

NEW WORKPLACE HARASSMENT AND VIOLENCE PREVENTION RULES FOR FEDERALLY-REGULATED EMPLOYERS

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The Government of Canada has published significant changes to the workplace harassment and violence provisions of the *Canada Labour Code* (the “**Code**”). The new Workplace Harassment and Violence Prevention Regulations (the “**Regulations**”),^[1] which will replace Part XX of the Canada Occupational Health and Safety Regulations, are intended to highlight the importance of harassment and violence prevention and make it easier for employers and employees to identify their legal rights and duties.

The new Regulations impose several duties on employers. Notably, an employee that alleges workplace harassment or violence can demand a third party investigation into the alleged incident if the employee is unsatisfied with the employer’s conciliation process or the results of that process.

The changes, summarized in part below, will take effect on January 1, 2021.

Definition of “Harassment”

“Harassment” is defined in the Regulations as:

“Any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.”

The term “harassment” was not previously defined in the Code, leaving employers to rely on judicial interpretations of the term and requiring them to consider whether alleged harassment amounted to “workplace violence” and demanded a third party investigation.

Workplace Harassment and Violence Prevention Policy

Employers must continue to work with their policy committee, workplace committee or health and safety representative(s) to prevent workplace harassment and violence. While employers were previously required to develop a number of policies, the Regulations will require employers to develop one comprehensive policy that addresses both harassment and violence. That policy must include, but is not limited to:

- a mission statement
- the roles of the employer, “designated recipient” (the person or work unit to whom notice of an occurrence of workplace harassment and violence may be provided), employees, policy committee, workplace committee and/or health and safety representative(s)
- the risk factors that contribute to workplace harassment and violence
- the training that will be provided
- the resolution process
- the emergency procedures that must be implemented when an occurrence of workplace harassment or violence poses an immediate danger
- a description of the manner in which the employer will protect the privacy of persons who are involved in an occurrence of workplace harassment or violence or in the resolution process
- a description of any recourse that may be available to persons who are involved in an occurrence of workplace harassment or violence
- a description of the support measures that are available to employees
- the name of the person who is designated to receive a complaint

Reporting Requirements

The Regulations require employers to provide the Labour Program with an annual report containing specified information about workplace harassment and violence, including the number and location of occurrences. The current rules only require employers to report cases of workplace violence if they result in injury.

Workplace Assessments

Employers must jointly carry out a workplace assessment with their policy committee, workplace committee or health and safety representative(s) to identify risk factors related to harassment and violence. If any risk factors are identified, employers must develop and implement preventive measures to protect the workplace from the assessed risks within six months. Employers must review and update the workplace assessment as required, and at least every three years.

Employer Response to Harassment or Violence Complaint

The employer’s primary obligations in responding to harassment and violence complaints will change under the Regulations, as detailed below.

a. *Initial Response to Complaint*

Once notified of a complaint, the employer will be required to respond to the complainant and responding party within seven days to:

- confirm receipt of the complaint
- inform them how to access the workplace harassment and violence prevention policy
- explain each step in the resolution process
- inform them that they may be represented throughout the resolution process

The employer is also required to notify any witness identified in the complaint that a complaint has been received.

b. Investigation

The employer, complainant and responding party are still required to make every reasonable effort to resolve the occurrence of harassment or violence. However, if the complaint cannot be resolved, the complaint will proceed by way of conciliation or investigation.

Conciliation is only available on agreement of both the complainant and the responding party, including agreement on the person that will facilitate or mediate the conciliation. If the conciliation process is unsuccessful, the complainant can require an investigation.

Where an investigation is required, the investigator must meet the following qualifications:

- be trained with respect to investigative techniques
- have knowledge, training and experience that is relevant to workplace harassment and violence
- have knowledge of the Code, the *Canadian Human Rights Act* and any other legislation that is relevant to workplace harassment and violence
- provide the employer, complainant and responding party with a written statement indicating that the person is not in a conflict of interest.

Given the breadth of these criteria and control over the resolution process that the Regulations afford the complainant, employers will very likely be required to retain a third party investigator in many cases if an investigation is necessary.

c. Reporting and Privacy

The appointed investigator will be required to complete a report following the investigation. The report must include:

- a general description of the occurrence (without disclosing the identity of any involved individual)
- the investigator's analysis and findings
- the investigator's recommendations to eliminate or minimize the risk of a similar occurrence

As indicated above, the report must not disclose the identity of any person involved in the complaint. In other words, the report cannot include any information that could establish the identity of the complainant, the responding party, any witnesses or any other person involved in the occurrence or resolution process.

A copy of the investigator's report must be provided to the complainant, responding party and the workplace committee or health and safety representative(s).

d. *Corrective Measures Following Receipt of Report*

Following receipt of the investigator's report, the employer and applicable committee will be required to jointly determine which of the investigator's recommendations they will implement in order to eliminate or minimize the risk of a similar occurrence. Under the Regulations, the employer will have a positive statutory obligation to implement such corrective measures.

Training and Support

Under the Regulations, employers will be required to provide mandatory training on harassment and violence prevention to employees. The training must be specific to the culture, conditions and activities of the workplace and include:

- the elements of the workplace harassment and violence prevention policy
- a description of the relationship between workplace harassment and violence and the prohibited grounds of discrimination set out in the *Canadian Human Rights Act*
- a description of how to recognize, minimize, prevent and respond to workplace harassment and violence

Such training will also be mandatory for employers. The policy committee, workplace committee or health and safety representative(s) should work with the employer to co-develop, co-identify and co-review training materials.

Employers will also be obligated to provide information to employees regarding available psychological or other support services in their geographical area.

Takeaways for Employers

Federally-regulated employers are encouraged to review their existing policies, practices and procedures in collaboration with the policy committee, workplace committee or health and safety representative(s), as required, in order to ensure compliance as of January 1, 2021.

In addition, given the specific roles and time lines imposed by the Regulations, employers should consider whether existing training should be updated.

For more information regarding the requirements under the Regulations, please contact a member of McMillan's Employment & Labour Relations Team

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[1] SOR/2020-130.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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