We Need to Talk About Psychologically Safe Workplaces



If you're like most people, psychologically safe workplaces might not be high on your list of priorities. After all, the historical focus of workplace safety has been on the basics, like keeping limbs out of machines – and even those basics have proven to be challenging. However, in truth, psychological harm can be just as debilitating as any physical injury. In some cases it can be just as fatal. For this reason alone, we need to re-think our approach to the issue. There are good legal and business reasons for doing so. There are also steps employers can take to better manage the mental well-being of employees. Those steps bring rewards and are not necessarily costly. The first step begins with awareness.

A compelling legal argument has been developing over the last decade that employers should face liability for mental injuries sustained by employees at work. This type of liability for employers can arise in many different ways.

An example of this legal trend comes from Workers' Compensation Board ("**WCB**") claims. In 2018, the WCB in Alberta reported that secondary psychological injuries (those arising from a physical injury) have increased at a rate of 16% per year; and primary psychological injuries (those that are not the result of a secondary psychological injury) have been rising at 25% per year.[1] A similar trend is seen in WCB statistics from British Columbia where mental disorder claims are the fastest growing type of claim: in 2018 mental disorder claims increased by 21 per cent compared to 2016.[2] This trend will continue in the West given that British Columbia, Alberta and Saskatchewan have all passed legislation adopting "presumptive coverage" for workers suffering psychological harm caused by a traumatic injury. This means that in a workplace accident where the worker experiences physical trauma, the law will presume a psychological injury unless the contrary is proven by the employer. If the employer cannot rebut this presumption, the damages for the psychological harm are added to the claim. These types of secondary psychological injury claims are increasing at a rapid rate and are not expected to slow down.

There are other avenues of legal liability for employers when employees suffer psychological harm at work. This legal liability can take the form of a human rights complaint, a civil claim for negligence, a dispute over an employment contract, a grievance with the union under the collective bargaining agreement, an occupational

health and safety administrative penalty or prosecution, or even a claim for damages under employment standards legislation. All of these forms of legal risk have resulted in awards against employers for psychological harm.

The prevalence of mental health problems in Canada is pervasive. The Mental Health Commission of Canada ("**MHCC**") estimates that 7.5 million Canadians live with a mental health problem or illness, one in five Canadians experience a mental health problem or illness at some point in their lives, and 1.6 million Canadians report an unmet need for mental health care.[3]

This societal problem has a significant impact on the Canadian economy and business profitability. The MHCC estimates half a million Canadians missed work last week because of a mental health problem or illness, and that 30% of short and long term disability claims in Canada are attributed to mental health problems and illnesses. The total cost to the Canadian economy for mental health problems is estimated to exceed $50 billion each year – an astonishing statistic given the GDP of Canada in 2019 was $1.7 trillion. The MHCC estimates (from a study in 2011) that the cost to employers for mental health problems and illnesses among working Canadians was $6 billion in lost productivity, absenteeism and turnover.[4]

On the flip side, it argued that a positive approach to psychological health and safety is an investment because it leads to other intangible benefits for employers, such as: better recruitment and retention of talented workers, improved worker engagement, enhanced productivity, and more creative and innovative workers. Accordingly, adopting a proactive approach towards the psychological well-being of employees leads to greater profitability and competitiveness for employers.[5]

Mental health is obviously not just an employer issue. It has far-reaching consequences, many of which are beyond the control of employers. However, the law is clear that employers have a role to play in creating and maintaining psychologically safe workplaces. Liability will flow to those employers who neglect their duty. Employers need to manage the risk. A good start is to develop a Psychological Health and Safety Management System ("**PHSMS**") or incorporate this idea into an existing Health and Safety Management System ("**HSMS**"). Formalizing and implementing such a system can be an investment which increases profitability while managing the legal risk.

Footnotes

1. Annual Report 2018, WCB – Alberta, at page 48.
2. *Canadian Occupational Safety Magazine,* October/November 2019 at page 9.
3. https://www.mentalhealthcommission.ca
4. https://www.mentalhealthcommission.ca
5. Canadian Standards Association, *Assembling the Pieces: An Implementation Guide to the National Standard for Psychological Health and Safety in the Workplace.*

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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