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The New Duty to Investigate: What Skills Are Required?

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Effective September 8th there is a new duty on employers to investigate all incidents and complaints of workplace and sexual harassment as a result of the amendments to the *Occupational Health and Safety Act* (the "OHSA"), through Bill 132. Bill 132 also arms the Ministry of Labour with the power to order an employer to hire a third party investigator to investigate and write a report – presumably where it finds the employer noncompliant with the duty to investigate. These changes beg the question: how do you know how to pick the right investigator?

The new duty stipulates that you must conduct an investigation that is "*appropriate in the circumstances*", which is not exactly clear guidance for employers. Recently, the Ministry of Labour unveiled its companion *Code of Practice to Address Workplace Harassment*, which offers guidance about how to conduct investigations, including choosing the right investigator. According to the Ministry, the investigator must:

- not be the alleged harasser or under the direct control of the alleged harasser
- be able to conduct an objective investigation
- receive information and instruction on how to conduct an investigation

While the *Code of Practice* is not law, and states that it is "*just one way*" that employers can meet their legal obligations under the OHSA's harassment provisions, it offers valuable insight into what the Ministry will consider when assessing whether an investigation was conducted in a fair and appropriate manner.

In most cases using an internal investigator is more cost-effective, less intrusive and faster than using an external investigator. He or she will also usually have a better understanding of your culture and the dynamics of the parties. Therefore, in many instances a well-trained internal investigator is your best choice.

However, it is prudent and, in some circumstances may be mandatory, to appoint an external investigator. This can include circumstances where:

- the complaint is against a senior individual in the organization or the person who would normally investigate it would be in a subordinate position to the respondent

- there is no one within your municipality with the expertise, knowledge and training to conduct an appropriate investigation in the circumstances
- an internal investigator is not, or will not be perceived, as neutral and objective (for example, if HR has previously been involved in issuing discipline against one of the parties, there may be a perception of bias if the HR representative conducts the investigation)
- the allegations are of a very serious nature (e.g., sexual assault) or are complex
- there are multiple complainants, respondents or numerous witnesses
- you do not have the time or resources to conduct the investigation quickly (the *Code of Practice* states that investigations should be completed within 90 days unless there are extenuating circumstances); or
- litigation or publicity regarding the incident is anticipated or ongoing.

The costs of a flawed or biased investigation can be significant and can increase the risk of legal liability. Therefore, it is important to ensure that you get it right.

Municipalities sometimes use external labour and employment counsel to conduct investigations. The Ontario Human Rights Commission has expressly cautioned against using a lawyer as an investigator who typically represents only employers or only employees/unions, noting that investigations should not be conducted by someone who might be perceived as taking sides with either party. It removes the optics of objectivity and neutrality and, if the investigation were challenged, the lawyer can be required to be a witness in any proceeding. Accordingly, while external lawyers can be used to conduct investigations, it should not be the law firm that regularly provides your organization with its legal advice.

Some guidance can also be taken from the federal sector. In *Public Service Alliance of Canada v. Canada (Attorney General)*, 2014 FC 1066, the Federal Court considered who can be considered a "*competent person*" under s. 20.9(1) of the *Canada Occupational Health and Safety Regulations* to the *Canada Labour Code*, which prescribes that in certain circumstances, an employer must appoint "*a competent person*" to investigate incidents of workplace violence (which the Court held can include workplace harassment). Under the regulation, a "*competent person*":

- must be impartial and be seen by the parties to be impartial
- have knowledge, training and experience in issues relating to workplace violence
- have knowledge of the relevant legislation

The employer in the case appointed its regional director to conduct the investigation, which was challenged by the employee and his union. The Court held:

> *Unless it is agreed by the employee and employer that an employer's representative is an impartial person, with all the attributes provided under section 20.9(1), there is no reasonable basis to proceed with any investigation unless an impartial third party who is seen by the parties to be impartial to act as the competent person has been appointed.*

Although neither the legislation nor decision in the case is applicable to provincially regulated employers in Ontario, the principles expressed by the court are useful in deciding who is the right investigator. Regardless of whether you choose an internal or external investigator, a trained, knowledgeable and impartial investigator – who is also seen by the parties involved to be impartial – is essential to a sound investigation.

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