

Published by Thomson Reuters Canada Ltd.

## Challenging a worker's right to sue

*Workers' compensation legislation can reduce liability in work-related accidents*

**E**mployers are increasingly becoming the target of unprecedented workplace lawsuits launched by current and former workers — lawsuits that are a departure from those related to wrongful or constructive dismissal, the traditional concerns for employer liability.

A variety of claims for psychological harm and traumatic stress suffered as a result of incidents of alleged workplace violence or harassment are on the rise. These are likely a byproduct of a number of factors, including an increasingly rights-aware society, highly publicized government initiatives such as Ontario's Bill 168 (the anti-harassment and workplace violence law), the recent recession (resulting in increased layoffs and terminations) and courts' increasing willingness to recognize and expand the range of workplace behaviour that can attract civil liability.

But as workers continue to test the boundaries of employment litigation by launching claims for a range of injuries incurred at work, employers should note the protection against litigation provided under workers' compensation in most jurisdictions across Canada. This protection will often prevent a worker or his dependants from suing his employer for harm — physical or psychological — suffered in the workplace.

### The scheme

In Ontario, for example, the basic premise of the workers' compensation system under its Workplace Safety and Insurance Act (WSIA) is a worker who is injured in a workplace accident may make a claim to the Workplace Safety and Insurance Board (WSIB) for benefits, but may not sue his employer for damages suffered. This is often referred to as a "historic trade-off" because the worker trades off the right to sue his employer in return for relatively



### LEGAL VIEW

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quick and easy access to income replacement and other benefits. To participate in this trade-off and protect itself from litigation arising out of a workplace accident, employers must pay premiums.

Every specified employer (those listed under schedule 1 of Ontario's WSIA, for example) must pay premiums into a mandatory insurance fund used to provide benefits to the injured worker. The annual premium is determined based on a number of factors, including the employer's claims experience, which is rated against the expected claims experience for the employer's type and size of business.

As with any insurance policy, the greater the number and value of claims arising out of a particular workplace or type of workplace, the greater the premiums. Certain types of employers self-fund all employee claims, which are administered by the board.

Ontario's WSIA describes the historic trade-off as follows: "Entitlement to benefits under the insurance plan is in lieu of all rights of action (statutory or otherwise) that a worker, a worker's survivor or a worker's spouse, child or dependant has or may have against the worker's employer or an executive officer of the employer for or by reason of an accident happening to the worker or an occupa-

tional disease contracted by the worker while in employment of the employer."

The employer's exemption from civil action also often includes directors, executive officers and co-workers. In Ontario, the exemption for certain employers (schedule 1) includes an action commenced by an employee of another schedule 1 employer.

The workers' compensation schemes in other Canadian jurisdictions employ measures that are substantially similar. However, there are differences. For example, in Ontario, a worker is entitled to benefits for traumatic mental stress resulting from an acute reaction to a sudden and unexpected traumatic event "arising out of and in the course of employment." This would include traumatic events such as criminal acts, threats or harassment, but would not include stress that results from the employer's employment decisions or actions.

In Alberta, a worker may be eligible for benefits for job-related stress that does not attach to a particular event or series of events. As a result, employers may have broader protection from court proceedings because there is wider latitude in the workers' compensation scheme for accepting stress-related claims.

### Determining the right to sue

The determination of whether a worker's right to sue has been removed under workers' compensation legislation is exclusively reserved to each jurisdiction's decision-making board or tribunal, such as the Workplace Safety and Insurance Appeals Tribunal in Ontario. On a "right to sue" application — brought by an employer named as a defendant in a civil action — the tribunal does not decide whether the worker is entitled to benefits, but only whether the worker could be entitled. That is, if the claims made by the worker in

the civil action could be made in support of an application for workers' compensation benefits, the civil action is barred by the worker's compensation legislation.

In deciding whether or not a worker could be entitled to benefits, the tribunal will determine whether the claims raised in the civil action arose from injuries suffered as a result of an accident occurring in the course of the worker's employment. What constitutes an accident has been interpreted broadly and includes incidents of workplace violence and harassment. As such, a civil action by a worker seeking compensation for psychological injury — such as traumatic stress — resulting from workplace violence or harassment is likely to be barred by a tribunal.

### Benefits to employers

Using workers' compensation legislation to challenge a worker's right to sue for a workplace injury is an important tool for employers in minimizing an employer's exposure to potentially expensive and high-profile litigation.

However, before launching a "right to sue" application, an employer should decide whether such a move is in its best interest. Proceeding under the WSIA or similar legislation is invariably less costly than in the civil courts and an employer is not exposed to an award for damages. However, a change to the employer's workers' compensation experience rating could have a financial impact.

An employer may also want to consider whether a civil action can be quickly and economically settled in exchange for a release from the worker that may include other non-WSIB claims. Finally, an employer should consider the potential harm to its business and reputation that may arise with publication of an unfavourable court decision.

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