



## Action on Workplace Stress: **Mental Injury Prevention Tools for Ontario Workers**

**PART 4 — What Are My Rights and Legal  
Protections? (Focus on Ontario)**



# Action on Workplace Stress

## A Worker's Guide to Addressing Workplace Causes of Mental Distress

This guide and resource kit will provide workers a basic understanding and a place to start to learn about workplace stress and what to do about it. The guide gives definitions, common causes of mental distress, legal frameworks (focusing on Ontario), possible actions to take, and resources available. It is an introduction and action guide created by workers for workers.

These tools are not clinical diagnostic tools. They are not meant to diagnose medical or psychological conditions or to be used by a physician to these ends. These tools are designed to identify problems that may exist within the workplace and provide possible avenues to address them.

This resource kit and tools are provided with a focus on the Ontario jurisdiction – workers in other provinces or in federally regulated workplaces should refer to their own legal framework.

# **PART 4 – What Are My Rights and Legal Protections? (Focus on Ontario)**

Your legal rights for reducing mental distress at work can be described as management's (legal) duty to provide a psychologically healthy and safe workplace just as management has a duty to provide a physically safe workplace. This means that if workplace factors exist that are negatively affecting the physical and mental health and safety of workers, employers should identify and prevent the harm where they can. Although not yet clearly specified in health and safety or other laws in Canada, protecting workers from psychological harm is a growing idea and principle in emerging common law. Whereas a few years ago the law would take note only of egregious and intentional harms, it now sees negligent and reckless causes of mental and emotional harm as attracting liability.

Therefore, with the increasing evidence that psychosocial hazards cause mental distress, the legal options for people suffering the impacts are becoming stronger. According to a Canadian Mental Health Commission's report written by Dr. Martin Shain (2010), *Tracking the Perfect Legal Storm*, developments in seven areas of law are making it clear that employers have some responsibilities for creating and maintaining a psychologically safe workplace for employees (Shain, 2010). Increasing amounts and incidences of damages paid to wronged employees in employment law, human rights law, health and safety law, and compensation law, to name a few, mean that courts, tribunals, and arbitrators have become more sensitive to the issues especially with advances in laws elsewhere in the world. These emerging legal cases give workers the impetus to expect and lobby for psychologically healthy and safe workplaces with employers and to urge governments and policy-makers to update legislation to account for these obligations. Indeed, progressive employers will no doubt be monitoring these events and will likely adopt practices in their workplaces that take them into the future and set themselves apart as leaders and top attractors of talent and people resources. These firms will maximize and bring out the very best in their people resources and systems while lowering lost time, bad morale, bullying and harassment levels, and episodes of dysfunction that all remove the daily focus from the business at hand.

Long standing stereotypes and stigma applied to people with mental illness are weakening as the magnitude of mental health suffering is exposed — Canadian Mental Health Association estimates that one-fifth of all Canadians will personally experience a mental illness in their lifetime (para. 1). An enforceable, legal duty to provide a psychologically safe workplace has emerged.

Although responsibility and growing legal obligations for dealing with mental distress is better known, the employer may still be reluctant to address these concerns in many workplaces. In general, your legal remedies fall into four broad areas: the duty to accommodate, income replacement, protection of health and safety, and fair treatment at work (human rights and employment standards).

Remember the kinds of work organization which have been shown to contribute to mental distress in workers include the *chronic* and the *consistent*, for example:

- Imposition of unreasonable demands
- Withholding of adequate levels of materially important information, whether deliberately or by neglect
- Refusal to allow the exercise of reasonable discretion over the day to day means, manner, and methods of work
- Failure to acknowledge or credit contributions and achievements
- Failure to recognize and acknowledge the legitimate claims, interests, and rights of others (unfairness, justice at work)

In this section, we will briefly describe the legal principles which apply, how they apply, and provide you with links to more information on how to use them.

## Fair Treatment at Work

### A complaint under human rights legislation

All jurisdictions in Canada have human rights legislation that protects individuals from discrimination or harassment based on prohibited grounds. For example in Ontario, a complaint can be filed with *Human rights Tribunal of Ontario* when the employers' actions or omissions constitute harassment or discrimination that is *based on prohibited grounds* (race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, same-sex partnership status, family status, and disability). It also applies where the employers' actions or omissions constitute a failure to provide reasonable accommodations for a person's disability, age, religion, marital status, immigration status, ethnic or racial identity or family obligations, or other factors listed in the Code (1990). In Ontario, Human Rights legislation is sufficiently robust to offer claimants compensation and redress for their mental injury if it is due to harassment or discrimination on prohibited grounds, or a failure to accommodate. The Human Rights tribunal may also require the employer to take systemic actions to prevent the harassment or discrimination.

### A complaint under the Employment Standards Act (ESA)

This act places limitations on the working conditions (i.e., the maximum length of a work day, certain hours employees are entitled to be free of work, eating periods) and the ability to take personal emergency leaves and time off to care for a dying family member. The ESA may apply when the work demands violate these minimum standards.

### A grievance under collective agreement

Many Collective Agreements have protective language prohibiting harassment. Some have language that addresses how unreasonable workload demands can be investigated and resolved. However, even if discrimination, accommodation, health and safety (including workplace violence and harassment) are not specifically mentioned in the Agreement, statute

laws such as these are implied in union agreements — they do not have to be mentioned to apply. This means that the grievance procedure in a collective agreement is the dispute mechanism used and available to unionized workers if they feel that their employer is not complying with a statute. If you are a union member, contact your union representative to file a grievance.

The grievance process available under the collective bargaining system is usually based on finding language that requires the employer and its agents to act in a fair and reasonable manner. The scope of this broad duty appears to be expanding.

There is also a presumed fundamental requirement of fairness and reasonableness in the conduct of the employment relationship. Increasingly, arbitrators are willing to read this requirement into collective agreements even when there is no contract language to support it.

If you are not a union member, you should see a lawyer or go to a community legal clinic in your area. In addition to helping you with a Human Rights or WSIB claim, a lawyer can advise on any other employment law remedies you may have in your circumstances. The courts are increasingly reading into employment contracts an implied term that the employment relationship be conducted in a manner that is not injurious — based on a presumption that no reasonable person would agree to such working conditions as a condition of employment.

## **Protection of Health and Safety**

### **Using the health and safety legislation (such as the *Occupational Health and Safety Act or OHSA*)**

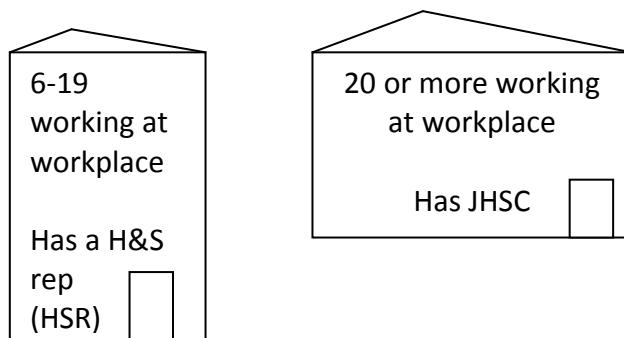
In Ontario, an employer has a general duty to take all measures reasonable in the circumstances for the protection of the health and safety of the worker (Occupational Health and Safety Act, 1990, Sect. 25; Sub. 2(h)). Employers are also now required to have workplace violence and harassment programs that include policies on workplace violence and harassment and procedures for reporting, investigating, and dealing with complaints of workplace violence and harassment. Employers must also provide you with information and instruction on the contents of the policies and programs. The new law is explicit that the general duty to take every precaution reasonable to protect workers extends to preventing “workplace violence” as defined in the Act. The amendments were not explicit about employer duties with respect to psychosocial hazards such as harassment, work overload etc.

### **Joint health and safety committees (JHSCs) and worker health and safety representatives (HSRs)**

Occupational health and safety legislation makes it mandatory that joint health and safety committees and health and safety representatives exist in workplaces to identify hazards and make recommendations to the employer to improve workplace health and safety. In Ontario, workplaces with 20 or more people regularly employed must have a JHSC that is composed of equal numbers of worker and employer representatives. In smaller workplaces (6-19 in Ontario), a worker health and safety representative is selected to perform the role instead of a larger committee. See Fig. 1. Although there is no legislative requirement for a JHSC or a health and safety representative in workplaces with 1-5 workers, if the workplace uses designated

substances, the employer is required to have a JHSC. JHSC members and HSRs get paid work time to inspect the workplace to identify hazards, investigate critical injuries and fatalities, receive information from the employer about health and safety, provide recommendations on health and safety policies and procedures, accompany health and safety inspectors on visits to the workplace, among other things listed in the *OHSA* (1990). The Ministry of Labour provides a Guide for Joint Health and Safety Committees (JHSC) and Representatives in the Workplace <http://www.labour.gov.on.ca/english/hs/pubs/jhsc/>

Fig. 1



In a unionized environment, the worker members of the committee (or the HSR in a small workplace) are selected by the union and in a non-unionized workplace, the worker representatives are selected by the workers at the workplace.

Engage your Health and Safety Representative or Joint Health and Safety Committee on the need to identify and control the psychosocial hazards in the workplace.

## Duty to Accommodate

This legal principle for duty to accommodate is found in the *Human Rights Code* (1990) and in the *Workplace Safety and Insurance Act* (1997). It is applicable in all workplaces regardless of size or sector. If you are experiencing health problems at work or you have to go off work because of your health or you want to come back to work after being off sick or injured, your employer has a **duty to accommodate** your illness or disability up to undue hardship. This right can be enforced by the Human Rights Tribunal of Ontario or the WSIB or Workplace Safety and Insurance Appeals Tribunal (WSIAT) if the cause of your illness or disability is work related.

The duty to accommodate requires the employer to make changes to your work if necessary to enable your successful return to work.

Organizational factors of the workplace such as job control, work and rest schedules, long working hours, high psychological demands, and specific characteristics impacting the injured worker such as pain, severity of injury, low recovery expectations, and depression can all create obstacles in the return to work process and prolong work disability. Other psychosocial factors including relationships with co-workers and supervisors, organizational culture and labour relations in the workplace can also contribute to prolonged work disability. But when there is

an offer of a work accommodation or modified work that is meaningful and in a setting where the worker can “fit in” the likelihood for return to work doubles and the number of days the injured worker is off work is reduced by half.

Unfortunately WSIB, employers, and insurance interests do not give high enough regard to evidence of physically or psychologically unsafe work in their blind adherence to the *early return to work* model. The Institute for Work and Health study, *A deliberation on ‘hurt versus harm’ logic in early-return-to-work policy*, discusses the flaws in the therapeutic early return to work model that may actually hinder an injured worker’s ability to return to sustainable work (McEachen, Ferrier, Agnieszka, & Chambers, 2007). The research suggests that the early return to work model works best in “ideal” work environments that have harmonious labour relations and robust health and safety systems. The facts and context of each worker’s situation must be considered individually to ensure that early return to work does not cause further harm to the returning worker (McEachen et al., 2007).

The Canadian Human Rights Commission’s *Policy and Procedures on the Accommodation of Mental Illness* (2008) recognizes the impact that workplaces can have on workers’ mental health when it advises workplace parties to identify and diminish factors that might worsen mental illness (Canadian Human Rights Commission, 2008).

To read the document, click [http://www.chrc-ccdp.ca/pdf/policy\\_mental\\_illness\\_en.pdf](http://www.chrc-ccdp.ca/pdf/policy_mental_illness_en.pdf)

## **Income Replacement**

When an employee has to take time off work because of illness or injury, there are generally three options for income replacement: workers’ compensation (called WSIB in Ontario), sickness and accident insurance, and employment insurance. For a person with a permanent disability and who is unable to work there is the Canada Pension Plan (CPP) and the Ontario Disability Support Program (ODSP).

Workers’ Compensation (WSIB) is a mandatory program for most employers that provides employees with benefits when unable to work because of an illness or injury caused by work. Currently Ontario’s legislation prohibits payment for illness due to workplace stress. It does cover traumatic stress related illnesses. See below for more information.

Sickness and accident insurance provided by private companies may be offered by an employer. It is not required by law and usually related to union negotiations. These insurance plans will usually provide benefits when you are off work because of mental illness.

Employment insurance provides a short term sickness benefit. See here for more information: <http://www.servicecanada.gc.ca/eng/ei/publications/sickness.pdf>

CPP provides a disability benefit for people who have contributed to the plan and have a long term disability that prevents them from working.

<http://www.servicecanada.gc.ca/eng/isp/cpp/applicant.shtml#b>

ODSP helps people with disabilities who are in financial need pay for living expenses, like food and housing, and can help with employment supports to help you find employment or start a business. <http://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/>

Welfare is available as a last resort, or while waiting for ODSP or CPP to be approved.

## **WSIB and Psychological Injury**

### **A claim for compensation from the Workplace Safety and Insurance Board (WSIB)**

#### **What types of psychological injuries are covered by the WSIB?**

If you have a **physical** work-related injury or illness, and you develop a mental illness/injury as a result of the physical accident itself, or the consequences of the injury on your life, you can get WSIB benefits. This kind of injury is called a secondary “psychotraumatic” injury. The law does not limit benefits to workers in this situation. The physical injury does not have to have been “traumatic”.

Unions and worker representatives have volumes of examples of injured workers driven to psychological distress by various hazards that happen to workers after they suffer a physical injury at work. These psychosocial hazards include treatment of injured workers by WSIB, reduced income, and employer and WSIB pressure to return to work. For example, you might have suffered a repetitive strain injury at work. You might then develop depression because of the pain, financial strain while not working, and emotional effects of having your co-workers mad at you when you return to work because they have to take on additional tasks to accommodate your injury. You can be compensated for the effects of the depression on your employability and receive WSIB support for medical care and medication for the depression.

You can also get benefits if you suffer a mental illness/injury because of experiencing a sudden and unexpected “objectively traumatic” event at work, or a series of sudden and unexpected traumatic events. This type of injury is called “Traumatic Mental Stress”. The WSIB says that “objectively traumatic” events are generally those that involve a risk or element of physical violence, for example:

- being held hostage
- being threatened with physical harm or death, or
- witnessing a fatality or horrific accident.

#### **What types of psychological injuries are not covered by the WSIB?**

The law and policies say the WSIB cannot pay benefits to workers who suffer mental illness/injury because of “stress” at work (Workplace Safety and Insurance Board, 2004). The only exceptions are where the stressful workplace event(s) was “objectively traumatic”, meaning it usually involved violence.

If you suffer a psychological injury/illness because of stressful work conditions (psychosocial hazards) at your workplace, you probably will not get WSIB benefits for your injury. You probably will not get WSIB benefits if your injury is caused by:

- bad work organization;
- overwork;
- lack of recognition of your contribution to the workplace;
- poor supervisor or co-worker support;
- lack of job security and precarious work; or
- harassment/ bullying without threat of violence.

\*some decision-makers at the Workplace Safety and Insurance Appeals Tribunal (WSIAT) have suggested that harassment/bullying might be enough to qualify for benefits, even without the threat of violence, but they are in the minority.

Also, the WSIB cannot pay benefits for injuries caused by employer decisions about the workplace, like decision to terminate your employment or transfer you to a new position.

WSIB laws preventing injured workers from getting benefits for mental stress injuries arising from stressful working conditions are out of date and unfair. At the WSIAT, several workers are arguing that the law is discriminatory against people with mental disabilities. The workers argue that the law violates both the *Charter of Rights and Freedoms* (1982) and the *Ontario Human Rights Code* (1990). Unfortunately, it may take many years before this issue is resolved at the Tribunal and the courts.

The workers' compensation system was set up to protect employers from lawsuits for causing personal injury or disease — workers gave up the right to sue in exchange for this compensation. As more litigation for mental harm occurs, and larger compensation awards are issued by the courts, employers might join workers in lobbying for chronic work-related stress induced conditions to be compensated through WSIB.

### **How can I handle having a psychological injury and a WSIB claim?**

You should talk to a qualified union or other representative if you have suffered a psychological injury because of stress at work. These cases can be difficult to handle on your own.

A qualified representative can give you the best advice about what to do in your case. Even if your injury was caused by non-violent stressful events at work, for example, it might be worth trying to get WSIB benefits through an appeal. The law is changing quickly and the WSIAT has allowed compensation in some cases that don't involve a threat of violence, like a wrongful accusation of serious wrongdoing.

Navigating workers' compensation when you are suffering a mental injury/illness is daunting. Get support from those around you to go through this process or to find out information about help available. Supports can be your family, your union, your friends, a legal clinic, an injured workers group, Occupational Health Clinics for Ontario Workers (OHCOW), the Workers Health and Safety Centre (WHSC), or anyone else you choose.

Being labelled with a mental illness unfortunately often carries with it a burden of stigma because many people don't understand it. Due to this lack of knowledge (and often lack of understanding), the process of filing a WSIB claim itself, and of going through medical/WSIB

assessments, can actually cause psychological distress. Know that the system itself has identified that stigma is a problem (Workplace Safety and Insurance Board, 2012). Here is a link to the WSIB's stigma information and material:

<http://www.wsib.on.ca/en/community/WSIB/ArticleDetail?vgnnextoid=92b75779bdc6e210VgnVCM100000469c710aRCRD>

### **What is a psychological injury?**

In all cases, the WSIB will only pay benefits for psychological injury/illness if the workplace conditions — including things that happened because of a workplace accident or conditions like financial stress or pressure to return to work — were one main cause of the psychological injury/illness. You can get WSIB benefits if there were other non-work causes, as long as work also caused the injury/illness.

The WSIB will only consider paying benefits for psychological conditions where the worker's doctor or psychiatrist/ psychologist (a psychiatrist or psychologist opinion is strongly preferred, and in some cases required) has diagnosed a psychiatric condition. Examples of psychiatric illnesses that the WSIB compensates are depression, post-traumatic stress disorder, and anxiety disorders. Psychiatric conditions are diagnosed according to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV).

The DSM-IV is a manual used by medical professionals to diagnose mental illnesses. At this time, it is a requirement for eligibility for many benefit programs to have a valid diagnosis listed in the DSM-IV. The Diagnostic and Statistical Manual of Mental Disorders (4<sup>th</sup> edition or DSM-IV) is the result of an attempt by the American Psychiatric Association to standardize the diagnosis of recognized mental disorders. It defines mental conditions and lists the symptom criteria for their diagnosis. There is a fair amount of controversy over these definitions and criteria, and significant changes are expected in the 5<sup>th</sup> edition which is scheduled to be released in May 2013.

### **Does it matter when I was injured?**

It might. Limits in the law on "stress" injuries were only formally introduced in 1998, although decision-makers had already denied many stress cases before the law changed. If you suffered a psychological injury because of stress at work before 1998, the law's limits on mental stress injuries do not apply to your case. Workers injured before 1998 usually have to show that workplace events were such that an "average worker" would have experienced the events as "stressful" and been at risk of developing a psychological injury.

## **Resources for Advocates**

### **Board Policies**

OPM 15-03-02, Traumatic Mental Stress

<http://www.wsib.on.ca/portal/server.pt/community/WSIB/230/OPMDetail/24347?vgnnextoid=7d12ae75e15d7210VgnVCM100000449c710aRCRD>

OPM 15-04-02, Psychotraumatic Disability

<http://www.wsib.on.ca/portal/server.pt/community/WSIB/230/OPMDetail/24347?vgnextoid=8606ae75e15d7210VgnVCM100000449c710aRCRD>

### **Best Approaches Guides**

WSIB Traumatic Mental Stress Guide

<http://www.wsib.on.ca/en/community/WSIB/230/ArticleDetail/24338?vgnextoid=5bd7d3d819f0d210VgnVCM100000469c710aRCRD&vgnextchannel=0b0ec9cccd09be110VgnVCM1000000e18120aRCRD>

WSIB Return to Work Considerations — Workers with Psychological Entitlement and Chronic Pain Disability

[http://www.wsib.on.ca/files/Content/AdjudicativeAdviceRTW-CPDandPsychEntitlement/BA\\_CPD\\_Psych.pdf](http://www.wsib.on.ca/files/Content/AdjudicativeAdviceRTW-CPDandPsychEntitlement/BA_CPD_Psych.pdf)

### **IAVGO Manual**

Chapter 9: Psychological Disability

<http://www.cleo.on.ca/english/wcManual/ch09.pdf>

Chapter 11: Stress Claims

<http://www.cleo.on.ca/english/wcManual/ch11.pdf>

## **Short-term and Long-term sick benefits**

### **1. Short-term Disability (STD) and Long-term Disability (LTD) through your work benefits**

If you are unable to work because of illness, you may be eligible for both short and long-term disability benefits through your work benefits. Generally, to be eligible for STD benefits, you must be unable to do your job. For LTD benefits, you must be disabled from performing your own job for the first two years. After the two-year mark, most LTD plans require that you be disabled from performing any job in order to continue to qualify.

Few LTD plans permit part-time work while continuing to receive benefits. So if you are able to work part-time, you will generally be disqualified from receiving LTD.

Ontario Disability Support Program (ODSP) helps people with disabilities who are in financial need pay for living expenses, like food and housing, and can help with employment supports to help you find employment or start a business.

<http://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/>

### **2. CPP Disability**

You may be eligible for CPP disability benefits if (Service Canada, 2012a):

- You are under 65 years old
- You have a severe and prolonged illness

- You contributed to CPP in four out of the last six years **or** you contributed to CPP for at least 25 years and contributed in 3 out of the last six years

CPP provides a disability benefit for people who have contributed to the plan and have a long term disability that prevents them from working.

<http://www.servicecanada.gc.ca/eng/isp/cpp/applicant.shtml#b>

For more information, please see the Service Canada website: [www.servicecanada.gc.ca](http://www.servicecanada.gc.ca).

Ontario Disability Support Program (ODSP) helps people with disabilities who are in financial need pay for living expenses, like food and housing, and can help with employment supports to help you find employment or start a business.

<http://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/>

### **3. Employment Insurance Sickness Benefits**

You may be eligible for EI sickness benefits if (Service Canada, 2012b):

- You worked in insurable employment (i.e., EI premiums were deducted from your wages) for at least 600 hours in the past 52 weeks
- If you received EI in the past 52 weeks, you have worked at least 600 hours since your last EI claim ended
- You are unable to work because of illness, but you are otherwise able to work

Employment Insurance (EI) sickness benefits are paid for a maximum of 15 weeks.

Employment insurance provides a short term sickness benefit. See here for more information:

<http://www.servicecanada.gc.ca/eng/ei/publications/sickness.pdf>

For more information, please see the Service Canada website: [www.servicecanada.gc.ca](http://www.servicecanada.gc.ca).

Ontario Disability Support Program (ODSP) helps people with disabilities who are in financial need pay for living expenses, like food and housing, and can help with employment supports to help you find employment or start a business.

<http://www.mcss.gov.on.ca/en/mcss/programs/social/odsp/>