the individual who has allegedly experienced workplace harassment and the alleged harasser, as well as any relevant witnesses. Reasonable efforts should be made to interview witnesses who are not employed by the employer;
- Ensuring that the alleged harasser has the opportunity to respond to the specific allegations raised;
- Collecting and reviewing any relevant documents;
- Taking appropriate notes and statements during the interviews with all parties; and
- Preparing a written report summarizing: the steps taken during the investigation, the complaint, the allegations, the response from the alleged harasser and the evidence gathered from evidence and documentation. The report must set out findings of fact and render a conclusion as to whether workplace harassment was found or not. The report is to be provided to the employer's designated individual to take appropriate action.

#### ***The takeaway: The Code of Practice is an important tool!***

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While the above-noted recommendations are not codified procedure in the OHSA itself, employers who take steps to follow them will likely reduce the risk of the Ministry stepping in or ordering a third-party investigation.

Navigating workplace harassment investigations, particularly in today's environment, can certainly be akin to walking a tight rope for employers. While the pressure is great to satisfy both internal and external onlookers, we must not forget that our job as managers, human resources professionals and lawyers, is to ensure all incidents of workplace harassment are dealt with in accordance with all obligations as set out in the OHSA.

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