

BILD Guideline

Defining Zero-Tolerance

Disclaimer: this guideline is to provide you a general overview and is not intended as legal advice. We encourage you to seek legal counsel when needed. Under the *Occupational Health and Safety Act*, employers are required to have a Workplace Violence and Harassment Policy. We anticipate that members will choose to incorporate some of the guidance below into their existing mandatory policies and training.

What does 'zero-tolerance' mean?

Zero-tolerance is a practice of setting high standards of conduct for not tolerating discriminatory behaviour. An employer's commitment to zero-tolerance for discrimination means that if there is a complaint, or a known act of discrimination, a fair and impartial investigation will be conducted, and appropriate action will be taken based on the outcome. Appropriate action means any kind of corrective action, including progressive discipline up to and including termination.

Adhering to a zero-tolerance policy does not mean automatic dismissal if a concern is brought forward. From a legal standpoint, automatic dismissal is not a viable option without understanding both sides of the situation directly from the parties involved and any witnesses. This is why a fair and impartial investigation is a key component within the zero-tolerance standard.

It is important to know that zero-tolerance extends beyond complaints between two employees of the same company and encompasses those that you do business or interact with. Even if there is a situation where a complaint is made against an external party, it must still have an impartial investigation (to the best of your ability) and where substantiated, corrective and/or preventative measures taken.

Zero-Tolerance Best Practices

Policies

Policies should define what zero-tolerance means and explain that each reported incident of the inappropriate behaviour will be investigated and addressed by the organization.

For example, zero-tolerance for discrimination means that once a complaint is brought forward, or the company has knowledge that discriminatory behaviour is taking place, a fair and impartial investigation must take place in a timely manner. In these situations, the investigation should be initiated as soon as possible. After the fair and impartial investigation is completed and if the complaint is substantiated (or merit determined), consequences will reflect the severity of the conduct and disciplinary action may range from a verbal warning up to and including termination.

Policies must also outline the fair and impartial investigation process and a non-retaliation requirement.

In Good Faith

Policies should define how complaints should be brought forward. Within this, policies can outline the expectation of concerns being brought forward 'in good faith.' Meaning, complaints brought forward by any stakeholder must be truthful and should provide all the information the employee knows regarding the matter so that it can be investigated and addressed in an appropriate and timely manner. Your policy can also outline that you, the company, will take seriously any reports which, upon investigation, prove

not to be substantiated (unless made in good faith pursuant to your policy) or which prove to have been made maliciously or knowingly to be false. You can also include that you will regard the making of any deliberately false or malicious allegations by any employee as a serious disciplinary offence, which will result in corrective action, up to and including immediate termination of employment without notice or pay in lieu of notice.

Legislative Requirements: Investigations

Overview

Having a fair and impartial investigation process for complaints of discrimination or harassment has been a long-standing requirement under the law. In Ontario, this requirement falls within the Occupational Health and Safety Act, as well as the Ontario Human Rights Code (<http://www.ohrc.on.ca/en/ontario-human-rights-code>). Other provinces have similar requirements—please check your Province’s requirements. Regardless of intent, once a complaint is brought forward, or the company has knowledge that discriminatory behaviour is taking place, the company is required to conduct an investigation that is appropriate in the circumstances. Additionally, depending on the situation, an external investigator *may* be required. Whether the investigation is being conducted in-house or by an external investigator, the investigator must have proper training and experience of the investigative process, producing summary reporting, action plans and recommending corrective actions.

Investigations should be completed within 90 days following receipt of a complaint.

Requirements

Under the Occupational Health and Safety Act, there are *minimum* requirements for an investigation which are:

1. Each situation must be treated on an individual basis and investigated impartially;
2. All details of the complaint and investigation must be kept confidential (to the best of the company’s ability) to protect the integrity of the investigation;
3. Non-retaliation measures must be put in place to protect the complainant;
4. Consistent application of the policy and enforcement is key to maintaining fair practices;
5. The respondent should be informed of the alleged misconduct and have an opportunity to give their side of the story.

Once an investigation is complete and corrective actions are being discussed, severity of the conduct and severity of the corrective action must be balanced.

It is important to note that workplace violence and workplace harassment also fall within the Occupational Health and Safety Act. As such, the Occupational Health and Safety Act also sets out roles and responsibilities of various workplace parties when enforcing or investigating workplace violence and/or workplace harassment.

Non-Retaliation

Employees are protected from any form of retaliation regarding a complaint of harassment or discrimination. It is important that your policy outlines that you will not tolerate any form of retaliation, including any change in the terms or conditions of employment, against an employee who acts in good faith (i.e., sincerely) and with reasonable grounds for believing that a violation of the policy has occurred or who expressed concern, witnessed, complained about, resisted discrimination or participated in any investigation regarding same.

Scope

Your policy should make it clear that the terms and expectations apply to anyone you do business with or that your employees interact with. This means that it applies to your Trade partners, sub-trades, unionized employees, external consultants or even anyone your employees encounter.