Protecting Employees from Harassment Outside the Workplace



The right to a harassment-free workplace accompanies employees wherever they go.

The duty to prevent “workplace harassment” isn’t a literal one in the sense that it extends to harassment employees experience while working offsite. Thus, sales representatives, home healthcare nurses and office-based employees visiting clients, traveling on business or working from home don’t lose their right to be free of harassment just because they’re away from the employer’s premises. However, protecting employees can be especially challenging when harassment takes place in offsite settings beyond an employer’s control.

What the Law Requires

OHS laws require employers to protect workers from hazards at the “workplace” or “place of employment.” These terms are defined broadly to include any site or location in which workers do or are likely to perform their job duties. That may include just about any setting, including a client’s office, business convention, vehicle or hotel where an employee stays during a business trip. That’s why employers in many province have an OHS duty to protect telecommuters who work out of their own home office. The crucial issue is how the OHS law of the jurisdiction defines what a workplace is.

Human rights laws also come into play when the harassment is based on sex, race, religion or other personal characteristics protected from discrimination. Specifically, employers are expected not only to refrain from committing harassment themselves but also ensure that other people the employee works with don’t engage in this kind of behaviour, either. Those other people include other staffers such as co-workers, supervisors and members of upper management, as well as the other individuals the employee is reasonably expected to encounter while doing the job such as customers, clients, vendors and colleagues from other firms.

Example: A woman signed a contract with the Canadian Space Agency (CSA) to work on an isolation study being conducted in Moscow. While in Russia, she complained to the CSA that she was being sexually harassed by a Russian colleague in charge of the study. She complained to the CSA. But the agency took no action. When the harassment continued, she filed a sex harassment complaint. The CSA denied responsibility, arguing that it had no control over the workplace where the harassment occurred, or over the Russian colleague she accused of committing it.

But the federal court disagreed, finding that the *Human Rights Act* bars discrimination "in the course of employment" or "in matters related to employment." The employee was in Russia performing work on behalf of the CSA. Although the CSA didn't have control over the Russian colleague, it did have a duty to protect the employee from sexual harassment in the workplace—"irrespective of its source," especially once it received her harassment complaint [*Canada v. Lapierre*, 2004 FC 612 (CanLII)].

How to Handle Offsite Harassment

The moral: Treat offsite harassment exactly like you would treat harassment that occurs on your own premises by taking 6 steps to address the problem.

Step 1. Incorporate Off-Premises Conduct into Your Workplace Harassment Policy

The first thing to do is include language in your general workplace harassment policy making it clear that the right of employees to work in a harassment-free environment extends beyond the 4 corners of the workplace.

MODEL HARASSMENT POLICY LANGUAGE

> **Offsite Harassment.** Every employee of ABC Company has the right to be free from harassment in the workplace. Employees who work outside of ABC Company's premises, either full-time or occasionally, have the same right to be free from harassment while they are performing their duties offsite. ABC Company takes offsite harassment seriously.
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> Employees who have been subject to or witnessed harassment while working outside of ABC Company's premises should immediately report such harassment to their supervisors or, if supervisors are involved in the harassment, another ABC Company official. ABC Company will treat the complaint with the same degree of seriousness and in accordance with the same procedures it applies in response to complaints of harassment that occurs on the premises.

Step 2: Establish a Harassment Complaint Mechanism

Be sure there's a clear and simple way for employees to report the offsite harassment they experience or witness. Designate somebody or some office to receive complaints. If that designee is a supervisor or manager, provide a third-party alternative, preferably from outside the company, in case the person receiving the report is involved in the incident. Allowing anonymous reports may hamper the investigation. So, instead, assure employees that reports will be kept confidential and not disclosed except as necessary to complete the investigation or as required by law.

Step 3: Investigate the Complaint

Failure to investigate harassment complaints can get you into major hot water.
Example: A home health nurse complained to his agency that a patient was shouting racial slurs at him. After assuring the attendant it would take care of the matter, the agency sent the patient a warning note but didn't investigate, allowing the racial abuse to continue for 16 months. The federal arbitrator described the agency's inaction as "troubling" and ruled it liable for failing to protect the attendant against offsite racial harassment [*Clarendon Foundation v. O.P.S.E.U., Local 593*,

[2000] 91 L.A.C. (4th) 105].

Investigating complaints can be tricky when the alleged harassment occurs in a place you don't control by individuals who aren't subject to your disciplinary authority and whom you might not even know. Despite these obstacles, you're still obligated to take action. Consider enlisting the help of others in performing the investigation, HR lawyers advise, starting with those who control the place and people involved in the reported harassment. Be sure to get detailed information about the incident from the employee who reports it, so you can tell that third party controller, preferably via its HR director, what happened, when and where it happened and who was involved.

Step 4. Support the Victim

First and foremost, get the alleged harassment victim out of harm's way. If possible, try not to send the employee back to the place where the harassment occurred. If it's essential for the employee to go back to the lion's den, tell the employee not to deal with the individuals involved in the original harassment—even if they've been disciplined for their behaviour. And insist that the other company keep those individuals away from the employee.

But be careful—you don't want to penalize your employee by, say, removing them from a lucrative account. So, speak to the employee about the various options before taking action. And if removing the employee from the account in question is the only viable solution, make sure the employee is compensated with a comparable replacement account.

Step 5. Hold the Harasser Accountable

If the investigation concludes that the complaint is valid and the employee was harassed, take steps to ensure the guilty individuals are held accountable. Ask the HR director of the harasser's company to impose appropriate discipline as it would had the victim been an employee of that company. Use whatever leverage you have if the company refuses. But talk to your company's lawyer before deciding what to do. For example, threatening to end your relationship with a firm might violate the terms of your written contract.

Step 6. Train Employees about Offsite Harassment

Last but not least, be sure to address offsite harassment as part of your general workplace violence and harassment education and training. All employees should understand that their right to a harassment-free workplace travels with them while they're on the job and that your company has implemented measures to protect them from offsite harassment.