Employers in Ontario are required to maintain a safe workplace, free from harassment and violence. Workplace harassment and violence include workplace sexual harassment and workplace sexual assault.

This duty requires employers to implement certain policies and program, such as a Workplace Violence & Harassment Policy, annually review these policies and programs, and conduct workplace investigations into complaints of harassment and violence in the workplace.

Failure to comply with an employer’s duties with respect to violence and harassment, including sexual harassment and sexual assault, as set out in the Occupational Health and Safety Act (“OHSA”) may result in fines of up to $1,500,000.
for directors and officers of corporations and/or up to 12 months imprisonment, and a fine of up to $1,500,000 for a corporation.

Failure to comply with an employer’s duties with respect to sexual harassment and sexual assault under the Ontario Human Rights Code ("Code") may result in the Ontario Human Rights Tribunal awarding an Applicant damages of $100,000 or more (which may include damages for injury to dignity, feelings and self-respect and damages for lost wages), requiring an employer to undergo human rights training for staff and management, requiring an employer to develop new policies (including human rights policies), change hiring practices, provide a written or oral apology to the Applicant, and other relief sought by the Applicant.

Failure to comply with an employer’s duties with respect to sexual harassment and sexual assault under the Ontario Human Rights Code ("Code") may result in the Ontario Human Rights Tribunal awarding an Applicant damages of $100,000 or more (which may include damages for injury to dignity, feelings and self-respect and damages for lost wages), requiring an employer to undergo human rights training for staff and management, requiring an employer to develop new policies (including human rights policies), change hiring practices, provide a written or oral apology to the Applicant, and other relief sought by the Applicant.

I. WHAT IS WORKPLACE SEXUAL HARASSMENT AND SEXUAL ASSAULT?

One of the main objectives of the OHSA is to provide all parties in the workplace, including employers and workers, with the legal framework to achieve the goal of making Ontario’s workplaces safe and healthy. The goal of making workplaces safer and healthier includes promoting a workplace environment that is free of sexual harassment and sexual assault.

Workplace sexual harassment is not only limited to unwanted or inappropriate physical contact, but rather, it can involve unwelcome words or actions associated with sex, sexual orientation or gender that are known or should be known to be offensive, embarrassing, humiliating, or demeaning to a worker or group of workers.

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Employers must also be weary of facing allegations of constructive dismissal for failure to properly address an allegation of workplace harassment and violence, including workplace sexual harassment and workplace sexual assault. Allegations of constructive dismissal may lead to an employee claiming reasonable notice for wrongful dismissal of employment, up to 24 months’ notice of pay in lieu of termination, or possibly more, plus aggravated damages, punitive damages, damages for mental distress, damages for intentional infliction of mental suffering, and more.

Part I of this Guide has been put together to help employers understand what constitutes sexual harassment and sexual assault in the workplace, and what an employer’s obligations are with respect to sexual harassment and sexual assault, pursuant to the OHSA and the Code.

Part II of this Guide will provide guidance to employers on how to conduct an unbiased and thorough workplace investigation into complaints of sexual harassment and sexual assault.
or ought reasonably to be known to be unwelcome; or,

(b) making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome."

Section 1 of the OHSA defines workplace violence as follows:

“(a) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker,

(b) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker,

(c) a statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker."

The Code similarly defines sexual harassment at the workplace as section 1 of the OHSA. Section 7(2) of the Code states as follows:

“Every person who is an employee has a right to freedom from harassment in the workplace because of sex, sexual orientation, gender identity or gender expression by his or her employer or agent of the employer or by another employee.”

In addition to outlining that all employees have a right to freedom from harassment in the workplace, section 7(3)(b) of the Code also places emphasis on every person having the right to be free from reprisal or threat of reprisal for the rejection of a sexual solicitation or advance:

“Every person has a right to be free from, a reprisal or a threat of reprisal for the rejection of a sexual solicitation or advance where the reprisal is made or threatened by a person in a position to confer, grant or deny a benefit or advancement to the person.”

Examples of sexual harassment may include:

• asking for sex in exchange for a benefit or a favour;
• repeatedly asking for dates, and not taking “no” for an answer;
• demanding hugs;
• making unnecessary physical contact, including unwanted touching;
• calling people sex-specific derogatory names;
• making sex-related comments about a person’s physical characteristics or actions;
• saying or doing something because you think a person does not conform to sex-role stereotypes;
• posting or sharing pornography, sexual pictures or cartoons, sexually explicit graffiti,
I. WHAT ARE SEXUAL HARASSMENT, SEXUAL ASSAULT AND OTHER SEXUAL HARASSMENT?

Sexual harassment is unwanted sexual attention or conduct that occurs in the workplace and can involve:

- making sexual jokes;
- leering or inappropriate staring;
- threatening to penalize or otherwise punish a worker if they refuse a sexual advance;
- bragging about sexual prowess.

II. WHAT ARE AN EMPLOYER’S DUTIES UNDER THE OHSA?

The OHSA sets out specific requirements that an employer must adhere to with respect to sexual harassment and sexual assault prevention in Ontario workplaces, including:

1. Developing and implementing a Workplace Violence & Harassment Policy;

2. Regularly educating workers on workplace harassment and violence, and regularly assessing the risks of sexual harassment and sexual assault at the workplace;

3. Conducting a thorough and diligent workplace investigation in response to sexual harassment and sexual assault in the workplace; and

4. Investigating allegations of sexual harassment and sexual assault promptly and thoroughly.

These duties are expanded upon below:

Duty #1: Develop and Implement a Workplace Violence & Harassment Policy and Programs with respect to Workplace Violence and Workplace Harassment

All employers, who are subject to the OHSA, must develop and implement policies with respect to workplace violence and workplace harassment and review them at least once a year. These two policies can be in the format of one policy and should also include a section on sexual harassment and sexual assault.

In a workplace where there are six (6) or more regularly employed workers, the Workplace Violence & Harassment Policy is required to be in writing and posted in the workplace where workers are likely to see it. Employers may wish to post the policy on a bulletin board in the main area of an office, where all workers are able to access and review the policy, provide each new worker with a copy of the Workplace Harassment & Violence Policy when they are hired, and/or include the Workplace Harassment & Violence Policy in the Employee Handbook.

Employers are also required to develop and maintain a written program to implement the Workplace Harassment & Violence Policy. There are separate requirements with respect to the harassment program, and the violence program, as outlined below.

Employers with twenty (20) or more regularly employed workers are also required to establish a Joint Health and Safety Committee.

What should be included in the Workplace Violence & Harassment programs and Policy?

The Workplace Violence program must include the following:

(a) measures and procedures to control the
risks identified in the assessment of risks of workplace violence as likely to expose a worker to physical injury;

(b) measures and procedures for summoning immediate assistance when workplace violence occurs or is likely to occur;

(c) measures and procedures for workers to report incidents of workplace violence to the employer or supervisor;

(d) set out how the employer investigate and deal with incidents or complaints of workplace violence; and

(e) any other elements prescribed by the OHSA.

The Workplace Harassment program must include the following:

(a) measures and procedures for workers to report incidents of workplace harassment to the employer or supervisor;

(b) measures and procedures for workers to report incidents of workplace harassment to a person other than the employer or supervisor, if the employer or supervisor is the respondent;

(c) set out how incidents or complaints of workplace harassment will be investigated and dealt with;

(d) set out how information obtained about an incident or complaint of workplace harassment, including identifying information about any individuals involved, will not be disclosed unless the disclosure is necessary for the purposes of investigating or taking corrective action with respect to the incident or complaint, or is otherwise required by law; and

(e) set out how a worker who has allegedly experienced workplace harassment and the respondent, if he or she is a worker of the employer, will be informed of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation.

The workplace harassment and workplace violence program must be reviewed as often as necessary, but at least annually, to ensure that it adequately implements the Workplace Violence & Harassment Policy.

The above requirements for the workplace harassment and workplace violence programs must be included in the Workplace Violence & Harassment Policy.

An employer should establish the procedure for reporting incidents of sexual harassment and violence in a simple format, which is consistent for all levels of workers and easily accessible to all workers in the form of an Employee Handbook and a wall posting.

An employer must also train supervisors to recognize and respond to incidents of harassment and violence, including sexual harassment and sexual assault, and to report these incidents to the Human Resources department and/or a member of the management team.
Duty #2: Regularly educate workers and assess the risks of sexual harassment and violence at the workplace

Pursuant to the *OHSA*, an employer has a general duty to provide information, instruction, and supervision to protect a worker. This duty includes providing workers with information and instructions on the contents of the Workplace Violence & Harassment Policy and programs and any other prescribed information that are relevant to the issue of harassment and violence, including sexual harassment and sexual assault, at the workplace.

In addition to providing workers with information and instructions on how to address workplace harassment and violence, an employer must also regularly conduct proactive risk assessments related to workplace harassment and violence, including sexual harassment and sexual assault.

An employer should provide information and conduct proactive risk assessments:

• on a regular basis;

• when there are significant changes to the risks encountered;

• when there are significant changes to the Workplace Violence & Harassment Policy or programs; and/or

• when circumstances indicate additional instruction or training is needed such as when procedures are not being followed or workers do not know about them.

The assessment must take into account:

• circumstances that would be common to similar workplaces;

• circumstances specific to the workplace; and

• any other elements prescribed by the *OHSA*.

If a workplace has a Joint and Safety Committee or health and safety representative, the employer must advise the committee and representative of the results of the assessment and provide a copy if the assessment is in writing.

If there is no Joint and Safety Committee or health and safety representative, the employer must advise the workers of the results of the assessment, and if the assessment is in writing, provide a copy of the assessment upon request from a worker, or explain to the worker how to obtain a copy of the assessment.

Duty #3: Conduct a Thorough and Diligent Workplace Investigation with respect to Sexual Harassment and Sexual Assault

In addition to the written workplace policies for workplace harassment and violence (including sexual harassment and sexual assault), under the *OHSA*, an employer also has a duty to protect their worker(s) from workplace harassment and violence (including sexual harassment and sexual assault).

The employer must ensure that:

(a) an investigation is conducted into incidents and complaints of workplace harassment and violence that is appropriate in the circumstances; and
(b) the worker who has allegedly experienced workplace harassment / workplace violence and the respondent, if he or she is a worker of the employer, are informed in writing of the results of the investigation and of any corrective action that has been taken or that will be taken as a result of the investigation.

Information and guidance on how to conduct a workplace investigation with respect to sexual harassment and sexual assault is provided in Part II of this Guide.

Duty #4: Investigate Allegations of Sexual Harassment and Sexual Assault Promptly and Thoroughly

An employer’s obligation to investigate allegations of sexual harassment and/or sexual assault is triggered as soon as the employer becomes aware that an incident has occurred. Some examples of notice of potential sexual harassment and/or sexual assault may include:

• internal complaints (written or oral);
• notice of lawsuits;
• informal reports;
• hotline calls to corporate compliance;
• observations;
• anonymous letters and/or messages;
• union grievances; and
• exit interviews.

When an employer becomes aware of an incident of sexual harassment and/or sexual assault directly through formal complaint or indirectly through conversations in the workplace or through a third party, it is critical to follow up on each and every complaint and investigate all complaints. This duty exists regardless of whether or not the complainant requests an investigation.

Employers also should encourage workers to notify the Human Resources department or a member of the management team of any instances of sexual harassment and/or sexual assault and employers should provide reassurance to their workers that they will not be penalized nor face reprisal for reporting an incident of sexual harassment and/or sexual assault at the workplace.

Information and guidance on how to conduct a workplace investigation with respect to sexual harassment and sexual assault is provided in Part II of this Guide.

III. WHAT ARE AN EMPLOYER’S DUTIES UNDER THE CODE?

The Ontario Human Rights Commission has outlined the duties an employer owes to employees in respect of sexual harassment. Employers must ensure they:

1. Have a poison-free environment that respects human rights;
2. Implement and educate employees on a clear, comprehensive anti-sexual harassment policy;
3. Respond to complaints of sexual harassment, whether this complaint is:
   a. a formal complaint to the employer;
   b. an informal complaint to the employer; or
c. an Application to the Human Rights Tribunal of Ontario.

4. Regularly monitor their environments to make sure they are free of sexually harassing behaviour.

What should be included in the Anti-Sexual Harassment Policy?

The Ontario Human Rights Commission recommends including the following information in an Anti-Sexual Harassment Policy:

1. A vision statement setting out the employer’s commitment to maintaining a fair and equitable environment free of sexual and gender-based harassment, and stating that the organization will not tolerate sexual and gender-based harassment.


3. A list of the prohibited grounds of discrimination contained in the Code.

4. The Code definition of “sexual harassment” and a definition of “gender-based harassment.”

5. An explanation of the concept of a “poisoned environment” as a violation of the Code, and examples of a poisoned environment that are meaningful in that organization’s context.

6. A description of unacceptable behaviour, such as: examples of sexual harassment as listed in the Ontario Human Rights Code’s Policy on preventing sexual and gender-based harassment.

7. A description of who the policy applies to (such as employers, employees, third party service providers, etc.).

8. How internal complaints will be handled with details on:
   a. who to complain to;
   b. an assurance that the person handling the complaint should be independent and an expert;
   c. confidentiality reassurance that the person making the complaint will be protected from reprisal, or threat of reprisal;
   d. help that is available for parties to a complaint;
   e. the availability of Alternative Dispute Resolution, such as mediation, to resolve a complaint;
   f. how the complaint will be investigated;
   g. how long the process will take;
   h. steps that will be taken if it is not appropriate for the person making the complaint to continue working with the person/people being complained about;
   i. how the organization will deal with the complaint when the harasser is unknown (e.g. cyber harassment).

9. Remedies that will be available if the claim of sexual harassment is proven, such as
disciplinary measures to be applied (for example, measures could range from a verbal warning or a letter of reprimand to termination).

10. A statement reinforcing the right of individuals to file other types of complaints, such as:

   a. a human rights application with the Human Rights Tribunal of Ontario at any time during the internal process, as well as an explanation of the one-year time limit in the Code;

   b. a complaint under the Occupational Health and Safety Act, if applicable;

   c. a grievance under a collective agreement, if applicable; or

   d. criminal charges, if applicable.

_Responding to a sexual harassment or sexual assault complaint_

When the Human Rights Tribunal of Ontario assesses whether an employer has met its obligation to respond to a complaint of sexual harassment or sexual assault, the Tribunal will take into consideration the following:

• the procedures in place at the time to deal with discrimination and harassment;

• how quickly the employer responded to the complaint;

• how seriously the complaint was treated;

• the resources made available to deal with the complaint;

• if the employer provided a healthy environment for the person who complained; and

• how well the person who complained was told about the action taken.

As outlined above, employers should promptly and thoroughly conduct an unbiased investigation into complaints of sexual harassment and sexual assault.

Information and guidance on how to conduct a workplace investigation with respect to sexual harassment and sexual assault is provided in Part II of this Guide.

_WE ARE HERE TO HELP!_

Understanding an employer’s obligations pursuant to the OHSA and the Code with respect to sexual harassment and sexual assault is crucial to avoid penalties and prevent liability. Contact Minken Employment Lawyers for assistance with reviewing and drafting workplace policies, conducting investigations in the workplace and addressing or responding to allegations of sexual harassment and sexual assault. Contact us today at contact@minken.com or call us at 905 477-7011. Go to our website and sign up for our newsletter to receive up to date information, including new legislation and Court decisions impacting your workplace.

Please note that this Guide is for informational purposes only and does not constitute legal advice. Every case is different, so we strongly recommend speaking to an experienced Employment Lawyer at our firm about your specific circumstances.

The content of this booklet is intended to provide general information on the subject matter and is not legal advice. Specialized legal advice should be sought with respect to your circumstances.

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