

Federal government interpretive guidelines on Workplace Harassment and Violence Regulations

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As many ushered in a new year, federally regulated employers welcomed the coming into force of changes to the *Canada Labour Code* (the Code) pursuant to Bill C-65, *An Act to amend the Canada Labour Code (harassment and violence)*, the *Parliamentary Employment and Staff Relations Act* and the *Budget Implementation Act, 2017, No. 1* and corresponding *Workplace Harassment and Violence Regulations* (the Regulations). The requirements of the Regulations are summarized in our previous posts on the topic (you can find Part 1 [here](#) – and Part 2 [here](#)).

The changes include new requirements with regard to training, investigating, reporting and preventing workplace harassment and violence in federally regulated workplaces. To assist employers in implementing the new changes, the federal government released interpretive [guidelines](#) (the Guidelines) which answer potential questions regarding the new workplace violence and harassment provisions of the Code and Regulations and provide practical guidance on implementing the new requirements. Some of the key takeaways from the Guidelines are discussed below.

Key definitions

Given the terminology used in the Regulations is novel (and somewhat unusual), we have included some commonly used defined terms here for ease of reference:

- **“applicable partner”** means the employer’s policy committee or, in the absence of a policy committee, the workplace committee or the health and safety representative.
- **“notice of occurrence”** means a complaint of an occurrence of violence or harassment.
- **“principal party”** means the party who experienced the violence or harassment.
- **“responding party”** means the party against whom the complaint of violence or harassment is made.

Clarification of what can be considered an occurrence of harassment and violence in the workplace

The Code defines harassment and violence as “any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.” The Guidelines confirm that a *single* action, conduct, or comment can alone constitute an occurrence of workplace harassment and violence. The Code also leaves

open the possibility for future regulations to prescribe further actions, conduct, or comments as workplace harassment and violence (no such regulations are yet in place). The Guidelines provide examples of the broad range of behaviours that may constitute workplace harassment and violence, such as spreading rumors or gossip, cyberbullying, making offensive jokes or remarks, practical jokes, unwanted remarks about a person's body or appearance, social exclusion, hitting, swearing or shouting in an offensive manner, sexual contact, and maliciously changing work guidelines and deadlines.

The Regulations define an occurrence of harassment as one that occurs "in the work place." The Guidelines explain that, for the purposes of the Code, an occurrence of harassment and violence in the workplace can occur at any location where an employee is performing work for their employer, including while travelling or during after-work functions organized by the employer and that a workplace can include public spaces, third-party premises, and even the employee's residence if the employee is subject to a work-from-home agreement. What is notable for employers, given the rise of work-from-home arrangements, is that an occurrence of workplace violence can include domestic or family violence that takes place either at a workplace provided by the employer, or in the home during the course of a work-from-home agreement. This definition of workplace places a responsibility on the employer to address incidents of domestic or family violence. The Guidelines recommend that in the case of family or domestic violence, the employer is to conduct a risk screening and develop a workplace safety plan. The employer should also provide referrals to support services.

Obligations of employers with regard to workplace assessments

The Regulations require an employer to conduct an initial workplace assessment that includes a consideration and identification of the internal and external risk factors. The Regulations direct the employers to conduct the assessment alongside an applicable partner. The Guidelines provide examples of some possible risk factors that contribute to harassment and violence in a workplace including: client characteristics, the physical work environment, the work activity and workplace culture, job factors, and other external factors such as domestic violence.

There are certain circumstances where the Regulations require that an employer's workplace assessment be reviewed and updated with the applicable partner, including where the principal party ends the resolution process but before the occurrence is resolved and where the responding party is a third party (i.e., not an employee). The Guidelines shed light on the employer's duties in this situation: the employer must identify any additional risk factors, assess the adequacy of the preventive measures and develop new preventive measures. The Guidelines also provide examples of preventive measures that an employer can use to mitigate the risk of harassment and violence in the workplace, including workplace training, workplace design and administrative practices.

Deadlines for notifying the employer of an occurrence of workplace violence and harassment

The Code does not prescribe any time limit for a current employee to submit a notice of an occurrence of harassment and violence to the employer. The Guidelines confirm that there is no such time limit. However, the Guidelines acknowledge that a delay in notifying the employer may affect the employer's ability to assess the occurrence. The Guidelines also clarify that if the responding party is no longer employed, the employer is not required to investigate, but rather is required to conduct a review and update of the employer's workplace assessment.

For former employees, the Code limits the time period for submitting a notice of occurrence of workplace harassment and violence. Former employees generally have three months after the end of employment to do so; however, the Code permits a former employee to apply for an extension to the three-month notification period after the end of employment. In particular, an extension can be obtained where the principal party demonstrates that they were unable to notify the employer within the three-month time period because of the trauma incurred as a result of the occurrence or another health condition. According to the Guidelines, the principal party is required to provide supporting documentation of the trauma or health condition such as a sworn statutory declaration, a police report, a note from a social worker, health practitioner, or counselor, or a restraining order.

Meaning of “designated recipient” vs. a “person who is designated”

The Regulations include obligations applicable to the “designated recipient” and, separately, obligations of a “person who is designated to receive a complaint.” The difference between these two somewhat similar phrases is clarified in the Guidelines. In particular:

- The “designated recipient” is the person to whom the complainant employee or a witness may submit a notice of occurrence of harassment and violence in the workplace.
 - The “person who is designated” is the person to whom an employee can submit a complaint regarding the employer’s failure to fulfil the requirements of the Regulations.
- The Guidelines clarify that, in practice, the person who is designated can also function as a designated recipient for the purposes of the Regulations.

The Regulations direct an employer to designate a person or a work unit as the designated recipient. The Guidelines explain that, the employer is not limited to employees in the workplace, but must ensure that the designated recipient has no direct personal or working relationship with any of the parties and is well equipped to protect the confidentiality of the matter.

Interaction between the Code and *Canadian Human Rights Act*

The Code clearly states that the protections under the Code do not take away an employee’s right under the *Canadian Human Rights Act*. The Guidelines provide that this means employees can pursue the resolution process under the Code and Regulations concurrently with any resolution processes under the *Canadian Human Rights Act* and grievances under their collective agreement.

The resolution and investigation procedures

After the notice of occurrence is received, the employer has certain obligations to the principal party. The Regulations direct an employer to perform an initial review of a notice of occurrence to determine if all the information required has been provided, and provides that if all the information is not provided, the occurrence will be resolved. The Guidelines explain that, if the notice does not have sufficient information, the employer must give the employee who submitted the notice an opportunity to provide the information.

The Regulations expressly allow for both the principal party and the responding party to be represented during the resolution process (in fact, the employer or designated recipient is

required to inform the principal party and responding party that they may be represented). The Guidelines further clarify that the parties can be represented during the resolution process by a range of individuals, including a union representative, a colleague, a spouse/partner/family member, or a friend, provided the same person does not represent both parties. The Guidelines also specify that a representative may only speak on a party's behalf to the administration of the resolution process; each individual must directly speak to the incident and respond to questions regarding the incident during the negotiated resolution. Further, the employer only needs to contact the responding party if the principal party agrees it is appropriate, or the complainant employee chooses to proceed with either conciliation (as defined in the Regulations) or an investigation.

Negotiated resolution

The Guidelines shed some light on the requirement that the employer, designated recipient, principal party and responding party where applicable, make a reasonable effort to resolve an occurrence within 45 days – this section of the Regulations is entitled “negotiated resolution” and the Guidelines define a negotiated resolution as the employer, the principal party and the responding party meeting to discuss the incident, clarifying the information and attempting to reach a resolution. According to the Guidelines, this must occur before an investigation takes place.

The parties may participate in negotiated resolution or conciliation at any point, including during an investigation. However, if the employer asks the investigator to pause investigations in order to facilitate the negotiation or conciliation process, the one-year time period to complete the resolution process still applies.