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OHS & Workers' Compensation

M A N A G E M E N T U P D A T E

National Standard for Psychological Health and Safety in the Canadian Workplace Released

A new and surprisingly complex Canadian Standards Association (CSA) Standard may be arriving at and impacting your workplace soon. A proposed Standard has been developed, setting out optimistic goals and processes for achieving “psychological health and safety” in the workplace. Policies, procedures, hazard identification, incident investigation and monitoring activities may be required, in addition to all of the existing steps being taken to develop and manage OHS systems. This article introduces and analyses the proposed Standard.

The CSA which develops standards for business, industry, government and consumers, released the draft Standard¹ on November 1, 2011 for a period of public consultation which ended on January 6, 2012. The final Standard, which is expected to be published in early 2012, is intended to provide organizations with the necessary tools and guidance to achieve “measurable improvements in psychological health and safety”² for Canadian employees and prescribes specific steps for employers to take to develop and maintain psychologically healthy and safe workplaces. As currently drafted, the steps prescribed and obligations imposed by the Standard are significantly broader than those currently imposed on employers under OHS and human rights legislation and the breadth of the Standard raises concerns about its viability for Canadian employers.

THE DRAFT PROPOSED STANDARD

A Policy on Psychological Health and Safety and the Roles of Workplace Parties

The draft Standard requires, among other things, that organizations draft a policy committing to the development, implementation, funding, continuous improvement, and review of a systematic approach to managing psychological health and safety (“PHS System”).³

In addition to supporting the implementation of the PHS System, “leaders,” those with “key responsibility for the organization’s performance,”⁴ have special obligations to develop a “psychologically healthy and safe workplace,” one that “promotes workers’ psychological well-being and allows no harm to worker mental health in negligent, reckless or intentional ways,”⁵ by leading in a “positive way,” making

psychological health and safety (“PHS”) part of decision making, and “engaging” workers to understand the importance of PHS and the risks of PHS hazards, to determine the effectiveness of the PHS System, and to identify workplace PHS needs.⁶

Organizations are required by the Standard to “engage” “stakeholders”⁷ to determine their PHS needs, encourage participation in programs to meet those needs and in the PHS System evaluation process, and to ensure that the results of the evaluation process are communicated.⁸ In order to encourage participation, organizations must provide time and resources, identify and remove barriers, and train and consult with workers in all aspects of the PHS System associated with their work.⁹ Organizations must also educate stakeholders about stigma, psychological illness, PHS, and PHS policies, and provide a process for input and organizations must inform external parties about PHS policies, monitor compliance with those policies, and address any PHS issues that arise.¹⁰

Develop and Implement the PHS System

If there is an existing PHS System in place, the Standard recommends that it be reviewed to determine whether it complies with the Standard.¹¹ If there is no existing PHS System, an organization must gather the necessary information to develop a PHS System.¹² There is no set information to be gathered; rather, the type and degree of information necessary will depend on the nature of the workplace and PHS goals.¹³

The Standard requires organizations to set PHS objectives, develop a plan to meet those objectives,¹⁴ and at least every three years, review the achievement of those objectives and whether a psychologically healthy and safe workplace is being achieved.¹⁵ It also requires organizations to define minimum PHS requirements and provide training and support to workers and management to enable them to meet these minimum requirements, and inform managers that successful performance requires maintaining a psychologically health and safe work environment.¹⁶ The Standard recommends that organizations develop and set goals to achieve a PHS vision while planning for the impact of PHS on worker health and organization finances.¹⁷

Organizations are required to identify “hazards”, a potential source of psychological harm to a worker,¹⁸ and assess the risks of those hazards.¹⁹ Once hazards are identified and assessed, organization must establish and maintain processes to eliminate or prevent their

occurrence, protect workers, and foster a psychologically healthy workplace.²⁰ They must also plan to manage changes that can affect PHS and provide information, training and assistance to workers and stakeholders regarding those changes.²¹

The Standard requires organizations to develop a PHS System implementation process that includes sponsorship from leaders, stakeholder engagement, and change management principles.²² To support implementation of the PHS System, organizations are required to provide sufficient resources for the system and provide workers with sufficient authority and knowledge to fulfill their duties and integrate PHS in their work.²³

Identify and Investigate PHS Incidents

Organizations must identify events where psychological illness or injury has or may occur to individuals and develop a process to respond to those event and to provide support, training and debriefing opportunities to responding personnel.²⁴ Organizations have similar obligations in relation to events that pose PHS risks at the organizational level without individual illness or injury.²⁵ Organizations must also implement reporting and investigation processes for “work-related injuries, illnesses, acute traumatic events, chronic stressors, fatalities (including suicides), and PHS System incidents.”²⁶ After an investigation, recommendations for PHS System improvement must be developed and communicated to affected parties and form the basis for corrective action.²⁷

Monitor, Audit, and Improve the PHS System

Organizations must monitor PHS and the PHS System to determine, among other things, whether objectives are being met and hazard are identified, assessed and controlled.²⁸ Organizations must identify any new or inadequately controlled hazards, expedite and record action taken to address those hazards, and implement measures to prevent their recurrence.²⁹

The Standard also requires organizations to establish audit programs to determine compliance with the Standard and internal PHS System requirements and whether the system is effectively implemented and maintained.³⁰ Management must ensure that documented corrective action is taken and that corrective actions and the results of the audit are communicated to affected workplace parties.³¹

THE STANDARD COMPARED TO OCCUPATIONAL HEALTH AND SAFETY LAW

The Standard aims to improve psychological safety which is identified in the Standard as synonymous with "mental health" which is broadly defined as a "state of well-being in which the individual realizes his or her own abilities, can cope with the normal stresses of life, can work productively and fruitfully, and is able to make a contribution to his or her community."³² The breadth of this definition is at odds with obligations under OHS legislation. Canadian courts and tribunals have not interpreted OHS legislation this broadly and in fact, have indicated that the purpose of OHS legislation is not to create a perfect workplace but rather to ensure a reasonable level of protection for workers.³³

The Standard states that it has been developed in the "context of an existing and still emerging legal duty for the employer to demonstrate that all reasonable steps have been taken to provide and sustain a psychologically safe workplace"³⁴ and that there is an "increasing recognition in at least two provinces" that PHS is part of the obligation to "provide a safe system of work under OHS legislation."³⁵ This appears to overstate OHS law as currently no Canadian OHS legislation mentions or defines mental or psychological health and safety.³⁶ While the Standard correctly identifies that some jurisdictions have added workplace violence and harassment provisions to OHS legislation, these provisions have not and do not technically require employers to provide a psychological safe workplace, which is defined as a workplace that "promotes workers' psychological well-being and allows no harm to worker mental health in negligent, reckless or intentional ways."³⁷

In the federal jurisdiction, for example, employers are required, among other things, to identify workplace violence factors and assess the workplace for risk, develop and implement a program for identifying and preventing these risks, educate employees on factors that contribute to workplace violence, and provide a means to investigate reports of workplace violence.³⁸ Workplace violence is defined as "any action, conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee."³⁹ This is the general model for workplace violence prevention requirements in Canada. It falls far short of the requirements to promote psychological well-being and allow no harm to worker mental health. Obligations in relation to workplace harassment, which exist in only a few provinces' OHS legislation,⁴⁰ also falls short of the obligations in the Standard. At the highest, these provisions apply to threats,

conduct or gestures that may cause injury or illness, or a course of vexatious comment or conduct that is unwelcome. There is no reference to psychological health and safety and no OHS statute includes an express obligations for employers to prevent harassment; rather, employer obligations are limited to creating policies and programs and conducting training regarding these policies and programs.

The definitions in the Standard are also inconsistent with similar terms in OHS legislation. The definitions of "hazard," "harm," "health," "psychological health," "psychological safety," and "psychologically healthy and safe workplace" in the Standard are very broad and vary from the definitions that have emerged in Canadian OHS law. For example, no OHS statute defines a "hazard" as a "potential source of psychological harm to a worker" or "health" as a "state of complete physical, social and mental well-being and not merely the absence of disease or infirmity."⁴¹

In addition the Standard is inconsistent with the extent to which employers have traditionally been required to protect workers from mental or psychological safety risks. In fact, prior to the enactment of workplace violence and harassment provisions in OHS legislation, tribunals in Ontario specifically stated that statutory concepts of occupational health and safety may not have been sufficiently broad enough to encompass "mental" or "psychological" risks or "harassment" in the workplace. While these comments must be tempered in light of the addition of workplace violence and harassment obligations in some OHS legislation, the Ontario Labour Relations Board has clarified that the harassment-related provisions in Ontario's OHS legislation do not include a positive obligation for the employer to ensure that the workplace is harassment-free or to investigate harassment complaints.⁴²

While CSA standards are voluntary and have no legal force in their own rights, they are considered best practice documents in their subject matter area and have the potential to impact employers' legal obligations. The Standard could become part of OHS law either through references in occupational health and safety legislation, which would require specific amendments to enabling legislation or regulations to include references to the Standard, or as a result of being used by courts and tribunals to determine whether an employer has complied with the general duty clause in OHS legislation. Every jurisdiction in Canada has a general duty clause in their OHS legislation that requires employers to take all reasonable precautions in the circumstances to protect the health and safety of workers.⁴³ In determining whether a particular step taken by an

employer has satisfied the general duty clause, courts and tribunals will consider standards for health and safety promulgated by respected external sources, such as the CSA, and accordingly, it is possible that the Standard could be used to interpret and inform employer obligations under the general duty clauses of OHS legislation.

The fact that the Standard far exceeds the provisions of any current OHS legislation in its definitions, duties, and responsibilities in relation to mental or psychological safety, could have very significant long term consequences for employers who have not met the extraordinarily far reaching and stringent provisions of this proposed Standard.

ENDNOTES

- 1 Canadian Standards Association, Draft Standard CSAZ1003/BNQ9700-803-5 Psychological Health and Safety in the Workplace. ["Standard"]. A copy of the Draft Standard is available on request from the CSA.
- 2 Mental Health Commission of Canada, "Public Consultation for Workplace Mental Health Standards Underway", online: <http://www.mentalhealthcommission.ca/English/Pages/Public_consultation_wmh.aspx>.
- 3 Standard, *supra* note 1, section 4.2.2 (a) – (f).
- 4 Standard, *supra* note 1, section 4.2.3.
- 5 Standard, *supra* note 1, section 3 "psychologically healthy and safe workplace".
- 6 Standard, *supra* note 1, section 4.2.3 (a) - (f).
- 7 "Stakeholder" is very broadly defined as "any person or organization within the workplace that may affect or be affected by, or perceive themselves to be affected by, the decisions or activities related to mental health and safety factors within the workplace": Standard, *supra* note 1, section 3 "stakeholder".
- 8 Standard, *supra* note 1, section 4.2.4.1(a).
- 9 Standard, *supra* note 1, section 4.2.4.2.
- 10 Standard, *supra* note 1, sections 4.4.3 and 4.4.11.
- 11 Standard, *supra* note 1, section 4.3.2.
- 12 *Ibid.*
- 13 Standard, *supra* note 1, section 4.3.3. The Standards lists a wide range of resources that may be considered including: standards, codes, best practices, laws and regulations, scientific journals, worker engagement data, etc.
- 14 Standard, *supra* note 1, section 4.3.6.1. PHS objectives must be measurable, consistent with the PHS policy, and based on reviews, data collection and the assessment of workplace factors: Standard, *supra* note 1, section 4.3.6.1.
- 15 Standard, *supra* note 1, sections 4.5.3.
- 16 Standard, *supra* note 1, section 4.4.7.
- 17 Standard, *supra* note 1, section 4.3.1.
- 18 Standard, *supra* note 1, section 3 "hazard".
- 19 Standard, *supra* note 1, section 4.3.4.
- 20 Standard, *supra* note 1, section 4.4.2.
- 21 Standard, *supra* note 1, section 4.3.7; The Standard contains the following non-exclusive list of changes that may impact PHS: the development of new products, process or services; changes to work procedures, equipments, organizational structures, staffing, or suppliers; and changes to PHS strategies and legal requirements: *Ibid.*
- 22 Standard, *supra* note 1, section 4.4.4.
- 23 Standard, *supra* note 1, section 4.4.1.
- 24 Standard, *supra* note 1, section 4.4.8.
- 25 Standard, *supra* note 1, section 4.4.9.
- 26 Standard, *supra* note 1, section 4.4.10
- 27 If the event was of such a nature that the development of improvements for the PHS System would be appropriate: *Ibid.*
- 28 Standard, *supra* note 1, section 4.5.2. The performance monitoring and measurement must review the requirement of the PHS System and the following as applicable: leadership engagement with the PHS system; baseline assessment of psychosocial risk factors; a baseline assessment of other workplace determinants of psychological health; injury and illness tracking; return-to-work programs; psychological and physical health risk assessments; and aggregated analysis of the results of investigations or events: Standard, *supra* note 1, section 4.5.2.
- 29 Standard, *supra* note 1, section 4.5.6. In developing protective and corrective action procedures, an organization must consider input from PHS System monitoring, recommendations from workers and worker representatives, PHS System audits, and management reviews: Standard, *supra* note 1, section 4.5.6.
- 30 The program must include criteria for auditor competency, the audit scope, the frequency of audits, the audit methodology, and reporting: Standard, *supra* note 1, section 4.5.5.
- 31 *Ibid.*
- 32 Standard, *supra* note 1, section 3 "hazard" and "health".
- 33 See for example, *Ontario (Ministry of Labour) v. Sheehan's Truck Centre Inc.*, 2011 ONCA 645 at para. 28.
- 34 Standard, *supra* note 1, Introduction, lines 165 to 167.
- 35 Standard, *supra* note 1, Annex E.
- 36 While Quebec's *Act Respecting Labour Standards*, R.S.Q. c. N-

- 1.1 does define "psychological harassment" and imposes obligations on employers to create policies, assess hazards and take reasonable action, this is not OHS legislation.
- 37 Standard, *supra* note 1, section 3 "psychologically healthy and safe workplace".
- 38 *Canada Occupational Health and Safety Regulations*, SOR/86-304, Part XX.
- 39 *Canada Occupational Health and Safety Regulations*, SOR/86-304, s. 20.2.
- 40 Currently only Manitoba, Ontario, and Saskatchewan include definitions and obligations related to harassment in their OHS statutes.
- 41 Standard, *supra* note 1, section 3 "hazard" and "health".
- 42 *Conforti v. Investia Financial Services Inc.*, 2011 CanLII 60897 (OLRB) at paras 11 to 17.
- 43 For example, the *Canada Labour Code*, R.S.C., 1985, c. L-2, s. 124 requires that "every employer shall ensure that the health and safety at work of every person employed by the employer

is protected". In Alberta, employers are required by the *Occupational Health and Safety Act*, R.S.A. 2000, c. O-2, s. 2 to "ensure, as far as it is reasonably practicable for the employer to do so, the health and safety of workers engaged in the work of that employer...". In Ontario, employers must "take every precaution reasonable in the circumstances for the protection of a worker": *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1, s. 25(2)(h).

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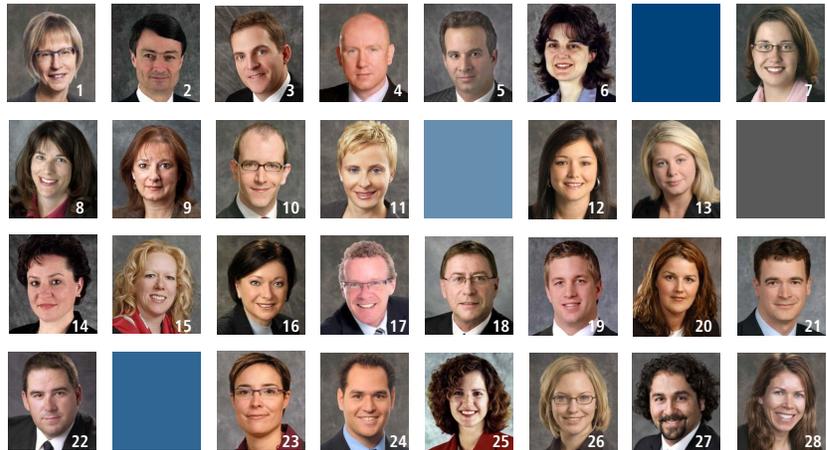
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