

**Ontario's Bill 26 introduces new "sexual misconduct" rules
for post-secondary institutions**
June 2023

Bill 26, [*Strengthening Post-Secondary Institutions and Students Act, 2022*](#)¹ amends the *Ministry of Training, Colleges and Universities Act* and the *Private Career Colleges Act, 2005* to add new rules and requirements regarding sexual misconduct toward a student by an employee of a publicly-assisted university or college of applied arts and technology, or a private career college ("Institution"). Key changes come into effect on **July 1, 2023**.

Bill 26 makes the following amendments:

- Introduces a new defined term, "sexual misconduct"
- Requires an Institution to have a sexual misconduct policy
- Removes an adjudicator's power to substitute a penalty when an Institution imposes a disciplinary penalty for sexual misconduct
- Prohibits re-employment of an employee who committed an act of sexual misconduct toward a student
- Prohibits certain types of a non-disclosure agreement ("NDA") regarding an allegation or complaint of sexual misconduct by an employee toward a student.

What is "sexual misconduct"?

The bill creates a new defined term "sexual misconduct" which is different from existing legislative terms such as "sexual harassment" and "sexual violence". Sexual misconduct is defined as:

- Any physical sexual relations with a student, touching of a sexual nature, or behaviour or remarks of a sexual nature where that act constitutes an offence under Canada's *Criminal Code*
- Any act that infringes the right of the student to be free from sexual solicitation or advance under the Ontario *Human Rights Code* (the "Code")
- Any conduct by an employee that infringes the student's right to be free from reprisal or threat of reprisal for the rejection of a sexual solicitation or advance under the Code, or
- Any act defined as such in the Institution's sexual misconduct policy or any contravention of any other policy, rule or requirement of the Institution respecting sexual relations between employees and students.

¹ Bill 26, *An Act to amend various Acts in respect of post-secondary education*, 1st Sess, 43rd Parl, 2021, Ch 22 (assented to 8 December 2022) [*Strengthening Post-secondary Institutions and Students Act, 2022*].

Sexual misconduct policy

The bill requires an Institution to have a sexual misconduct policy, which may be included as part of another policy such as a sexual violence policy. The sexual misconduct policy *may* specify acts that constitute sexual misconduct, but *must* include:

- a) The Institution's rules with respect to sexual behaviour that involves an employee and student
- b) Examples of disciplinary measures that may be imposed on an employee who contravenes the policy.

Adjudicator cannot substitute disciplinary penalty

If an employee of an Institution commits an act of sexual misconduct, the discharge or disciplinary measure imposed by the Institution is deemed to be "just cause" for all purposes, and no adjudicator can substitute any other penalty.

Further, if an employee is dismissed, the employee is not entitled to notice of termination or termination pay or any compensation or restitution as a result of the disciplinary measure.

No re-employment

If an employee of an Institution commits an act of sexual misconduct and the Institution dismisses the employee for that act or the employee resigns from their employment, the Institution shall not subsequently re-employ the employee.

If an Institution discovers it has re-hired such an individual, the Institution must discharge the employee, and the employee is not entitled to notice of termination, or termination pay, or any other compensation or restitution.

Restriction on NDAs

No agreement between an Institution and any person, entered into after July 1, 2023, shall contain any term that directly or indirectly prohibits the Institution, or any person related to the Institution, from disclosing that an allegation or complaint has been made that an employee of the Institution committed an act of sexual misconduct (except as noted below).

Significantly, an earlier draft of the bill only prohibited an NDA when there was a finding of sexual misconduct, but the Standing Committee on Social Policy amended the prohibition to also cover any allegation or complaint.

An Institution may enter into an NDA if a student requests the Institution do so, provided that:

- a) The student had a reasonable opportunity to receive independent legal advice
- b) There have been no undue attempts to influence the student with respect to the request
- c) The agreement includes an opportunity for the student to waive their own confidentiality in the future, and the process for doing so; and
- d) The agreement is of a set and limited duration.

Bill 26 controversy

Bill 26 has both fans and detractors.

On the one hand, the bill seeks to protect students and empower others within an Institution who wish to disclose employee-student sexual misconduct.

On the other hand, the bill does not enact measures to prevent sexual misconduct in university and college communities (*e.g.*, educational programs), focuses only on staff and faculty misconduct, and may interfere with the rights of those accused of sexual misconduct to challenge a decision by an Institution to discipline or dismiss.

The blanket prohibition of an NDA, unless requested by a student, may also encourage malicious complaints intended to publicly damage reputations, and make it more difficult to settle a complaint, because a staff or faculty member accused of sexual misconduct may feel they have to litigate the complaint to clear their name, lest the allegations follow them throughout their career.

Next steps for Institutions

Bill 26 becomes law on July 1, 2023. Before then, every Institution should:

1. Define sexual misconduct.
2. Develop a sexual misconduct policy consistent with existing Institution policies.

An Institution should carefully consider its definition of sexual misconduct, because a broad or narrow definition will have a trickle-down effect particularly with respect to discipline and the use of an NDA.

A broad definition of sexual misconduct may assist an Institution to uphold discipline and termination for cause, because once the alleged behaviour has been proven to have occurred, Bill 26 prohibits an adjudicator from assessing the reasonableness of the penalty imposed. A broad definition of sexual misconduct may also assist an Institution to uphold discipline for a wider range of behaviours.

On the other hand, a broad definition of sexual misconduct may restrict an Institution from entering into an NDA which, in turn, may hamper the parties' ability to appropriately settle a complaint.

For advice or assistance regarding Bill 26, contact your Sherrard Kuzz LLP lawyer or info@sherrardkuzz.com.

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