

Reducing Conflict in the Workplace

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Overview

- Prioritizing and addressing mental health in the workplace is the best thing for employees and the workplace
- Having a positive workplace has many upsides for employers, including improving performance, reducing absenteeism, potentially reducing health care premiums, reducing staff turnover, and attracting top talent
- In addition to the upside of fostering a positive workplace, employers have a legal obligation to address certain negativity in the workplace
- In particular, employers have obligations relating to preventing and responding to workplace violence and harassment and may be held liable or face consequences for failing to do so

Overview

- This webinar addresses the best practices for dealing with conflict in the workplace
- In addressing this issue, this webinar speaks to non-unionized employers who are provincially regulated in Ontario
- If you are unionized, your options and obligations as an employer will be further impacted by the collective agreement
- This webinar should not be relied upon in lieu of legal advice from your employment lawyer

Agenda

- 1) Positive Workplace Strategy
- 2) Positive Workplace Training
- 3) Positive Workplace Policies
- 4) Addressing Workplace Conflicts
 - a) Legal Obligations
 - b) Receiving Complaints
 - c) Investigating Complaints
 - d) Responding to Complaints

1. Positive Workplace Strategy

- Bringing about a positive workplace only comes with strong leadership and direction
- As a starting point, your business should consider creating a long-term, company-wide mental health strategy
- The strategy should consider how to support a positive workplace, from preventing a toxic workplace to addressing a toxic workplace, and to supporting employees with mental health issues
- The strategy should ensure that everyone, from the top to the bottom, is invested in a positive workplace
- The strategy can include opportunities for promoting positivity, such as ensuring team members express gratitude, holding team-building events, having staff appreciation moments, keeping the workplace clean (to avoid tension), etc.

2. Positive Workplace Training

- As part of a positive workplace, your managers and supervisors should receive training
- The training should include general information on mental health and the workplace, including understanding mental health, how to speak about mental health, and what is needed for a safe and supportive workplace
- The training should also include skills training on mental health and the workplace, including how to address workplace conflict and complaints of workplace harassment and violence

2. Positive Workplace Training

- Potential training programs include:
 - Mental Health Commission of Canada - Mindful Employee Orientation – this is a free online training program, which addresses the impact of employee mental health and what can be done to support mental health in the workplace
<https://www.mentalhealthcommission.ca/training/online-training-in-psychological-health-and-safety/>
 - Canadian Centre for Occupational Health and Safety (CCOHS) – Stress in the Workplace – this is an e-course on how workers, managers, and supervisors can prevent, reduce, and eliminate workplace stress
https://www.ccohs.ca/products/courses/stress_work/
 - Canadian Centre for Occupational Health and Safety (CCOHS) – Mental Health: Psychologically Healthy Workplaces – this is an e-course on how mental health impacts the workplace and how to promote mental health at work
https://www.ccohs.ca/products/courses/mh_psychological/
 - Canadian Centre for Occupational Health and Safety (CCOHS) – Mental Health: Health and Wellness Strategies – this is an e-course on how workers can improve their mental health in the workplace
https://www.ccohs.ca/products/courses/mh_wellness/

3. Positive Workplace Policies

- In order to support a positive workplace, various policies are needed
- These policies are also legally required under the *Accessibility for Ontarians with Disabilities Act* (AODA) and the *Occupational Health and Safety Act* (OHSA)
- Employers must have a written workplace policy in place to address attendance and leaves of absence
- The attendance and leaves of absence policy should address various issues, including:
 - Outlining the company's expectations around attendance
 - When an employee will be required to provide a health care provider's note to justify a medical absence
 - Whether the employee's health care provider may be required to complete a medical questionnaire
 - Whether the employee may be required to attend an independent medical examination
 - Whether the employee may be required to complete additional paperwork in regard to an absence
 - Whether the employee may be placed on a leave of absence by the company

3. Positive Workplace Policies

- Employers must also have a written workplace policy in place to address accommodation requests/needs
- The need for or request for accommodation arises when an employee has a *Human Rights Code* protected ground (e.g. disability, family status, religion, etc.) that requires changes/support
- For example, an employee with children who need to be picked up from daycare by 5:00 p.m. may require accommodation in regard to scheduling
- The accommodation policy should address various issues, including:
 - How and to whom accommodation requests are to be submitted
 - How accommodation plans are developed
 - What documentation may be requested in regard to accommodation requests/needs
 - How often will the accommodation plan be revisited

3. Positive Workplace Policies

- Employers must also have written workplace policies in place to address workplace harassment, workplace sexual harassment, and workplace violence
- In accordance with the OHSA, the policies must be drafted to:
 - confirm how workers will be trained on workplace harassment, workplace sexual harassment, and workplace violence
 - address the potential risks of workplace violence, based on a workplace-specific risk assessment
 - confirm what reasonable precautions will be taken in regard to workplace harassment, workplace sexual harassment, and workplace violence
 - confirm how workers are to file any complaints of potential workplace harassment, workplace sexual harassment, and workplace violence
 - confirm how the company will investigate potential incidents of workplace harassment, workplace sexual harassment, and workplace violence
 - confirm what should occur in the event of an incident of workplace violence when assistance is needed (e.g. health care, police, etc.)

4) Addressing Workplace Conflicts

- Employers should pay attention for potential or actual workplace conflicts
- Even when no worker has complained about the conduct, it does not mean that the company does not have an obligation to address same
- The appropriate response will depend on the potential or actual workplace conflict
- For some workplace conflict, leaving it to the workers to discuss and resolve may be most appropriate
- For other workplace conflict, a formal investigation, report, and response may be most appropriate
- In determining the most appropriate response, employers should be mindful of the relevant legal obligations

4)a) Legal Obligations

- Employers have obligations relating to preventing and responding to workplace conflict arising from the OHSA, the *Human Rights Code*, and the common law
- Under the OHSA, employers are responsible for addressing workplace harassment, workplace sexual harassment, and workplace violence
- In addition, where the worker is concerned about their physical safety, the worker is able to refuse to work until their physical safety is properly addressed, as determined by the employer and/or the Ministry of Labour

4)a) Legal Obligations

- Under the *Human Rights Code*, employers are responsible for preventing and responding to workplace harassment and discrimination
- Unlike under the OHSA, under the Code workplace harassment and discrimination only includes harassment and discrimination that is based on the specific prohibited grounds identified in the Code
- The prohibited grounds are race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability
- As such, general non-discriminatory harassment and discrimination is not covered by the Code

4)a) Legal Obligations

- An employer may also be liable at common law for failing to prevent or respond to workplace harassment, workplace sexual harassment, or workplace violence under one or more categories of damages
- For example, employers, as well as individuals such as supervisors, have been held liable in regard to workplace harassment under the torts of “intentional and negligent infliction of mental suffering” and “intentional infliction of emotional distress”

4)a) Legal Obligations

- In the event that a company fails to comply with its numerous obligations or there is an incident which is not properly responded to, then the company may be prosecuted and/or held liable
- The main sources of liability are:
 - 1) Ministry of Labour Orders or Prosecutions
 - 2) Applications under the Human Rights Code (Ontario)
 - 3) Civil Actions

4)b) Receiving Complaints

- When an employer is made aware (either formally or informally) of a complaint of workplace conflict, the employer should require the complainant to submit a complaint using a standard formal complaint form
- The use of a standard form ensures that all information is recorded, including:
 - the type of allegations (e.g. discrimination, harassment, sexual harassment, violence, none of these)
 - the who, when, where, and what details of the allegations
 - any witness details
 - the requested response to the conflict
- A standard form may also dissuade a person from continuing with a false or frivolous complaint

4)b) Receiving Complaints

- If no formal complaint is received, the company should still investigate and address any incidents of likely workplace discrimination, workplace harassment, workplace sexual harassment, or workplace violence
- An employer can be liable even if no one complained about the incident at the time

4)c) Investigating Complaints

- Complaints should be investigated in accordance with the Company's written policies
- If the matter involves potential workplace harassment, workplace sexual harassment, or workplace violence, the investigation should be conducted by the designated workplace violence and harassment program coordinator or another appropriate individual
- The Investigator should not be a related party to the complaint (e.g. the Complainant, the Respondent, or a witness)
- In addition, the Investigator should not be in a subordinate role to a relevant party to the complaint (e.g. the Respondent's assistant)
- If more than one individual is assigned to be the Investigator, it is important that they are both present at all investigation meetings and that both receive all investigation-related communications

4)c) Investigating Complaints

- In general, once a completed complaint is received, the person or persons investigating should take the following steps:
 - 1) The Investigator should advise the Complainant that they have received the complaint and will let them know of the investigation process
 - 2) The Investigator should advise the Respondent of the complaint and let them know of the investigation process
 - 3) The Investigator should meet with the Complainant before the Respondent
 - 4) The Investigator should meet with the Respondent to obtain his/her evidence in regard to what occurred (including the list of witnesses identified by the Respondent and what response the Respondent believes is appropriate)
 - 5) The Investigator should meet with all of the witnesses and obtain their evidence
 - 6) The Investigator should meet with the Complainant, Respondent and/or witnesses again, as is deemed necessary
 - 7) The Investigator should prepare a report summarizing the evidence, rendering a conclusion, and presenting recommendations, if appropriate

4)c) Investigating Complaints: Step 1

- The first step is to contact the Complainant and to explain the investigation process
- Sample email in a harassment complaint:

I am writing further to your recently submitted complaint alleging harassment on the part of the co-worker, [insert name].

I have been assigned by [Company name] to conduct an investigation in regard to the complaint. The investigation will involve interviewing the Complainant (which is you), the Respondent, and any identified witnesses. I understand that you have identified the following potential witnesses: [insert names]. It is expected that my investigation meetings will take place over the next 2 – 3 weeks.

Once I have completed my investigation, I will then prepare a report. If I have determined that incident(s) of harassment have occurred, I will make recommendations. Both you and the Respondent will have an opportunity to review the report in draft form and provide comments. The report will then be finalized and sent to you, the Respondent, and [Company name]. In review of my report, [Company name] will then decide what it wishes to do.

Further to my investigation, I would like to meet with you. Please let me know your availability on [insert proposed date(s)].

Finally, I wanted to note that, unless decided otherwise, [Company name] intends on allowing both you and the Respondent to continue to work during this investigation. However, for the duration of the investigation, you are not to communicate with each other. If at any point, the Respondent communicates with you, please let me know right away. In addition, if at any point you are concerned about your safety, please let me know right away.

4)c) Investigating Complaints: Step 2

- The second step is to contact the Respondent and let them know of the Complaint and the investigation process
- In addition, as they did not sign the Complaint Form, it is important that you let the Respondent know of their confidentiality obligations
- When you first contact the Respondent, you may or may not want to provide them with a copy of the completed Complaint Form and any enclosed related documents (e.g. harassing emails, etc.)
- If you do not provide the full details of the Complaint and the documents when you initially contact them, then you should ensure that they are informed of the full details and have a chance to review all relevant documents at the initial investigation meeting

4)c) Investigating Complaints: Step 2

- Sample email:

I am writing further to a recently submitted complaint alleging harassment by you against your co-worker, [insert name].

I have been assigned by [Company name] to conduct an investigation in regard to the complaint. The investigation will involve interviewing the Complainant, yourself, and any identified witnesses. It is expected that my investigation will take place over the next 2 – 3 weeks.

Once I have completed my investigation, I will then prepare a report. If I have determined that incident(s) of harassment have occurred, I will make recommendations. Both you and the Complainant will have an opportunity to review the report in draft form and provide comments. The report will then be finalized and sent to you, the Complainant, and [Company name]. In review of my report, [Company name] will then decide what it wishes to do.

Further to my investigation, I would like to meet with you. Please let me know your availability on [insert proposed date(s)].

I also wish to take this time to confirm that you are expected by [Company name] to treat confidentially any information and/or documents provided or received in the course of this investigation.

Finally, I wanted to note that, unless decided otherwise, [Company name] intends on allowing both you and the Complainant to continue to work during this investigation. However, for the duration of the investigation, you are not to communicate with each other. If, at any point the Complainant communicates with you, please let me know right away.

4)c) Investigating Complaints: Steps 3 - 6

- The 3rd to 6th steps involve meeting with the relevant individuals, being the Complainant, the Respondent, and the Witnesses
- The meetings should occur in a private place, where the individual being questioned can comfortably provide their evidence without fear that someone will overhear or watch the meeting
- If one of the relevant individuals is on leave, a non-workplace location may be proposed (e.g. a lawyer's office, a hotel conference room, etc.)
- As the Complainant has submitted a Complaint Form detailing the allegations, in general the Complainant is met with first
- It may be necessary to meet with the Complainant, the Respondent, and some or all of the witnesses on more than one occasion

4)c) Investigating Complaints: Steps 3 - 6

- When meeting with any of the relevant individuals, there are a few key things to keep in mind:
 - ✓ Before starting the meeting, make sure you remind the person of their confidentiality obligations
 - ✓ Properly record all statements with hand written notes, which may be signed by the worker
 - ✓ Make sure to get specific details about date, time, location, etc.
 - ✓ Avoid leading the individual by asking open questions before asking specific questions
 - ✓ Ensure subjective statements (e.g. “I was forcefully pushed”) are defined objectively (e.g. “On a scale of 1 – 10, I was pushed about a 6”)
 - ✓ Make sure to get what response is proposed by the Complainant and the Respondent if harassment and/or violence is determined to have occurred (e.g. is the Respondent willing to apologize?)

4)c) Investigating Complaints: Step 7

- At the conclusion of the investigation, the Investigator(s) will need to prepare a report
- The report should be composed of the following sections:
 - 1) Complaint: it should outline the basic facts alleged by way of the complaint
 - 2) Scope: it should define the scope of the investigation
 - 3) Evidence: it should outline the evidence of the Complainant, the Respondent, and the Witnesses
 - 4) Conclusion: it should provide the conclusion reached by the Investigator, which may be a “it is most likely” conclusion or “it has been determined” conclusion
 - 5) Response: it should outline what the Complainant, Respondent, and the Investigator propose as a response
- In addition, if there are relevant documents produced by the parties (e.g. harassing text messages), they should be attached to the Report

4)c) Investigating Complaints: Step 7

- It is up to the company to determine whether all or part of the report will be provided
- In order to avoid further conflicts, it is recommended that the Respondent does not see what response was proposed by the Complainant (e.g. that the Respondent be dismissed), and vice versa

4)d) Responding to Complaints

- If it has been determined that an incident of workplace discrimination, workplace harassment, workplace sexual harassment, or workplace violence has occurred, or was very likely to have occurred, it must be responded to
- If none of those occurred, but it is determined that there was a workplace conflict, the company may still wish to address the same to ensure a positive workplace
- The nature of the response will depend on the facts of the situation

4)d) Responding to Complaints

- In general, if there was a workplace incident, there are three areas to consider when making recommendations:
 - 1) Respondent: the individual may need to be disciplined (e.g. a written warning, suspension, termination)
 - 2) Respondent and Complainant Relationship: the relationship between the Respondent and the Complainant may need to be repaired (e.g. training) and/or altered (e.g. a change in the Complainant's workstation or a change in who the Complainant reports to)
 - 3) Company: any company-wide issues will need to be addressed (e.g. company training, new policies, etc.)

Managing Your HR Issues

We are ready to strategically support you and your business. For more information or for assistance with HR and employment law issues, please contact our firm.

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