

When to Hire an External Investigator

As a human resources professional or manager, you may be responsible for conducting or assigning workplace investigations into problematic employee behaviour.

Allegations may include:

- An employee makes a formal harassment or discrimination complaint;
- Allegations surface regarding inappropriate workplace conduct; or,
- A workplace has become "poisoned" and dysfunctional.

These situations can be challenging for employers, and carry the potential for costly litigation, through an application under the *Human Rights Code*, a complaint under the *Occupational Health and Safety Act*, or a lawsuit. A thorough and competent investigation will enable the employer to manage these risks by reducing the potential for litigation, and demonstrate due diligence in the event that litigation occurs.

Some organizations have the capacity internally to conduct effective investigations, however there may be limitations or risks associated with proceeding internally in all cases. Other organizations may not have the capacity to conduct an immediate and thorough investigation. There are several issues that employers should consider, when evaluating whether to retain an external investigator.

Skills and Expertise

Each investigation is different, and each involves different types of misconduct.

An experienced investigator:

- Understands the laws pertaining to the type of incident
- Knows what to look for and how to get the information they need to complete the investigation on time
- Understands the requirements and expectations should a case proceed to court

Impartiality

Selecting an investigator who will not only be impartial, but is perceived as being neutral by employees and management is critical to the confidence and success of the investigation. When selecting investigators (internal or external) consider pre-existing interests or biases that could raise doubts about impartiality.

Are there prior relationships between the investigators and those involved in the investigation?

Does their role in the workplace require them to report or delegate to any of the involved parties?

Are there potential or perceived conflicts of interest?

Appointing an investigator who is perceived to be biased will compromise confidence in the investigation process and jeopardize the entire investigation. Retaining an external investigator may be appropriate in those circumstances where impartiality and credibility are concerns. Employees may be more comfortable talking to "an outsider" who is neutral and impartial.



When to Hire an External Investigator

Timeliness

In order to reassure a complainant that the complaint is being taken seriously, it is important that the investigation be conducted as quickly and as thoroughly as possible. A complainant who feels his or her complaint is being dealt with appropriately is less likely to file a human rights complaint, hire a lawyer, or initiate some other form of litigation.

Timeliness also increases the investigator's ability to obtain the relevant facts and deal with the concerns in a manner that instils confidence among all the parties. In choosing whether or not to proceed with an internal or external investigator, consider the investigator's availability and ability to proceed immediately without other distractions and workplace demands.

HR Proactive Inc.

Our Investigators are trained specialists with extensive experience in the human rights field. HR Proactive Investigators act as neutral fact finders who interview the complainant, the respondent, and any witnesses to the alleged incidents of harassment. Evidence is gathered and a confidential report is prepared by the Investigators which sets out the evidence and examines it in the context of the organization's internal policy as well as any applicable Human Rights legislation, such as the Ontario Human Rights Code.

Severity

In potentially serious cases, consider retaining an external expert who is experienced in conducting investigations.

Serious cases may include situations where:

- Government is involved (Human Rights Tribunal, Ministry of Labour).
- Risk of lawsuit or government investigation.
- More than one employee complains about the same serious problem (e.g. systemic racism, toxic work environment, bullying, etc.)
- The accused is a high-ranking employee.
- The complaint is subject to media attention.
- The complainant has hired a lawyer, filed a suit or there has been a complaint filed with a government agency.
- The accusations are extremely serious and may threaten the reputation of the organization.
- There is a heightened need for objectivity and impartiality.

In these situations, the benefits of an outside investigator include understanding how to prepare a report that will likely be evidence or a defense in litigation or a government investigation, less interruption to business, more effective interviews, and demonstrate that the company is taking the complaint seriously.

Other Considerations:

Very often, harassment allegations, whether substantiated or not, are an indicator of other difficulties in the workplace. These may include:

1. Personality conflicts
2. Mismatched leadership style
3. Unclear or conflicting goals or roles
4. Unclear standards of interpersonal behaviour
5. Lack of team cohesiveness
6. Inconsistent performance management practices.

Any such observations, as well as any related recommendations will be noted by the Investigators and relayed in accordance with the Employer's wishes. Options include:

- a) Including the observations and recommendations in the body of the report.
- b) Creating a separate report for the Employer.
- c) Providing them verbally in consultation with the Employer.

The Employer's Role:

Upon receipt of the report, the Employer:

1. Reviews the report and determines what actions and follow-up need to occur.
2. Meets individually with the Complainant and Respondent to explain the findings of the report. Whether or not the report is shared in its entirety, depends upon the Employer's internal policy and procedure.

Available Follow-up Services:

Based on the results of the investigation, the Employer may identify measures which need to be implemented with the parties involved and/ or with other employees in the workplace. These measures are sometimes necessary to restore normal workplace communication and teamwork and prevent future difficulties. HR Proactive offers additional services by qualified specialists to assist the employer in this regard:

1. Conflict Resolution
2. One-to-one Coaching and Sensitivity Training
3. Harassment Prevention Training
4. Respectful Workplace Training
5. Workplace Assessments
6. Team Facilitation and Teambuilding
7. Leadership Training and Coaching
8. Performance management systems and training
9. Policy Research and Development





What to Expect in a Workplace Harassment Investigation

HR Proactive provides investigation services when there are allegations of harassment in your organization. The following outline is designed to assist you in understanding this process:

Role of the Investigators:

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The report is then submitted to the employer who determines what action will be taken.

Steps in the Investigation Procedure:

1. The Complainant files a formal written complaint in accordance with the Employer's policy and procedure
2. The Respondent is provided an opportunity to review the complaint and prepare a written response.
3. The Employer provides the Investigators with a copy of the Complainant's statement, the Respondent's response, and any supporting documentation.
4. The investigators interview the Complainant in confidence to gather additional information.
5. The Complainant is provided with their interview notes, asked to make any corrections or additions, and requested to provide written confirmation that the information is accurate to the best of their knowledge.
6. The investigators interview the Respondent in confidence to gather additional information.
7. The Respondent is provided with their interview notes, asked to make any corrections or additions, and requested to provide written confirmation that the information is accurate to the best of their knowledge.
8. Any Witnesses to the alleged incidents of harassment are interviewed in confidence.
9. The Witnesses are provided with their interview notes, are asked to make any corrections or additions, and are requested to provide written confirmation indicating that the information is accurate to the best of their knowledge.



10. The Complainant and Respondent are allowed to respond to any new allegations or relevant information which arise during the investigation.
11. If there any outstanding questions following the interviews, the investigators may contact the parties for further clarification. Likewise, if the parties have any additional information to add, they may contact the investigators within a set time period to have the information added to the report.

The Report:

The report prepared by the Investigators will include:

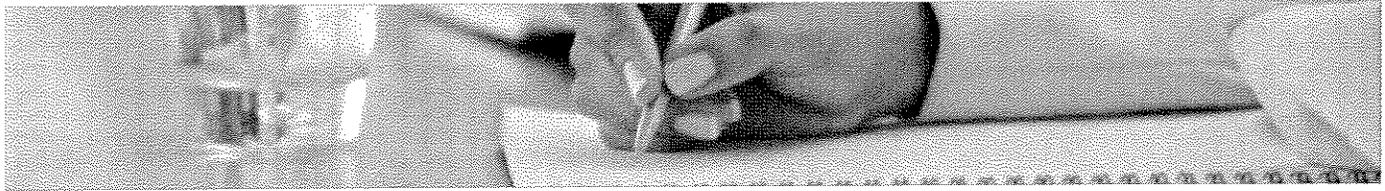
1. Background
2. Documented testimony of the Complainant and Respondent
3. Evidence gathered
4. Summary of Findings

The report will be submitted to the Employer who may wish to meet with the investigators to explore the findings and options for resolution.

Please note that witness names and identifying information are normally not included in the report. This is to protect confidentiality and encourage witness participation and candidness. If the Witness's name is required to provide context, they will be asked to sign a written consent to allow their name to be used in the report.

Workplace Harassment and Discrimination Awareness/Sensitivity Sessions

(Sample - multiple sessions: *Note – could be incorporated into one to one and one half days or three half-day sessions)



Session One

Agenda

0 - 15 min.	Introductions, General Discussion of Situation: Where are we at, comfort levels, why am I here (venting)? How to proceed – getting buy-in.
15min. - 1:15hr.	General Overview of Harassment (racial and other forms): <ul style="list-style-type: none"> • definitions • the dynamics/nature of • types, examples, language issues • the parties • the legislation (Code) • managerial responsibility and legal liability (use of Human Rights Tribunals, case law etc.)
1:15 - 1:30 hr.	Break
1:30 to 2:15 hr.	Video "Everyone's Problem": Viewing followed by discussion.
2:15 to 2:45 hr.	How Common a Problem ? <ul style="list-style-type: none"> • Statistics • Reported Incidents • Impact (quantifiable, emotional) • Case Studies/Examples
2:45 - 3:30 hr.	Discussion: Moving forward. What has been learned? More reading, case studies, prep for next session.

Session Two:

Workplace Harassment Awareness Training cont'd

Agenda

0 - 30 min.	Review, follow-up from previous session: quiz, case study, reading materials.
30min. - 1:30hr.	Managing Yourself, Diverse Workplaces and Addressing Harassment Issues in the Workplace: <ul style="list-style-type: none"> • awareness, sensitivity • dealing with diverse workplaces • recognition • responsibilities (legal) • setting boundaries, limits/ tolerance • being in control/being more professional • seeking assistance – from whom, why and when
1:30 - 1:45 hr.	Break
1:45 to 2:30 hr.	Video "Prevent Harassment & Bullying by HR Proactive" <ul style="list-style-type: none"> • Discussion • Quiz • Workbook
2:30 - 3:00 hr.	Case Studies: What could/should be done. (Time permitting or homework)
3:00 hr.	Discussion: Moving forward. What has been learned? More reading, case studies, prep for next session.

Workplace Harassment and Discrimination Awareness/Sensitivity Sessions

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Session Three:

Awareness Training: Managing Workplace Conflict

Agenda

0 - 15 min.	Review of Materials, Homework, Levels of Understanding and Awareness – Discuss
15min. - 1:15hr.	<p>Workplace Conflict:</p> <ul style="list-style-type: none"> • definitions • inappropriate behaviours • language • anger • abusiveness • bullying, etc. • impact of workplace conflict
1:15 - 1:30 hr.	Break
1:30 - 2:15 hr.	<p>A More Positive Workplace/Approach:</p> <ul style="list-style-type: none"> • when conflict happens • being in control • improving interpersonal skills • conflict management and communication skills (12 steps) • Respectful workplaces, codes of conduct - management, leadership roles, inclusiveness
2:15 - 2:45 hr.	Video and/or Case Studies dealing with Workplace Conflict (time permitting)
2:45 - 3:30 hr.	<p>Wrap-up: Discussion – Where do I go from here? (expectations, behavioural issues, identification of any additional supports that may be needed)</p>

CONDUCTING A HARASSMENT INVESTIGATION, THE DO'S AND DON'TS

carolyn Hutniak

The issue of harassment in the workplace continues to represent a significant challenge for employers, both from a productivity and a liability perspective. Having a proactive and preventative strategy in place can significantly improve the response time and the ultimate resolution of these sorts of complaints and can also minimize the employer's risk of liability.

One of the most significant aspects of a harassment policy is the investigative process. Not only will that process influence how successful the employer will be in resolving the issues raised by the complaint, the manner in which the employer conducts the investigation will directly affect any liability it may have if the complaint is not ultimately resolved in the employment setting. It is therefore important to take steps to ensure that any harassment investigation is timely, responds to issues raised by the complaint and is fair to both the complainant and the respondent. Some specific Do's and Don'ts follow.

DO'S

Ensure that a harassment/ sexual harassment policy is in place, that it details the process to be followed in the event of a complaint and that the policy has been communicated to and is available to all employees.

Follow any harassment/sexual harassment policy that is in place. Having a policy but failing to follow it is poor practice and may attract greater employer liability.

Respond quickly and seriously to any complaint of harassment. The employer's response is important in assessing employer liability down the road.

Arrange for an independent investigation by objective and trained investigators, if possible. The investigation in all events should be conducted in good faith and by persons outside of the work area involved.

Ensure that the respondent is provided with full information regarding the complaint and other information provided in relation to it. An individual accused of harassment is entitled to know the specific allegations made against him or her and to respond accordingly. Where a written complaint has been made, a copy of that statement should be provided to the respondent.

Provide an opportunity for both the complainant and the respondent to present their version of the events. Ask specific questions and obtain as much detail as possible regarding the allegations and any responses.

Interview additional witnesses who may not have been specifically referred to by either party. Essentially, interview anyone who may have relevant knowledge.

Keep the process confidential. Although no absolute guarantee of confidentiality should be given to any of the witnesses or parties to the complaint, advise them that the information received will be held in strict confidence except as necessary to investigate and respond to the complaint and any other legal or administrative proceedings relating to it. Complainants and respondents should likewise be encouraged to maintain confidentiality.

Emphasize to all witnesses that they will be protected from any retaliation regarding their evidence.

Obtain written statements or take careful notes of all interviews.

Document, in writing, the process followed as well as the results of the investigation.

Discuss the results individually with the complainant and the respondent

Consider providing a final opportunity for the respondent to respond to any written report of the investigator's findings or recommendations, particularly where discipline may be imposed.

DON'TS

Prejudge either the allegations or the denial of the allegations.

Focus only on the specific allegations without getting a good read on the attitude within the organization.

Simply counsel the complainant on "how to take it" or "not to let it bother them so much" or suggest that the harassment would stop if they simply tried "to fit in better".

In conducting harassment and sexual harassment investigations, there are a number of other important considerations to bear in mind.

Where required under the provisions of the collective agreement, union representation may be necessary or at least permissible during any meetings or interviews particularly if signed statements are to be given.

Consider whether, given the circumstances including the severity of the allegations, it would be appropriate and permissible under the terms of any employment or collective agreement to take interim steps to deal with the situation. For example, depending on the circumstances, an employer might consider: changing the reporting structure, redoing or reviewing negative performance evaluations and reinstating lost benefits, transferring the complainant or the respondent, granting a paid leave to the complainant or suspending the respondent pending the investigation.

Care must be taken to maintain the pay/level of work of the complainant if he or she is transferred. The complainant must not be penalized for coming forward with a complaint.

Provide counselling services to the complainant to be paid for by the employer. In some cases, it may be appropriate to extend the benefit of counselling or sensitivity training to the respondent, as well.

When imposing any interim measures, care must be taken to confirm that such actions do not represent a final finding of wrongdoing.

Finally, if as a result of the investigation it is determined that harassment or sexual harassment has occurred, the outcome may be, but will not necessarily be, the respondent's termination of employment. It is always advisable to consult legal counsel who can provide guidance on the appropriate response to a finding of harassment or sexual harassment.

DISCLAIMER this article should not be interpreted as providing legal advice. Consult your legal adviser before acting on any of the information contained in it. Questions, comments, suggestions and address updates are most appreciated and should be directed to:

The Labour and Employment Group - Edmonton 780-423-3003 - Calgary 403-260-8500

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