

An experienced workplace investigator will be able to conduct a thorough investigation



Who Should Your Workplace Investigator Be?

EXPERIENCE IS KEY WHEN DECIDING WHO WILL FILL THIS ROLE

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All employers in Ontario, pursuant to the *Occupational Health and Safety Act*, RSO 1990, c O.1 (OHSA) have an obligation to provide a workplace free from harassment and sexual harassment, and must also conduct an investigation into incidents or complaints of workplace harassment or sexual harassment. Employers and supervisors have a positive obligation under sections 25(2)(h) and 27(2)(c) of the OHSA to, "...take every precaution reasonable in the circumstances for the protection of a worker."

In addition, pursuant to the *Ontario Human Rights Code*, RSO 1990, c H.19 (HRC), employers in Ontario must also provide a workplace free from discrimination. Further, a company's own internal policies may provide for instances where an investigation is required for incidents or employee's conduct which may be contrary to such a policy or policies.

A workplace investigation is required in instances when there is an incident or conduct in the workplace which infringes upon

an employee's right to be free from harassment and sexual harassment in the workplace, infringes upon an employee's right to be free from discrimination in the workplace or is contrary to the company's policies. The employer is required to investigate when a complaint or grievance is made, or the employer becomes aware of an issue requiring an investigation. Who the employer turns to and entrusts with an investigation once it is aware of the incident, issue or complaint, is critical.

Employers must recognize that ad hoc, cursory, superficial or minimal investigations in an effort to satisfy their obligation to investigate complaints, conduct or incidents will not be considered sufficient by Courts or the Ministry of Labour. Investigations which are deemed improper and insufficient as a result of being minimal, superficial or cursory elevate a company's exposure to liability in litigation. Investigations of such a nature are likely to result in the company being ordered by the Ministry of Labour pursuant to OHSA section 55.3(1) to conduct a further investigation

utilizing an impartial person with appropriate skills in conducting investigations at the employer's expense into the incident, issue or conduct initially complained of.


An investigation which is ad hoc, cursory, superficial or minimal will also not inspire confidence in employees to bring matters of this nature to their employer's attention and may result in those employees turning to legal recourse to address the issues or making a complaint to the Ministry of Labour. Therefore, it is essential that employers not only take these matters seriously, but are seen to take these matters seriously and dedicate the necessary attention and resources to the investigation.

The investigation which is to be conducted must be sufficient in the circumstances in order to survive tribunal and judicial scrutiny. At the very least, all investigations must be impartial, free of bias, thorough and timely. The quality of the investigation starts with the selection of the investigator who will conduct the investigation, gather evidence, interview witnesses, make credibility assessments and make decisions based on the facts. The investigator must be

neutral, trained with the skills required to interview witnesses and evaluate credibility, and must be able to prepare a report with respect to the issues investigated.

The report which the investigator prepares provides the employer decision-maker with sufficient information to determine the appropriate action to be taken (if any) based on the facts as well as the basis for a defence from liability for the employer in the event of any future litigation. Seeing as the quality of the investigation and report is of utmost importance, utilizing a trained third-party investigator is critical to assist the company in adhering to its legal obligations; and the investigation is deemed to be sufficient in the circumstances and can withstand tribunal and judicial scrutiny. ■

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THE EMPLOYER IS REQUIRED TO INVESTIGATE WHEN A COMPLAINT OR GRIEVANCE IS MADE, OR THE EMPLOYER BECOMES AWARE OF AN ISSUE REQUIRING AN INVESTIGATION.