

# How to Comply with New Workplace Harassment and Violence Investigation and Resolution Rules



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

Of the many changes contained in the new federal OHS regulations implementing the Bill C-65 workplace harassment and violence rules which take effect on January 1, 2021, the provisions dealing with investigating and resolving complaints are the most far-reaching and difficult to comply with. Rather than simply tweaking the process, Bill C-65 requires employers to implement a whole new system for handling incidents that goes light years farther than any OHS laws have gone before. Although they cover only employers that are federally regulated, the new rules deserve consideration for adoption as a best practice for all Canadian employers because they represent the current state of the art for ensuring swift, thorough and fair investigation and resolution of workplace harassment and violence situations. In either case, here's how to create a policy to comply with the new C-65 requirements.

## 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

To understand what Bill C-65 is all about requires a bit of context. The duty of employers to investigate and seek to resolve incidents of workplace harassment and violence has been a staple of OHS laws for over a decade. But they're not working. 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, one of if not the biggest flaws in the system is the reluctance of victims to come forward and report misconduct to their organizations.

Bill C-65 is a response designed to correct the problems that the 2017 developments exposed. The central feature of the re-engineered workplace harassment and violence regime is the establishment of a new system for resolving complaints that employees will be less hesitant to use.

## **The Designated Representative**

One reason employees are so reluctant to report the workplace harassment and violence they suffer or witness is that they must direct the report to their employers. Bill C-65 eliminates this stumbling block by requiring employers to appoint a person or work unit as a “designated party” to whom employees who don’t trust their employers to give them fair shakes can report instead. 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 employee 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)

## The 5 Workplace Violence & Harassment Risk Factors to Consider

The new federal OHS regulations implementing the Bill C-65 rules list the 5 risk factors the assessment must consider:

1. The culture, conditions, activities and organizational structure of the workplace;
2. Circumstances outside the workplace that could lead to harassment and violence in the workplace, such as domestic abuse or family violence;
3. Reports, records and data related to harassment and violence in the workplace;
4. The physical design of the workplace; and
5. The current measures in place to protect psychological health and safety.

Note that risk factors 3, 4 and 5 are also relevant to workplace violence hazard assessments and should pose no problems getting used to. The possible exceptions are risk factors 1 and 2. One excellent technique for getting the information you need to properly evaluate these risk factors is to reach out to your employees and ask them to complete an anonymous survey relating their own experiences with harassment, bullying and violence at your workplace, the threats they perceive and who, where or what those threats come from. You should also do a separate workplace violence and harassment survey of your supervisors.

## **Follow-Up, Updating & Review**

While follow-up and review of previous hazard assessment is a must for all hazards, Bill C-65 includes some unusually specific requirements. Most notably, employers must review and update the workplace assessment:

- In response to any changes to identified risks;
- In response to any changes that compromise the effectiveness of a preventive measure; and
- At least every 3 years.

After the assessment is done, the employer and applicable partner have 6 months to jointly develop and implement preventive measures and a prevention plan that mitigates the risk of harassment and violence in the workplace.