Golden Rules of Internal Harassment Investigations

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The #metoo movement may have started in 2017, but workplace harassment and appropriate employer response are still proving to be ongoing challenges for businesses across the country as summer 2019 approaches.

Since June 2018, employees of provincially regulated businesses must file their complaint with the Québec Labour Standards, Pay Equity, Health and Safety Commission (the CNESST) within two years of **the last incident of the offending behaviour** , under the *Act Respecting Labour Standards*.[1] Employers will have to show great diligence in their investigations to collect all relevant evidence and come to accurate findings.

For employees of federally regulated businesses, the *Canada Labour Code* does not currently provide employees with any recourse for psychological harassment (it does however prohibit workplace violence and sexual harassment). This is likely a temporary situation, as Bill C-65, the federal government's proposed legislation to amend the Canada Labour Code and the *Canada Occupational Health and Safety Regulations*, proposes to define and prohibit psychological harassment and is expected to come into force in 2019. There is currently a 12-month time limit to file sexual harassment complaints, and there is no indication in Bill C-65 that a different time limit will be set for psychological harassment.

To assist employers in complying with both their obligations to provide their employees with a workplace free of harassment and to assess the validity of claims or allegations fairly, we prepared a list of golden rules to consider when conducting internal harassment investigations.

1. Be impartial

In international and family-owned businesses alike, the employer's representative conducting the investigation (the investigator) may know the complainant(s), the respondent(s) and/or the witnesses. It is key to set aside any preconceived notions of the individuals and dynamics at play, and, rather, focus on the evidence. The bias of an investigator could taint the entire investigation. This is especially important for federally regulated employers, in light of pending Bill C-65. The amended legislation, if passed,

will require that investigators be “competent persons”, who must be impartial, and perceived by all to be impartial.

2. Be thorough

The investigator should meet with every individual who may have relevant information related to the complaints. To identify these potential witnesses, the investigator should question the complainant and respondent thoroughly and specifically ask who they believe could substantiate their factual contention. This will help draw up a comprehensive witness list. Should the investigator be unable to meet with all potential witnesses or determine that it is not necessary to meet with a specific individual, it should be appropriately explained in the final report, as it may become an issue in case of litigation.

3. Maintain confidentiality

When meeting with witnesses (including complainant and respondent), the investigator should stress the importance of keeping any information related to the investigation confidential. It is generally good practice to make witnesses sign a confidentiality agreement drafted for this purpose. Employers should however be aware that the U.S. National Labor Relations Board has released a decision in 2015[2] restricting circumstances in which employers may require their U.S. employees to refrain from discussing an ongoing investigation. Thus, employers should know that general confidentiality requirements are susceptible to be unlawful in such circumstances. In any case, employers must promote confidentiality when it comes to filing documents related to the investigation, and share them on a need-to-know basis within the organization.

4. Be efficient

The investigation must be initiated swiftly after a complaint is filed or a report is made. Unnecessary delays should be avoided, and employers should keep in mind that certain costs related to expediting the investigations (*i.e.* flying in or giving the day off to witnesses or hiring external resources), although prohibitive at first, may be decisive as to the employer’s diligence, if the investigation is ever called into question. For federally regulated employers, Bill C-65 proposes to amend the current legislation to require that employers resolve an incident or situation within six months being first made aware of the situation.

5. Be tactful

The witnesses should be interviewed in a confidential area, where other employees will not see their comings and goings. The investigation meetings may be highly emotional, and no employee wants to be seen walking out of a conference room distraught or agitated. If the organization has no on-site location ensuring such privacy, employers should consider external locations. Of course, such locations have to provide the confidentiality and privacy that are appropriate in regards of the complaint. For instance, in cases of sexual harassment, meeting in a public space will likely be inappropriate, but a hotel conference room would be suitable. The investigator should also be able to interview the individuals in their language of preference (French or English).

6. Maintain records

The investigator should document the plan of the investigation, the content of the investigation meetings, and the reasons behind any decision to meet or not meet a specific witness or to set aside an element of proof. After all, the investigator's notes are the diary of the investigation. Further, any physical evidence provided by the witnesses should be catalogued in a confidential and orderly manner.

7. Be methodical

Witnesses should be met in a logical order, in light of the allegations of the complaint. Each witness should be presented with the facts and allegations in an orderly fashion, and have a fair opportunity to respond to them and provide their full version of events. All employees have a duty to collaborate and be loyal towards their employer. As such, they may not refuse to answer in order to protect another individual or by fear of self-incrimination. Investigators who treat witnesses differently or fail to follow a logical method may see their impartiality called into question.

8. Be aware of the risks

An employer who does not investigate diligently and impartially faces two main risks:

- In the context of a harassment complaint, the employer can be deemed having failed to provide the employee with a workplace free of harassment, and thus be held liable to pay damages to the plaintiff;
- In the context of a complaint for termination without cause, an employer who terminated an employee based on the findings of a faulty investigation could be required to reinstate them with back pay and/or to pay them damages.

9. Be aware of the limits

Employers should know when the investigation requires the intervention of an outside investigator, such as in the following circumstances:

- the investigation is particularly complex (many complainants, respondents or witnesses);
- the respondent holds a position of authority within the company (close to or member of management);
- the costs of allocating internal resources (in some cases, up to full-time) to investigate diligently are significant;
- the company has no experienced or appropriate internal investigator;
- the investigator has a relationship with the parties (which creates an appearance of partiality).

10. Be proactive

Employers are encouraged not to wait until a formal complaint is lodged to initiate a response. In fact, they have a duty to take reasonable measures to address the

harassment allegations as soon as they are brought to their attention. An informal report or disclosure should trigger an appropriate response, even if it does not always (or yet) entail a full investigation.

These golden rules are a great place to start for employers conducting investigations. BLG has several experienced investigators and advisors who can assist their clients in navigating workplace harassment complaints or litigation related thereto.

[1] Following changes to the Act respecting labour standards in June 2018. See our article on this subject: Time Limit for Filing a Complaint of Psychological Harassment Increased from 90 Days to Two Years. It is noteworthy that the Administrative Labour Tribunal, in Dinuv. 9227-3754 Québec inc. 2018 QCTAT 4502, ruled that, where the 90-day time limit has expired prior to June 12, 2018, the date of the legislative amendment, the right to file a complaint is not revived by the new time limit. Thus, it is not retroactive in its effect.

[2] *Banner Health System d/b/a Banner Estrella Medical Center (28-CA-023438; 362 NLRB No. 137)*,Phoenix, AZ, June 26, 2015.

By

Vanessa Lapointe

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BLG Offices

Calgary
Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa
World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver
1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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