

## BILL 127 – More Stress for Ontario Employers



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As Ontario Employers endeavour to come to grips with the financial and operational changes coming to their workplaces as a result of Bill 148, further changes are coming under Bill 127 which are flying somewhat below the radar because of the significant impact of Bill 148.

Bill 127, which will take effect on January 1, 2018, is essentially an Omnibus Bill which amends a number of existing legislative enactments. For Employers, the most significant of these is Schedule 33, which constitutes amendments to the *Workplace Safety and Insurance Act* to allow a worker entitlement to benefits for “*chronic or traumatic mental stress arising out of and in the course of the worker’s employment*”.

Previously, a worker was only entitled to Workplace Safety and Insurance benefits for mental distress if there was an acute reaction to a sudden and unexpected traumatic event arising out of and in the course of the worker’s employment. In other words, the entitlement to such benefits was severely restricted. Bill 127 creates a specific entitlement for both chronic and traumatic mental

stress. Neither of these terms is defined in the legislation.

The Workplace Safety and Insurance Board has published a Policy in an attempt to provide clarification, but pending decisions by both the Board and the Workplace Safety and Appeals Tribunal, it remains uncertain under what circumstances such benefits might be granted. For the moment, the Board’s Policy considers work related chronic mental stress as “*an appropriately diagnosed mental stress injury caused by a substantial work-related stressor arising out of and in the course of a worker’s employment*”. In terms of what is “*substantial*”, the Board’s Policy suggests that if the stressor was excessive in intensity and/or duration compared with the normal pressures and tensions experienced by people working in similar circumstances, this would be considered “*substantial*”. It identifies, as an example, that work-related chronic mental stress could be a mental disorder resulting from being subjected to harassment or bullying at work.

The Board’s Policy indicates that for workers to be entitled to benefits for

work-related chronic mental stress under the Policy, three (3) conditions need to be met:

- an appropriate regulated health professional, such as a family physician, provides a diagnosis based on the diagnostic and statistical manual of mental disorders,
- the person has experienced a substantial work-related stressor(s) such as workplace bullying or harassment, and
- the work-related stressor(s) was the predominate cause of the appropriate diagnosed mental stress injury.

Employers might have reason to be concerned about the objectivity of a family physician, who might and is often seen as an advocate for the patient, rather than an independent assessor of facts. In other words, if family physicians simply reiterate what their patient has told them, there is reason to be concerned that such opinion may in fact simply be a more sophisticated expression of the patient's wishes to claim benefits.

Another issue that arises out of the language of this Bill is the difference between "*chronic mental stress*" and "*traumatic mental stress*". According to the Board's Policy, work related traumatic mental stress involves events that are "*generally accepted as traumatic*" and cites as examples a criminal act or a horrific accident, that will be in most cases sudden

and unexpected. On the other hand, "*work related chronic mental stress*" involves certain stressful events that can be identified, which events are not traumatic, but substantial, and which are excessive in intensity and/or duration compared with normal pressures and tensions experienced by other people working in similar circumstances. As can be seen, given the comments in the Policy, each case will be fact specific and it is uncertain whether there will be a subjective or objective standard, which is likely to lead to an increase in the number of claims for these types of benefits.

The Bill has also amended the definition of workplace harassment to align it with the language in the *Occupational Health and Safety Act*. There is no longer a requirement that a traumatic event be "*sudden and unexpected*". It is helpful to Employers that the Board's Policy specifically deems that an Employer's decisions or actions that are part of the management function would **not** be considered causes of traumatic or chronic mental stress. Listed examples include terminations, demotions, transfers, discipline, changes or working hours or changes in productivity expectations. However, Employers are reminded that they are prohibited from taking any action which might prohibit or suppress the ability of an employee to file a claim for benefits, regardless of whether the claim may appear to be legitimate or not.

Bill 127 should give Employers

pause to consider the increased need to identify possible stressors in the workplace and to limit or eliminate these stressors. As well, it continues to be important for Employers to promptly investigate and deal with possible harassment and bullying in the workplace, not only to comply with their obligations under other legislation, but to now limit or eliminate potential costly and complicated claims for stress related matters.