DENTONS

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

Dentons' 26th annual Ottawa employment and labour law webinar

Thursday, September 11, 2025

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Agenda

Topic	Speakers
Improving performance in performance improvement	**Stephanie Lewis** - Counsel, Ottawa
What's new and exciting? Employment case law in 2025	**Catherine P. Coulter** - Counsel, Ottawa
Legislative updates: What's unfolding and what's next?	**Maggie Sullivan** - Associate, Ottawa
The employer checklist: Keeping track of everything you need to keep track of	**Colleen Hoey** - Counsel, Ottawa
The employer guide to workplace investigations	**Julia Dales** - Senior Associate, Ottawa

Housekeeping

- This presentation is being recorded and will be distributed post event.
- Questions? Drop them in the Q&A feature and our speakers will do their best to answer as many as they can.
- For accreditation purposes, please note this session is eligible for 120 Substantive minutes with the Law Society of British Columbia; 120 Substantive minutes with the Law Society of Ontario; and, in our view, meets the CLE requirements of the Barreau du Québec. A contact email will be provided in the post event email to receive a certificate.
- This program has been approved for 2.5 Continuing Professional Development (CPD) hours with the Human Resources Professionals Association (HRPA).

Improving performance in performance improvement

Agenda

1. Why is it important to document employee performance?
2. The legal test for proving incompetence
3. When to start discussing and documenting performance concerns
4. Risks with waiting to address performance
5. Tips for effectively documenting performance
6. Performance Improvement Plans – pros and cons
7. Takeaways

Why are we here?

Why is it important to document employee performance?

Employee terminations most frequently occur due to performance issues.

Federally regulated employers:

- Just cause is required to terminated the employment of an employee. Establishing just cause requires documentation.

Provincially regulated employers:

- Employees can be terminated at any time and for any reason except a protected ground under Human Rights legislation or as a reprisal against an employee for exercising legitimate employee rights under statute. No need to establish just cause to terminate.
- However, if performance is not documented, there is a risk of claims being made that the employee was really terminated due to a protected ground under Human Rights legislation, or in reprisal for making a complaint about harassment.

Why are we here?

Why is it important to document employee performance?

With this in mind, it is important to document performance issues and to do so being mindful of what is required at law to establish cause for termination based on incompetence.

In order to establish cause based on incompetence:

- The conduct at issue must be “real incompetence”, not simple dissatisfaction with performance or concerns about future conduct.
  - - **AND -**
- The onus for demonstrating cause lies with the employer.
- *Geluch v. Rosedale Golf Assn.,* [2004] O.J. No. 2740

The “legal” test for proving incompetence

To dismiss an employee for incompetence, the employer must show, on balance, the following:

1. The level of job performance that it required and that the level required was communicated to the employee.
2. That it gave suitable instruction to the employee to enable him to meet the standard.
3. That the employee was incapable of meeting the standard.
4. That there had been a warning to the employee that failure to meet the standard would result in his dismissal.

NOTE: The standard for competence is an objective one.

Kirby v. Amalgamated Income Limited Partnership, 2009 BCSC 1044 (CanLII)

When to start discussing performance issues?

Managing employees means giving advice on what they can do better, giving praise when praise is due, but also letting employees know when they're not hitting the mark, and helping them to get there.

It's never too early to start discussing performance, and it should be front and centre starting with the probationary period.

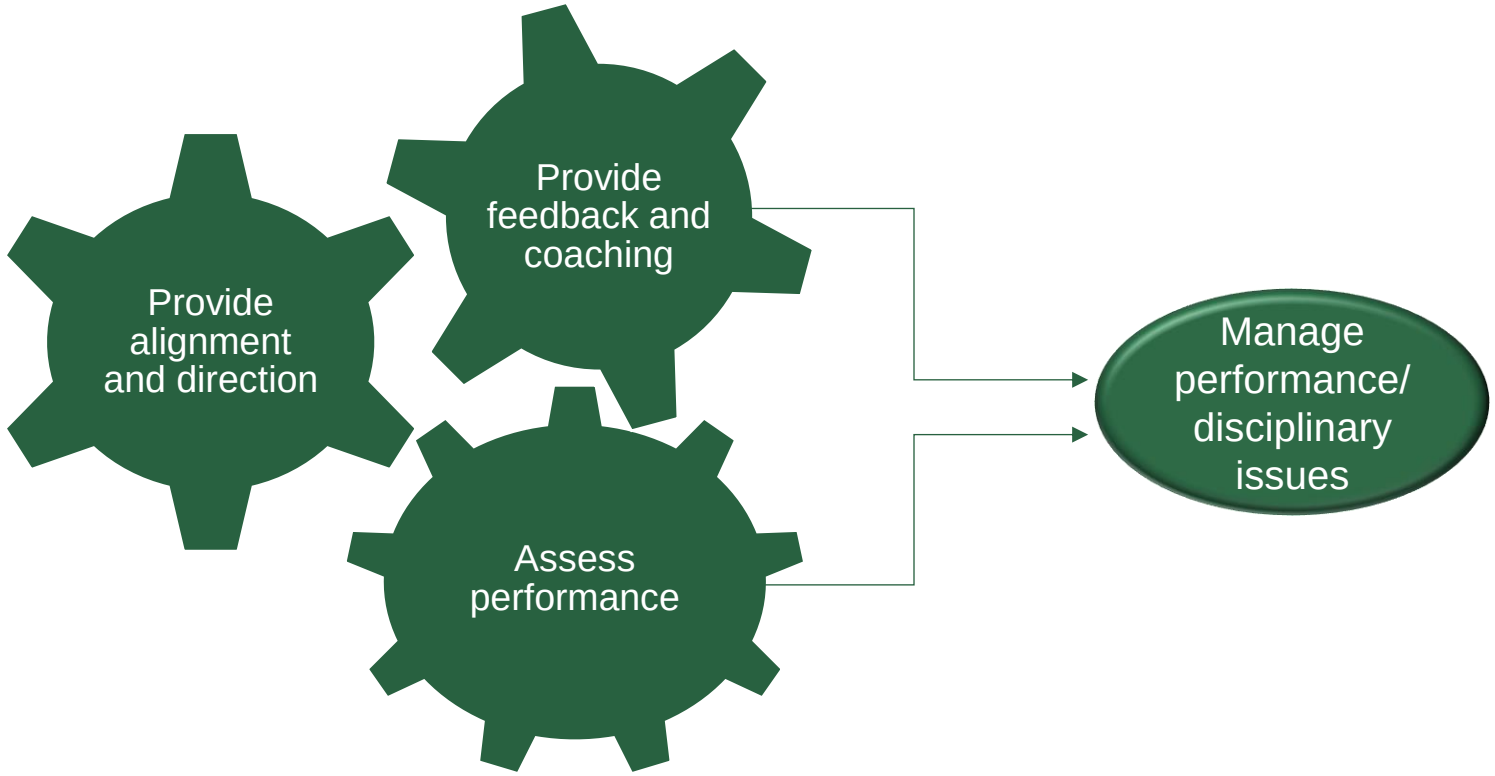
Discuss and document performance issues as they occur (not weeks or months later).

Risks with waiting to discuss performance

- Employees have no reason to believe that they are not performing as required.
- The natural assumption of the employee upon termination of employment is that there must be a hidden reason for the termination, such as discrimination or retaliation.
- Reasons managers don't like to performance manage:
    1. Telling an employee that they are not performing is not pleasant.
    2. Performance management is extra work.
    3. Fear of being accused of harassing.

BUT, it gets even more difficult if it's not addressed as it occurs.

How performance improvement fits with overall performance management of employees



Tips for documenting performance

- KISS (Design principle first noted by the U.S. Navy in 1960)

  ► KEEP IT SIMPLE STUPID

- Anything written is fine, but email is best (date and time confirmation).
- The goal is to improve performance - not scare the employee.
- Remember you are writing for the record.
- Summarize negotiated terms, warnings issued, specific performance measures reviewed, performance objectives and goals.
- Document the facts, not opinions or emotions.

Tips for documenting performance (con’t)

- Include supporting material – customer complaint letters, timecards, email correspondence with HR
- Comment on performance issues for as long as they persist.
- Offer assistance to the employee.
- Provide substantive goals and dates by when they should be met.
- Be clear in the final warning – “If your performance does not significantly improve, your employment will be terminated for cause”

PIP Pros and Cons

Pros:

→ Provides the employee with a clear summary of performance issues, sets out expectations going forward, and gives a timeline for improved performance.

→ In the event of litigation, it's a clear record of what has transpired.

Cons:

→ Can lead to stress and anxiety → disability leave

→ Employee refusal to agree with PIP or to sign PIP

→ Employer needs to carefully monitor and assist with the performance management process.

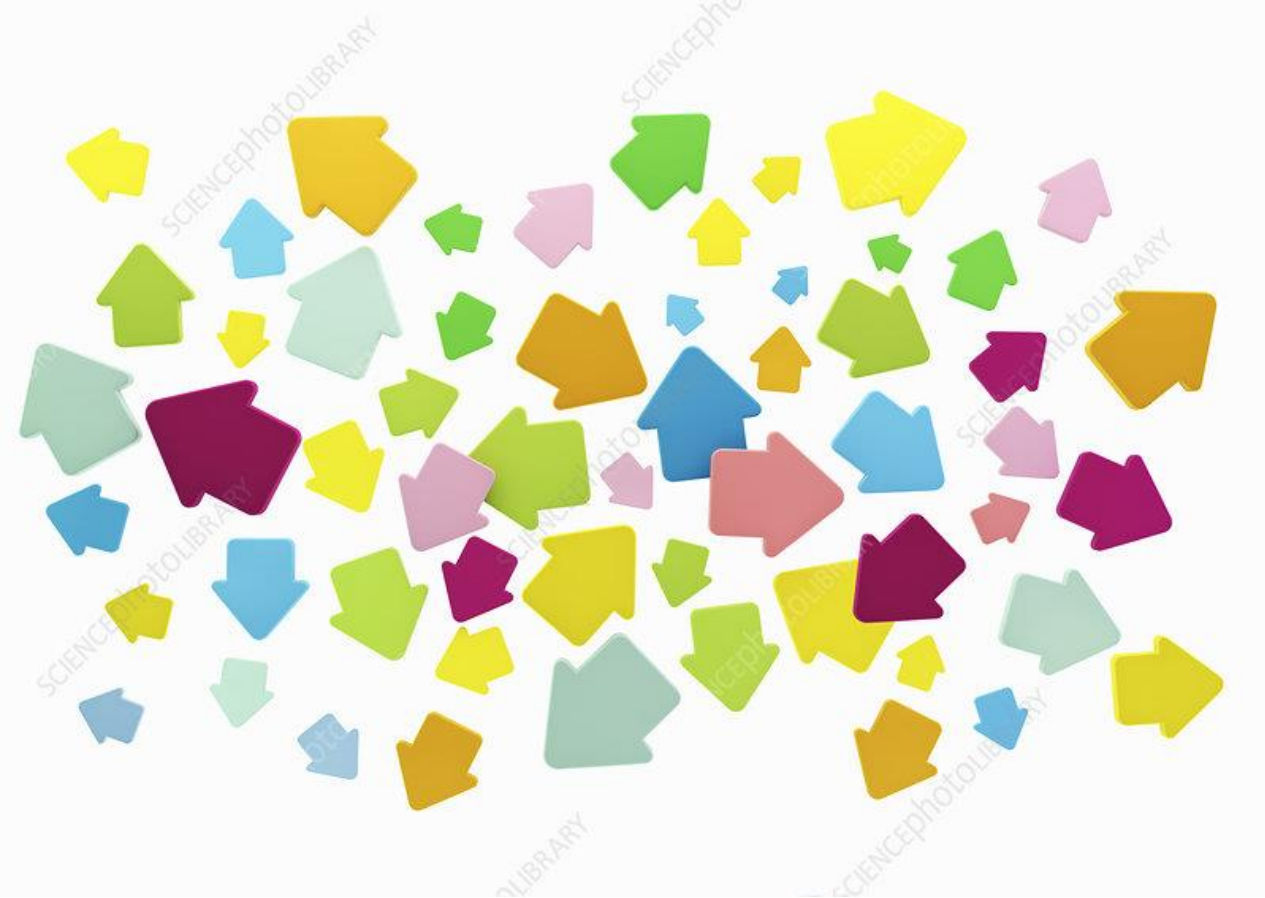
Takeaways

1. In order to establish performance-based cause for termination of employment, documentation is required.
2. This documentation should be provided promptly as performance issues arise and drafted clearly, as though it will be read by others.
3. The consequences of failure to improve should be drafted clearly and unambiguously.
4. While it is difficult to establish performance-based cause, employers are able to take calculated risks even in the absence of a perfect written performance improvement record.

What’s new and exciting? Employment case law in 2025

Termination provision confusion

Contradictory Canadian case-law



Termination law 101 refresher

- Canadian employees are entitled to reasonable notice or pay in lieu when terminated without cause.
- The starting point for determining notice is applicable employment standards legislation in the province in which the employee is employed (approximately 1-2 weeks of total compensation per year of service).
- Employees can be limited to those statutory entitlements, but only if they are subject to an employment agreement with a properly drafted termination provision.
- If there's a problem with the termination provision, courts will instead award common law notice to the terminated employee. Common law notice is a discretionary judicial amount determined with reference to a number of factors which are fact-specific to the employee (i.e. employee age, length of service, positions, seniority and ability to find comparable new employment).
- Common law notice is generally at least 1-2 months of total compensation per year of service, and often higher.
- Per *Waksdale v. Swegon* (2020), an invalidity anywhere in a termination provision will void an otherwise valid termination provision.

Dufault v. Ignace

The first of the “termination at any time” cases

- In February 2024, the Ontario court in the case of *Dufault v. Ignace* stated that if you have a termination provision which states that an employee may be terminated without cause “at any time”, the “at any time” language will make the termination provision invalid and unenforceable.

  *“The Township may **at its sole discretion** and without cause, terminate this Agreement and the Employee’s employment thereunder **at any time** upon giving to the Employee written notice as follows…”*

- *Dufault* was upheld by the Ontario Court of Appeal in December 2024 for different reasons.

Baker v. Van Dolder's Home Team

- In April 2025, the *Baker* decision upheld the law in *Dufault v. Ignace* on the basis that the words termination "at any time" may undercut the Ontario *Employment Standards Act, 2000* and therefore will be interpreted to strike down the entire termination provision.

  Termination without cause: we may terminate your employment ***at any time****, without just cause…"*

- *Baker v. Van Dolder's Home Team* has been appealed to the Ontario Court of Appeal and leave to intervene has been granted to the Ontario Chamber of Commerce. Intervention is quite rare in appeals to Ontario's highest court.

Jones v. Strides Ontario

- Also in April, a different Ontario court in the decision of *Jones v. Strides Ontario* looked at the *Dufault* decision and held that the presence of the words “at any time” in a termination provision, in the absence of the words “sole discretion” (which were found in *Dufault*), do not contract out of the ESA.

  *“The Organization may terminate your employment without cause **at any time** upon providing you with the following: Advance notice, or payment in lieu, in accordance with the Employment Standards Act, 2000 (“ESA”) and any other payments required by such legislation including severance pay, and as well as continuing to provide benefits (which includes participation in the group RRSP) during the applicable statutory notice period; plus…”*

- The court in *Jones* ultimately struck down the termination provision, but for a completely unrelated reason.

Li v. Wayfair Canada

- In July the court in *Li v. Wayfair Canada* ignored the *Dufault* and *Baker* cases on the basis that the termination provision in Li was “distinguishable”.

  “After your probationary period concludes, in the absence of Cause, the Company may terminate your employment ***at any time and for any reason****…”*

- And the difference is what?

- No surprise, *Li* has also been appealed to the Ontario Court of Appeal.

Chan v. NYX Capital Corp.

- In August of this year, the court in *Chan v. NYX Capital Corp*. found that termination provisions containing the words “termination at any time” or “termination at any reason” are invalid and unenforceable.

  The first three months of your employment are probationary, during which time the Company may terminate your employment ***at any time and for any reason*** *at its discretion, without notice or pay in lieu of notice, or other obligation.*

- The rest of the termination clause had the “termination at any time” language and was therefore void and unenforceable.
- The probationary clause is noteworthy because: (i) it also contained the “at any reason” language; and (ii) it proves that any part of a termination provision can invalidate the provision as a whole.
- This case has probably (and unfortunately) the best judicial analysis on this issue.

Henderson v. Slavkin

- And finally, because we're not already confused enough, here's a reminder that back in 2022, the Ontario court came to the decision that "termination for any reason" language was absolutely fine.

  "Your employment may be terminated without cause ***for any reason*** *upon the provision of notice equal to the minimum notice or pay in lieu of notice and any other benefits required to be paid under the terms of the Employment Standards Act, if any."*

- A distinction without a difference, no?

Bertsch v. Datastealth Inc.

The new gold standard?

- **Termination of Employment by the Company:**
  - *If your employment is terminated with or without cause, you will be provided with only the minimum payments and entitlements, if any, owed to you under the Ontario Employment Standards Act, 2000 and its Regulations, as may be amended from time to time (the "ESA"), including but not limited to outstanding wages, vacation pay, and any minimum entitlement to notice of termination (or termination pay), severance pay (if applicable) and benefit continuation. You understand and agree that, in accordance with the ESA, there are circumstances in which you would have no entitlement to notice of termination, termination pay, severance pay or benefit continuation.*
  - *You understand and agree that compliance with the minimum requirements of the ESA satisfies any common law or contractual entitlement you may have to notice of termination of your employment, or pay in lieu thereof. You further understand and agree that this provision shall apply to you throughout your employment with the Company, regardless of its duration or any changes to your position or compensation.*

Key takeaways

1. Drafting an enforceable termination provision which will remain enforceable over time is very difficult, and despite the various cases this year, this is an area of the law which remains difficult and unpredictable.
2. Courts will usually do whatever they can to invalidate a termination provision in order to award employees greater notice of termination.
3. Employment agreement templates should be reviewed annually and updated as needed.

Brocklehurst v. Micco Companies Limited

- An interesting recent Nova Scotia case…

  Termination Without Cause:

  Your employment may be terminated by Micco without cause, upon provision to you of the following payments: (i) any portion of the annual salary and accrued vacation pay, if any, that has been earned by your [sic you] prior to the date of termination by [sic, but] not yet paid; (ii) continued participation in Micco group health plan for such time as may be required under Nova Scotia Labour Standards legislation; and (iii) only such minimum notice of termination, or pay in lieu thereof, **and severance pay (if applicable) to which you are entitled under the Nova Scotia Labour Standards legislation.**

- There is no statutory severance in N.S. Be aware of and ensure that ambiguities are avoided if you use national employment agreement templates.

Miller v. Alaya Care Inc.

The new test for employee inducement?

The Ontario court judge listed the following factors to consider when determining whether or not there was inducement:

(i) the reasonable expectations of both parties;

(ii) whether the employee sought out work with the prospective employer;

(iii) whether there were assurances of long-term employment;

(iv) whether the employee did due diligence before accepting the position by conducting their own inquiry into the company;

(v) whether the discussions between the employer and prospective employee amounted to more than the persuasion or the normal “courtship” that occurs between an employer and a prospective employee;

(vi) the length of time the employee remained in the new position, the element of inducement tending to lessen with the longevity of the employment; and

(vii) the age of the employee at termination and the length of employment with the previous employer.

Ursic v. Country Lumber (B.C.)

New “dependent contractor” decision

- Contractor Borly Holdings was a company owned by Ursic which provided delivery services exclusively to Country Lumber for 16 years.
- There was no written contractor agreement between the parties.
- The nature of Borly’s work precluded Borly from providing services to other companies.
- Borly’s drivers were subject to oversight and occasional discipline by Country Lumber.
- On the other hand, Borly filed corporate taxes on its fees for services, owned and maintained its own trucks, paid its own expenses, and hired its own drivers.
- The courts made a finding of dependent contractor status due to the economic reliance, long-term exclusivity, and operational control Country Lumber had over Borly. 10 months pay in lieu of notice granted.

Lischuk v. K-Jay Electric Ltd. (Alberta)

Employee equity rights post termination

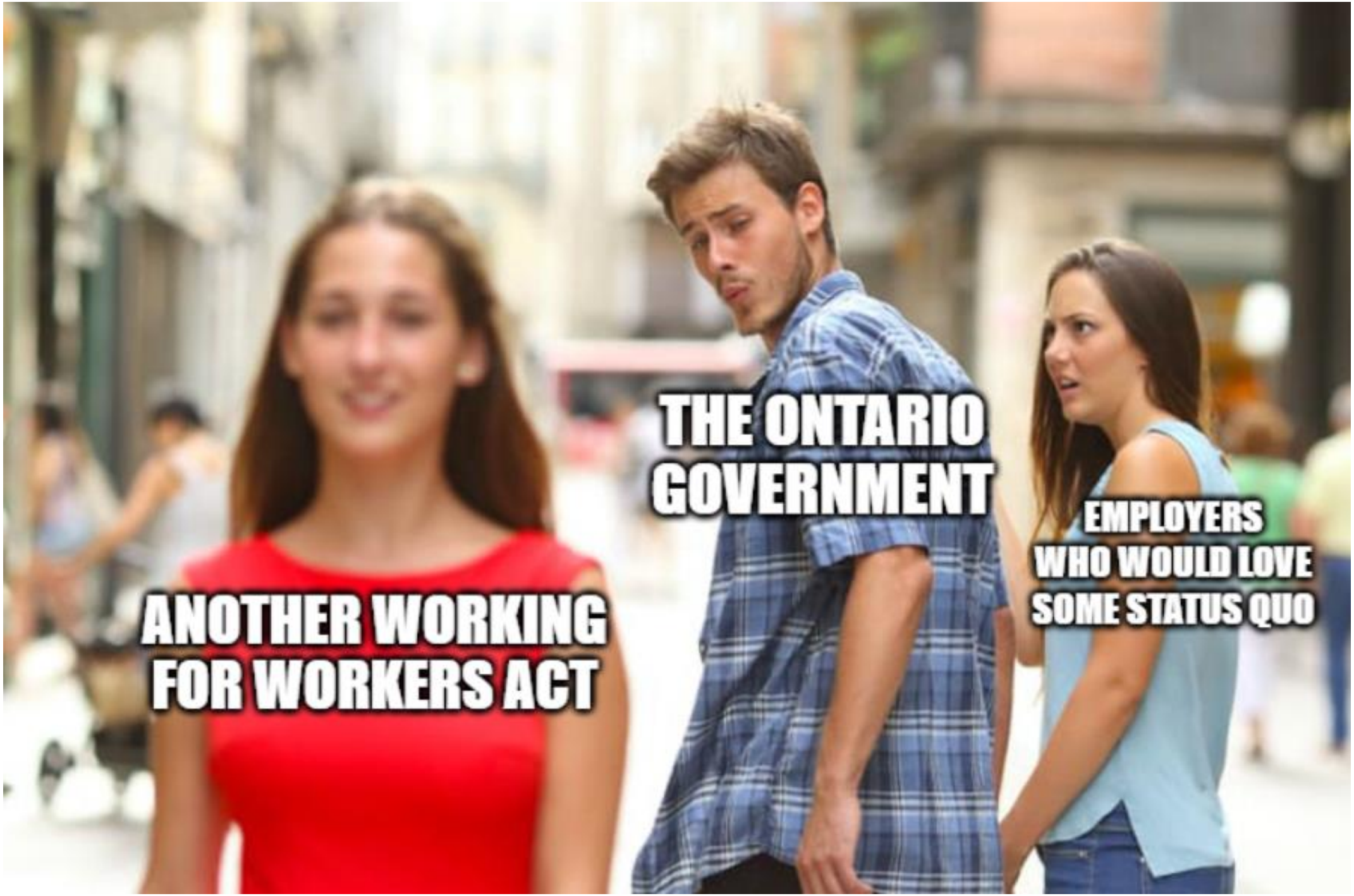
- Lischuk was a major shareholder of the company under its Unanimous Shareholders Plan and received significant bonuses based on his percentage shareholdings. Those bonuses ended effective as of his termination date.
- The Alberta court rejected the Ontario court decision in *Mikelsteins v. Morrison Herschfield* and decided to instead follow the Supreme Court of Canada's direction in the case of *Matthews v. Ocean*, where employment is deemed to terminate at the end of the employee's statutory notice period.
  - The court stated the following: ***"****I disagree that an individual shareholder, whose ability to hold shares is tied to their employment in any fashion, can be dealt with simply as a corporate law matter. This places the interests of the corporate employer above those of the employee, which is not consistent with the balance between employees and employers established over decades of employment law, a balance that is maintained by the required analysis set out in Matthews."*
- Apart from receiving a 26 month notice period, Lischuk received almost $1 million for the increased value of his equity over the full notice period.

Wigdor v. Facebook (Ontario)

Employee equity rights post termination – a different conclusion

- Under the terms of the company's RSU agreement, the plaintiff's RSU's were forfeited as of the date of notice of termination.
- *Wigdor* is considering an appeal to the Court of Appeal.
- The nub of the argument in Wigdor centred on whether the language around RSU forfeiture breached the ESA. Section 60(1) requires all "terms and conditions" of employment to be continued during the statutory notice period if an employee is working out their notice period, but that language is missing from section 61(1), which applies if an employee is provided with pay in lieu of notice. The court ultimately hung its hat on that distinction in order not have to continue the RSU vesting.

Legislative updates: What's unfolding and what's next?


THE ONTARIO GOVERNMENT
EMPLOYERS WHO WOULD LOVE SOME STATUS QUO
ANOTHER WORKING FOR WORKERS ACT

A recap of 2024

As you may know…

- Since **June 21, 2024**, employers are required to enter into a written agreement with an employee if they intend to pay their vacation by any method other than as a lump sum prior to the employee commencing vacation.
- Since **October 28, 2024**, employers are prohibited from requiring an employee to provide a certificate from a qualified health practitioner as evidence of their entitlement to ESA sick leave.
- Since **October 28, 2024**, the OHSA has explicitly confirmed that the protections under that Act apply to remote work (i.e. “telework”). As well, the definitions of “harassment” and “sexual harassment” were amended to explicitly include harassment that occurs in a workplace “virtually through the use of information and communications technology.”.
- Other legislative amendments already in force include an expansion of the definition of “employee”; increased fines for violations of the ESA and the OHSA; the requirement for a written policy on “tip-pooling”; requirements for PPE and clean washroom facilities, and more.

What's new and now for 2025?

Job protected long-term illness leave

- In force June 19, 2025.
- Ontario employees with at least 13 weeks of service are entitled to take up to 27 weeks of long-term illness leave in a 52-week period.
- An employee will qualify for long-term illness leave if:

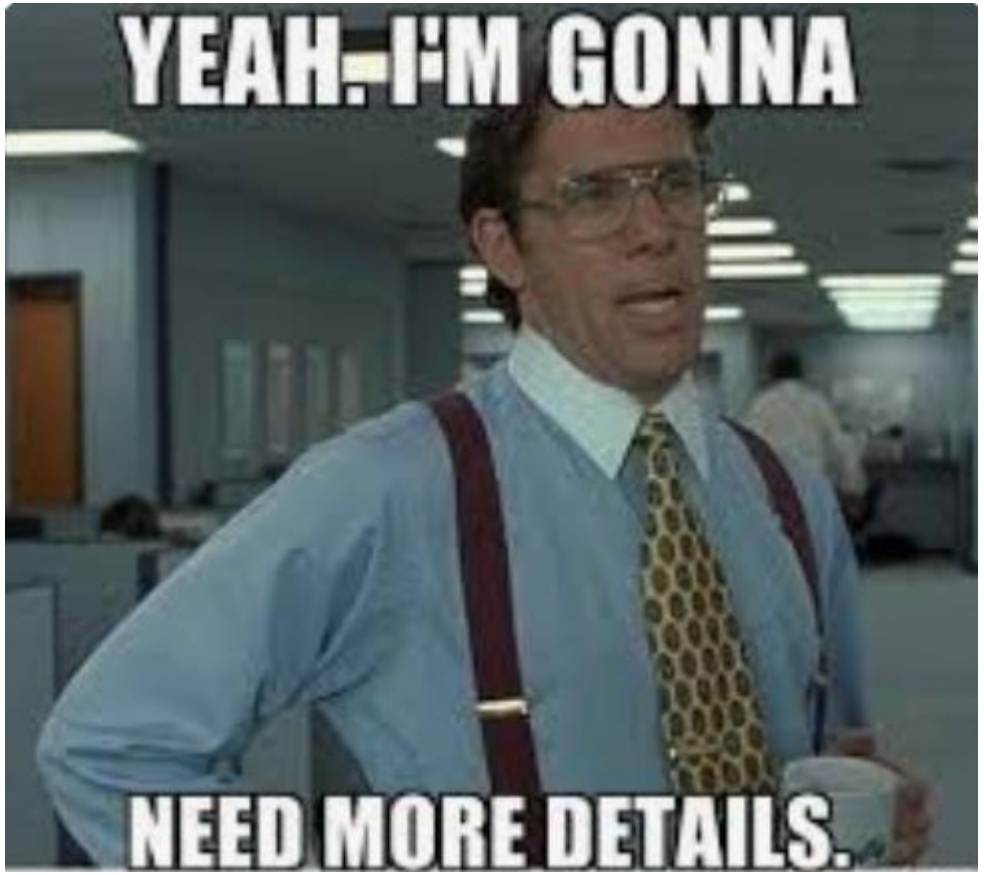
1. the employee will not be working because of a "serious medical condition"; and
2. a "qualified health practitioner" issues a certificate that (i) states that the employee has a serious medical condition and (ii) sets out of the length of time the employee will not be working because of the condition.

- "Serious medical condition" is not defined in the legislation.
- "Qualified health practitioner" is defined as a physician, registered nurse or psychologist.

- From a practical standpoint, this will likely not materially affect the way most employers do business, as employers are already required to accommodate employees with medical issues which constitute a "disability" under human rights legislation.

What’s new and now for 2025?

Prescribed information to be given to employees at hire



- As of July 1, 2025, employers must provide new hires with the following details before their first day of work (or as soon as practicable thereafter):
  - Legal and operating name of the employer;
  - Contact information, including address and key contacts;
  - Anticipated work location;
  - Starting wage, pay period and pay day;
  - General description of initial hours of work;
- Often, the best way to satisfy this requirement is to ensure that all of the foregoing is addressed in your employment agreements.

Still to come in 2026

Publicly advertised job postings

- As of January 1, 2026, employers must comply with the following as it concerns publicly advertised job postings:
  - Include compensation details;
  - Disclose the use of Artificial Intelligence;
  - Do not include “Canadian experience” requirements; and
  - Indicate vacancy status.
- “Publicly advertised job posting” is defined as “an external job posting that an employer or a person acting on behalf of an employer advertises to the general public in any manner…” subject to exclusions.
- Employers must also (i) retain copies of job postings and application forms for three years after they are removed, and (ii) retain records of information provided to applicants interviewed for a position for three years.

Still to come in 2026

Advising applicants of the outcome of an interview

- As of January 1, 2026, employers must also, within 45 days of an applicant's job interview, advise the applicant of the outcome of that interview.
- Note that this requires an actual "interview", being "a meeting in person or a meeting using technology, including but not limited to teleconference and videoconference technology, between an applicant who has applied to a publicly advertised job posting and an employer or a person acting on behalf of an employer where questions are asked and answers are given to assess the applicant's suitability for the position but does not include preliminary screening before the selection of applicants for such a meeting".

What’s next?

Placement of a child leave

- Will come into force “on a future date to be announced”.
- When in effect, this new “placement of a child” leave will provide employees with at least 13 consecutive weeks of service with up to 16 weeks of leave without pay triggered by the placement or arrival of a child into the employee’s custody, care and control for the first time through adoption or surrogacy.
- The placement of a child leave is largely designed to mirror the ESA’s pregnancy leave provisions and would be in addition to parental leave that is already available to new parents in adoption and surrogacy situations.
- Consider your top-up policies.

What's next?

Working for Workers Seven Act, 2025

- On May 28, 2025, Ontario tabled its latest "Working for Workers" Act, being the *Working for Workers Seven Act, 2025* (Bill 30). If passed, key changes will include:
  - A new requirement on employers operating a "job posting platform" to have a procedure in place for users to report fraudulent postings, and a policy addressing how fraudulent postings will be addressed;
  - Another new unpaid leave, being 3 days of unpaid leave for employees' part of a mass termination for the purpose of allowing them to engage in job searching, interviewing and training
  - Flexibility for a temporary layoff longer than 35 weeks, with the approval of the Director of Employment Standards; and
  - Additional penalties under the *Occupational Health and Safety Act*, and the *Workplace Safety and Insurance Act, 1997*.

What else?

Digital Platform Workers' Rights Act, 2022

- New statute in force as of July 1, 2025.
- The *Digital Platform Workers' Rights Act, 2022* establishes minimum wage and other rights for workers who perform "digital platform work".
- "Digital Platform Work" is defined as "the provision of for payment ride share, delivery, courier or other prescribed services by workers who are offered work assignments by an operator through the use of a digital platform."
- An "operator" is then defined as "a person that facilitates, through the use of a digital platform, the performance of digital platform work by workers," but expressly excludes temporary help agencies.

Beyond Ontario

Legislative updates across Canada – Federally regulated employers

- As of February 1, 2024, federally regulated workers who are terminated without cause are now entitled to graduated notice of termination commensurate with their years of service.
- As of June 20, 2024, the *Canada Labour Code* was amended to provide that a person (other than a manager or someone employed in a confidential capacity) is presumed to be an employee unless proven otherwise. The *Code* was also amended to expressly prohibit such misclassification.
- As of June 20, 2025, federally regulated workers are prohibited from using replacement workers during a legal strike or lockout, subject to certain exceptions. Violations will result in a penalty of up to $100,000 per day. As well, employers and unions must establish a maintenance of activities agreement within 15 days of a bargaining notice or seek resolution from the Canada Industrial Relations Board in this regard.
- Lastly, on a future date to be announced, federally-regulated employers will be required to implement a disconnecting from work policy.

Beyond Ontario

Legislative updates across Canada – Other provincial changes

- **British Columbia:**
  - On September 3, 2024, the BC ESA was amended to include a definition of “online platform workers”, and to correspondingly provide those workers with certain protections under the ESA.
  - On April 15, 2025, the BC government introduced Bill 11 which would also prohibit employers from requiring sick notes for short-term absences.
- **Alberta:**
  - As of March 31, 2025, Alberta employers are required to adopt and maintain one comprehensive violence and harassment prevention plan.
- **Quebec:**
  - On April 24, 2025, the Quebec Minister of Labour introduced Bill 101, *An Act to improve certain labour laws* (the Bill), which proposes a range of amendments – some minor and others more substantive – to key employment-related statutes in Quebec, including (a) *the Labour Code*, (b) *the Act respecting labour standards*, (c) *the Act respecting industrial accidents and occupational diseases*, and (d) *the Act respecting occupational health and safety.*

The employer checklist: Keeping track of everything you need to keep track of

Purpose of Checklist:

Prevention

The checklist

Main categories

- Mandatory policies
- Recommended policies
- Mandatory training
- Posters
- Plans
- Contract and manual review
- Records
- Other

Which of the following are mandatory policies in Ontario?

A) Workplace Harassment and Violence Policies

B) Disconnecting from work

C) Human Rights policy

D) Electronic Monitoring policy

E) AODA policy

Answer: Which of the following are mandatory policies in Ontario?

A) Workplace Harassment and Violence Policies

B) Disconnecting from work

C) Human Rights policy

D) Electronic Monitoring policy

E) AODA policy

Policies

All Ontario Mandatory Policies

a. Occupational Health and Safety Policy
b. Workplace Harassment Policy
c. Workplace Violence Policy
d. Workplace Harassment and Violence Program
e. Disconnecting from Work
f. Electronic Monitoring
g. AODA – Accessible customer service Plan

Recommended Policies

a. Privacy
b. Human Rights Policy
c. General employment policies (greater right or benefit)
d. Computer/Device Use Policy

Which of the following do not require annual employee training?

A) Workplace Harassment

B) Workplace Violence

C) AODA

D) Occupational Health and Safety

Answer: Which of the following do not require annual employee training?

A) Workplace Harassment

B) Workplace Violence

C) AODA

D) Occupational Health and Safety

How often should contracts be reviewed?

A) Surely once should be enough

B) Each time there is a change in role or salary

C) We have given up on contracts – handshakes only

D) Annually

Answer: How often should contracts be reviewed?

A) Surely once should be enough

B) Each time there is a change in role or salary

C) We have given up on contracts – handshakes only

D) Annually

Contract Check:

List at least 4 items that should be checked when reviewing contracts

Items to check in annual review of contracts

A) Termination clause

B) Probation clause

C) Timing of signing the agreement

D) Consideration in the event of a new agreement

E) Does the company have a copy of the signed agreement?

F) Does the company have a copy of the original agreement (original date of hire)

True or False?

A clause in the employment manual which undercuts the *Employment Standards Act* can render an otherwise enforceable employment contract void?

True

The current law is that any language that is contrary to the ESA could make the employment agreement connected to the dismissal unenforceable.

True or False?

Effective January 1, 2026 employers will need to notify everyone who submitted an application for a job whether the position has filled.

False

The obligation is only to notify those employees who have been interviewed within 45 days.

True or False?

An employer must immediately inform benefits providers of salary increases?

True

Yes, an employer must immediately inform benefits providers of salary increases because some benefits such as life insurance,

AD &D and LTD are often tied an employee’s salary. Employers may be found liable for failing to ensure the correct coverage and premiums are maintained.

What is the maximum fine for a 1st contravention of the ESA by a corporation?

A) $250,000.00

B) $10,000.00

C) $100,000.00

D) $ 25,000.00

E) $ 500,000.00

What is the maximum fine for a 1st contravention of the ESA by a corporation?

A) $250,000.00

B) $10,000.00

C) $100,000.00

D) $ 25,000.00

E) $ 500,000.00

A second offence is $250,000.00 and the third is $500,000.00

The employer guide to workplace investigations

Objectives

By the end of this session, you should be comfortable with the following:

- When to investigate and when not to investigate;
- How to design an appropriate investigation process;
- How to conduct effective interviews; and
- How to make findings of fact and report on the outcome of an investigation.

Why investigate?

Where the duty to investigate stems from and its scope

1. The law

2. Employer policies

3. Best practices

Ontario's *Occupational Health and Safety Act (OHSA)*

- Section **25(2)(h)**: an employer shall… take every precaution reasonable in the circumstances for the protection of a worker;
- Section **32.0.02:** workplace violence program will set out how the employer will investigate and deal with incidents or complaints of workplace violence.
- Section **32.0.7(1)**: To protect a worker from workplace harassment, an employer shall ensure that:

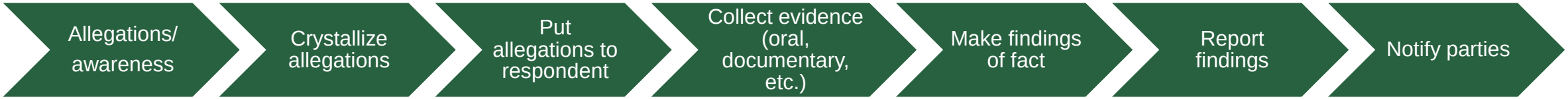
  (a) an investigation is conducted **into incidents and complaints** of **workplace harassment** that is **appropriate in the circumstances**;

  (b) the worker who has allegedly experienced workplace harassment and the alleged harasser, 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;

Ontario's *Human Rights Code*

- Section **5(1)(2), 7(2):** Rights to equal treatment without discrimination and freedom from harassment/sexual harassment in the workplace.
- Employer is in violation of the *Code* if it fails to take appropriate steps to respond to an employee's allegation of discrimination, including investigating to determine if a discriminatory act occurred. (*Lakowska v Marineland of Canada Inc.,* 2005 HRTO 30 at para 53)

Overview of investigation process



When to investigate

What conduct requires an investigation?

Workplace violence: (i) the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker, (ii) an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker, or (iii) 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.

Discrimination: differential treatment based on grounds protected by human rights laws, including race, ancestry, age, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, marital status, family status, disability or record of offences.

When to investigate

Nature of the conduct

Workplace harassment: engaging in a course of vexatious comment or conduct against a worker in a workplace, including virtually through the use of information and communications technology, that is known or ought reasonably to be known to be unwelcome – this may include one or a series of incidents or comments. Workplace harassment includes workplace sexual harassment.

Workplace sexual harassment: (i) engaging in a course of vexatious comment or conduct against a worker in a workplace, including virtually through the use of information and communications technology, because of **sex, sexual orientation, gender identity or gender expression**, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome; or (ii) 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.

When to investigate

Nature of the conduct

Other serious misconduct: In most cases an investigation should be conducted prior to terminating for just cause. A just cause termination will require serious misconduct that is intentional or willfully negligent and has not been condoned. Examples include time theft, theft, benefit fraud, etc.

When to investigate

Complaints, allegations and awareness

- Obligations of employers, managers, and supervisors are triggered by becoming **aware** of the incident, not just receiving a report of allegations or complaint
- A complainant may not use the words “harassment” or “discrimination” in describing an issue
- Complaint may be informal
- Confidentiality considerations
  - No complaint is “off the record”
  - Complainants cannot be promised confidentiality

When to investigate

And when not to investigate…

- Not all dissatisfaction in a workplace constitutes harassment.
  - Workplace harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers in the workplace.
  - There is a difference between the normal abrasiveness of daily life in the workplace, including personal dislikes and personality conflicts, and harassment.
  - Allegations of personal harassment or workplace bullying should not be used to deal with personal conflicts, personal animosity, or dissatisfaction with an individual's work or management style.

When to investigate

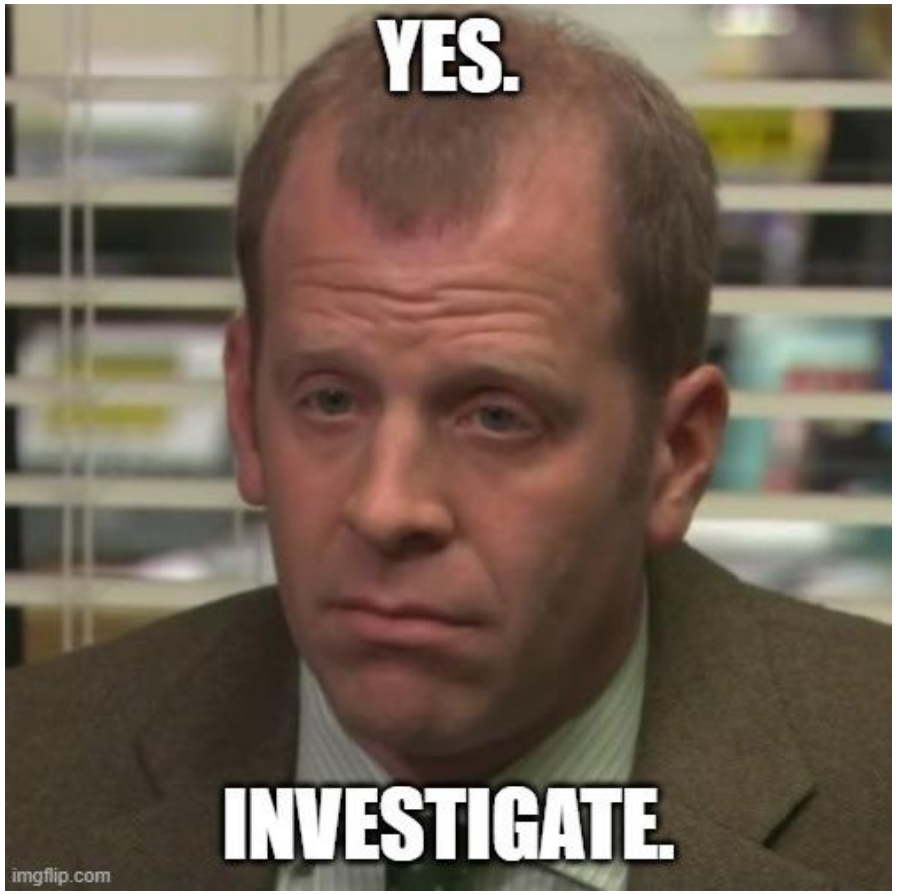
Location of incident and individuals involved

Workplace: can include the office, office related social functions, work-related conferences or training sessions, work-related travel or elsewhere if the persons involved are there as a result of work-related responsibilities. In some cases, it may extend to conduct on social media.

Worker: Can include employees, agency employees, and contractors.

When to investigate

Complainant/respondent is no longer employed or refuses to cooperate?



- Complainant’s refusal to investigate doesn’t absolve employer from investigating if otherwise required
- Explain consequences of refusal to participate to the party and document
- Document any refusal to participate

Step one: Crystalize allegations

Are the allegations sufficiently detailed to begin investigating?

- Establish the facts of a complaint and clarify what, exactly, the complainant is alleging.
  - Try to find out:
    - Dates of alleged incidents;
    - Locations of alleged incidents;
    - Times of alleged incidents;
    - The name(s) of the alleged harasser(s);
    - The names of witnesses, if any;
    - The nature of the harasser’s behaviour; and
    - The nature of the complainant’s own behaviour and actions.
  - If possible, have unwritten complaints committed to writing.

Step two: Investigation planning

Who will investigate

- When deciding who should conduct the investigation, consider:
  - Should it be conducted by an external or internal investigator?
  - Who may be more appropriate to speak with the complainant?
  - Should it be arm’s length?
  - What expertise or experience is required (i.e. are there technical issues, etc.)?
  - Are there issues of actual or perceived bias?
  - How fast does the investigation need to be completed?
  - What is the budget?

Step three: Investigate!

Preparation

- Review relevant employer policies, preliminary documentary evidence available, including complaint, personnel files
- Determine initial witness list
- Develop questions
  - Isolate & number each incident in chronological order
  - Isolate key points/issues & build questions around them
  - Cover procedures, processes and policies as applicable

Step three: Investigate!

Interviews

- How to begin an interview:
  - Explain investigator’s role
  - Review confidentiality, non-interference and non-reprisal obligations
  - Importance of being truthful and forthright
  - Avoid starting things off with adversarial questions or tone
  - Ensure safety & comfort of interviewees
- Review use of recording devices during interviews/discussions
- Explain what could happen if they resist or refuse to cooperate
- Discuss support available (EAP) as appropriate

Step three: Investigate!

Interviews: How to question a witness in a workplace investigation

- Avoid leading questions
- Start with broad questions to let witness tell you everything they recall without prompting
  - “I’d like to ask you about a matter that you raised with your HR rep relating to [X] – can you tell me about that?”
- “What happened next?”
- Ensure extent of disclosure of facts to witness is proportionate and necessary

Step three: Investigate!

Interviews: How to question a witness in a workplace investigation

- Once the witness has told you everything they think they know about the incident(s) –go back over their story and ask questions to fill out the details
  - Take them through the narrative step by step.
  - Ask one question at a time and let the witness answer before moving on to the next
  - Avoid compound questions – (2 questions in one) e.g. “Who was in the lunchroom and what did they say to you?”
- Listen for inconsistencies/gaps & go back to those issues
- Consider consistency with other witnesses questioned
- Use pauses or silence as technique

Step three: Investigate!

Interviews: How to question a witness in a workplace investigation

- Ensure all material allegations reviewed with sufficient particularity by reference to 7 “W” questions:

Who: said or did alleged conduct

What: was said or done

Whom: to whom was it said or done

Where: where did conduct occur

When: when did conduct occur

Why: why did this happen

Witnesses: who saw conduct & what did they say or do

Step three: Investigate!

Interviews: Ending the interview

- Ask if there is anything else to add that witness believes important but did not come up in interview
- Collect all relevant documents
- Remind them of confidentiality obligations
- Advise them who to contact if they recall additional information
- Remind them they may need to attend further interviews
- Thank witness for participation

Step three: Investigate!

Interviews: The respondent

- Notify respondent of complaint
- Give respondent time to absorb allegations
- Inquire about all material allegations, with particulars
- Ensure respondent is given opportunity to respond to all allegations
- Ask respondent for their version of events & clarify additional information

Step three: Investigate!

Interviews: Note-taking and witness statements

- Take detailed interview notes and consider secondary recording device
- Record observations of behaviour
  - Note general demeanor when witness arrives (e.g. calm, agitated, etc.)
  - Observe if behaviour changes throughout interview & response to certain questions or topics
  - Watch for evasiveness or combativeness
- Prepare witness statements

Witness statements

- Ensure date, time & people present are identified on top of statement
- Be clear who actually took/wrote statement
- Ensure quality & completeness
- Capture in narrative format
- **Record what was actually said in interview – not your interpretation**
- Paraphrase what you have heard to ensure proper understanding
- Be as detailed as possible
- Never throw away interviewer notes – keep both copies
- Allow witness to review & change or clarify things
- Point out inconsistencies in statement
- Review statement with witness & edit as required
- Once complete, have witness do final review for accuracy and completeness & sign

Step three: Investigate!

Interviews: Addressing witness behaviors

- If witness is being uncooperative:
  - Remind them of obligation to participate pursuant to Policy
  - Press harder in questioning
  - If that doesn't work, end interview & go back for redirect interview at later date
- If witness is emotional:
  - Be prepared to show empathy & diffuse emotions while remaining neutral

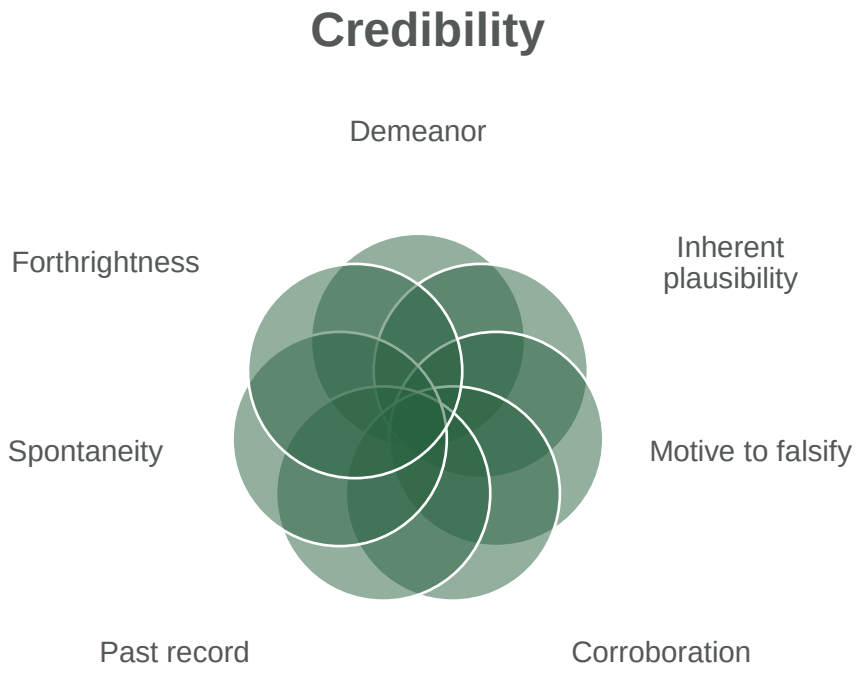
Always:

- Be respectful & courteous
- Maintain your own composure
- Immediately end interview if witness becomes abusive or violent

Step four: Make findings

Assessing the evidence

- Determine what happened on a balance of probabilities (more likely than not) based on the evidence collected (video/audio, documentary, oral, etc.)
- What consistent narrative comes out of the evidence?
- What are the incontrovertible facts?
- Which facts are less clear?
- Do not forget to assess the credibility of the witnesses.



Step five: Report findings

Preparing the report

1. Overview of the involved parties
2. Summary of Incident/Complaint/Allegations
3. Summary of Complainant’s Evidence
4. Summary of Respondent’s Evidence
5. Summary of other evidence considered (witnesses, documentary, etc.)
5. Finding
6. Conclusion (breach or no breach)
7. Additional information for management

- Information that was discovered during the investigation (witness lying, performance issues, issues with other employees that were not investigated, etc.)

Step five: Report findings

Notifying parties of outcome

- If workplace harassment/discrimination → advise the person who is alleged to have experienced the behavior of the outcome
- Advise respondent of the outcome
- If it was a complaint of workplace harassment, workplace sexual harassment, or workplace violence then the alleged victim should also be advised of any corrective measures taken.

Questions


What would you like
to hear from us next?

Thank you!

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