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Sexual Harassment in the Workplace



Accessibility and Convenience

Lancaster, Brooks & Welch LLP have offices in both St. Catharines and Welland which are conveniently located in the downtown core.

Regular office hours are Monday to Friday from 8:30am to 5:00pm.

We are happy to make appointments at other times to satisfy our clients' needs.

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There is no place for sexual harassment in today's workplace. This is not just politically correct. Under the Ontario Human Rights Code, sexual harassment is illegal and can expose an employer to fines, damages for humiliation and loss of dignity, physical or emotional distress, and a variety of other sanctions. In keeping with a more "gender neutral" approach to the workplace, sexual harassment in any form is inappropriate. Apart from legal and moral sanctions, it is costly. In 1998, a group of 160 companies were polled and estimated a total annual cost of \$7 million (US) as a result of productivity losses, absenteeism, staff turnover, and counselling arising from sexual harassment. The cost of damage to reputation is over and above that. To keep a workplace free of harassment, understand how the law defines it, then take active steps to prevent it from occurring.

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A Matter of Definition

The Courts and Human Rights Commission look at the conduct and its context to decide if it is harassment. Sexual advances, requests for sexual favours, and other verbal and physical contact of a sexual nature will constitute harassment when it is unwelcome, unsolicited and when submission to such conduct is either explicitly or implicitly a condition of employment (or will be used for employment decisions affecting the person). The "power" relationship between an employee and their superior is of special concern in this context. Similar conduct which unreasonably interferes with an individual's work performance or creates a hostile, intimidating or offensive atmosphere at work will be harassment. Leering, making sexually suggestive gestures, telling embarrassing sexual jokes, making repeated propositions or flirtations, or displaying sexually suggestive materials have been found to be harassment.

Stopping Harassment Before it Starts

An Ounce of Prevention:

Sexual harassment exists in the workplace and comes in various degrees. To let the problem persist is both counter-productive and illegal. Even without direct employer knowledge, there can be liability if the employer lacked "due diligence" in failing to prevent the problem from occurring in the first place. The following suggestions may help create a "climate" to discourage harassment.

Make it a Policy and Publicize it:

Let your staff know you take the issue seriously. Distribute a memo to all employees defining sexual harassment and have a written policy posted in the workplace.



Use a Simple Definition:

Define sexual harassment in terms that all employees can understand. Knowing the type of conduct that constitutes harassment helps discourage it and eases concern about boundaries of acceptable behaviour.

A Statement of Rights:

Confirm your employees' rights to a harassment-free workplace. Educating employees is especially important if there are language, ethnic, or cultural minorities who might not expect the protection provided by law. Rights are of no value if they are unknown.

How to say "No":

Help employees to deal with potential harassment situations themselves to nip offensive behaviour in the bud. Conduct that has the potential to become harassment can often be corrected.

Treat Matters Seriously:

Follow up employee complaints concerning fairness of performance appraisals or behaviour of supervisors. Managers may be unaware their behaviour is viewed as offensive. Keep notes of discussions in case further complaints are made involving the same supervisors, so you can see if a pattern is developing.

Ask Why They are Leaving:

Arrange exit interviews with employees who are resigning to discover their reasons for leaving. If sexual harassment appears to be all or part of the problem, give them information to make a formal complaint through your internal procedures, as an alternative to resignation.

Managers as Role Models:

Ensure that executives and managers are good role models. Casual comments can be more important than formal pronouncements. The workplace extends to lunches and work-related social gatherings as well.

Orientation:

In initial sessions with new employees, deal with the issue of sexual harassment and make it known the employer will not tolerate it, and that all complaints will be followed up.

Educational Seminars:

In a unionized environment, the union can play a significant role in either assisting or impeding management's efforts to avoid harassment. Explore the possibility of holding management/labour seminars to gain the co-operation of the union in dealing effectively with the issue.

Danger Signals:

Watch out for symptoms of the sexually-harassed person, including reduced productivity, psychological effects such as anger, fear, frustration and increased sick leave. Question sudden changes in evaluations of employees submitted by supervisors.

Be Proactive:

Approach employees if you suspect something. They may be reluctant to approach you, but by letting them know you are aware of negative changes, they may welcome the opportunity to share their concerns. Instruct victims on their rights, processes to file a formal complaint and where to get assistance.

Watch for Reprisals:

Employees who make complaints, or about whom complaints are made, can find themselves the butt of jokes or subject to other reprisals. Protect against this, especially during the investigation, by adopting a "firm but fair" tone.

Contact your lawyer should any situation arise in which you sense that you or your company is at risk of being sued.

The Investigation – Fairness and Damage Control:

There is no perfect way to investigate a complaint or a suspected harassment. Make sure you give the appearance of fairness, and follow certain basic rules. A proper investigation is more likely to produce a result that all parties can live with than one that is superficial or incomplete, and it will help protect you from claims or criticisms later.

Be Even-handed:

It is a manager's duty to respond in the same manner whether the alleged harasser is an employee working on an assembly line or a corporate executive.

Confidential:

Make sure the sensitivities of all concerned are respected. Although credibility must be established, investigations should be done as confidentially as possible. Keep the investigation and witness interviews in strict confidence, and instruct all parties to keep the matter confidential.

Don't Forget the Union:

If your workplace is unionized, try to involve the union in the investigation to reduce the risk of a public and perhaps emotionally damaging grievance arbitration being launched.



Employment Law Department

Civita M. Gauley
Leanne E. Standryk
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Human Rights Complaints and Wrongful Dismissal:

When a harassment allegation surfaces, the employer is often faced with an uncomfortable choice. If the allegation is believed and an offending employee fired or demoted, the company may be sued for wrongful (or constructive) dismissal. Alternatively, if the complaint is not well-founded, the employee may complain to the Ontario Human Rights Commission, which will conduct its own investigation, and may bring the matter to a Board of Inquiry. Either way, the company must spend significant time and money to defend itself.

Although there is no perfect answer, the consequences can be minimized by investigating fully and fairly, and communicating results clearly. If people feel they have been treated properly, regardless of the outcome, they will be less likely to proceed further. Of course, the best solution is to prevent the problem from occurring in the first place.

You Take the High Road...

Dealing appropriately with the issue of sexual harassment, even when it's not a problem in your workplace, will add further administrative burden to management. All the signs point to the benefits of setting up a policy before one is really needed. With a policy in place, practicing "due diligence" is good business today and a good defence, should one ever be needed, tomorrow!

Employment Law Department

Leanne E. Standryk: Ms. Standryk is the senior partner of the Firm's Labour, Employment and Sports Law Department. She acts for a variety of employers in the private, charitable, not for profit and public sector. She is experienced in the full range of employment and labour issues including employment contract negotiation, terminations, workplace restructuring, labour relations, collective bargaining, wrongful dismissal, workplace privacy issues, occupational health and safety, human rights and human resource policy development, etc. In addition to her negotiation and counsel experience, Leanne provides assistance to our Corporate lawyers regarding labour and employment matters that arise during the purchase and sale of a business. Leanne also acts for several sports organizations regarding contract negotiation, athlete appeals and risk management. She has experience before the SDRCC and has acted as a panel member regarding appeals in amateur sport.

Civita M. Gauley: Vita is a Partner at Lancaster, Brooks & Welch. She was called to the Bar in 2012 and is a member of the Labour & Employment team. Through her focus on detail, positive outlook, motivation and energy, Vita offers her clients great skills and experience.

Emily V. Keene: Emily is a proud Niagara resident, having moved to the region at a young age. Emily was called to the Ontario Bar in June 2014 and joined Lancaster, Brooks & Welch. Emily is committed to providing excellent legal services, including understanding the legal issues clients face, offering proactive approaches for resolution, and advocating with strong legal writing and communication skills.

The information provided in this brochure is designed to provide topical information of a general nature only. You may wish to discuss any specific matter with your lawyer and you should feel free to do so at any time. This material is provided for information purposes only, not as legal advice, and is not intended to be exhaustive of your rights under the relevant legislation.

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Investigate Thoroughly:

Obtain as much information about an incident as possible. Managers should quietly and objectively balance the evidence they have collected in order to distinguish between fact and innuendo.

Statements in Writing:

If possible, obtain written statements from witnesses. Managers should not, however, consider a refusal on the part of an alleged offender to provide a statement as an admission of guilt. Neither should the victim's unwillingness to complete a statement be considered reason to ignore a sexual harassment allegation.

Be Consistent:

Conduct investigations in line with the particular procedures set out in your own internal policies for dealing with sexual harassment.

Keep Records:

Maintain a well-documented written record of the investigation. This should include the investigator's notes, witness statements, and references to procedure followed. It will be difficult to recall details later if the matter proceeds to the Human Rights Commission or a Court, if careful records are not kept.

Weigh Credibility:

Resolve any credibility issues by considering independent witnesses or documents which substantiate one side or the other. Does either party have a motive to be less than candid? All available and relevant evidence must be considered in forming a conclusion.

Make the Punishment Fit the Crime:

Ensure that any discipline applied for sexual harassment is appropriate. Using a strictly progressive approach is not always suitable. Even a first offence can merit severe discipline and perhaps dismissal, depending on the severity of the situation.