

# Alberta OHS Workplace Violence and Harassment Investigation and Reporting ? Maintaining Confidentiality



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Bill 30 revisions to the Occupational Health and Safety Act (the "OHS Act") and *Occupational Health and Safety Code* (the "OHS Code") that took effect on June 1, 2018 have significantly changed the way workers, supervisors and employers must address workplace violence and harassment. The previous *Occupational Health and Safety Act* was silent with respect to violence and harassment. However, under the previous *Occupational Health and Safety Code*, workplace violence was considered a hazard and employers were required to develop a policy and procedures respecting potential workplace violence including providing workers with instruction to recognize, minimize/eliminate, respond to, report and investigate workplace violence.

The OHS Act now defines "violence" and "harassment" and both the OHS Act and the OHS Code have created new duties relating to violence and harassment for employers, supervisors and workers. Workers now have an obligation to refrain from causing or participating in violence or harassment, and both employers and supervisors have a duty to ensure that workers

are not subjected to or participate in these behaviours at the work site.

## **Workplace Violence**

The definition of violence under the previous OHS Code was restricted to threatened, attempted or actual conduct of a person that caused or was likely to cause physical injury. The new definition under the OHS Act includes both physical and psychological injury or harm, as well as domestic and sexual violence.

Section 1(yy) 'violence' whether at a work site or work-related, means the threatened, attempted or actual conduct of a person that causes or is likely to cause physical or psychological injury or harm, and includes domestic or sexual violence.

## **The Nature of Harassment**

Whilst violence in the workplace is likely to be a rare occurrence, the broad definition of harassment suggests that more behaviours are now likely to be considered harassment. The definition includes behaviours that go beyond the protections afforded by the *Human Rights Act*. Objectionable conduct may constitute harassment whether or not the victim belongs to a protected class.

Section 1(q) 'harassment' means any single incident or repeated incidents of objectionable or unwelcome conduct, comment, bullying or action by a person that the person knows or ought reasonably to know will or would cause offence or humiliation to a worker, or adversely affects the worker's health and safety, and includes

(i) conduct, comment, bullying or action because of race, religious beliefs, colour, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status, gender, gender identity,

gender expression and sexual orientation, and

(ii) a sexual solicitation or advance,

but excludes any reasonable conduct of an employer or supervisor in respect of the management of workers or a work site;

Section 37(1)(b) of the OHS Act requires employers to identify existing and potential incidents of violence and harassment and the measures that will be taken to eliminate, reduce or control those incidents. The amended Part 27 of the OHS Code requires employers to develop and implement a violence and harassment prevention plan, policy, and procedures.

### **Reporting and Investigating Violence and Harassment**

Pursuant to sections 40(1) and 40(2) of the OHS Act, if an injury or incident results in the death of a worker or hospital admission as an inpatient, the prime contractor or, if there is no prime contractor, the employer, must report the injury or incident to a Director of Inspection as soon as possible. Presumably, this would apply to an incident of violence or harassment. However, section 391.1 of the OHS Code creates some confusion; it seems to suggest that only sections 40(5)(b) to (d), (7) and (8) and 53 of the OHS Act apply to incidents of violence or harassment. As section 40(1) is excluded from this list, it is currently unclear whether this reporting obligation applies to incidents of violence and harassment.

Whether or not an incident of violence or harassment which results in the death of a worker or the worker's admission to hospital is notifiable to the Director under s40(1) , it is clear that, in relation to such an incident or any other injury or any other incident that has the potential of causing serious injury to a person occurs at a work site, the prime contractor or, if there is no prime contractor, the employer, must carry out an investigation into the circumstances

surrounding the injury or incident (pursuant to section 40(5)(b)) and must prepare a report outlining the circumstances of the injury or incident and the corrective action, if any, undertaken to prevent a recurrence of the injury or incident (pursuant to section 40(5)(c)). A copy of the report must be readily available and provided to an officer on demand.

## **Protection of Personal Information**

The reporting and investigation duties under section 40(5) initially appear to conflict with the maintenance of privacy necessary in the investigation of an incident of violence or harassment.

For example, under section 40(5)(e) a copy of the report must be provided to the Director of Inspection, the joint work site health and safety committee ('JWHSC'), or health and safety representative, if applicable, or, if there is no committee or representative, make it available to the workers once complete, and section 40(6) requires that the investigation must be conducted with the participation of the JWHSC or health and safety representative, if there is one at the work site.

Many victims of violence or harassment may be reluctant to report incidents if they believe their fellow workers will have access to the type of personal information that will be collected in an in-depth investigation; it is crucial that such information be kept confidential to the extent possible. Equally, in these types of allegations, the respondent's personal information should also be kept confidential, to the extent possible.

Therefore, as outlined in sections 390.1 and 390.5 of the OHS Code, employers should not disclose the circumstances related to an incident of violence or harassment or the names of the complainant, the person alleged to have committed the violence

or harassment, and any witnesses. There are exceptions, such as where necessary to investigate the incident or to take corrective action, or to inform the parties involved in the incident of the results of the investigation and any corrective action to be taken to address the incident; where necessary to inform workers of a specific or general threat of violence or potential violence; or as required by law. The employer should only disclose the minimum amount of personal information that is necessary to inform workers of a specific or general threat of violence or potential violence.

The protection of personal information is also addressed by section 391.1 of the OHS Code, which effectively carves out incidents of violence and harassment from the requirements to:

- report the time, place and nature of the incident to the Director of Inspection (s40(5)(a));
- provide a copy of the investigation report to the JWHSC, health and safety representative, or the workers (s40(5)(e); and
- ensure that the investigation is conducted with the participation of the JWHSC or the health and safety representative, if there is one at the work site (s40(6)).

Therefore, allegations of violence and harassment should be investigated and confidentiality maintained. The investigation report should be kept on file for at least two years in case an officer requests to see the report.

Employers should review their existing workplace violence policies to ensure that the addition of psychological harm or injury and sexual and domestic violence are adequately addressed. Employers may elect to develop separate policies and procedures to address the new harassment requirements or combine the issues into a single workplace violence and harassment policy.

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*Note\* this information is not intended to constitute legal advice and readers should not rely on it in substitution for obtaining specific legal advice from a lawyer.*