REMINDER: CHANGES TO WORKPLACE HARASSMENT RULES ARE JUST AROUND THE CORNER

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Categories: Insights, Publications

As a follow-up to our bulletin of March 2016, employers need to be aware that on September 8, 2016, significant changes to the workplace harassment provisions of *Ontario's Occupational Health and Safety Act* (OHSA)[1] will take effect. Below is a summary of several new requirements that employers should ensure are addressed in their workplace harassment policies and training programs:

- **Workplace Sexual Harassment:** The OHSA will now specifically address workplace sexual harassment, which is defined as:

a. 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
b. making a sexual solicitation or advance where the person making the solicitation or advance 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 that the solicitation or advance is unwelcome.

- **Duty to Investigate:** Currently, the OHSA requires that an employer set out in its policy how it will investigate and deal with complaints of workplace harassment. This has created some confusion about how much discretion an employer has in deciding whether or not an investigation is necessary. Going forward, the OHSA will require employers to appropriately investigate all incidents of workplace harassment (whether a worker has formally or informally made a complaint or the employer is otherwise aware of an incident).[2]

  Further, the investigator must prepare a written report summarizing the steps taken during the investigation, the complaint, the complainant's allegations, the response from the alleged harasser, the evidence of any witnesses, and any other evidence gathered. The report must also set out the findings of fact, and come to a conclusion about whether workplace harassment was found.

- **Confidentiality:** Information obtained about an incident or complaint of workplace harassment must not be disclosed by an employer, unless disclosure is necessary for the purposes of investigating or

taking corrective action, or is otherwise required by law.

- **Duty to Inform: Following an investigation, both the complainant and the alleged harasser (if he or she is a worker of the employer) must be informed in writing of the results of the investigation and of any corrective action that has been or will be taken. However, they do not necessarily need to be provided with a copy of the investigator's report.**
- **Duty to Consult: Employers will also be under a new legal duty to consult with the health and safety committee or a representative (if any) in order to develop a written program designed to implement the employer's workplace harassment policy. This program must be reviewed as often as necessary, but at least annually.**
- **Impartial Investigator: Among other things, the written program mentioned above must include procedures for workers to report incidents of workplace harassment to a person other than the complainant's employer or supervisor (if the employer or supervisor is the alleged harasser).**
- **Performance Management: In welcome news to employers, the OHSA will now expressly confirm that a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace is not workplace harassment.**

In addition to the above requirements, the OHSA will also give occupational health and safety inspectors broad powers to order an employer to cause a workplace harassment investigation to be conducted, at the employer's expense, by an impartial third party possessing "such knowledge, experience or qualifications" as specified by the inspector.

One of the changes that employers may struggle with is the requirement that there be a procedure for an employee to make a complaint of harassment to an impartial person. For small employers, this will likely mean a third party agency or contracted resources. The Ministry of Labour has provided its view that a member of the Board of Directors could be an impartial contact. For large employers, it may also be possible to have a person in a parent or affiliated entity be the contact point.

With these changes less than one month away, employers in Ontario would be wise to revisit their workplace harassment policies and training programs in order to ensure that they are updated to address the new OHSA requirements. Employers should also be prepared to consult with the health and safety committee or a representative (if any) in order to develop the mandatory written program mentioned above.

Do not hesitate to contact any member of McMillan's Employment and Labour Relations group if you have any questions regarding your new obligations under the OHSA.

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1. RSO 1990, c O.1.

2. See the Ministry of Labour's Code of Practice to Address Workplace Harassment under Ontario's Occupational Health and Safety Act, available at https://www.labour.gov.on.ca/english/hs/pubs/harassment/part3.php (accessed on August 16, 2016)

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.