



QUICK REFERENCE COMPLIANCE GUIDE – NEW BRUNSWICK

Employers in New Brunswick have specific legal obligations to prevent and respond to allegations of workplace harassment, which is increasingly becoming a significant issue for workplaces nationwide. This *Quick Reference Compliance Guide* is intended to supplement the Respectful Workplaces in the Arts New Brunswick Legislative Webcast by providing New Brunswick-based employers with 7 key compliance strategies and practical considerations to meet their obligations and address workplace harassment issues as they arise.

For the purposes of this *Quick Reference Compliance Guide*, “employer” includes not-for-profit Boards and arts organizations. The term “cultural worker” includes individuals who may be referred to as employees, self-employed artists, contractors and volunteers. To get a more comprehensive understanding of your compliance responsibilities as an employer, consult the New Brunswick legislative webcast and other Respectful Workplaces in the Arts resources at respectfulartsworkplaces.ca.

1. Examine: Know your legal obligations

Employers should familiarize themselves with applicable legislation before drafting harassment policies and procedures and communicating them in the workplace. New Brunswick workplace harassment obligations are set out in the General Regulation of the New Brunswick *Occupational Health and Safety Act* (the “OHS”) and the *Human Rights Act*.

2. Assess: Identify practices that could make your workplace susceptible to harassment risks

While workplace harassment may seem easy to define and identify, workplace harassment can often be discrete and may be occurring in the workplace while an employer is completely unaware. For this reason, it is not sufficient for employers to simply understand their legal obligations with respect to workplace harassment; employers must evaluate their workplace to identify what practices and working conditions may make it vulnerable to harassment exposures and risks.

Identify working conditions and practices that create harassment risks

Employers should conduct a workplace risk assessment for harassment risks, considering:

- their workplace culture and the nature of the work performed;
- which different locations or “settings” could constitute the workplace (e.g., a theatre, a rehearsal space, a gala, after work social events involving colleagues, etc.); and
- whether there are any workplace practices that could increase the likelihood of an incident of workplace harassment occurring.

Examples of working conditions or practices that could make a workplace susceptible to harassment risks include: long working hours, tight project deadlines, work that involves touch or contact (e.g., intimate acting scenes, dance, stunt work), a permissive alcohol or recreational drug use culture, a competitive workplace, interpersonal politics, aggressive or demanding personalities, and tolerance of “diva” behaviour.



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Employers should conduct follow-up risk assessments as often as necessary and particularly after harassment incidents arise, or in response to major changes that impact working conditions or workplace culture (e.g., a new type of project requiring different work, or significant growth in the number of cultural workers).

3. Draft: Create a customized workplace harassment policy and program

After employers have conducted a thorough risk assessment for workplace harassment, they should draft a workplace harassment policy that covers their legal obligations and addresses any practices that create risks within the workplace.

Tailor your harassment policies to reflect your workplace realities

- While many employers may use template policies to begin the harassment policy drafting process, they should ensure that their workplace policies are ultimately customized to reflect the unique realities and particular risks related to their working environments and culture.
- Workplace policies should not suggest procedures, beyond those that are required, that the employer will not consistently perform.
- Employers should not be dismissive of an identified potential risk simply because it has not caused any issues of workplace harassment in the past.

Clearly set conduct expectations

- Policies should clearly set out conduct expectations (identifying what is appropriate and inappropriate behaviour), and that the employer has zero tolerance for conduct that could constitute harassment.
- Employers should be clear that workplace harassment is prohibited in any form, and that cultural workers will be subject to discipline up to and including termination, for engaging in this type of behaviour.
- If applicable, consider collective agreement terms (e.g., where cultural workers may have rights to a representative), and where a union or guild may have an active role in the complaint intake process or have issued policies or codes of conduct that support harassment compliance that could be cross-referenced.

Require everyone in the workplace to help minimize harassment risks

- The OHS Act is founded on an internal responsibility system (“IRS”). The IRS means that everyone in the workplace, including employers, supervisors and cultural workers, has a role to play in minimizing harassment risks to keep the workplace safe and healthy.
- Employers should take advantage of the existence of these shared duties to require and reinforce cultural worker conduct expectations, and reporting of incidents and complaints of harassment, including bystander (i.e. those who witness harassment-related misconduct) reporting requirements.



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4. Implement and Enforce: Ensure workplace policies are consistently applied

Writing and establishing a workplace harassment policy is one thing, but the more challenging task for employers is implementing these policies and ensuring they are consistently applied as intended.

Ensure cultural workers and management are properly trained

- Conducting appropriate training for all cultural workers, Board members and managers, is key to meeting obligations related to preventing and addressing workplace harassment.
- Employers should communicate, cross-reference and reiterate conduct expectations through various policies (including harassment policies, codes of conduct, etc.) and workplace training.
- Employers should conduct training as often as necessary (at a minimum annually) and ensure that new cultural workers are provided with training to communicate expectations, obligations, rights and shared duties regarding preventing, reporting and participating in investigations related to workplace harassment.

Follow and consistently apply your workplace harassment policy

- Employers must follow the terms of their workplace harassment policy and ensure it is applied consistently in all cases.
- Where employers fail to follow their established policies and procedures, they undermine the enforceability of the policies and risk compromising any investigations they complete and exposing themselves to potential liability. They also risk condoning misconduct by not addressing it according to policy requirements.

Do not condone unacceptable behaviour

- Employers should not tolerate unacceptable workplace behaviours that could constitute harassment as this creates risks and undermines their zero-tolerance stance against this type of misconduct in the workplace.
- Examples could occur where employers: tolerate inappropriate conduct because of an individual's prominence in the industry; ignore early warning signs of harassment risks (such as escalating interpersonal conflict); fail to investigate complaints and incidents of workplace harassment; or do not impose discipline for violations of conduct expectations.

5. Address: Appropriately intake incidents and complaints and respond

Once a complaint or incident occurs, employers must respond as quickly as possible to minimize the impact that the incident or complaint has on the workplace.

Manage the impact on the workplace

- Upon receipt of an incident or complaint, employers must consider who should be involved in the intake process and the appropriate individual(s) to conduct the intake of the circumstances (e.g., if the allegations



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are against someone in authority, it may need to be addressed by the Board or an external agency to avoid bias or conflict of interest concerns).

- Employers should assess whether the respondent (i.e. the individual facing the allegations of misconduct) should be removed from the workplace pending the outcome of an investigation.
- If a manager or high-level cultural worker is the respondent to an investigation and placed on leave, the employer may have to quickly determine temporary working solutions in that cultural worker's absence.
- Employers should refer cultural workers to employee assistance programs under benefit plans, if applicable, to help manage any psychological impact on affected cultural workers or other workers.

Consider whether an external investigator is necessary

Employers should always consider whether a complaint or incident can (or should) be handled internally or if an external investigator should be engaged. An external investigator should be considered where:

- the allegations are against a person who is considered influential or who has a high level of authority within the organization;
- the available internal investigator is in a position of conflict, could be biased by having a personal relationship with one of the parties, or has some involvement in the incident in question; or
- the employer does not readily have an internal investigator who is adequately trained and/or who has the capacity or availability to conduct an investigation that is appropriate in the circumstances.

While an external investigator may cost more than an internal investigator in the short term, if employers improperly conduct investigations the negative consequences may prove to be costlier in the long term.

Communicate conduct expectations related to the investigation process

- Employers must be clear in their policies and during the intake process that all information pertaining to the incident or complaint in question, and any resulting investigation, will be kept confidential and not discussed unless required by the investigation or otherwise by law.
- Employers must communicate through policies and training that allegations are not determinative of fault and that respondents will not be subjected to disciplinary measures prior to any allegations against them being investigated and substantiated.
- Employers should caution cultural workers against gossiping and rumour-milling about the incident or allegations as this could be harmful to those involved, to the investigation process and to workplace culture overall.

6. Investigate: Conduct investigations that are appropriate in the circumstances

Employers should take every complaint and incident of workplace harassment seriously and investigate as appropriate in the circumstances. In New Brunswick, employers are legally required to investigate all incidents or complaints of workplace harassment. Although some complainants may say that they do not want an incident investigated, employers must comply with their legal obligations and conduct investigations in response to all complaints or incidents of workplace harassment. While undertaking a workplace investigation may be inconvenient and costly for the employer, the potential costs of not conducting an appropriate investigation are significantly greater.



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Do not pre-judge the outcome of an investigation

- An investigation is an impartial fact-finding process. When conducting investigations internally, employers must not prejudge the findings of the investigation and/or fail to take complaints and incidents of harassment seriously.
- Investigators must gather all relevant facts that answer the “who, what, where and when” related to the incident or allegations. This could involve interviewing witnesses and reviewing documentation, including from electronic means such as emails, texts and social media communications and posts, where relevant.
- A fair and thorough investigation should be conducted in response to all complaints and incidents of workplace harassment, no matter how egregious the allegation.
- In all cases, respondents to allegations of workplace harassment should be given a full and fair opportunity to respond to all allegations against them.

Obtain legal advice when necessary

If at any time during the complaint and investigation process the employer is unsure of its legal obligations or whether the conduct in question has met the legal definition of workplace harassment, the employer should retain the seek legal advice.

Document the entire process and keep records

- Employers should retain all records pertaining to incidents and complaints of workplace harassment, including documents created as part of any investigation.
- As a general practice, employers should keep documents for as long as practicable, but at least for two (2) years consistent with the limitations period for how long an individual may wait before bringing a civil claim against the employer.
- Victims of sexual assault are not limited in terms of when they can bring a civil claim. Therefore, employers should retain all records pertaining to any potential sexual assault claim as long as possible.

Prepare investigation reports that summarize findings

- The investigator should prepare an investigation report that summarizes the “evidence” considered and the findings that result from the investigation process.
- The investigator and/or the employer should take care to ensure that the investigation report is clear and comprehensive, as the employer may be compelled to produce the report by an adjudicator as part of a legal proceeding.

Wrap up the investigation and bring closure

- New Brunswick employers should inform the complainant and the respondent of the findings of the investigation, and the respondent should be advised of any corrective action taken as a result, in writing.
- Ensure that appropriate corrective action is taken immediately against any person who is found to have committed workplace harassment.



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7. Restore: Assess and address impact on individuals and culture post-investigation

Harassment incidents and investigations can have a negative impact on individuals and an organization's culture after the fact. Once the investigation is complete, employers should implement measures to address any fallout or impact that may have resulted from the incident and/or investigation process.

Review policies and procedures (and revise, if necessary)

Upon conclusion of the investigation and implementation of any corrective action, there should be a debrief of the circumstances that gave rise to the investigation to determine if any practices or working conditions contributed to the complaint or incident arising. Any identified practices or conditions should be addressed, to the extent possible, and policies should be updated to prevent a recurrence, if necessary.

Address any potential fallout

- If the respondent to the investigation is returning to the workplace, ensure that there are no obstacles to their reintegration to the working environment, particularly where the cultural worker was a manager or team leader and there may be a loss of credibility among the staff.
- Continually assess the performance of any cultural worker or department/team affected by the incident/investigation and monitor for potential escalation of conflict or further incidents of harassment or retaliation.
- Consider providing workplace-wide training, one-on-one coaching, team building activities, as appropriate, to reiterate workplace expectations, rebuild relationships, restore leadership authority and re-establish the employer's credibility.