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MANAGEMENT LABOUR & EMPLOYMENT LAWYERS

THE EMPLOYERS' CHOICE

CRAWFORD CHONDON & PARTNERS LLP

Navigating Mental Health Issues and Balancing Privacy Rights / Safety Obligations



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May 3, 2018



Agenda

- Introductions
- Legal framework
- Participants in the process
- Challenges in addressing mental health issues
- Case scenarios and strategies for addressing
- Concluding comments on process and documentation



Legal Framework

- Human Rights legislation
 - Actual & perceived disabilities - e.g. mental illness & addictions
- Occupational health & safety and workers' compensation regimes
 - General obligation, workplace violence/harassment, the psychological harm protections
 - Enhanced recognition of mental health claims
- Disability plans and contracts



Participants in the Process

- There are a number of participants typically involved in dealing with mental health issues in the workplace
- Each has roles, responsibilities and interests
- Understanding the respective roles, responsibilities and interests will assist in managing a successful return to work and reduce the risk of conflict



Participants in the Process

- Consider the roles, responsibilities and interests of the following:
 - The Employer
 - Supervisors / Managers, OHS nurse, HR, investigator (incl. 3rd party)
 - Productive and safe workplace, costs, education and training
 - The Employee (and perhaps advocate / union representative)
 - Return to work, benefit entitlement, participation and cooperation, medical privacy
 - Committees
 - JHSC, return to work, accessibility representative(s)



Participants in the Process (cont'd)

- Consider the roles, responsibilities and interests of the following:
 - The Co-workers (and perhaps union representative)
 - Personal and workplace safety, reporting, cooperation in accommodation initiatives, EAP
 - The Employee's Family Physician
 - Advocacy, medical reporting, insurance claim reporting, privacy, referral to specialists
 - The Mental Health Specialist(s)
 - Appropriate treatment/medication, comprehensive medical reports, fitness to work



Participants in the Process (cont'd)

- Consider the roles, responsibilities and interests of the following:
 - The Insurer
 - Claim adjudication, rehabilitation / retraining, appeal process, functional abilities assessment, IMEs
 - The 3rd Party Adjudicator
 - Assessment of “total disability”, benefit entitlements, review of accommodation efforts, IMEs



Challenges in Addressing Mental Health Issues

1. Identifying a mental health concern
 - Is a change in behaviour or performance a concern?
 - The Employer's duty to inquire(?)
2. The employee's concern about stigma
 - How do you talk to the employee about it? – “Let's Talk”
3. Disruptive behaviour that impacts the workplace
 - What if colleagues are “afraid” to work with the employee?



Challenges in Addressing Mental Health Issues (cont'd)

4. Leave options
 - Should it be paid or unpaid?
 - What benefits are available?
5. Adequacy of medical information
 - Is a note from the family doctor sufficient?
 - Can an employer ask about the treatment plan?



Challenges in Addressing Mental Health Issues (cont'd)

6. Consent and capacity of employee
 - Does the employee have the capacity to make decisions regarding treatment, release of information, etc.?
7. Return to work / accommodation
 - Does an employer have to accept sub-standard work?
 - What medical information can be requested?
 - What types of accommodation might be considered?



Case Scenarios and Strategies

- The “stress” claim
 - Is stress a mental illness?
 - Can stress be considered a total disability entitling employees to STD or LTD benefits?
 - What are the options for dealing with the “stressed-out” employee?
 - Consider source(s) of stress



Case Scenarios and Strategies

- The poor performer
 - Qualified when hired but “failing” probation – should you care?
 - Should an employer be concerned about a change in performance? - i.e. once exceptional to now poor
 - How does an employer raise with the employee a mental health concern in connection with the poor performance?
 - Does the employer have to accept “sub-standard” performance as a form of accommodation?



Case Scenarios and Strategies

- The employee “in denial” or uncooperative
 - What if the employee simply denies or refuses to discuss the employer’s concerns regarding mental health?
 - In what circumstances could the employer consider removing the employee from the workplace?
 - Do other employees have any input into such matters?
 - Role of JHSC or Ministry of Labour and work refusals



Case Scenarios and Strategies

- Mental health and addictions
 - Is an employee's addiction a mental health issue?
 - What different considerations might apply in returning to work an employee with a substance abuse issue?
 - Is monitoring of an addicted (recovering) employee's substance use appropriate?
 - Balancing other forms of monitoring and reasonable expectations of privacy



Case Scenarios and Strategies

- Mental health raised post discipline or termination
 - Does an employer have any obligation to consider mental health issues raised following a disciplinary incident or the termination of the employee?
 - Does this mean you can't discipline or terminate someone with a mental health issue?
 - Is there a nexus between the incidents and the mental health issue?



Concluding Remarks On Process & Documentation

- A robust process is required to properly manage, and this takes time and requires patience
- Delays associated with obtaining necessary medical information should be anticipated including
 - Employee's ability to attend necessary appointments
 - Availability of physicians and willingness to write reports, especially specialists
- Document all steps taken in the process



Concluding Remarks On Process & Documentation

- Must anticipate and be prepared to educate workforce on accommodation obligations and assisting those with mental illness
- Be prepared to manage the gossip or potentially discriminatory or harassing remarks of co-workers
- Seek out external supports to assist in managing such matters



Questions?



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