

# Navigating Workplace Risk: Legal Obligations in Health, Safety and Mental Well-being

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# Presenters



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# Agenda

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*O*HSA overview

02

Workplace violence

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Workplace harassment

04

Violence or harassment related to  
mental health issues

05

Workplace risk and WSIB mental  
stress claims



01

# OHSA Overview

# OHSA Structure

Sets out duties and responsibilities for a variety of persons who have involvement in the workplace

Duties are prescribed for:

- Employers
- Officers & directors
- Supervisors
- Workers

# The Workplace Parties

“Employer” under the *OHSA* includes both a contractor and a sub-contractor who undertakes to perform work or supply services

“Supervisor” means a person who has charge of a workplace or authority over a worker

“Worker” is a person who performs work or supplies services for monetary compensation

- Includes supervisors and independent contractors

# Employer Obligations

- ✓ Provide information, instruction and supervision to a worker to protect the health and safety of the worker
- ✓ Appoint competent person as supervisor
- ✓ Acquaint worker with any hazard in the work
- ✓ Develop and post a health and safety policy
- ✓ **Take every precaution reasonable in the circumstances for the protection of a worker**

## Workplace violence and harassment:

- Develop a program and policy
- Conduct risk assessment for workplace violence
- Protect workers from workplace harassment and violence
- Investigate all incidents of workplace harassment
- Provide training on policy and program



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## Workplace Violence

# Defining Workplace Violence

**“Workplace violence” means:**

- The exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker
- An attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker
- A statement or behaviour that it is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker

# Workplace Violence Examples



Making threatening remarks (direct or veiled, and written or verbal) towards an individual, or his/her family member or associate



Aggressive or hostile acts such as shouting, using profanity, throwing objects at another person, fighting, or intentionally damaging a coworker's property



Bullying, intimidating, or harassing another person (for example, making obscene phone calls or using threatening body language or gestures, such as standing close to someone or shaking your fist at them)

# Workplace Violence Examples



Behavior that causes another person emotional distress or creates a reasonable fear of injury, such as stalking



Hitting, shoving, or any other type of assault



Possession or use of firearms, weapons, or any other item with the potential to inflict harm that has no common business purpose

# Workplace Violence

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Develop a program and policy

A blue circle icon with a white center, connected to a blue line that extends upwards and to the left.

Conduct risk assessment for workplace violence

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Protect workers from workplace violence

# Risk Assessments

Assess the risk of workplace violence that may arise from:

- The nature of the workplace
- The type of work
- The conditions of work

Must take into account common risks at other similar workplaces

Share results with JHSC or health and safety representative

Reassess as necessary for the protection of the workers

# Measures to Protect Employees

- ✓ Methods to summon assistance
- ✓ Security or PPE
- ✓ Training on prevention/response
- ✓ Transportation to/from workplace
- ✓ Hours of work
- ✓ Trespass notice?

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## Workplace Harassment



# Defining Workplace Harassment

Workplace harassment means:

- Engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome, or
- Workplace sexual harassment

# Defining Workplace Harassment

## Workplace harassment:

- **Does not include:** “a reasonable action taken by an employer or supervisor relating to the management and direction of workers or the workplace”

## “Workplace”:

- Is defined broadly to include any land, premises, location or thing at, upon, in or near which a worker works

# What is Typically NOT Considered Harassment



The normal and reasonable exercise of supervisory and management rights and responsibilities including but not limited to, job assignments, working hours, performance reviews, work evaluations and disciplinary actions



Differences of opinion



Minor disagreements between workers

# What is Typically NOT Considered Harassment



Isolated incidents of rudeness



Conducting investigations



Legitimate relationships between consenting adults

# Obligations Related to Workplace Harassment



Develop a program and policy

Provide training on policy and program

Protect workers from workplace harassment

Investigate all incidents of workplace harassment

Communicate outcome of investigation and corrective measures

# Managing Harassment Complaints: Reprisals



Legislation (*OHRC* and *OHSA*) prohibits reprisals or threats of reprisal against any person who takes steps to enforce their rights



Reprisal is a separate and distinct violation



Includes any person who initiates a complaint, or participates in an investigation or a proceeding



Includes investigators and anyone who helps someone to enforce their rights



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## Violence or Harassment Related to Mental Health Issues

# Definition of Disability

*Human Rights Code* definition of disability is expansive:

- s. 10(b): a condition of mental impairment of development disability
- s. 10(d): a mental disorder



# Psychological Disabilities

Mental health issues are among the most difficult to identify and address in the workplace:

- Often invisible
- Differential effect of particular illness, treatment regime and the individual's ability to cope
- Subjective assumptions and stereotypes

Presents a unique set of challenges for employers

# Duty to Accommodate

Right to be free from  
discrimination and  
harassment based on  
mental health disability or  
addiction

## When is it triggered?

- Employee asks for accommodation
- Suspect mental health issue
  - Low-threshold – whether the employer knew or ought to have known that the employee has a disability

# Procedural and Substantive Duties

The duty to accommodate has two components:

- Procedural (the process)
- Substantive (the accommodation provided)

An employer can be found to have substantively accommodated an employee and yet still fail the procedural component

# *Bellehumeur v. Windsor Factory Supply Ltd. (2013)*

## Facts

- Employee was suspended with pay as a result of his conduct during a meeting with his new manager
- During the meeting informing the employee of his suspension, he began cursing and, on his way out of the building, the employee was yelling threats to fellow employees
- The employer dismissed the employee for making violent threats, claiming they had a right to dismiss the employee for just cause
- Employee brought an action for damages for wrongful dismissal, and further claimed that he suffered from a disability and that it would be contrary to the Ontario *Human Rights Code* for him to be terminated while he was under a disability

## **Decision**

- Employer had a responsibility to all employees in the face of serious threats that constitute a serious employment offence
- In such a situation, the employer had the right to dismiss the employee for just cause – they had to take the threats seriously for the protection of their employees
- A person with a disability must provide information regarding relevant restrictions, including information from health care professionals, where appropriate and as needed

## Key Takeaway

- An employer can terminate an employee for just cause if the employee makes serious threats that constitute a serious employment offence

A red octagonal graphic with a white border and a white shadow, containing the number 05 in white.

05

# Workplace Risk and WSIB Mental Stress Claims

How can workplace risks lead to WSIB claims?

- Harassment
- Violence
- Threats of violence
- Verbal and physical aggression



# The Three Types of Mental Stress Entitlement



1. Post traumatic stress disorder (PTSD) in first responders and other designated workers



2. Traumatic mental stress (TMS)



3. Chronic mental stress (CMS)

# Presumptive Entitlement for PTSD in First Responders and Other Designated Workers

## WSIB Operational Policy 15-03-13:

- Presumption of entitlement if employment and diagnostic criteria met
  - Must be one of 18 designated workers (listed in policy)
  - Must be diagnosed with PTSD by a psychiatrist or psychologist
  - If both criteria are met, there is a presumption that the PTSD arose out of and in the course of employment
- Employer can try to rebut presumption with evidence that the PTSD did not arise out of and in the course of employment (i.e., pre-existing condition, non-work-related traumatic events)

## WSIB Operational Policy 15-03-02:

- Entitlement generally granted if an appropriately diagnosed mental stress injury was caused by one or more traumatic events arising out of and in the course of employment
- WSIB must be satisfied that it is more likely than not that the traumatic event(s) arose out of and in the course of employment and caused or significantly contributed to an appropriately diagnosed mental stress injury

# What Are Traumatic Events?



May include witnessing fatality/horrific accident, suffering a serious injury, witnessing/being the object of a threat of violence or actual violence



Entitlement may be for cumulative effect even if worker was able to tolerate similar past traumatic events

# TMS Entitlement: Diagnostic Requirement

Worker must have DSM diagnosis, made by physician, nurse practitioner, psychologist or psychiatrist

DSM diagnosis may include, but not limited to:

- Acute stress disorder
- Post traumatic stress disorder
- Adjustment disorder
- Anxiety or depressive disorder

## WSIB Operational Policy 15-03-14:

- Entitlement generally granted when an appropriately diagnosed mental stress disorder has been predominantly caused by a substantial work-related stressor or a series of stressors

# What is a Substantial Work-Related Stressor?



## Substantial Work-Related Stressor

- 01 A work-related stressor is generally considered substantial if excessive in intensity and/or duration compared with normal pressures and tensions experienced by workers in similar circumstances
- 02 Meant to include multiple work-related stressors, as well as a cumulative series of work-related stressors

# Workplace Harassment and CMS



Workplace harassment may be considered a substantial work-related stressor

Workplace harassment occurs when someone, while in the course of employment, engages in vexatious comments or conduct against a worker, including bullying, that is known or ought reasonably to be known to be unwelcome



# CMS and Predominant Cause

WSIB must be satisfied that the substantial work-related stressor(s):

- Arose out of and in the course of employment
- Was the predominant cause (primary or main cause) of the mental stress injury compared to all other individual stressors

Substantial work-related stressor can still be considered the predominant cause even if outweighed by all other non-work-related stressors combined

# CMS: Diagnostic Requirement

Worker must have a DSM diagnosis made by a physician, nurse practitioner, psychologist, or psychiatrist

DSM diagnosis may include, but not limited to:

- Acute stress disorder
- Post traumatic stress disorder
- anxiety
- Depressive disorder

Workers are not entitled to PTSD, TMS, or CMS caused by employer decisions and actions that are a normal part of the employment function, such as:

- Terminations
- Discipline
- Demotions
- Changes in hours or productivity expectations

# Return-to-Work in Mental Stress Claims




Mental stress claims present unique challenges for return to work



FAF does not include cognitive abilities information



Duty to accommodate, return-to-work obligation, and re-employment obligation all exist



Requires collaborative approach with WSIB, treating health care practitioner, worker and employer

# Effective Return-to-Work Strategies for Mental Stress Claims

- ✓ Don't wait for WSIB to initiate return to work
- ✓ Seek assistance from case manager and return-to-work specialist, and ask for a return-to-work meeting
- ✓ Be creative with modified work offer and ask WSIB to provide offer to treating practitioner for review and comments
- ✓ Be prepared for a longer return-to-work process
- ✓ Understand that return to work can aid in recovery

# Impact of Pre-Existing Conditions on Entitlement



Pre-existing conditions may limit or preclude entitlement



If work-related event(s) are a significant contributing factor to the diagnosis, entitlement likely granted



Evidence of symptomatic pre-existing conditions may support argument that loss of earnings not a result of work-related mental stress injury

# Appeals



Important to meet appeal time limit noted in the decision letter by filing intent to object form



Review file for merits of objection/seek advice



Success of appeal depends on facts of each case, and whether work-related event(s) are considered significant contributing factor/cause of mental stress injury

## Facts and Issue

- Worker seeking CMS and TMS entitlement
- Claimed persistent sexual harassment by supervisor
- Was transferred to a new position as a result of sexual harassment complaint, and then claimed to be the subject of significant and regular angry outbursts from co-worker (swearing, shouting, hitting things), and worker feared for physical safety
- Did the workplace incidents amount to substantial work-related stressors/traumatic events?



## Decision

- CMS entitlement granted:
  - The tribunal determined that the sexual harassment was continuous, vexatious, oppressive, and predatory, and therefore amounted to substantial a substantial work-related stressor
  - The tribunal determined that the angry outbursts were more than interpersonal conflicts because they were excessive, amounted to egregious and abusive conduct with elements of violence, therefore considered to be a substantial work-related stressor
  - TMS entitlement denied as nature of stressors more consistent with CMS policy

## Facts and Issue

- Worker had a pre-existing condition (diagnosed with a mental health disorder in 2005)
  - Worker alleged that the stressors in his CMS claim were a series of workplace altercations with a co-worker over a six-month period
  - Co-worker had uttered threats against the worker and his family on six different occasions, and the culminating event was a physical fight between the two
  - Did these workplace incidents amount to substantial work-related stressors?

## Decision

- CMS entitlement granted:
  - The tribunal held that the workplace altercations constituted harassment that a reasonable person would find egregious or abusive
  - If harassment is found to be “objectively traumatic” then the “thin-skull” principle applies
    - The “thin-skull” principle means that the worker is still eligible for CMS entitlement, even if the pre-existing injury makes them more vulnerable than the average worker

## Facts and Issue

- Worker was a supervisor at a daycare facility
- Employer informed the worker that her co-workers had formed a Facebook group chat behind her back, and showed the worker the contents of the group chat
- Co-workers had made multiple disparaging or violent comments in the group chat. One co-worker expressed a desire to “cut [the workers] throat open”
- The co-workers were disciplined. The worker returned to work immediately but subsequently claimed CMS arising from the incident
- Did these workplace incidents amount to substantial work-related stressors?

## Decision

- CMS entitlement denied:
  - While the tribunal recognized that the Facebook group chat comments were “indefensible”, they did not constitute workplace harassment
  - A critical element of harassment is that the target of the harassment is aware of that harassment. The members of the group chat did not intend for the worker to know about the comments
  - The panel stated that a worker cannot be harassed by comments they did not know about. The worker was unaware of the animosity from her colleagues until her employer provided excerpts from the group chat

## Facts and Issue

- The worker was employed as a healthcare support service attendant. She claimed CMS after a series of confrontations with supervisors
- The worker claimed she was singled out for intense criticism that her colleagues were spared. She claimed that she overheard her manager refer to her with a misogynistic slur
- The worker also claimed that her union representative swore at her when she refused to sign a form they provided
- Did these workplace incidents amount to substantial work-related stressors?

## Decision

- CMS entitlement denied:
  - The tribunal found that the alleged conduct arose from the employment function
  - While the worker may have found her employer's actions highly disturbing, the *WSIA* and board policy clearly state that a worker is not entitled to benefits for CMS caused by the employer reasonably managing their workforce
  - The incident with the union representative was dismissed as interpersonal conflict

## Facts and Issue

- Worker seeking CMS entitlement for alleged harassment at work by co-workers and management
- Incidents involved yelling, “ganging up on worker,” verbal insults, sweeping broom over worker’s feet
- Did the workplace incidents amount to substantial work-related stressors?



## Decision

- CMS entitlement denied:
  - The tribunal determined that the worker was an active participant in the incidents, which amounted to interpersonal conflicts
  - The tribunal noted that the worker's subjective opinion about whether they were harassed is **not** determinative of entitlement
  - Employer acted in good faith in addressing concerns



A photograph of a modern office interior with glass walls, wooden floors, and large windows overlooking a city skyline. The office is furnished with desks, chairs, and bookshelves filled with binders.

# Thank You

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