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MAINTAINING A WORKPLACE FREE OF SEXUAL HARASSMENT

Over the past several months, the issue of workplace sexual harassment has been in the spotlight and the subject of considerable discussion. In response to recent media attention, the Ontario Human Rights Commission recently issued a statement reiterating the legal duty of employers to prevent sexual harassment and to respond to any complaints in the workplace. In addition, on December 4, 2014, the Ontario government announced a package of initiatives designed to take action against sexual harassment and violence. Those initiatives include a public education campaign and the creation of a standing Roundtable on Violence Against Women.

In this *FTR Now*, we revisit an employer's obligation both to prevent sexual harassment and to take steps to respond to any allegations of sexual harassment.

OVERVIEW OF LEGISLATIVE COMPLIANCE REQUIREMENTS

Ontario's *Human Rights Code* ("*Code*") stipulates that every person who is an employee has the right to be free from harassment in the workplace, including sexual harassment. This includes the right to freedom from sexual solicitation or advances by a person who is in a position of authority. The *Code* defines "harassment" as "engaging in a course of vexatious conduct or comment that is known or ought reasonably to be known to be unwelcome." Harassment is only prohibited under the *Code* if it occurs "because of" one of the prohibited grounds enumerated by the *Code*.

An employer has the obligation to provide a harassment-free workplace, not just in individual cases but also to ensure that the work environment is not poisoned through inappropriate behaviours and attitudes which become part of the atmosphere of the workplace.

In 2010, the *Occupational Health and Safety Act* (“OHSA”) was amended to require employers to develop, post and maintain policies and programs regarding workplace violence and harassment. They must also assess the risks of workplace violence, conduct training and take other prescribed steps.

A CHECKLIST FOR COMPLIANCE

The Workplace Harassment Policy

A comprehensive workplace harassment policy will:

- set out the employer’s commitment to maintain a fair and equitable environment free of harassment and indicate that there is “zero tolerance” for sexual harassment and other forms of harassment in the workplace;
- clearly state a definition of harassment that is consistent with the *Code* and the *OHSA*;
- outline expected behaviour, outline prohibited behaviour and provide examples that are meaningful to the employer’s employees;
- state that differences of opinion, minor disagreements between co-workers or the exercise of management functions (with key examples) do not constitute harassment;
- describe the scope of the policy, both in terms of who the policy applies to (e.g. employees, independent contractors, third party service providers) and that the policy extends to employment-related incidents that occur beyond the traditional workplace location and outside of normal working hours;
- outline a complaint resolution process (e.g. who to complain to, confidentiality, how the complaint will be investigated, other steps that will be taken);
- specify that corrective action will be taken by the employer where a breach of the policy occurs;
- warn employees that social media conduct, even off-duty, may give rise to a breach of the harassment policy;
- specify that employees making good faith complaints under the policy will be protected from reprisal;

- expressly preserve the employee's ability to file other types of complaints as appropriate and available to them (e.g. with the Human Rights Tribunal of Ontario within one year);
- state that the employer has a responsibility to investigate potential breaches of the policy even where no formal complaint is made; and
- be posted in the workplace and reviewed annually or more frequently as necessary.

Communication and Training

To ensure that the policy is well understood:

- it should be clearly communicated to employees and others to whom it applies so that they are aware of the policy, their rights and the obligation that they not engage in harassment;
- all employees should receive a copy of the policy (and/or electronic access to it) and sign an acknowledgement of their responsibilities under the policy that is kept on file by Human Resources;
- all employees should receive training on the policy including the complaint process, and records should be maintained of the content of the training and the attendees. The training session content should be tailored to management and non-management groups. The employer should plan to hold refresher training sessions at a reasonable frequency and/or following a significant workplace harassment incident; and
- managers, directors and supervisors should be specifically trained on their special obligations in the workplace.

Complaint Resolution Process and Outcome

Where a complaint is made under the employer's policy:

- every complaint and investigation should be taken seriously;
- there must be no retaliation for good faith complaints;
- the employer should act expeditiously and consider whether interim measures are needed;

- consideration should be given to whether the investigation ought to be conducted by an internal or external investigator;
- the investigator should advise the parties of their duty to co-operate and that information provided will be kept as confidential as possible; and
- a determination must be made as to whether there was a breach of the policy and whether corrective disciplinary action, up to and including termination of employment, is required.

CONCLUSION

The overriding obligation of an employer is to provide a workplace free of harassment, and to act quickly and decisively where complaints of sexual harassment are made.

Prevention, and working towards a reasonable and appropriate resolution when an issue arises, will assist in ensuring employees are provided with a harassment-free workplace and will mitigate against any liability the employer may incur in the event of a breach. It may also enhance good employee relations by underscoring the employer's commitment to compliance with its legal and policy obligations.

Should you have any questions about sexual harassment in the workplace or any other human rights issue, please contact Jodi Gallagher Healy at 416.864.7035 or your regular Hicks Morley lawyer.

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