

Ontario Human Rights Commission Release

New Policy On Mental Disabilities And Addictions



On June 14th, 2014, the Ontario Human Rights Commission ("Commission") issued a new policy entitled, Policy on preventing discrimination based on Mental Health disabilities and Addictions ("Policy"). While this policy is not legally binding on the Human Rights Tribunal ("Tribunal"), or other adjudicative decision-makers, the Tribunal often takes into consideration the suggestions made by the Commission in the course of its decisions. For this reason, it is important for employers to familiarize themselves with this policy, particularly if it is dealing with issues of accommodating an employee(s) with a mental disability or addiction.

While the Policy does not provide an exhaustive list of what constitutes a "mental impairment" or "mental illness", some of the examples it provides of mental disabilities include:

- Depression
- Anxiety
- Panic Attacks
- Bipolar Disorder
- Schizophrenia
- Alcohol and substance abuse

Statistics published by the Commission indicate that 1 in 5 employees suffer from mental illness. Further, the World Health Organization has reported that depression and other associated mental health conditions are the leading cause of disability worldwide. Despite the fact that mental illness appears to be one of the leading causes of disability, there is recognition in the Policy that mental disabilities/disorder and addiction issues are "invisible disabilities", meaning that employees are reluctant to disclose the nature of their disability due to fear of stigmatization in the workforce, or are in denial over the nature of their disability.

Traditionally, as part of the accommodation process, employees typically have to advise their employers that they suffer from a particular disability in order to trigger the accommodation process. However, under the Policy, the Commission has reiterated its view that in certain circumstances, an employer will have to make "meaningful inquiries" if they suspect an employee is suffering from a mental

disability, regardless of whether the employee has brought their disability to the attention of their employer. This could be the case where an employee is demonstrating a dramatic change in behaviour and/or frequent performance issues are occurring which previously was not the case. In these circumstances, an employer may have a duty to inquire further if this information is brought to their attention.

Other important information that is worth highlighting from the Policy is indicated below:

- Detailed sections are included in the Policy regarding the types of mental disabilities and addictions; stereotypes and stigmas that exist regarding same; the obligation of an employer to accommodate to the point of undue hardship; and various ways in which employers or service-providers can accommodate persons with a mental disability or addiction;
- The Policy recognizes that the Accessibility for Ontarians with Disabilities Act ("AODA") addresses the right to equal opportunity for people with disabilities, including mental health disabilities and addictions, and that employers are required to comply with the accessibility standards. However, the Policy is quick to point out that compliance with AODA will not always result in compliance with the Human Rights Code ("Code").
- Of utmost importance to employers is guidance on how to deal with consent and capacity issues when it is questionable whether an employee or individual appears to lack capacity to deal with various decisions. The Policy confirms that in order to respect the dignity and autonomy of an individual, individuals will be presumed to have capacity depending on the type of decision-making involved. Further, it is the Commission's view that the complex legislative scheme that governs matters related to mental capacity, which includes the Substitute Decisions Act, the Health Care Consent Act, and the Mental Health Act are all subject to the Code, and in the event of a conflict, the Code will prevail.

Based on the foregoing, we recommend that employers conduct a review of the new Policy, particularly if it is currently dealing with the challenging issue of how best to accommodate employees who suffer from these "invisible disabilities". Further, given that mental disabilities are increasingly on the rise, employers will inevitably have to deal with accommodating employees who suffer from mental health or addiction issues, and associated issues of tracking absenteeism, loss of productivity and scheduling/staffing issues.

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