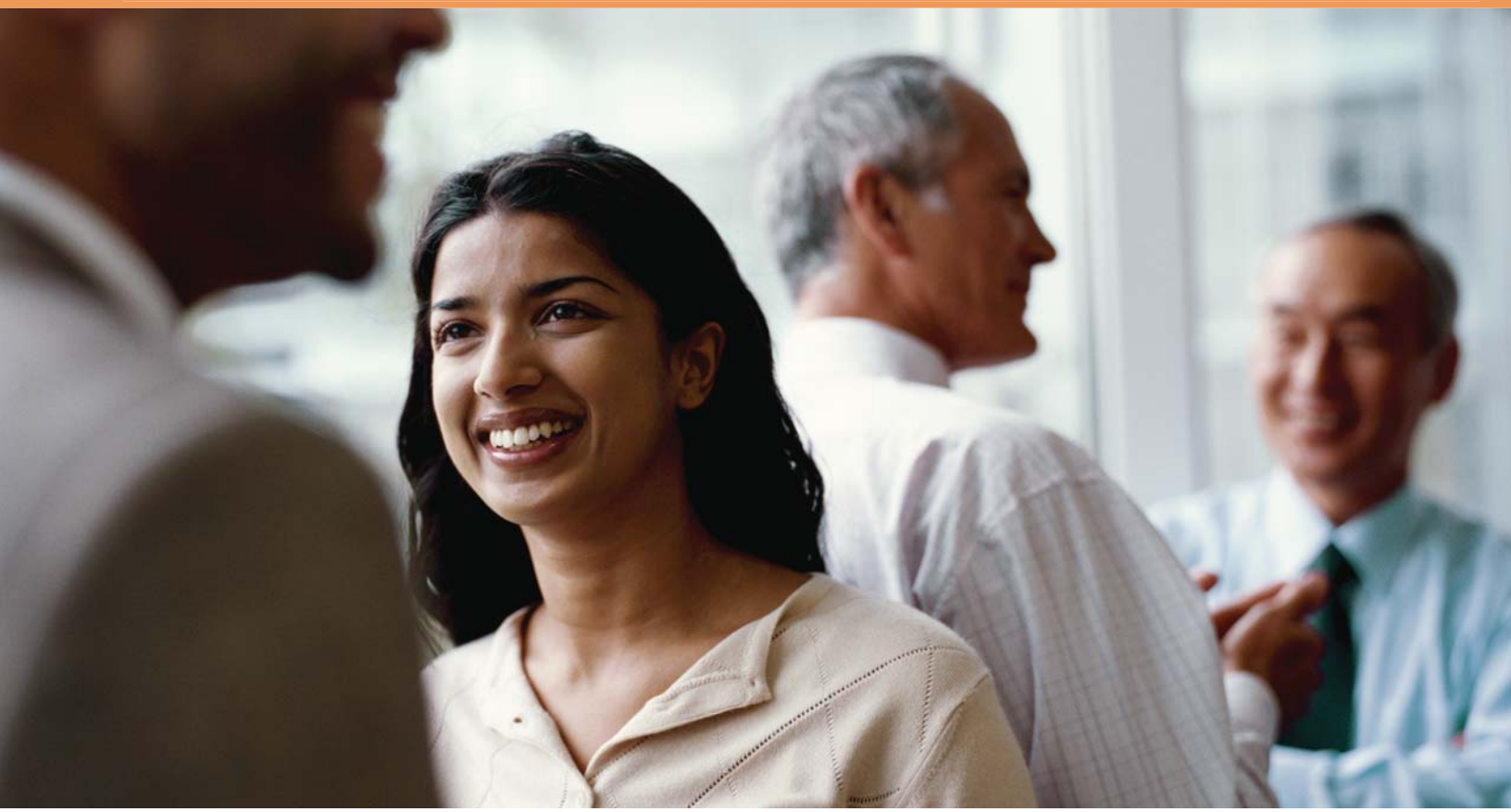
HR PROACTIVE Inc.
Profit by Proactive Prevention™

An Employer's Guide to Conducting Harassment Investigations



2-558 Upper Gage Ave. Suite 217, Hamilton, Ontario L8V 4J6
Tel: 905 304-6660 TF: 1 888-552-1155
www.HRPROACTIVEINC.com

Conducting Harassment Investigations

If you are a manager or supervisor, a complaint of harassment brought to you by an employee can be a daunting challenge and a potential headache. You can hope that one never lands on your desk, but as the saying goes, "hope is not a plan." Human nature being what it is, you must expect that eventually you will be called upon to address workplace harassment concerns, and that means being ready to conduct a harassment investigation.

Policies and training

To begin with, every company should develop, post, and constantly update and reinforce anti-harassment policies that reflect the company's values and comply with the law. In Ontario, two laws in particular specifically address the issue of harassment – the Ontario Human Rights Code ("the Code"), and the Occupational Health and Safety Act ("OHSA"). Under the Code, harassment in the workplace is prohibited if it is based on identifiable grounds outlined in the Code: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status or disability.

Under the OHSA, which requires employer to take every reasonable precaution to protect workers, harassment is also prohibited. Notably, however, the harassment does not need to be based on any of the grounds set out in the Code in order for it to contravene the OHSA. As a result of Bill 168, which amended OHSA's health and safety protections to include harassment (as well as workplace violence), the employer obligation, according to a recent arbitration decision, "now extend[s] beyond ensuring safety from hazardous substances and dangerous machinery and equipment…. [A]n employer must protect a worker from a hazardous person in the workplace."

OHSA now requires employers to develop written policies addressing both workplace violence and harassment, and to review those policies at least once a year. Harassment policies must include measures and procedures to enable workers to report incidents, and must set out how the employer is to address and investigate incidents and complaints of workplace harassment. As well, employers are now required to conduct training on these policies in order to meet their due diligence.

If your workplace does not have anti-harassment policies in place, you are already in contravention of the OHSA. You need to put these in place first.

Investigator

The person chosen to conduct the investigation should be familiar with the Code, recent anti-harassment and anti-violence amendments to OHSA (Bill 168) as well as the employer's policies and practices. It is crucial that the investigator be someone seen by both sides as neutral, unbiased, objective, and independent. Ideally, the investigator should come from outside the company. However, if the investigator is from the company, he or she should not have any direct working relationship with either of the parties or any witnesses. As well, the investigator should not be someone who can be seen as an interested party; accordingly, the company's lawyer should not conduct such interviews.

Confidentiality

The investigator must also ensure that the investigation process is as confidential as possible. Disclosure of information from the investigation should be confined to those people legitimately responsible for acting on the investigation's findings. For example, complainants and respondents do not have the right to demand to know the identities of all the witnesses interviewed. For their part, witnesses should be instructed not to speak to anyone about the investigation, and reminded that if they breach this confidentiality, they may be subject to discipline. As well, witnesses should be reassured that their names will not be revealed in any investigation report sent to the employer.

Investigation Plan

Prior to beginning the investigation, the investigator should prepare an investigation plan. Such a plan, based on a review of the particulars of the complaint, should set out the issues to be addressed, and the steps needed to address them. This normally means setting out who, in addition to the complainant and the respondent, should be interviewed, as well as any documents or physical evidence (e.g., documents, records, emails, HR file, phone calls, pictures or graphic information, etc.) that need to be examined. The plan should also set out a reasonable and realistic time line for the completion of the investigation.

The complainant should be interviewed first. This interview will help the investigator plan the investigation, and determine who should be interviewed, and what other evidence should be sought.

Logistical Considerations

There are a number of practical considerations to take into account when conducting interviews with parties and witnesses.

Time Frame

To begin with, the investigation should commence as soon as possible after a complaint is filed, while memories are their freshest, and ideally be completed within 2-3 months. It should be kept in mind that a complainant has a 6-month window (from the time of the last incident) within which to file a complaint with the Human Rights Tribunal, should he or she choose not to accept, or to challenge, the internal investigation. As well, of course, the complainant can choose at any time to file a case with the Tribunal.

Interview Setting

Ideally, interviews should take place in settings where the people being interviewed feel comfortable and free to speak. This may entail holding interviews away from the work site, which should be offered whenever feasible. As well, interviews, if they are held at a specific location, should be scheduled in such a way that the complainant or respondent do not run into witnesses or parties they perceive as hostile or adverse to them.

Interviews can also be conducted over the telephone, although this should be undertaken only if it is impossible to meet in person, and the information would not otherwise be obtainable.

All witnesses are parties should be interviewed individually. Do not interview groups of people, who may be subject to undue peer influence.

Questions

An investigation seeks first to find out what happened, and then to establish whether what happened is in violation of policy or law. The investigator needs to address the basics: who, what where, when, why, and how:

What did the person see or hear?
Where did the event take place?
When did the event happen?
Who told the person about it?
Whom did the person see?
Who else was present?
Why does the person think the incident happened the way it did?
How did the person come to know this information?

Avoid leading questions, that is, questions that suggest or point to the answer you are looking for, and which subtly prompt the person to answer a certain way. If you ask, for example, "you were in the lunchroom when these remarks were made, weren't you?", you are suggesting that you believe that the individual was there, and are merely looking for confirmation. The question should instead be "where were you when the remarks were made?" Remember, questions are not for the purpose of confirming what you suspect may be the case, but to elicit information that is relevant to determining whether a breach of policy or the law has occurred.

Allow individuals to speak to how certain incidents or events affected them. These are important considerations in determining the impact of any impugned conduct. However, avoid remarks that, in attempting to be sympathetic, might lead an interviewee to think you share their view of the case. So, for example, instead of saying "that must have been awkward for you", which is a leading question, ask the person "how did you feel about that?" or "how did that make you feel?"

Report

The investigation report should review the complainant's allegations, the respondent's response and all the pertinent evidence gathered, and reach a conclusion as to whether, taken as a whole, the evidence supports the allegations in the complaint, and whether, as a result, it discloses a breach of company policy, the Code or OHSA. Remember that the standard of proof in harassment cases is not the criminal standard of proof (beyond a reasonable doubt), but a civil standard, which is based on a balance of probabilities. In other words, if the evidence as a whole shows that, on a balance of probabilities, it is more probable than not that the alleged harassment occurred, then a finding of harassment can be made.

This standard is important to keep in mind since much of the evidence in harassment cases is circumstantial and contextual. In sexual harassment cases, the investigator is often presented with "he said, she said" accounts of incidents, which are rarely corroborated by direct witness evidence. Thus it is important to pay attention to all the evidence taken together, in order to establish what is more likely than not to have taken place.

The names of third-party witnesses should not appear in any investigation report handed over to an employer for review. Their identities should be kept only by the investigator. If witnesses think that their names and statements may be seen by their employer, they may not be as willing to speak and their evidence will be, to that extent, less complete.

Finally, the report is delivered to the person designated responsible for handling the case.

Disclosure

Once the report is delivered to the person designated to receive it, and after a decision has been made by the employer as to what needs to be done pursuant to it, the parties in the case (that is, the complainant and respondent) must be advised of the report's conclusions. Some employers may choose to provide a copy of the report itself to the parties. Others will choose to disclose the findings of the report while not providing an actual copy of the report. They may choose to have the complainant and respondent come in and be given the report to read and make notes from, without letting them take away a copy of the report. Or, they may provide the parties with a written summary of the case report and its findings.

Whatever course employers take, they should be guided by the principle that parties are entitled to know how the report came to its conclusions. That is, they have a right to know whether the allegations set forth in the complaint were corroborated by the evidence or not. Remember that if either of the parties suspects that the employer is withholding information in this phase of the investigation process, he or she may apply to the court in an effort to compel the production of the report. It is important that if the employer chooses not to share the report with the parties, it nevertheless discloses all necessary and relevant information from the report to enable the parties to understand its conclusions and the reasons behind them.

Finally, the parties should be given an opportunity to submit a response to either the report (if it is disclosed in its entirety) or the disclosure of its findings. The employer should accommodate whatever means the parties choose to respond, that is, whether in writing or orally. This provides procedural fairness, and will help the employer to come to the best possible decision regarding further steps.

Recommendations

Depending on the circumstances, the investigator may be asked to include recommendations on policies or practices, or measures that need to be undertaken to ensure that harassment does not recur. The investigator needs to establish, at the beginning of the investigation process, whether he or she will be asked for recommendations. If the employer asks for recommendations, they should not, under any circumstances, be included as part of report, but rather submitted under separate cover.

Harassment can be kept to a minimum in the workplace if there are clear and unequivocal policies in place to address it, as well as a process to investigate complaints. With both of these in place, an employer will minimize its liability to these kinds of complaints.