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# **Mental Health and Employer Liability**

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# Mental Health and Employer Liability

By Rensia Melles, Founder, Integral Workplace Health



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Until the mid-twentieth century workplace health and safety focused exclusively on the protection, promotion, and mitigation of risks to physical health. However, in 1948 when the World Health Organization defined health as: “a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity,” it created the first step toward re-examining the breadth of employer accountability for employee health and making employers responsible for employee mental health. Countries now are beefing up their occupational safety and health laws and making employers liable not just for their employee’s physical health on the job, but also for their employees’ mental health and wellbeing.

Factors contributing to the recognition of mental health as a crucial component of occupational health and safety include:

- **An increased interest in psychosomatic medicine** -- This discipline has created a growing body of research regarding the mutual impact between psychological factors and somatic functions. According to WHO, depression combined with other chronic, preventable diseases such as diabetes and cardiac disease is the leading cause of disability worldwide. Furthermore, poor psychological health and functioning undermine an individual’s willingness and ability to manage disease and to adopt healthy lifestyle changes.
- **Destigmatizing of mental illness and poor mental health** -- Anti-discrimination legislation that prohibits discrimination based on a disability has contributed to the need to accommodate individuals who suffer from mental illness. Governments and NGO’s around the globe have engaged in campaigns to address stereotypes and destigmatize mental illness. With this call to action there is also an increased openness to acknowledge and seek help for poor mental health.
- **The need to address the growing global economic burden of mental illness and poor mental health** -- A 2017 WHO-led study estimates the cost of lost productivity to the global economy because of depression and anxiety disorders at \$1 trillion each year. In the U.S. 65 percent of employees cite work as a significant source of stress and more than one-third

report chronic work stress. The American Institute of Stress estimates the cost to U.S. industry at \$300 billion a year in absenteeism, turnover, diminished productivity, and medical, legal, and insurance costs. The Conference Board of Canada estimates the 2017 cost of lost productivity in Canada due to depression and anxiety at C\$50 billion. The Health, Labor, and Welfare Ministry of Japan reported more than 200 workers' compensation claims for *karoshi* (suicide and heart attack due to overwork) in 2014. The cost of healthcare for work related stress in the EU countries is estimated by the European Union at 20 billion Euro annually.

This article discusses the nature of the changing employer liability for worker mental health, provides an overview of legislation in the U.S., Canada, and the EU, and provides recommendations for how employers should respond to this changing liability.

## **Changing Liability**

The number of legal claims of employer liability for employee mental health has been increasing, and these claims are frequently successful. This success can be partially attributed to two developments:

### **1. Emergence of a shared definition of workplace psychological healthy and safety and identification of workplace psychosocial risk factors.**

Previously psychological health and safety in the workplace was vaguely defined making it difficult for claimants to demonstrate work related harm. In recent years, the WHO, ILO, European Social Directive, and the Harvard Center for Work, Health, & Well-Being have put forward guidelines for psychologically safe workplaces. The most comprehensive description of features of a psychologically healthy and safe workplace was developed by the Canadian Standards Association (CSA) in the 2013 Standard for Psychological Health and Safety (PHS). Although the standard is currently voluntary, it has garnered international attention. The CSA PHS identifies 13 features of an ideal psychological work system – all of which have been thoroughly researched and can be slotted into the categories of work organization, work design, working conditions, and labor relations. The CSA PHS standard identifies the following features of a psychologically healthy and safe work environment:

- psychological support,
- organizational culture,
- clear leadership and expectations,
- civility and respect,
- psychological job demands,
- growth and development
- recognition and reward,
- involvement and influence,
- workload management,

- engagement,
- work/life balance,
- psychological protection from violence, bullying, and harassment,
- protection of physical safety, and
- a reduction of other chronic stressors as identified by workers.

With the emergence of distinct criteria, it becomes increasingly possible to identify where an employer may have failed to provide employees with an adequately psychologically safe system of work or failed to prevent foreseeable harm.

## **2. The acknowledgment of the workplace itself as an etiological factor in poor psychological health.**

In other words: work environment itself can be mentally harmful. This opens the way to extend occupational health and safety requirements to include protection of mental health. Similar to physical risks, employers now need to assess work related risks to mental health and act to eliminate or mitigate those risks.

The most common response to work related stress and mental health concerns has been to encourage behavior and attitude change of individual workers by offering stress management training, relaxation training, and implementing mental health care programs, such as an Employee Assistance Program. These programs can most certainly bring value, however, when the organization does not also consider possible root causes within the workplace, the benefit is undermined in two ways: programs may be underutilized because there is no overall endorsement or acknowledgement of mental health (WHO predicts that at any given time 20 percent of individuals struggle with mental health issues yet EAP utilizations are typically well under 10 percent) and secondly, even if individuals use the programs available to them, they continue to be affected by the root cause of the stress.

As legislation becomes more established, organizations will increasingly be held accountable to assess and prevent systemic work-related risk factors to psychological health, as well as establish policies and procedure to eliminate or mitigate risk factors.

### **Relevant Recent Legislation**

Multiple areas of law can be applied to establish employer liability for work-related psychological harm to employees.

#### **Human Rights Legislation**

The U.N.'s International Covenant on Economic, Social and Cultural Rights has been ratified or acceded to by 132 countries. These countries have taken on the obligation to respect, protect, and fulfil human rights and to instigate legislation to reflect their obligations and duties,

including protection of its citizens and mechanisms and procedures for individual complaints or communications for when the laws are not upheld.

Equality, nondiscrimination, the right to enjoyment of just and favorable work conditions, and the right to enjoyment of the highest attainable standard of physical and mental health are included in the International Covenant on Economic, Social and Cultural Rights.

Based on these described and ratified rights, employees could have grounds to file a complaint against their employers, claiming that their basic human rights have been violated by employers who condone bullying, harassment, violence, or discrimination (including discrimination due to mental health issues). Additionally, there could be grounds for complaints based on condoning less obvious but equally damaging workplace circumstances such as preventable, persistent, and severe work-related stress, poor personal treatment by management or peer, and constant work overload. Research has linked all of these to poor psychological health. Therefore, such work conditions could be interpreted as undermining the right to just and favorable conditions at work and the right to physical and mental health.

### **Anti-bullying and Anti-harassment Legislation**

Mobbing, harassment, and workplace violence have become hot topics around the globe and many countries have introduced national legislation to protect the psychological and physical safety of citizens. Bullying is most often defined in terms of the perpetrator's behaviors and includes discrimination. France takes a unique approach and defines bullying as an injury to mental health – thereby defining bullying by its consequences. In France, a manager who causes significant and ongoing mental distress by refusing to speak to an employee, ignores them or refuses to assign the individual work can be found guilty of workplace bullying.

Many countries are introducing workplace specific anti-bullying and anti-harassment legislation. Such legislation holds the employer accountable to implement prevention policies, communications and training of employees on policies and expectations, confidential complaint protocols, and accountability protocols for complaint resolution.

The following countries have nationwide workplace specific anti-bullying, anti-harassment and workplace violence legislation in place: Belgium, China, Denmark, Finland, France, Germany, Ireland, Luxembourg, Kenya, Norway, Netherlands, Poland, Serbia, Singapore, South Africa, Spain, Sweden, South Korea, Turkey and the U.K.

Australia, Canada, and the U.S. have national anti-bullying or anti-harassment legislation in place and some states/provinces in each of these countries have introduced workplace specific anti-bullying, anti-harassment and violence legislation.

### **Selected Occupational Health and Safety Legislation and Enforcement**

A common thread of occupational health and safety legislation across countries is the recognition that the work experience can be a possible root cause of employee poor

psychological health. These laws carry the requirement that companies must review and adapt work organization, work design, working conditions, and labor relations to prevent harm and mitigate risk.

## **U.S.**

The Occupational Safety and Health Act administered by the OSH Administration under the U.S. Department of Labor focuses on the identification, prevention, elimination, and/or mitigation of hazards to employee health. Workers are protected from undue stress, harassment, negligence, and unsafe working environments. Stress from repetitive exposure and from discrete single events in the workplace is recognized as a work-related hazard. Much of the focus with regard to mental health has been on bullying, violence, and incivility in the workplace.

Since 1985 federal labor law and California labor laws allow employees to receive workers' compensation due to one time or repetitive exposure to excessive work-related stress causing mental harm or injury. Legislation requires employers to take a preventative approach and respond to complaints from employees. Employees for their part are expected to make their employer aware of their stress in the workplace. The National Institute for Occupational Safety and Health has shifted its focus from physical health to total worker health, incorporating mental wellbeing, behavioral wellbeing, and quality of life into its research and recommendations for a healthy work organization.

## **Canada**

Employees in Canada can be covered under federal legislation and/or provincial legislation. Under the Federal Canadian Occupational Health and Safety Act, all employers are required to implement comprehensive policies, programs, and investigative procedures to address workplace harassment. Employers may be sued for mental distress experienced at work, including harassment, bullying, and workplace violence. Workers' compensation is arranged at the provincial level. Employees may be eligible for compensation for psychological disability due to excessive workplace stress. This excludes stress due to normal expectations of work.

The voluntary 2013 Occupational Standard for Psychological Health and Safety includes a number of innovative and unique features: a strong focus on health promotion as well as prevention, and a broad requirement to also protect employees from harm by third parties such as vendors, suppliers, and contractors. It is widely expected that parts of the standard will become law in the near future.

## **European Union**

The EU Framework Directive 89/391/EEC on Safety and Health of Workers at Work obliges employers to address and manage all types of risk in a preventive manner and to establish

health and safety procedures and systems to do so. This includes work related risks to mental health (often referred to as work related psychosocial risks).

Employers must identify risks to mental health and assess the impact of, prevent, and manage identified risks to reduce or eliminate their impact. The Directive also includes provisions requiring employers to develop a coherent overall prevention policy which covers technology, organization of work, working conditions, social relationships, and the influence of factors related to the working environment. The employer's duty of care is unambiguous: They must consider the health and wellbeing of employees in relation to their working conditions. Mental health and psychosocial risk are not specifically mentioned but they are implied as included.

Mental health and psychosocial risk are, however, often explicitly included in country-level legislation. For instance, French legislation emphasizes the duty of employers to ensure the safety and protect the health, both physical and mental, of their employees. Among other things, employers are obliged to draw up a written risk assessment, the single risk assessment document (DUER) that must be updated at least annually.

Belgium requires a general risk analysis and psychosocial risk assessment covering all aspects of occupational well-being. Employers can utilize specialized "prevention advisors" who specialize in psychosocial problems in the workplace and confidential mediators. Individual or collective complaints can be filed confidentially, and employers must have a prevention advisor and confidential mediator in place to investigate the complaint.

Italy requires employer measures related to communication and training aimed at prevention, reduction, or elimination of work-related stress.

### **Tort Law/Common Law**

In several countries common law has been used to file civil damage claims for psychiatric or psychological injury in the workplace, i.e. due to workplace stress or excessive workload. Employers may be found negligent in the face of foreseeable injury and in their duty to accommodate. In the U.K. for example, employees have successfully filed such suits against their employers, and employers have also been held vicariously liable for behavior of their employees.

In Canada, the Supreme Court rejected the argument that claims for mental injury are subject to a different test than claims for physical injury, holding that the law of negligence accords identical treatment to mental and physical injury.

Under the Wrongs Act in Australia, claimants can file a mental injury suit. Workplace related suits for mental injury frequently involve bullying, harassment, and workplace stress. They may also arise from witnessing a workplace accident or death. Unlike in Canada, a formal psychiatric diagnosis is required.

## **Recommendations**

In light of global expansion of duty of care to mental health and the possible legal implications, employers should proactively act to protect themselves and their workers.

When recruiting and contracting with employees, employers should be aware that engaging in a relationship with an employee implies a duty of care and protection from harm. Employers must be informed about local, regional, and country-specific legislation as it applies to bullying, harassment, workplace violence, and psychological injury.

Employers should develop and implement protocols throughout the organization to foster a supportive, respectful, and safe culture, as well as develop and follow protocols to resolve complaints and conflict. That includes holding employees accountable for poor behavior, regardless of rank or high performance. This is necessary to foster trust and buy-in with all stakeholders.

In situations where companies work across several jurisdictions with varying standards for duty of care, it is advisable to apply the highest legal standard for all, regardless of potentially lower local standards in different states/provinces or countries. It is imperative that company leadership endorse these policies and protocols to ensure their success.

Companies should provide proactive knowledge and skills training to staff and management concerning behavioral expectations, mental health, clear communication, empathy, listening and access to resources for support. This training can help avoid foreseeable harm and reduce risk factors.

Finally, it's important for organizations to monitor the workplace for signs of conflict or stress among employees or between management and staff and address concerns right away. Individuals in the organizations should be charged with establishing policies and ensuring they are applied consistently. Most organizations already have multiple sources of information to help assess psychological health and safety as well as workplace root causes. These include employee surveys, disability and absenteeism statistics, complaints to HR, and exit interviews.

Although managing employee stress and psychological health may seem to be a daunting investment of time and effort, with leadership support and a goal for changing employee and management attitudes and behaviors it is possible to proactively foster a workplace that is both physically and psychologically safe for employees. Ultimately, such programs will protect the organization against lawsuits and complaints, save money, protect the organization's reputation and reap the benefits of a healthy productive and engaged workforce.