

Member's Quarterly

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Feature

The Duty to Investigate

Employer action is superior to employer inaction

In an era of increasing workplace complaints and incidents of harassment, the question facing many employers is, do I have a duty to investigate such complaints and incidents? The short answer is yes. An employer's duty to investigate can be found in various employment statutes, the common law and the employer's own policies and procedures.

The first thing that comes to mind for most when discussing workplace investigations is harassment, violence and bullying. It is true that workplace harassment, violence and bullying investigations have increased over the last the little while, especially in light of the #MeToo movement and the surge in media attention to harassment or sexual harassment. It is also important for employers to be aware that they may have a duty to investigate other workplace issues such as misconduct, health and safety incidents and a breach of policy.

Let's explore an employer's duty to investigate most workplace incidents and provide guidance to employers grappling with the issue of whether or not to conduct a workplace investigation.

Harassment, Violence & Bullying

The duty to investigate harassment in the workplace stems from the legal requirements as set out in section 32.0.7 of the *Occupational Health and Safety Act*. Section 32.0.7 of the OHSA came into force in September 2016 when Bill 132 was passed by the Ontario government. The legislation, as it relates to the duty to investigate, mandates employers to investigate all incidents and complaints of workplace harassment. It also provides Ministry inspectors with the right to order an employer to retain an impartial third-party investigator to conduct an investigation into the workplace harassment incident or complaint. The legislation also requires employers to conduct investigations into harassment incidents and complaints in a timely manner.

As a note of caution, while Bill 132 imposed a duty on employers to investigate incidents and complaints of workplace harassment, the term incident is not defined in the legislation or the *Ministry of Labour's Code of Practice* to address workplace harassment. As a practical tip, when the employer or supervisor is aware of an occurrence of harassment or potential harassment, it is good practice for employers to conduct an investigation into the incident in question. Conducting the investigation will prevent the employer from condoning harassing behaviour if it is true and from having the issue of harassment continue or get worse in the workplace if it does exist. As good practice, employers should remember that employer action is superior to employer inaction and condonation.

Similarly, the duty to investigate violence and bullying in the workplace stems from the legal requirements as set out in sections 25(2)(h) and 32.0.5 of the OHSA. The legislation outlines that employers must take "every precaution reasonable" to protect the worker, thus imposing the duty to investigate incidents of violence and bullying on employers in order to address and stop the violence or bullying that is occurring in the workplace.



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Feature continued

Human Rights Code Complaints

The *Human Rights Code* in many provinces does not place an explicit duty on employers to investigate complaints relating to discrimination. However, each province's human rights code mandates employers to provide employees with an environment free from discrimination. For example, in Ontario, section 5 of the *Human Rights Code* states that all individuals must be free from discrimination in employment based on the enumerated grounds listed in the *Code*. The free from discrimination provision in the *Code* is in effect telling employers that investigating discrimination complaints is a means by which employers can ensure they are providing employees with a workplace free from discrimination. Thus, employers have a duty to investigate human rights complaints.

Other (Mis)Conduct

Generally, under provincial and federal health and safety legislation, employers have a duty to investigate incidents or accidents in the workplace and/or notify their labour ministry, depending on the severity of the accident or incident. Furthermore, workplaces with joint health and safety committees have additional duties relating to the investigation of an incident or accident.

With respect to other workplace incidents such as employee misconduct or breaches to the employer's policies and procedures, many employers can find their duty to investigate the incident and the process by which the incident must be investigated as outlined in their own policies and procedures.

Practical Tips

While employers have a duty to investigate most incidents in the workplace, employers must be cautious when conducting investigations. The employer must ensure that the investigator is impartial, thorough and preserves the integrity of the investigation and the investigation process. Furthermore, jurisprudence also suggests that employers have a duty to conduct an adequate and proper investigation when conducting workplace investigations. Otherwise, the employer may be found liable for breaching the employer's duty of good faith.

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