



# GUIDE FOR EMPLOYERS



 Preventing Workplace Harassment & Violence: Toolkit for Trucking & Logistics Employers

A GUIDE FOR FEDERALLY REGULATED WORKPLACES

# Understanding the Workplace Harassment & Violence Prevention Regulations



***Disclaimer:** This guide aims to provide an overview of the changes Bill C-65 makes to existing law. This guide does not constitute legal advice.*



The federal government has introduced *Bill C-65* to simplify and streamline how harassment and violence in the workplace are handled. The Bill and its Regulations came into force on January 1, 2021, so it is important for employers to understand their new obligations.

## WILL THIS APPLY TO YOU?

In general, transportation companies that provide international and interprovincial services are regulated by the federal government, while provincial governments oversee companies that provide services within one province. Trucking and logistics companies that provide international and interprovincial services are subject to federal jurisdiction, meaning they are subject to the *Canada Labour Code* (the “Code”) and will be affected by *Bill C-65*. There may be additional factors or considerations that determine your status. Consult a lawyer if you are unsure of your standing. If you are not a federally regulated fleet, similar obligations in the area of labour law can still apply to you depending on the specific labour laws in your province. While the Code is only applicable to federally regulated companies, the changes provided by *Bill C-65* still provide a useful framework for best practices across the industry.



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If you are an employer, you'll be responsible for instituting the following, non-exhaustive changes in your workplace: expanding protections to former employees, instituting mandatory training in the prevention of workplace harassment and violence, allowing employees to bring their complaints to someone other than their supervisor, assessing your workplace for risks of harassment and violence, and developing a workplace policy for the prevention of harassment and violence.

### Under the Code, an employer is defined as:

- (a) Any person who employs one or more employees, and
- (b) In respect of a dependent contractor, such person as, in the opinion of the Board, has a relationship with the dependent contractor to such extent that the arrangement that governs the performance of services by the dependent contractor for that person can be the subject of collective bargaining.

## WHO IS COVERED?

To fall under the protection of the new legislation, the worker in question must be an **employee** or **dependent contractor**. The chart below outlines the differences between who is and isn't covered:

### EMPLOYEES

#### EMPLOYEE

Any person employed by an employer (including dependent contractors) but does not include a person who performs management functions.

Whether or not a person is a manager will depend on the structure of the business and the duties they perform, not just their formal title.

### CONTRACTORS

The Code defines a contractor as: the owner, purchaser, or lessee of a vehicle that is used for hauling who has entered a contract that requires them to provide and operate their own vehicle for the purposes of this hauling. They will make a profit from the difference between what it costs for them to fulfil the contract (operate the vehicle, make the delivery, etc.) and what they were paid to fulfil the contract.



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### CONTRACTORS (CONT'D)

**NOTE:** It does not, in and of itself, matter if an employer and worker signed an agreement that states the worker is a contractor. What defines a worker's status as either employee or contractor is the way the employment relationship works in practice.

There are a number of factors that determine if a worker is an employee or a contractor:

- 1) **Control** – An employee will have less control over their workload, salary, hours, duties, and the profitability of the business itself than a contractor. A contractor may be responsible for finding their own work, and will assume risk for their business's profitability
- 2) **Equipment** – An employee will generally rely on the employer to provide these, while a contractor will provide their own tools and equipment. Contractors also incur the loss of replacing or repairing their tools and vehicle.
- 3) **Hiring** – Employees generally cannot hire people to assist them with their job, while contractors can.
- 4) **Financial Risk** – Contractors shoulder a bigger risk by taking on contracts, because (as outlined above) they're responsible for running their own business. They take on the risk of losing money due to large operating costs, bad contracts, etc.

#### DEPENDENT CONTRACTOR

Dependent contractors are protected under the new legislation. They exist in a sort of middle category between employee and independent contractor. As the name suggests, the defining traits of a working relationship that make a worker a *dependent* rather than *independent* contractor are their exclusivity in working for the employer rather than numerous clients, and their overall financial dependency on the employer.

In practice, "dependency" means that the employer must provide "substantially more than the majority" of the contractor's income. Therefore, if the contractor relies on an employer for more than 50% or more of their income, they're likely to be found economically dependent on the employer.

#### INDEPENDENT CONTRACTOR

Independent contractors are **not** protected under the new legislation. They meet the definition of a contractor as listed above, but are not economically dependent on the employer. They will likely perform a number of contracts with different clients, and will not rely on any one client for more than 50% of their income.

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Owner Operators and Personal Services Business drivers may or may not be considered employees or dependent contractors, depending on the factors at play in the working relationship, as described above.

## PAY ATTENTION TO THE DEADLINES

While it is best for a current employee to make a timely report, there is no time limit for a current employee to submit a complaint on workplace harassment and violence. A former employee may still report conduct to their employer within 3 months of leaving their job. If the former employee applies to the Minister of Labour's office, the Minister may choose to extend this deadline. After an employee has made a report, an employer has **1 year to resolve the complaint**.

### Additional timelines to keep in mind include:

- The workplace assessment (point 1 below) must be reviewed and updated if necessary, at least once **every 3 years**.
- The workplace harassment and violence prevention policy (point 2 below) must be reviewed and updated if necessary, at least once **every 3 years** or following any change to any element of the policy.
- The training must be reviewed and updated if necessary, at least once **every 3 years** and following any change to any element of the training.
- Employees, employers and the designated recipient must receive the training within **1 year** after the day the Regulations come into force (so by **January 1, 2022**), or for employees hired after that, within **3 months** of being hired.
- Note that an employer must ensure that the designated recipient is provided with training **before assuming their duties** under the Regulations.
- Following the initial training, employees must receive the training **every 3 years**.

## WHAT CONDUCT SHOULD YOU BE AWARE OF?

**Bill C-65** creates the following definition for harassment and violence under **Section 122(1)** of the Code:

*“any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.”*



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### HARASSMENT

Rude, degrading or offensive remarks; Sexist, racist or offensive emails or pictures; Repeatedly singling out an employee; Practical jokes that embarrass or insult another Employee; Offensive gestures; Patronizing or condescending behaviour; Abuse of authority; Vandalism of personal property; Physical or sexual assault; Threats or intimidation; Unwanted sexual behaviours; or Cyber bullying/harassment online.

### SEXUAL HARASSMENT

Unnecessary physical contact, such as inappropriate touching; Unwarranted sexual advances/flirting; Displaying pornography or sexual images; Offensive sexual jokes; or Vulgar language relating to sexuality, sexual orientation or gender

### VIOLENCE

Violence in the Bill includes the exercise of force against an employee that could cause physical or psychological injury.

### WHAT IS NOT INCLUDED?

Disagreements, Constructive criticism, Legitimate exercise of management authority or responsibility such as: progressive discipline OR following up on work; Work related stress; or Requiring performance to job standards.

Typically, harassment and/or violence involves a series of events. Repeated unwarranted behaviours that include any of the aforementioned criteria may be considered harassment, but a single incident may constitute harassment if it is significant enough to seriously offend or cause serious injury.

## HOW TO ADAPT YOUR WORKPLACE:

### 1 - Perform a Workplace Assessment

Employers will have to conduct an assessment that identifies risks of harassment and violence in their workplace and implement preventive measures to protect the workplace from these risks. Risks should be identified by taking into account the culture, conditions, and activities of the workplace, as well as any existing reports, records, and data related to harassment and violence in the workplace. Other risk factors to identify include the physical design of the workplace, the measures that are in place to protect psychological health and safety in the workplace, and any circumstances external to the workplace, such as family violence, that could give rise to harassment and violence in the workplace. Consult Trucking HR Canada's *Workplace Risk Assessment Checklist* for more information on the steps employers should take.

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Within **6 months** of identifying these risks, the employer and a member of either the (a) Policy Health and Safety Committee, (b) the Workplace Health and Safety Committee, or (c) the health and safety representative must work together to develop and implement a plan to eliminate those risks. This assessment will need to be reviewed and updated every **3 years**.<sup>1</sup>

## 2 - Develop a Workplace Harassment and Violence Prevention Policy

**This policy should be made available to all employees and (amongst other requirements) should do the following:**

- Define and prohibit harassment and violence;
- Identify factors which contribute to workplace harassment and violence, and set out preventative measures;
- Explain how to report instances of harassment and violence, and specify the designated recipient (described in point 4);
- Summarize the training that will be provided
- Outline emergency procedures for critical incidents of workplace harassment and violence;
- Describe risk factors internally and externally which contribute to workplace harassment and violence;
- Tell employees where they can find support or seek additional recourse if they have experienced violence or harassment; and
- Explain how employees' privacy will be protected during a complaint process.

Consult Trucking HR Canada's *Workplace Policy Template and Policy Implementation Checklist* for more information on the Workplace Harassment and Violence Prevention Policy.

## 3 - Provide New Training to Employees

Once every **3 years**, employers are required to train and inform all company staff about their rights and responsibilities, and on the prevention of workplace harassment and violence. The designated recipient outlined in section 4 below should receive special training relating to harassment and violence and they must receive training before assuming any responsibilities linked to this role.

**The training itself must be catered to the specific culture, conditions, and activities of the workplace and should make reference to, among other things, the following:**

- The elements of the workplace harassment and violence prevention policy
- How to recognize, minimize, prevent and respond to incidents of workplace harassment and violence;
- The relationship between workplace harassment and violence and the prohibited grounds of discrimination set out in the *Canadian Human Rights Act*.

<sup>1</sup> If your organization has up to 19 employees, you must work with the health and safety representative; for companies with 20 to 299 employees, you must work with the workplace committee; for companies with 300 or more employees, you must work with the policy committee. Under the Regulations, the selected entity is known as the company's Applicable Partner.

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Employers should ensure that they go through their Policy with employees to make sure they understand their rights and obligations, and have the employees sign a copy of the Policy to keep a record of their training.

Consult Trucking HR Canada's website for more details about industry-specific training solutions designed to provide training on the topics above. Trucking HR Canada training is designed to be industry specific.

#### 4 - Update the Internal System for Reporting Incidents

##### FIRST:

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Designate a person or work team to whom complaints can be directed regarding harassment and violence in the workplace. This person is known as the **designated recipient**.

- This person should be identified within the workplace violence and prevention policy and should ideally not be a supervisor or manager. This prevents employees from being forced to report violence and harassment to their direct supervisors, as many employees fear they will face negative consequences for doing so.
- If an employee feels comfortable making their complaint to a supervisor, they may, but it cannot be a requirement.
- The designated person must also have experience dealing with harassment or violence and have knowledge of the *Code and Canadian Human Rights Act*.
- Complaints of harassment or violence should not be referred to a health and safety representative, to the Policy Health and Safety Committee, nor to the Workplace Health and Safety Committee. This is to protect all employee's rights to privacy and to ensure that they may receive an unbiased and fair resolution of their issue.
- Employees can make their complaint to the designated recipient either verbally or in writing.

##### SECOND:

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The employer or designated person must, within **7 days** of receiving a complaint, notify the employee that submitted the complaint that their notice has been received, advise them of the steps in the resolution process, how to access the Harassment and Violence Prevention Policy, and inform them that they may be represented during the process. Note that the employer or designated recipient should only contact the source of harassment or violence (the subject of the complaint) if the employee that submitted the complaint agrees that it is appropriate. However, the subject of the complaint must be contacted if the target of harassment or violence chooses to proceed with conciliation and/or an investigation. At that point, the responding party (or subject of the complaint) must also be notified that they have been named in a complaint, informed about the Policy, the steps in the process and that they may be represented during the process.

##### THIRD:

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The parties involved can engage in a negotiated resolution or "conciliation" which is like a mediation where a third-party attempts to assist in facilitating a resolution. During early resolution, the employer or designated recipient must make every reasonable effort to resolve the complaint, and this process must begin within 45 days following the day on which the complaint was submitted.

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If a complaint is not resolved through conciliation or negotiated resolution, an investigation of the issue must be carried out if the person who has made the complaint requests it. Complaints must be investigated within a timely manner - the regulations outline a time period of 1 year after the day on which the employer or designated person is notified of the incident to have the resolution process completed. The investigator should prepare a report which includes a general description of the occurrence, their conclusions, including those related to the circumstances in the workplace that contributed to the occurrence; and their recommendations to eliminate or minimize the risk of a similar occurrence. For the occurrence to be resolved, the employer must consult with their Applicable Partner and implement selected recommendations within **1 year** of the complaint being made.

Also note that the Regulations allow for negotiated resolution, conciliation and an investigation to run as parallel processes. However, once the investigator's report is provided to the employer, the incident can no longer be resolved through negotiated resolution or conciliation. If the target of harassment or violence wishes to engage in negotiated resolution or conciliation, the employer can ask the investigator to suspend the investigation. However, this would not extend the 1 year time period to complete the resolution process.

If a resolution has not been found within 1 year of the complaint, either the employer or employee may apply to the Minister of Labour, at which point the Minister will investigate.

**HEALTH & SAFETY RECORDS**

**An employer must keep detailed health and safety records relating to workplace violence and harassment, including:**

- The Workplace Harassment and Violence Prevention Policy;
- A copy of the documents that form part of the workplace assessment;
- A copy of the documents that form part of each review and update of the workplace assessment
- A record of each notice (complaint) provided, and each action taken in response to the notice;
- A copy of each report that is prepared by an investigator;
- A copy of each annual report submitted to the Minister; and
- A copy of each fatality report (a report to be given to the Minister within 24 hours if an occurrence results in the death of an employee).

Any records and reports required by the Regulations must be maintained for a period of 10 years.





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### ANNUAL REPORT TO MINISTER

On or before **March 1** of each year, an employer must provide the Minister with an annual report which sets out their name or their business name and number, a contact person, and the following information respecting occurrences which notice was provided in the preceding calendar year:

- The total number of occurrences
- The number of occurrences that were related, respectively, to sexual harassment and violence and non-sexual harassment and violence
- The number of occurrences that resulted in the death of an employee
- The number of occurrences that fell under each prohibited ground of discrimination in *subsection 3(1)* of the *Canadian Human Rights Act*
- The locations where the occurrences took place, specifying the total number of occurrences that took place in each location
- The types of professional relationships that existed between the principal and responding parties, specifying the total number for each type
- The means by which resolution processes were completed, and
- The average time, in months, that it took to complete the resolution process for an occurrence.<sup>2</sup>

### BEST PRACTICES

Employers can maintain compliance with the changes to the Code relating to harassment and violence in the workplace by promoting newly developed company policies, providing on-going education to employees, measuring progress, and empowering employees to make their voices heard. Employers should be mindful of the three main elements of *Bill C-65*:

- 1) Prevent incidents of harassment and violence;
- 2) Respond effectively to those incidents if and when they occur; and
- 3) Support affected employees.

<sup>2</sup> Employers must report the information presented in these bullets for the preceding calendar year (January 1st to December 31st of the preceding year). Annual reporting will start on March 1st, 2022.