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## Harassment in the Workplace

# Workplace Harassment – A Refresher Course

Harassment is an Issue Plaguing Nearly Every Workplace, and That Includes Condominium Corporations

There is nothing new about harassment in the workplace, sexual or otherwise. An unwanted leer, an act of bullying, or an “accidental on purpose” brush of a co-worker’s body— the problem is ongoing, and we are only beginning to fully understand it.

Across the country today there is a broad social imperative to combat workplace harassment. Indeed, the issue has perhaps never been more prominent in the public consciousness.

Social media, with its global reach, has been a driver of this response. Campaigns such as the #MeToo movement have created a social platform and a network of support for those who have previously felt uncomfortable reporting issues in their workplace.

But, the response has not been isolated to social media. Legislative bodies have begun to rethink how workplaces should respond to incidents of harassment. To this end, we have seen legislative changes in Ontario, including to the Occupational Health and Safety Act, R.S.O. 1990 (“OHSA”).

### **Harassment in Condominiums**

Workplace harassment is an issue plagu-

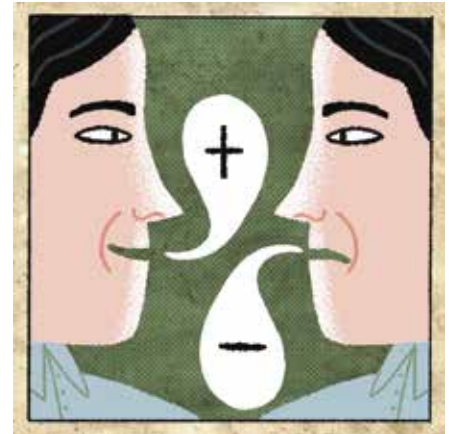
ing nearly every workplace, and that includes condominium corporations.

As we saw in a most recent edition of this publication, professionals at even the highest levels of this industry are often faced with behaviour that is shocking and downright appalling.

The ongoing prevalence of workplace harassment has inspired those who have experienced it to speak out. Whether it is commentary on how to ensure the safety of other workers, or a social media campaign such as #ImNotAJoke, the industry is taking notice of the harassment faced in condominium corporations.

The stubborn nature of the problem necessitates continual reviews of the obligations and duties imposed upon a condominium corporation and its board of directors, its owners and its management. As they say, knowledge is power.

The following is an elevated view of a condominium corporation’s obligations under the OHSA with respect to workplace harassment. It should be noted that the following is not legal advice, but rather a general overview of the process and duties imposed



on a condominium corporation in regards to workplace harassment. Each case must be assessed on its own unique facts.

### **Obligations of the Condominium Corporation**

A condominium corporation has a positive statutory duty to ensure the safety and security of the workplace for all workers, and to ensure that the workplace is free from any type of violence and harassment, whether physical or oral.

Without getting bogged down in minutiae of all the relevant legislation, a condominium corporation:

1. as the deemed occupier of the common elements, has a duty to keep the common elements reasonably safe;
2. under the Human Rights Code, has a further legal duty to maintain an environment free from discrimination and harassment; and,
3. as a workplace under the OHSA, a condominium corporation must establish a workplace harassment policy and program to implement that policy.

The workplace harassment program is to include, among other things, measures and procedures for reporting incidents of

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harassment, how incidents will be investigated and how the information obtained will remain confidential.

### **What Constitutes Workplace Harassment?**

Workplace harassment is defined in the OHSA as “engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome”. The definition of workplace harassment also includes workplace sexual harassment.

However, instead of parsing an ambiguous definition, it may be easier to ask “would a reasonable person in the complainant’s position find the conduct or comments to be objectionable?”

Examples of workplace harassment include, without limitation, bullying, aggressive behaviour, offensive comments and/or degrading or belittling another person.

Similarly, examples of workplace sexual harassment include inappropriate touching, sexually offensive gestures, and asking about another person’s sexual experiences.

### **Who is Protected?**

Under the OHSA, a “worker” is defined in part as someone who provides a service for monetary compensation. In the context of a condominium corporation, this includes not only the employees of a condominium corporation, but also any agents of a condominium corporation, including independent contractors. It does not include the directors of a condominium corporation, unless they are being compensated for their services as directors.

When is Duty to Investigate Triggered?

A condominium corporation has a duty to investigate not only if there is a complaint of workplace harassment, but if there is an “incident” of workplace harassment. The Government of Ontario suggests that the obligation to investigate arises whenever a supervisor becomes aware of any potential incident of workplace harassment. A supervisor is someone who has charge of a workplace or authority over a worker.

### **Conducting the Investigation**

A condominium corporation must conduct a thorough investigation which is “appropriate in the circumstances”. Due to the

relative newness of the amended provisions of the OHSA, there has been a debate surrounding what is considered “appropriate in the circumstances”.

What is clear, however, is that the investigation must:

1. be conducted promptly – within 90 days or less;
2. be objective – the investigator should not be the alleged harasser or the complainant, be involved in the incident or complaint, or under the direct control of the alleged harasser;
3. be thorough – interview all parties involved in the incident or complaint and any relevant witnesses; and,
4. maintain confidentiality.

In addition, in the investigation each party must be afforded procedural fairness. The alleged harasser should have the opportunity to hear the case against them and to respond to specific allegations made. If a board member or property manager is unable to conduct a fair and impartial investigation, an external third party may be required to conduct the investigation.

### **Can the Board or Property Manager Conduct the Investigation?**

There is also some debate as to whether an investigator can be internal to the corporation, or whether they should be an external third party.

The answer to this question is fact-driven and will depend upon the nuances of each case. Driving factors include cost, complexity and the independence of the investigator.

Some matters will clearly not require a lengthy investigation, and therefore the matter can be handled internally. An example of this may include a harassing email from a unit owner to the property manager.

Other matters, however, may be more complex and may require a lengthy and in-depth investigation. An example of this may include ongoing allegations of bullying by one worker against another.

It will be incumbent on a condominium corporation to assess the incident and properly determine which course of action is most appropriate.

### **The Results**

Details of the incident should remain confidential, unless disclosure is necessary to investigate, take corrective action or is otherwise required by law.

The results of the investigation and any corrective action taken should be summarized and provided to the parties in an executive summary.

The parties should be advised of the results within ten days of the conclusion of the investigation.

### **Harassment of Directors**

As previously mentioned, the definition of “worker” under the OHSA does not include the board of directors, unless the directors are being compensated for their services.

So what happens when a director is harassed by a unit owner or another director?

The harassment of directors is not condoned, and there are separate procedures to deal with such harassment.


This topic, however, is the subject for a different article.

### **The Minimum is Not Enough**

A condominium corporation should be determined to take all necessary steps to ensure that no harassment takes place on the property.

By law, a condominium corporation must only review its workplace harassment program and policy at least once annually. This may not be enough.

Educating workers on workplace harassment and reviewing the condominium corporation’s specific workplace harassment policy and program on a regular basis is a vital step in helping to protect workers, and in preventing further occurrences of workplace harassment.

When it comes to the safety and well-being of its workers, a condominium corporation shouldn’t live by the minimum standard. 

### **References:**

- Occupational Health and Safety Act, R.S.O. 1990
- Condominium Act, 1998, S.O. 1998, c. 19
- Occupiers’ Liability Act, R.S.O. 1990, c. O.2
- Human Rights Code, R.S.O. 1990, c. H.19
- [https://files.ontario.ca/workplace\\_harassment\\_en.pdf](https://files.ontario.ca/workplace_harassment_en.pdf)