# Addressing Mental Health Concerns In The Workplace



This blog outlines guidance for employers on how to manage an employee struggling with their mental health, and the delicate balance that's needed to accommodate employees, while still running a productive workplace.

### The Legal Framework

*i. When is a mental health concern considered a disability?*

Some, but not all, mental health issues can be considered a "disability" under the Ontario *Human Rights Code* (the "Code"), such as depression, bipolar disorder, anxiety, and obsessive-compulsive disorder, to name a few. The Human Rights Tribunal of Ontario has stated that there must be a diagnosis of some recognized mental disability (or at the very least, a working diagnosis or articulation of clinically-significant symptoms) from a health professional to be considered a "disability" warranting Code-protections. This means that an employee's assertion that they're stressed is not sufficient to establish a mental disability under the Code.[1] While such assertions are important to consider, they do not necessarily trigger the duties below, absent an actual diagnosis (or perception of a disability).

ii. *The right to be free from discrimination*

Discrimination is not defined in the Code and could take different forms. Oftentimes, it involves differential treatment of a person on the basis of a protected characteristic (e.g. a disability), and that person experiencing a negative impact because of that differential treatment.

Under the Code, an employer can't discriminate against an employee who has an actual or *perceived* disability. This means that even an employee without a diagnosis or who has not disclosed a diagnosis may be entitled to protection from discrimination. Put differently, they can't be discriminated against based on the perception that they could have or may eventually develop a disability and require an accommodation.

*iii. The duty to accommodate*

Employers have a duty to accommodate employees with a disability and this duty is comprised of two components: (i) the procedural duty, which includes things like asking the employee questions, requesting medical documentation, and engaging in

ongoing dialogue with the employee; and (ii) the substantive duty, which looks to the *actual* modification(s) the employer will institute in the workplace to allow the employee to participate on equal (or closer to equal) footing with others. Both employers and employees have a duty to participate in the accommodation process.

Accommodation is an individualized process, but common accommodations for employees with mental health disabilities include flexible scheduling, modifications to job duties, or time off to obtain treatment or recover.

## Guidance for Employers

Below are some achievable tips for employers when managing an employee experiencing mental health disabilities.

· **Reconsider flexible time off policies.**

Some employers offer explicit "personal days", keeping the entitlement intentionally broad so that employees don't have to disclose whether they are taking a day off to support their mental health or to go to the dentist. Similarly, flexible hours allow employees to shift their day when they may be experiencing an issue, instead of having to take time off and disclose personal medical information. Implementing these types of policies allows employees to "self-accommodate" and minimizes the recordkeeping for an HR team for health- and accommodation-related requests.

· **Have: (a) a policy that requires medical documentation from an employee only after a certain amount of time has passed; and (b) an accommodation form on hand for an employee's physician to complete.**

There should (and in some cases, must [2]) be a threshold before an employer requires an employee to provide professional, medical documentation to support the employee's absence or requested accommodation. For example, an employer may allow an employee struggling with symptoms of a mental health disability to take up to four days off work, but for any absences or accommodations required following the fourth day, the employee must submit medical documentation from their primary care physician to support additional absences or accommodations requested.

Employers should also have a template form on hand to provide to employees for their physicians to complete. This form should not request the employee's diagnosis, information about medication, or other personal health information. Instead, the information requested in the form should be limited to the employee's prognosis, functional abilities in the workplace, and information that is necessary to understand an employee's unique needs to implement a suitable accommodation.

· **Create a culture that encourages employees to disclose when they need an accommodation and provides support to employees when one is requested.**

Employees should feel like they can share their need for an accommodation with their employer if one arises, and feel confident that the employer will address this need. Employers can create this culture by checking in on employees; when accommodations are requested, maintaining communication with employees and respecting their privacy; remembering that symptoms of mental health illnesses can, at times, be invisible; and training managers and supervisors on how to address mental illness in the workplace. Managers and supervisors should be aware of the resources that are available to employees (e.g. EAP), so that they can convey such information to employees.

This culture is also created by not ignoring an employee's visible symptoms of a disability, even when they have not disclosed one. If it's clear that the employee is

struggling but they have not disclosed this, employers have a duty to inquire with the employee about whether the employee needs an accommodation.

## Takeaways

Accommodating employee mental health disabilities and running a productive business requires a delicate balancing act by employers. Ultimately, when an employer discloses a mental health disability, employers should consider how they can support the employee and what accommodations are feasible in that specific workplace. An employer should ask itself: what is the range of reasonable accommodation options, and what appears to merely be the employee's preference (which an employer is *not* required to accommodate)? Following the consideration of these factors, the employer will have to implement the necessary modifications for the employee to participate in the workplace.

Where an employee has not disclosed a disability but there may be symptoms of one, the employer's duty to inquire may be triggered. This duty is especially heightened if the employee's job performance is poor and there could be negative job consequences (e.g. a termination or lost bonus) as a result.

Ultimately, supporting an employee with a mental health disability involves the consideration of a wide range of factors. The accommodation process is nuanced and requires a balance of considering individual needs and the operational realities of the business.

If your business needs support in navigating the topics discussed above, please reach out to a member of our team.

**Footnotes**

1 See *Crowley v. Liquor Control Board of Ontario*, 2011 HRTO 1429.

2 As of October 2024, employers are not permitted to require employees to provide a certificate from a qualified health practitioner as evidence that they are entitled to sick leave under the *Employment Standards Act, 2000*.

*The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.*

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