

Emerging Trends in Employment & Labour Law

#MeToo/New OH&S requirements on Harassment



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Presented by:



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Presentation Overview

1. Societal Realities Me Too is here
2. Overview of Occupational Health and Safety Act changes
 - What is harassment?
 - What is required?
3. New rights
4. What to do with a complaint?
 - Investigation plan



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Harassment Defined

“harassment” means any single incident or repeated incidents of objectionable or unwelcome conduct, comment, bullying or action by a person that the person knows or ought reasonably to know will or would cause offence or humiliation to a worker, or adversely affects the worker’s health and safety, and includes:


conduct, comment, bullying or action because of race, religious beliefs, colour, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity, gender expression and sexual orientation, and(ii) a sexual solicitation or advance, but excludes any reasonable conduct of an employer or supervisor in respect of the management of workers or a work site;

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Right to Know

Workers have the right to know of potential hazards and have access to basic health and safety information in the workplace:

- ✓ All employers must inform workers about potential hazards
- ✓ All worksite parties must ensure information on health and safety hazards is available onsite

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Right to Participate

Workers have the right to be:

- ✓ Involved in health and safety discussions
- ✓ Participate in health and safety committees (20 or more employees) or have a health and safety representative (5 – 19 employees)

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How you organize your workplace may also change at each worksite?

If you have


- 1-4 workers no change is required
- 5-19 workers you must have a health and safety representative
- 20 or more workers you must have a joint work site health and safety committee
 - 2 employer representatives
 - 2 employee representatives

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How to determine the number

s. 18 In determining the number you look at the average of full-time workers and part-time workers self-employed persons over previous 12 months

- if less than 12 months the number of workers since starting, or
- if expected to last 90 days or more the expected number of workers.

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Duties of health and safety representatives or joint work site health and safety committee member

Duties of health and safety representatives or joint work site health and safety committee members are similar and include

- a. Receive concerns and complaints
- b. Identify hazards
- c. Develop and monitor measures to protect employee health and safety
- d. Cooperate with any Officer appointed in Occupational Health and Safety Act, regulation or code
- e. Develop and promote programs and education on health and safety

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Duties of health and safety representatives or joint work site health and safety committee members

- f. Make recommendations to the employer related to employee health and safety
- g. Inspect the worksite at regular intervals
- h. Participate in investigations of serious injuries and incidents
- i. Maintain records regarding concerns and complaints

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Employees appoint representatives

- a. In accordance with collective agreement provisions
- b. If no bargaining unit by the workers
- c. Representatives of employees must work at the worksite

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Duration of Appointment

- a. Not less than one year
- b. If one union in accordance with the union's constitution
- c. If more than one union in accordance with an agreement between the unions
- d. Must have a quorum
 - i. one representative of each the employer and the union

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Compulsory training times. 29(4)

- a. Joint work site health and safety committee co-chair entitled to training
- b. Health and safety representative
- c. Joint work site health and safety committee member
- d. for each of the above the greater of 16 hours or two shifts

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Committee member and representative release time from normal work duties s. 30

- a. To prepare for or attend meetings
- b. To attend health and safety training
- c. To carry out committee member or representative duties under the Act, regulations or OHS code
- d. While absent for the duties they deemed at work and entitled to regular pay

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Compulsory health and safety program s.37

- a. Each employer with 20 or more employees must have the following
 - i. health and safety policy for the protection and maintenance of health and safety representative of workers
 - ii. identification of existing and potential hazards including harassment, violence, physical and biological, chemical or radiological hazards and measures to eliminate or reduce them
 - iii. an emergency response plan
 - iv. a statement of responsibilities of the employer, supervisors and workers at the worksite
 - v. schedule and procedures for regular inspections at the worksite

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Compulsory health and safety programs s.37

- vi. health and safety representative procedures when another employer or a self-employed person is at the worksite including criteria for evaluating, monitoring and selecting, and regularly monitoring other employers and self-employed persons
- vii. worker and supervisor health and safety representative orientation and training
- viii. procedures for
 1. investigating incidents and injuries and refusals to work
 2. worker participation in worksite health and safety
 3. reviewing health and safety program if circumstances at a worksite change

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Why comply with these obligations?

- ✓ Clientele Employer reputation
 - ✓ Clientele
 - ✓ Recruitment
 - ✓ Credibility
 - ✓ Social Media
- ✓ Compliance with the Occupational Health and Safety Act obligations may alter common law standards and impact on the following:
 - ✓ Constructive dismissal claim
 - ✓ Grievances
 - ✓ Constructive dismissal claim
 - ✓ Human rights complaints
 - ✓ Grievance

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#1: Societal Realities

- ✓ Just deal with it is no longer acceptable. Boys will be boys and mean girls
- ✓ Significant disconnect between perception and reality in the workplace.
- ✓ A recent Canadian C-Suite survey revealed that 94% of the executives didn't think harassment was an issue in their workplace.
<http://www.gandalfgroup.ca/downloads/2017/C-Suite%20Report%20Q4%20December%202017%20tc2.pdf>
- ✓ We have to be objective about our circumstances.
- ✓ Significant percentage of employees report (over 66%) having been harassed or witnessed harassing behaviours in the workplace
- ✓ Anecdotes tell you where to look. Data tells you what to do about it. (But make sure it's the right data.)
- ✓ If you want to change your culture, you have to demonstrate why change is necessary.

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#2: Empower the bystanders

- ✓ We know that power and authority is often a significant factor in harassment cases and toxic work environments.
- ✓ In your policies and conduct, empower the bystanders to take action, and hold them accountable to do so.
- ✓ Change your policy language to reflect the power differential.
 - ✓ Protections for whistleblowers.
 - ✓ Obligations to report misconduct.
 - ✓ Ensure complaint process addresses all levels of organization.

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Training over opposition.

- ✓ Meetings / Seminars on Workplace Conduct
- ✓ Coach, train, empower and reward every employee on how to have difficult conversations. You must practice what you preach.
- ✓ Encourage “nipping the problem in the bud” and informal resolution of issues *when appropriate and reasonable*.
- ✓ Be prepared and when required complete a formal and thorough investigation in accordance with your policy framework.

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#4: Establish healthy expectations about confidentiality upfront

- ✓ In a formal investigation, absolute confidentiality cannot and should not be guaranteed, except in limited circumstances.
 - ✓ Disclosure between Victim and Accused;
 - ✓ Identifiable investigation team;
 - ✓ Statutory disclosure (ex. OH&S);
 - ✓ Reports to police.
- ✓ Clearly set expectations in your policy, and educate your teams.
- ✓ **Education = Expectations + Reality.**

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#5 Harassment / Abuse Policy

- ✓ Every Organization Must Have One
- ✓ Key Elements
 - ✓ Define unacceptable conduct
 - ✓ Occupational Health and Safety Act language an excellent starting point
 - ✓ Give examples relevant to your work place

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#5 Harassment / Abuse Policy

- ✓ Establish procedure for reporting and responding to complaints
 - ✓ Immediate response
 - ✓ Innocent until proven guilty
 - ✓ - not a criminal standard but the preponderance of the evidence
 - ✓ - what happened and does violate the policy
 - ✓ Prioritize rights and concerns
 - ✓ Conduct balanced confidential investigation
 - ✓ Take action
 - ✓ Have a plan and execute it!

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#5 Harassment / Abuse Policy


- ✓ Distributed and Acknowledged
 - ✓ Systematic review
 - ✓ Supervisors review with direct reports
- ✓ Periodically Reviewed and Up to Date
- ✓ Achievable
 - ✓ Timelines must be realistic
- ✓ Compliant with Occupational Health and Safety Act

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Right to Refuse Dangerous Work

Workers have the right to refuse dangerous work and are protected from reprisal for exercising this right:

- ✓ Workers must continue to be paid while a work refusal is being investigated
- ✓ Employers must ensure workers understand the hazards at the workplace, know what needs to be reported and have the support to exercise their right
- ✓ Employers must investigate the matter in cooperation with the joint worksite health and safety committee or health and safety representative, if applicable
- ✓ Employers cannot take or threaten discriminatory action against a worker for exercising their rights and duties under the legislation
- ✓ Other workers may be assigned to the work if they are advised of the refusal, reason for it and are made aware of their own right to refuse work after the employer determines there is not a risk

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Questions?

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