

# Outside Perspective

## WHAT IS A “WORKPLACE INVESTIGATOR” AND WHY DO YOU NEED ONE?

By Peter V. Matukas

A workplace investigator is an individual who conducts an impartial, timely and neutral investigation into complaints made at or with respect to a workplace or issues which have arisen in the workplace. It is important to note that an investigation may be required for after hours interactions between employees or an employee and non-employee where an issue has arisen or a complaint is made. The investigator can either be internal to the company or an external third party hired by the company to investigate the complaint or issue. However, it is important to note that in Ontario, workplace investigations can only be undertaken by 1) licensed attorneys carrying on the practice of law; 2) licensed private investigators under the *Private*

*Security and Investigative Services Act*, 2005, SO 2005, c 34; or 3) internal company personnel tasked with the investigation.

The issues which may be the basis for a complaint and related investigation include: workplace harassment, sexual harassment, workplace violence, discrimination based on a protected ground (race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability) under the *Ontario Human Rights Code*, RSO 1990, c H.19, failure to accommodate, a breach of a company policy (i.e. misuse of company property, theft, fraud, improper payments/gifts – such as kickbacks or bribes – breach of anti-trust policies, conflicts of

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interest, breach of fiduciary duties, improper disclosure of confidential information, etc.), bullying, poisoned work environment and retaliation, to name a few.

As a result of recent legislative changes, employers are now obligated by law to conduct workplace investigations pursuant to section 32.0.7(1) of the *Occupational Health and Safety Act*, RSO 1990, c O.1 (OHSA) in order to protect workers from workplace harassment. An employer is obligated to conduct a workplace investigation once it is aware of a complaint, workplace misconduct, incident or an issue whether it is by way of a formal complaint, brought forward by a non-aggrieved party or anonymously to the employer's attention. Further, the Ministry of Labour (MOL) pursuant to OHSA section 55.3 can require an employer to conduct a workplace investigation by an impartial person who possesses specific knowledge, experience or qualifications at the employer's expense. A MOL required workplace investigation can occur from a MOL blitz or by an employee reporting that an employer has failed to conduct a workplace investigation in contravention of its OHSA obligations. Other developments have increased the standard by which workplace investigations must be conducted.

The investigation which is to be conducted is required to be appropriate in the circumstances. However, applicable legislation does not define what is considered "appropriate." Accordingly, it

is left up to the company to try to determine what is considered "appropriate in the circumstances" at its own peril. General parameters for what is considered appropriate are for the investigation to be impartial, timely, fair and thorough and for the investigator to be at least arms-length from the parties involved.

Unfortunately, as is often the case, an employer is not necessarily the best suited, prepared or has the required skills to conduct a workplace investigation, which results in an inadequate or improper investigation. This generally also leads to an incomplete and deficient investigative report which cannot withstand tribunal or judicial scrutiny. Consequently, the Courts often denounce such investigations as improper, inadequate and/or insufficient, resulting in significant exposure to liability to the employer. Accordingly, it is best to utilize an external third-party investigator with specialized skills in workplace investigations to assist an employer in conducting an investigation into any complaints, issues and grievances – that the company has become aware of – and who can prepare an appropriate investigative report (which is often utilized and relied upon in subsequent litigation), which are more suited to survive scrutiny of the Courts. ■

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