

How to Comply with New Federal Workplace Harassment and Violence Resolution Rules



The new resolution requirements are the toughest part of complying with Bill C-65.

Arguably, the toughest challenge posed by the new federal Bill C-65 OHS regulations which take effect on January 1, 2021 is complying with the new rules for resolving workplace harassment and violence complaints. While most of the other Bill C-65 changes are just tweaks, the resolution requirements call for implementing a whole new system for incident and complaint response that goes light years beyond where OHS laws have ever gone before. Although they cover only employers that are federally regulated, the new rules are something of a best practice that all Canadian employers should consider implementing to ensure swift, thorough and fair investigation and resolution of workplace harassment and violence situations. Here's how to create a policy to comply with the new C-65 requirements.

Get More Help with C-65 Compliance: Click here for a Checklist of all the things you must do to ensure compliance with the C-65 workplace violence and harassment rules that take effect on January 1, 2021.

What's At Stake

- 50% of Canadian women say they've experienced sexual harassment at work at some point in their career;
- Less than 30% of these women actually chose to report the conduct;
- 61% of the women who chose not to report cited fear of retaliation or being perceived as a troublemaker as the reason

Source: Insights West study conducted from November 22 to November 29, 2017

The duty of employers to investigate and resolve incidents of workplace harassment and violence has been a staple of OHS laws for over a decade. But they're not effective. This became clear in 2017 with the breaking of the Harvey Weinstein case and subsequent series of accusations of workplace harassment and abuse by men in high positions. As illustrated by the poll numbers cited above, perhaps the biggest problem is the continued reluctance of victims and witnesses to come forward and report misconduct to their companies.

Bill C-65 is designed to correct this problem by establishing a new system for resolving complaints that workers will be less hesitant to use.

The Designated Representative

The federal *Canada Labour Code* requires employers to appoint a supervisor to receive workers' complaints about violence, harassment and other OHS violations committed by the company. But what if the supervisor is the alleged wrongdoer? And what if the worker is uncomfortable reporting to management? Bill C-65 eliminates this stumbling block by requiring employers to appoint a person or work unit as a 'designated party' to whom employees can report when they don't trust their employers to give them fair shakes. Other key terms you need to understand to comply with the new Bill C-65 complaint resolution rules:

- **'Occurrence'**: An occurrence of harassment and violence in the workplace;
- **'Principal party'**: The worker or employer who's the object of an occurrence (in other words, the alleged victim); and
- **'Responding party'**: The person who's alleged to be responsible for the occurrence (the accused). in notice of an occurrence.

The Resolution Process

The process of resolving 'occurrences' unfolds in stages. At any point during the process, the principal party (PP) can end the process by notifying the employer or designated representative (DR) of his/her intention to do so. The process can also end via negotiation or conciliation, as we'll explain below.

Stage 1: PP or Witness Gives Notice of Occurrence

The process begins when the PP or a witness gives the employer or DR a written or oral workplace harassment and violence incident report, aka, 'notice of occurrence,' that lists:

- The name of the PP and responding party (RP), if known;
- The date of the occurrence; and
- A detailed description of the occurrence.

Witnesses (but not PPs) can provide a notice of occurrence anonymously. Notice of occurrence can't be provided if: (a) the RP is neither the employer nor an employee; (b) exposure to harassment and violence is a normal condition of the PP's work; and (c) the employer has measures in place to address that workplace harassment and violence.

Stage 2: Employer or DR Initially Reviews Notice of Occurrence

Whoever receives the notice of occurrence, whether the employer or DR, must initially review it. After initial review, the occurrence may be considered resolved if the notice of occurrence doesn't list the PP's name or other information making it possible to determine the PP's identity.

Stage 3: Employer or DR Notifies the Parties of Occurrence

Once a notice of occurrence is provided, the employer or DR who receives it must contact and notify the parties.

PP: The employer or DR has 7 days to notify the PP:

- That the notice of occurrence has been received;
- Where the notice is given by a witness, that he/she has been named or identified as the PP in a notice of occurrence provided by a witness;
- Of how to access the company's workplace harassment and violence policy;
- Of each step in the resolution process; and
- Of the PP's right to be represented during the resolution process.

Witness: If a witness provides the notice, the employer or DR has 7 days to contact the witness to notify him/her that the notice has been received (assuming the witness isn't anonymous).

RP: The employer or DR who receives must during the first occasion it contacts the RP regarding the occurrence, notify him/her:

- That he/she has been named or identified as the RP in a notice of occurrence;
- Of how to access the company's workplace harassment and violence policy;
- Of each step in the resolution process; and
- Of the RP's right to be represented during the resolution process.

Stage 4: Sides Must Seek to Negotiate Resolution

Starting no later than 45 days after a notice of occurrence is provided, the employer or DR, PP and, if contacted, RP, must make every 'reasonable effort' to resolve it by negotiation. 'Reasonable effort' is defined as including a review by the PP and employer or DR to determine whether the alleged conduct, assuming it really happened, would actually amount to workplace harassment and violence under the law. If they determine that it doesn't, the PP, RP (if contacted) and employer or DR can make a joint determination to this effect, which resolves the occurrence. But the negotiation option ends once the investigator issues his/her report.

Stage 5: PP and RP Can Resolve by Conciliation

The PP and RP also have the option to resolve the occurrence by conciliation via a neutral third party, provided that both sides agree on the process and third party. As with negotiation, the right to resolve by conciliation ends when and if the investigator issues a report.

Stage 6: PP Can Ask for an Investigation

Where an occurrence isn't resolved via negotiation or conciliation, an investigation must be performed if the PP requests it. The employer or DR must notify the PP and RP that an investigation is going to be carried out.

Stage 7: The Investigator Is Selected

It's up to the employer or DR to select the investigator.

Qualifications: To be chosen as an investigator, a person must provide the employer or DR, PP and RP a written statement indicating that he/she has no conflict of interest in the occurrence. Investigators must also have: (i) training in investigative techniques; (ii) knowledge, training and experience

relevant to workplace harassment and violence; and (iii) knowledge of the OHS Act, the *Canadian Human Rights Act* and any other relevant legislation.

Selection Method: The investigator must be a person named on the list jointly created by the employer and joint health and safety committee (JHSC) or health and safety representative (HSR) acting as what's called 'applicable partner.' If there is no such list, the employer or DR, PP and RP must agree to the person selected to act as investigator. Any of the parties can propose an investigator, provided that they notify the others of the person's qualifications. If the sides can't reach agreement within 60 days after the employer or DR provides the notice of investigation, the investigator must be a person that the Canadian Centre for Occupational Health and Safety (CCOHS) identifies as having the required knowledge, training and experience.

Stage 8: The Investigator Makes Their Report

Once the employer or DR provides all of the relevant information, the investigator must investigate the occurrence and create a report that includes:

- A general description of the occurrence;
- Their conclusions, including with regard to the workplace circumstances that contributed to the occurrence; and
- Their recommendations to eliminate or minimize the risk of a similar occurrence.

The investigator's report must not reveal, directly or indirectly, the identity of persons who are involved in an occurrence or the resolution process. The employer must provide a copy of the investigator's report to the PP, RP, the JHSC or HSR and, if they were provided with a notice of occurrence, the DR.

Stage 8: Employer Implements Investigator's Recommendations

The employer must review the investigator's recommendations and decide jointly with the JHSC or HSR which ones to implement.

Stage 9: The Process Ends

The employer can treat the occurrence as complete when 1 of 3 things happens:

- Where the occurrence requires the employer and JHSC or HSR to review the workplace assessment, i.e., the process requiring evaluation of workplace-specific harassment and violence hazards and selection of controls to prevent them, when that review and necessary updates are carried out;
- The occurrence is resolved after initial review under Stage 2 or by negotiation or conciliation; or
- If an investigator issues a report, the employer implements the recommendations jointly agreed to with the JHSC or HSR.

Time Limits for Resolution

The employer must ensure that the resolution process is completed within 1 year after the day on which notice of the occurrence is provided. If the PP or RP is temporarily absent from work for more than 90 consecutive days after the day on which notice of the occurrence is provided, the employer must ensure that the

resolution process is completed within whichever of the following comes later:

- 1 year after the day on which notice of the occurrence is provided; and
- 6 months after the day on which the party returns to work.

Monthly Status Updates

Last but not least, for each notice of occurrence it receives, the employer or DR must provide monthly updates on the status of the resolution process to:

- The PP, starting on the first month after the month in which the notice is provided and ending on the month in which the resolution process is completed; and
- The RP, beginning on the first month after the month in which the RP is first contacted by the employer or DR about the occurrence and ending on the month in which the resolution process is completed.

What To Do

Admittedly, that's a lot of things to keep track of. The good news is that we've incorporated all of these requirements into a [policy template](#) posted on the HRI website that you can use to establish a compliant harassment and violence occurrence resolution system at your own workplace. The resolution process is actually part of a broader policy addressing all of the new C-65 requirements. (See Section 10 of our Policy)