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## ***New Workplace Harassment Regulations***

### *Follow-up Considerations for Implementation*

While Ontario's new anti-harassment legislation, the "Sexual Violence and Harassment Action Plan," has been widely communicated for several months, the Ministry of Labour very recently introduced several related regulations that some businesses might not yet be aware of.

In conjunction with any changes you have already made to your workplace harassment policy, some additional developments you should consider include:

1. Ensuring that your health and safety representative (or JHSC representative, if applicable) is consulted with in developing a new or revised Violence and Harassment policy that reflects all new 2016 regulations.
2. Posting your policy in a visible area of your workplace and ensuring that the most senior level manager has signed and dated this policy, which should in future be reviewed on an annual basis.
3. Carefully reviewing the new investigation requirements (note that in some cases these now necessitate the appointment of an outside investigator).
4. Also reviewing the time limits within which an investigation must be completed and the new requirements that details of certain aspects of the investigation must be shared with both the complainant and the alleged harasser/assailant.
5. Review the training you have conducted with staff (and new hires) to ensure it incorporates all of these new standards.



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## Benefits Corner

### *The Use of Benefit Trusts to Manage Costs*

#### **“Employee Life and Health Trust” Might Help Your Business Get a Handle on Rising Benefit Costs**



While not many employers provide post-retirement benefits to their employees, for those that do, the long-term costs can be significant to manage. Trends suggest that these costs will continue to rise, particularly in the context of an aging population and workplace demographic.

The rising cost of prescription drugs and privatized healthcare programs is prompting some employers to seek a more cost-effective way to ensure their employees' benefit needs are met into retirement. One emerging trend in the battle to cope with rising costs is the “Employee Life and Health Trust” (ELHT) model, which offers a defined contribution approach to funding benefits.

These trusts allow plan sponsors to hedge against rising retiree benefit liabilities and costs by establishing defined payments (basically, the money is set aside for eligible members and their beneficiaries, who can use the life, health, dental and/or disability benefits into retirement).

While it is the employer who funds the trust initially, the risk is ultimately shifted to a board of trustees, which acts on behalf of the participants. Trust members are encouraged to stay involved in decision making, ensuring that the plan is delivered in a way that best matches the needs of the participants.

The downside to this trust is that it restricts some rights of the employer, in the sense that there is no employer representative in control of the ELHT.

Still, this option may be worth discussing with your benefits provider, who will be able to further explain how an ELHT could provide you with some long-term cost savings in a climate of skyrocketing pharmaceutical and disability costs.

Just as many defined benefit pension plans have shifted to a defined contribution model to better predict and manage costs, we may see these trusts become more commonplace for those employers who have post-retirement benefit obligations.

## **“Harassment”**

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These new requirements can be incorporated into any existing workplace harassment or violence prevention policies that you have in place already.

You do not necessarily need to introduce a completely new policy, and can even include these requirements in your existing health and safety policies if this makes more sense in your organization.

These rules just came into effect the second week of September, so now is an opportune time to review your program to ensure it remains current.

*(Clients subscribing to our automatic policy updating service will have already received revised policies and the online training module has likewise been updated to reflect current requirements).*

## **Accommodating Mental Health Issues in the Workplace**



With an increasing web of regulatory, legal and social considerations, it can be difficult for an employer to determine what their responsibilities are when accommodating employees with a known mental health issue. Employers want to do the right thing, but it is not always clear what is required or appropriate. It is very clear that employers cannot discipline, suspend or dismiss employees suffering from a mental illness or disability.

What if it is unclear whether the employee has a mental health issue? What if the employee is causing disruption or a significant safety risk in your workplace? Can you temporarily suspend an employee pending psychiatric testing? Apparently, the answer is “no” if the findings of a recent court case in New Brunswick are to be followed.

When a maintenance department employee at a nursing home in New Brunswick began demonstrating concerning behaviour (which included mood swings, making inappropriate gestures, and, on one occasion, bringing an axe into work), his employer felt justified in suspending the employee until a psychiatric assessment was conducted. This employee in fact had a history of unpredictable behaviour, and had already received a written warning on two separate occasions, as well as a 1.5 day suspension (following the axe wielding incident).

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## Accommodating

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It came as a surprise to the employer when the results of the employee's psychiatric test concluded that he in fact did not pose a danger to himself or others. By the time this conclusion was reached, the employee had already missed more than 20 days of work. In this case, despite the fact that the employee had been causing problems at work for a number of years, and was actually the subject of a police investigation for a non work-related incident, the New Brunswick Court of Queen's Bench sided in favor of the employee following the filing of three grievances by the employee's CUPE local.

These grievances included alleging that the employer violated the collective agreement by not having a union representative at the suspension meeting (although, it is worth noting that the employee was offered a union rep, but he refused); and that the employer violated the collective agreement by suspending the employee pending an evaluation, without pay. The third grievance concerned a suspension for bringing an axe to work. On the third issue, the arbitrator concluded that the suspension was reasonable and this was not further pursued in court.

So what does this finding mean for Canadian employers? Do you have any recourse at all should you find yourself in a similar situation?

With the exception of industries where safety is of above-average concern (for example, an airline), employers cannot discipline, suspend or dismiss employees who have any degree of mental competency shortcoming. Employers have a duty to accommodate all disabilities, including those of a psychiatric nature. If your employees are unionized, the union also has a legal obligation to assist in dealing with "difficult" employee behaviour, including mental health issues (keeping in mind that difficult behaviour is not necessarily grounds for removing an employee from the workplace).

We recommend that you have a carefully drafted *modified work and return to work* policy which takes into account all requirements [including the human rights code, health and safety legislation, and the AODA]. This is a complex area to navigate, so consulting with a qualified employment lawyer or HR expert in this field is advisable. For more information about the case in this article, see *Passamaquoddy Lodge v CUPE Local 1763* 2016 NBQB 056.

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