



Navigating Today's Workplaces: Explore the Challenges of BYOD, Privacy and Beyond

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Navigating Today's Workplace:
Bring Your Own Device (BYOD)
Policy Considerations

BYOD

Overview

- Pros
- Cons
- Implementation



BYOD

Pros – Why BYOD policy?

- Increased job satisfaction and flexibility
- Increased efficiency and responsiveness
- Reduced expenses
- Formalize and address existing employee behaviours

BYOD

Cons – Potential pitfalls

- Potential hours of work, overtime violations
- Privacy, security and confidentiality issues
- Potential liability regarding data collection, retention and destruction
- Potential liability for employee misuse
- Issues arising when employees leave a company

BYOD

Implementing BYOD

- Start with company-specific risk assessment
- BYOD program should have 3 pillars:
 - Policy
 - Training
 - Technology

BYOD

Specific considerations – Labour standards compliance

- Blurred personal/professional divide carries risks for:
 - Recordkeeping
 - Overtime & wages for work performed
 - Rest periods
- Consider both policy and tech solutions

BYOD

Specific concerns – Personal information

- Employers have a right to monitor/access devices used for work, BUT
- Be aware of risks re. collection of employee personal data
 - Privacy, human rights considerations
 - Intrusion upon seclusion potential
- Address issues re. employee access to 3rd party personal information
- Consider both policy and tech solutions

BYOD

Specific concerns – Employer data and security

- Amount and sensitivity of employer information involved is relevant for BYOD assessment
- Need measures to protect company information
- Potential liability for data breaches/ use of confidential information
- Incident management
- Consider both policy and tech solutions

BYOD

Other Concerns

- Address ownership and payment
- Implement and enforce consequences for breach
- Obtain acknowledgement of policy



Navigating Today's Workplace:
Privacy, Confidentiality and
Harassment Investigations

Privacy and Confidentiality Challenges in Harassment Investigations

- In the #MeToo era, harassment investigations are the “new norm” in today’s workplace.
- Many jurisdictions have legislative and regulatory provisions designed to address workplace harassment. An example of the most robust legislative and regulatory change are the proposed federal *Workplace Harassment and Violence Prevention Regulations*.



Privacy and Confidentiality Challenges in Harassment Investigations

- If not handled properly (and even if handled properly) a harassment allegation (and the investigation process) can destroy reputations and careers.
- The investigation and post-investigation process has to be conducted in a manner that respects privacy and confidentiality of all those involved: the complainant; respondent; and witnesses.

CONFIDENTIAL

Privacy and Confidentiality Challenges in Harassment Investigations

Galloway Case

- Galloway, a former UBC professor, was alleged by another faculty member to have engaged in a sexual assault.
- Galloway was suspended and then his employment was terminated.
- An investigation was conducted by a former BC judge and it was determined that the allegations were not substantiated.
- The allegations that were ultimately not substantiated was the subject of substantial social media discussion by faculty members, former students, and the complainant.



Privacy and Confidentiality Challenges in Harassment Investigations

Galloway Case con't

- Galloway brought a grievance against UBC for the manner in which the allegations were communicated.
- An arbitrator awarded Galloway \$167,000.00 in damages.
- The arbitrator issued the decision in summary form and the parties were cautioned that the proceeding was to remain strictly confidential.
- A UBC representative told the Vancouver Sun reporter that the “allegations of sexual misconduct were not the only issues [UBC] examined during its review of [Galloway’s] employment.”
- Galloway brought another grievance for this breach of confidentiality and was awarded \$60,000.

Privacy and Confidentiality Challenges in Harassment Investigations

Upon receiving complaint, think hard about how you are going to protect the privacy and confidentiality of all those involved?



Privacy and Confidentiality Challenges in Harassment Investigations

Set the confidentiality and privacy rules

- Tell the complainant, respondent, and witnesses (and reinforce in writing) that they are not to discuss anything related to the investigation with anyone.
- Ensure support persons (who may attend the interview) are bound to a confidentiality agreement.
- Set expectations as to what information about the outcome that those involved will be provided. The witnesses will likely receive nothing. The complainant and respondent may not receive the investigation report.

Privacy and Confidentiality Challenges in Harassment Investigations



Remember the respondent (who has been accused of something serious) may not process the information after they are told, so confirmation of privacy and confidentiality obligations in writing is vital.

Privacy and Confidentiality Challenges in Harassment Investigations

- Witnesses are likely fellow employees.
- Witnesses like to talk (gossip) and tell other employees what is happening.



Privacy and Confidentiality Challenges in Harassment Investigations

Written confirmation of confidentiality and privacy obligations

- The key messages in the written confirmation of confidentiality and privacy obligations:
 - Retention of investigator.
 - Reference any confidentiality provisions in the Policy that applies to the investigation.
 - Confidentiality is crucial to fair and effective investigation.
 - Refrain from discussing the investigation or the allegations with anyone other than personal representative (if they have one).
 - You will keep all information you discuss during your meeting with the investigator confidential.
 - You shall not ask anyone if they have participated in the process nor speak to any individuals who may participate in the process about the subject matter of the investigation or the contents of discussion with the investigator.
 - Recognize that process is stressful and if they wish to speak to someone they can speak to X.

Privacy and Confidentiality Challenges in Harassment Investigations

The report – Who gets what?

- Consider the law
 - Statute (e.g. Proposed *Canada Labour Code* Regulations have strict requirements as to the form of the Report and who receives what type of Report)
 - Policy
 - Collective Agreement
- Consider the unique circumstances that may cause you to re-evaluate your approach? (e.g. has the rumour mill run wild?).
- Various options on communication of Report:
 - Complainant and respondent see entire report.
 - Executive summary provided to complainant and respondent only.
 - Different summary reports – one for the respondent and one for the complainant. Personal information is redacted.
 - Union representatives see report, but only after signing confidentiality agreement.
 - Investigator provides brief letters containing high level overview of findings and outcomes.
 - Respondent may agree to disclosure of consequences.

Privacy and Confidentiality Challenges in Harassment Investigations

After the investigation

- Investigations are divisive.
- Employees take sides.
- How are you going to “get back to normal”
 - Consistent “checking in” with members of team.
 - EAP – offer EAP to all those involved.
 - Workplace mediation
 - Coaching
 - Training
 - Establish process for receiving feedback on investigation.
 - Team building initiatives.
- Policy review – Did the policy work? How can the policy be improved?





Navigating Today's Workplace:
...And Beyond – Flexible Work
Arrangements

Beyond . . . Flexible Workplace

Want flexibility – different arrangements

- Employees:
 - FT
 - PT
 - Term
- Independent Contractors
- Dependent Contractors



Beyond . . . Employees

- Have employment agreements!
- From 2 page hire letter to detailed executive agreement
- Practical strategies:
 - Change
 - Termination provision(s)

Beyond . . . Employees

- Legal concerns with change:
 - Constructive dismissal
 - Limitations under NS Labour Standards Code (concern similar in other provinces) and Canada Labour Code
- So, “bake in” change:

“we are a dynamic business in a dynamic industry. . . Accordingly, you agree that your responsibilities, duties, title, etc. may change from time to time” (subject to statutory minimums)

Beyond . . . Employees

- Termination Clauses!
- Need legal advice on this – it's tricky and evolving
 - Meet minimum standards
 - Clear
 - Cap on notice

Beyond . . . Employees

- Fixed term employees (fixed end date):
 - Nothing owed after end date
 - But, potentially less flexibility during term;
 - No mitigation;
 - Renewals can get tricky
- Strategies:
 - Should you have other employment arrangement?
 - Early out clause

Beyond . . . Independent Contractors

- Have an independent contractor agreement
- Very important to have it in writing (one of the factors)
 - Clear statement that independent contractor (not employee or dependent contractor!)
 - Indemnity provision
 - Term provision
 - WCB clearances

Beyond . . . Dependent Contractor

- Evolving rights and protections
- Not quite employees not quite independent contractors
- Key is degree of exclusivity

Beyond . . . Dependent Contractor

- *Thurston v. Ontario (Children’s Lawyer)* 2019
 - Lawyer sole practitioner
 - Worked for children services for 13 years with renewing contracts
 - Work accounted for 40% of her billings
- Overturned by Ontario CA:
 - “need complete or near-complete exclusivity”
 - Case by case, but requires “substantially more” than 50% of billings

Beyond . . . Dependent Contractors

- Practical:
 - Agreements with termination provisions!
 - Watch out for exclusivity!

Beyond . . .

- Options available!
- Agreements – better protection and less headache in long run
- Changes to legislation?



These materials are intended to provide brief informational summaries only of legal developments and topics of general interest.

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