

How to Protect Your Company Against Risk of Liability for Reprisals



Canadian OHS laws are based on a theory of collective responsibility in which all of the parties involved, including the workers themselves, are expected to play a role to keep the workplace healthy and safe. That's why workers are allowed to refuse dangerous work, participate in safety committees, and exercise other rights essential to their safety. This is also the reason that [OHS laws in every part of the country include a provision that bans employers from taking or threatening reprisals](#) against workers for exercising their OHS rights. Here's a quick briefing of what OHS coordinators need to know to ensure their companies don't engage in illegal reprisals.

What a Reprisal Is

"Reprisal," or as it's called in some provinces "discriminatory action", means taking or threatening to take a harmful action against a worker in retaliation for engaging in legally protected activities. Reprisal may also be the result of indirect action, such as where it's committed by a manager, supervisor, or other company representative acting on the company's behalf.

How Reprisal Prohibitions Are Enforced

Unlike most OHS requirements, reprisal enforcement action is initiated not by government officials but workers themselves. Specifically, workers who feel they've been the victim of reprisal must either seek help from their union or file a written complaint with the government agency that administers the province's OHS laws within a certain period ranging from 21 days (Yukon) to one year (Nova Scotia), depending on the province. The agency must then determine whether a reprisal occurred and, if so, what the punishment should be, which may include not just penalties for violating the OHS laws but also orders requiring the employer that committed the violation to:

- Reinstate the terminated worker to the former position under the same employment terms and conditions that applied before the reprisal occurred.
- Repay the salary, wages, and benefits the worker lost as a result of the reprisal.
- Remove any reprimands, warnings, or other disciplinary actions taken as part of the reprisal from the worker's employment record.

The 3 Elements of a Reprisal Claim

Of course, penalties come into play only if the employer is actually liable. To find an employer liable for reprisal, the agency handling the complaint must determine that 3 things are true:

1. The worker engaged in some form of legally protected activity.
2. The employer took some form of discriminatory or adverse action against the worker.
3. The employer took that discriminatory or adverse action

because the worker engaged in protected activity.

Disproving any one of these elements is all that an employer has to do to make out a successful legal defense.

1. Worker Engaged in Protected Activity

First, workers must show that they engaged in some form of activity that the OHS laws list as being protected from reprisal. While the scope of protected activity varies slightly by province, it typically includes:

- Exercising an OHS right, such as refusing dangerous work or serving on a JHSC or as a workplace safety representative.
- Testifying, cooperating with or otherwise participating in an OHS inspection, investigation, or proceeding.
- Reporting safety concerns or OHS violations to the employer or its agent, JHSC/safety representative, union, or government officials.
- Complying with the law.
- Asking the employer to comply with the law.
- Otherwise attempting to have the law enforced.

2. Employer Took Discriminatory Action Against Worker

Employees must next show that the employer took or threatened to take some kind of adverse or discriminatory action against them after they engaged in the protected activity. Examples:

- Termination and other forms of discipline.
- Transfer or reassignment to less favorable duties or work conditions.
- Any other discrimination regarding compensation, terms, conditions, or privileges of employment, such as taking away a worker's preferred parking space.

3. Employer Took the Discriminatory Action Because the Worker Engaged in Protected Activity

Proving the first 2 elements is usually the easy part. Example: Workers who get fired **after** filing a workplace harassment complaint claim that they were fired **because** of the complaint. Of course, that may or may not be true. Maybe the employer fired the worker for poor performance, absenteeism, or another legitimate cause that had nothing to do with the harassment complaint. That's why the third element—the nexus between the protected activity and the discriminatory action—is where most reprisal cases are won and lost.

The bad news for employers is that in most jurisdictions (New Brunswick, Northwest Territories, Nunavut, Prince Edward Island, and Québec are the exceptions) once the worker proves elements 1 and 2, the burden shifts to the employer to prove that the discriminatory action the worker suffered **was not in reprisal** for engaging in the protected activity. In other words, the employer must show that it took the action for a non-related, legitimate reason and **solely** for that reason. The employer will be found guilty if reprisal was a factor even if it wasn't the only factor in the decision.

How to Avoid Liability for Reprisals

There are 2 things you can do to protect your company against risk of liability for reprisals under not only OHS but other laws that include prohibitions on reprisals, including the Criminal Code, employment standards, labour relations, and human rights acts:

Strategy 1: Implement a Non-Retaliation Policy

Create a clearly worded [policy](#) reassuring workers that you won't take or allow anybody else to take reprisals against them for exercising their OHS rights or engaging in other forms of protected activity. **Caveat:** Talk is cheap. A non-retaliation policy, no matter how eloquently worded, won't do much good if nobody believes it. In fact, having such a policy in an oppressive workplace borders on the grotesque. There needs to be trust and a recognized commitment to compliance on the part of management. A non-retaliation policy can't create this by itself; but it can contribute to its creation.

Strategy 2: Be Prepared to Respond to Employee Reprisal Complaints

If a worker does charge you with reprisal, you must [investigate](#) the situation and explain why you took the adverse action. This is your chance to knock out any of the 3 required elements from the worker's case; it's also a chance to shoot yourself in the foot. Misstating or omitting facts can arouse suspicions and hurt your chances of getting the case dropped.