

Update on quarantine rules, masking mandates, employee surveillance laws and investigations

WEBINAR SERIES
LEGAL UPDATES
FOR CANADIAN EMPLOYERS

Your speakers



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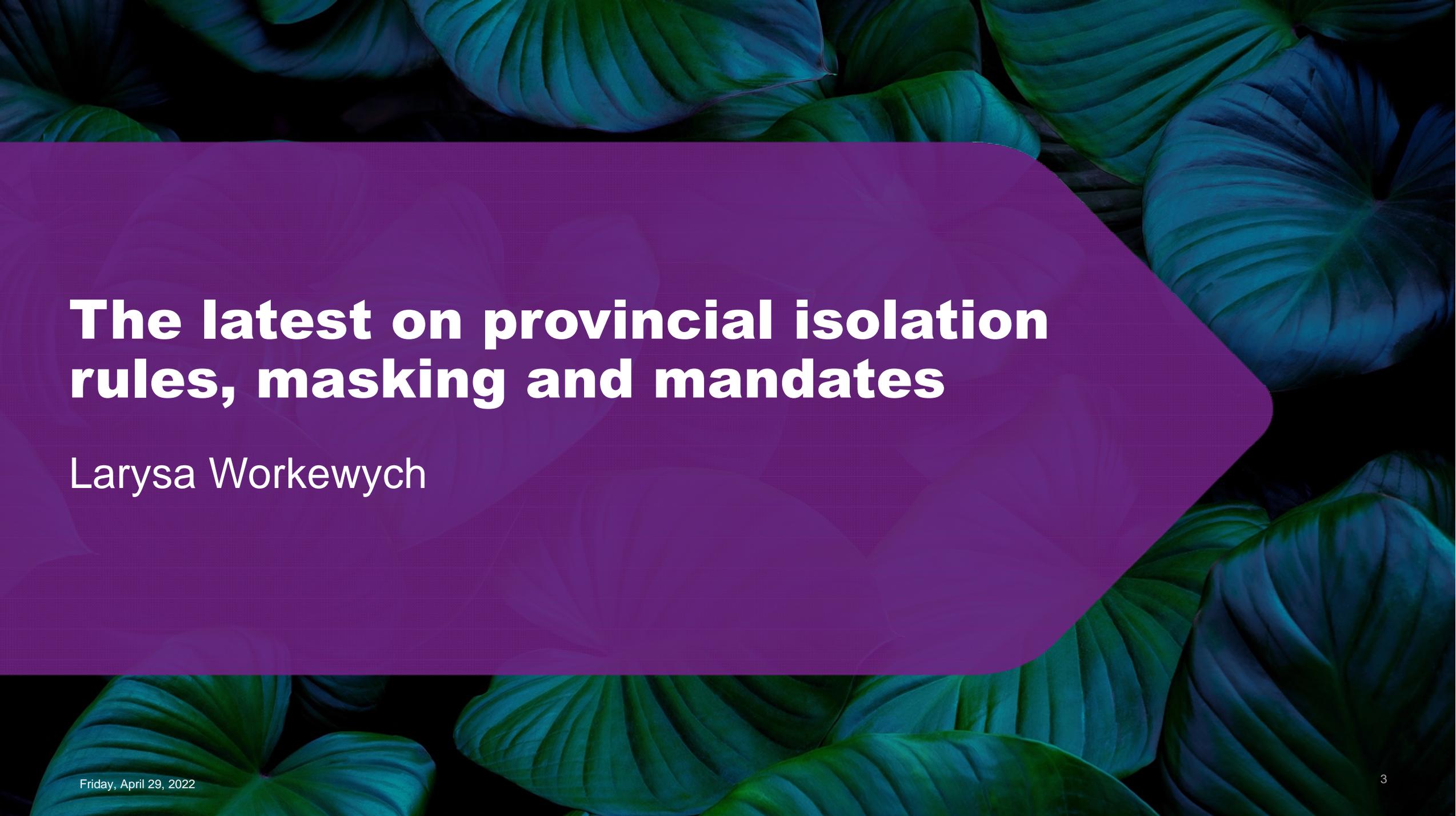


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The latest on provincial isolation rules, masking and mandates

Larysa Workewych

Status of the COVID-19 pandemic in Canada

- Gradual easing of public health restrictions in most Canadian provinces
 - Removal of masking requirements
 - Lifting of vaccination mandates
 - Elimination of gathering (indoor and outdoor) limits
 - Less restrictive self-isolation requirements
- Some provinces have lifted all public health orders

Ontario's O. Reg. 364/20

- Revoked on April 27, 2022
- Regulation outlined conditions and requirements for operating in the province, including:
 - Ensuring compliance with applicable laws, including the Ontario *Occupational Health and Safety Act*.
 - Ensuring compliance with any advice, recommendations and instructions issued by the Chief Medical Officer of Health, including any advice, recommendations and instructions on physical distancing, cleaning, disinfecting and COVID-19 vaccination policies.
 - Ensuring compliance with any advice, recommendations and instructions issued by a local public health unit official before February 25, 2022.
 - Ensuring that persons in indoor areas of premises of the business/organization (including vehicles) wore masks or face coverings.

Remember your occupational health and safety obligations

- COVID-19 pandemic is not over
 - Currently battling the “sixth wave”.
- No legal requirement to cancel health and safety measures, including physical distancing, masking or vaccination mandates
- Employers still have an obligation to maintain health and safety in the workplace and to take every reasonable precaution to ensure that its workplace is safe

Tips for employers

- Conduct a risk assessment of your workplace
 - How are workers interacting in your workplace?
 - Frequency?
 - Proximity?
 - Obligation to take every precaution reasonable in the circumstances to protect your workers
- Strongly consider maintaining COVID-19 measures (despite reduction of public health requirements)
 - Monitor guidance and recommendations from local public health authorities related to COVID-19.
 - Should any measures be sustained to help prevent the spread of other infectious diseases?
 - Premature removal may result in unnecessary tension in the workplace.



Employee surveillance laws

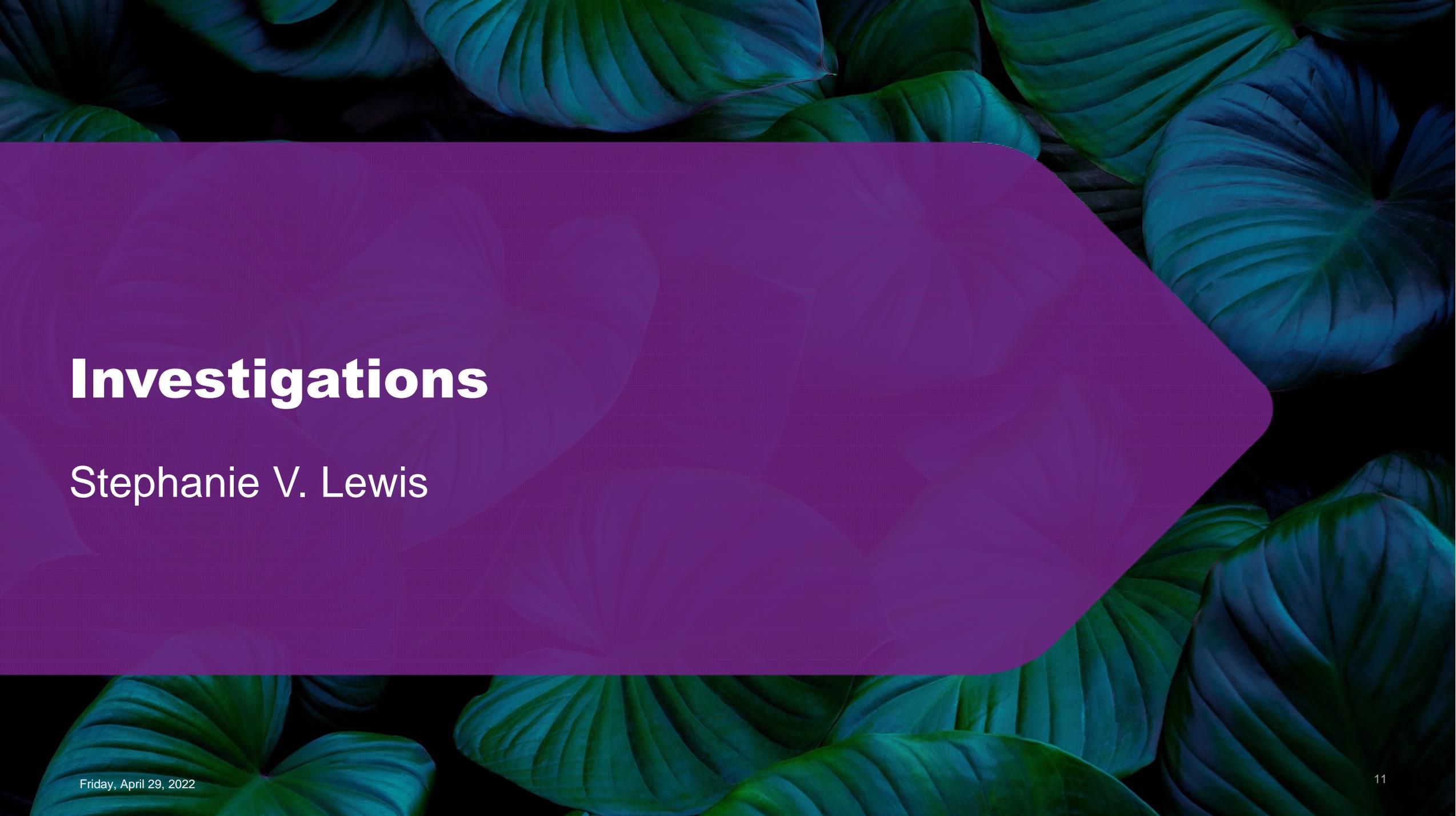
Claire Browne

R v Cole, 2012 SCC 53

- Reasonable expectation of privacy is diminished when an employee uses a work-issued computer
- Whether “reasonable expectation” exists depends on the “totality of the circumstances”
- In this case:
 - Employee was explicitly permitted to occasionally use work device for personal purposes
 - Device owned by employer
 - Employee did not have exclusive control over personal information recorded on computer
 - Contents of computer remained accessible to employer’s technicians
- Court: Employee had a reasonable, diminished expectation of privacy regarding the browsing history and informational content of the work issued laptop

Shalagin v Mercer Celgar Limited, 2022 BCSC 112

- Plaintiff employee made a number of surreptitious recordings during his employment
- British Columbia Supreme Court considered whether there was cause for the plaintiff's termination
- Court noted: After-acquired grounds for dismissal must be carefully examined
- Key question: whether the fact of the recordings fundamentally struck at the plaintiff's employment relationship
- Court found: Surreptitious recordings taken by the plaintiff employee were just cause for termination of employment



Investigations

Stephanie V. Lewis

Before the investigation

- The best way to ensure that your company can smoothly navigate the workplace investigation process is to be prepared for when a complaint arrives.
- This includes:
 - Making sure your policies and procedures are up to date.
 - Making sure all employees are trained on the policies and procedures and know how to bring a complaint forward.
 - Consider training some internal team members on workplace investigations so they're ready in the event that a complaint is made.

Did someone just complain?

- Complainant may not use the words “harassment” or “discrimination”
- Complaint may be informal

Did someone just complain?

- How to identify a complaint
 - Understand what constitutes workplace harassment, including sexual harassment, bullying, discrimination, and violence.
 - Discrimination means 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 or disability.
 - Workplace harassment is engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome
 - Includes workplace sexual harassment.
 - Includes stalking.
 - Can be one or a series of incidents or comments.

Did someone just complain?

Under Ontario's *Occupational Health and Safety Act*, "workplace sexual harassment" means:

- a) engaging in a course of vexatious comment or conduct against a worker in a workplace 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
- b) 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

Did someone just complain?

Sexual Harassment:

Conduct of a sexual nature covers a broad range of actions and comments, such as:

- **physical contact**
examples include: forced sexual acts, pulling of clothing, hugging, kissing, brushing against, patting, pinching
- **gestures or actions with sexual content**
examples include: leering, ogling, exposing or fondling oneself, giving sexually explicit gifts or persistent romantic attention
- **verbal conduct**
examples include: threats for failure to comply with sexual demands, or promises of job benefits for complying, sexual proposition, persistent romantic propositions, suggestive comments
- **denigration or insults based on gender**
examples include: comments about physical attractiveness, sexist remarks

When the investigation begins/contacting the parties

- Establish the facts of a complaint:
 - Clarify what, exactly, the complainant is alleging happened.
 - 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 an unwritten complaint committed to writing.
- When proceeding, be mindful of privacy concerns.
- Considerations re: when to advise the respondent.

When the investigation begins/contacting the parties

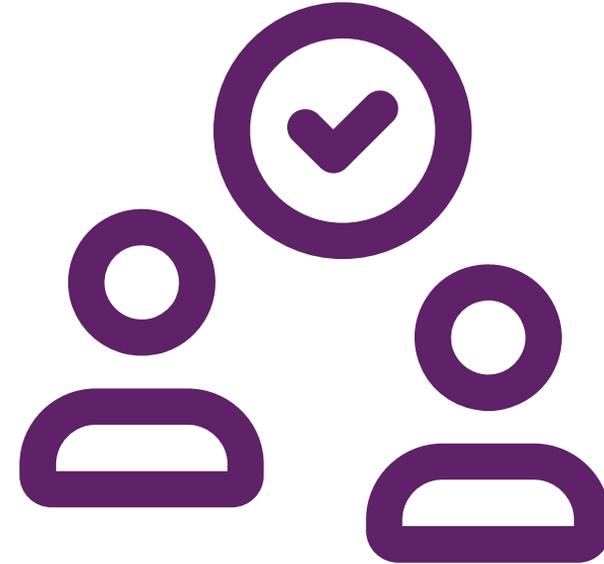
- Once you have all the details, before contacting the parties or taking any further steps, you will want to determine whether an investigation is necessary.
- Investigations are only necessary if allegations would constitute harassment if true.
- Not all dissatisfaction in a workplace constitutes harassment.
 - Workplace harassment does not include reasonable action taken by an employer or supervisor relating to the management and direction of the workers or of 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 personality conflicts, personal animosity, or dissatisfaction with an individual's work or management style.

When the investigation begins/contacting the parties

- Decide whether an investigation should be internal or external:
 - Consider:
 - Expertise
 - Experience
 - Actual or perceived neutrality
 - Speed
 - Efficiency
 - Resource allocation
 - The investigator should be at arm's length from the individuals involved.
 - If the complaint involves a senior employee, an external investigator is advisable.

Conducting interviews

- Location
- Order of interviews
- Timing
- Best practices during all interviews
- Requests for legal counsel to attend
- Review and acknowledgment of contents of notes
- Confidentiality
- Necessity of follow-up interviews



Concluding the investigation

- Review all evidence (including interviews and documents)
- Assess witness credibility:
 - Demeanor of the parties
 - Inherent plausibility of the testimony
 - Motive to falsify evidence
 - Corroboration
 - Past record
 - Spontaneity
 - Forthrightness
 - Observation
 - Memory capacity
- Make findings and draw conclusions based on policies and procedures

Concluding the investigation

- If the complaint is well-founded, determine appropriate next steps:
 - Relationship management?
 - Coaching?
 - Formal training?
 - Discipline?
 - Termination?



Concluding the investigation

- Advise the complainant and the respondent of the outcome.
- Provincially regulated employers do not need to provide a copy of the investigation report, which is employer property.

Post-investigation issues

- One party is unhappy with outcome – what now?
- Claims of bias or lack of neutrality
- Employee recourse
- Orders to re-investigate



What happens if I don't investigate properly?

Frolov v Mosregion Investment Corporation (2010 HRTO 1789)

- Employer's investigation was based on the sexist belief that older men sexually harass younger women, such that the employer did not take the applicant's complaint seriously.
- Investigative time frame was found to be inappropriate since action was only taken after a third complaint was filed.
- Investigative results were not communicated to the Applicant.
- Applicant awarded \$7,500 in damages.

What happens if I don't investigate properly?

Harriott v National Money Mart (2010 HRT0 353)

- Employer did not take applicant's complaint seriously or properly deal with her complaints.
- Employer also did not take care of its employee and did not demonstrate the appropriate sensitivity to her concerns.
- Human Rights Tribunal awarded \$30,000 in damages (\$7,500 for failure to investigate).

What happens if I don't investigate?

Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343

- On April 17, 2018, Bassanese wrote to Perske about “being constantly harassed by [Dhanani] yelling and screaming at me ... telling me that I am an idiot and that I should be fired, etc, etc.” She added, **“I am sorry Chris. I have never ever filed a complaint but I want you to step in and make sure this never happens again.”**
- Perske wrote back to Bassanese the same day, on April 17, 2018, stating, “Sorry to hear that. We’re a little short-staffed this week (2 illnesses, 1 sick child and a vacation) but I’ll run it by Anne Marie, she’s our HR person.”

What happens if I don't investigate?

Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343

- Employer did nothing to investigate.
- On June 21, 2018, Bassanese alleges Dhanani slapped her across the face three times.
- Bassanese's employment was terminated for cause that same day.

Findings

- Company did not file a Defence and was noted in default.
- Court awarded 19 months' notice PLUS \$65,000 for damages for assault and battery and punitive damages and \$10,000 in legal fees.

Thank you



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