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### **ILLNESS AND DISABILITY IN THE WORKPLACE**

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#### **What's New in This Update:**

This release includes updates to Chapter 6 (Workers' Compensation and Other Statutory Benefits) (with respect to workers' compensation legislation), Appendix A (Sample Documents) (with respect to menstrual leave and accommodation, and the provision of menstrual products in the workplace) and Appendix ND (New Developments).

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## Highlights

- **Workers' Compensation and Other Statutory Benefits—Workers' Compensation Benefits—Coverage—Definition of Employer**—Also of interest is occupational health and safety legislation, which can provide for hefty fines and penalties for workplace accidents, particularly in the case of fatalities. Fines in Ontario are particularly high. Since 2022, the maximum fine for a corporation under the Ontario *Occupational Health and Safety Act* is \$2 million, and individual corporate officers and directors can now be fined up to \$1.5 million. The criminal law may also have an impact in this area, particularly with respect to Bill C-45, *An Act Amending the Criminal Liability of Corporations*, S.C. 2003, c. 21 (otherwise known as the “corporate killing bill” or the “Westray bill”, after the infamous Westray mining disaster in 1992). Bill C-45, which came into force in 2004, added a new section to the *Criminal Code*. It also created rules for establishing criminal liability on the part of organizations, established a legal duty for supervisors and managers to ensure the safety of workers and the public, set out factors that courts must consider when sentencing an organization and provided optional conditions of probation that a court may impose on an organization. Prior to Bill C-45, it was necessary to identify a person acting as a “directing mind” of a corporation in order to establish criminal liability. This was known as the “identification doctrine”.
- **Workers' Compensation and Other Statutory Benefits—Workers' Compensation Benefits—Coverage—Period of Coverage**—In Ontario, workers aged 63 and above who are injured on the job are only eligible to receive benefits for up to two years, or until the day the loss of earnings ends or the day on which impairment ends, whichever is earliest (WSIB Policy 18-03-04). If an employee is under 64 on the date of a work-related injury or illness and has received loss-of-earnings or future-economic-loss benefits, the worker is eligible to receive loss-of-retirement-income benefits (see <https://www.wsib.ca/en/turning65>). Loss-of-retirement-income benefit generally ends at 65.
- **Workers' Compensation and Other Statutory Benefits—Workers' Compensation Benefits—Coverage—Cause of Injury or Disease**—In *Air Canada et Gentile-Patti*, 2021 QCTAT 5829 (Que. Admin Lab. Trib.), the employee, Alexandria Gentile-Patti, worked as a customer service agent for Air Canada. She was working from home when she fell down the stairs during her lunch break after losing her footing. Air Canada did not dispute Ms. Gentile-Patti’s version of the events but argued instead that she was not working when the injury occurred. The employer maintained that the accident

happened in her personal sphere as opposed to her professional sphere and there was no connection between this activity and her work. Air Canada also pointed out that they had no control over her activities once she disconnected from her computer and no control over Ms. Gentile-Patti's place of residence. Gentile-Patti argued that her injury was an unforeseen and sudden event that was connected to her work and had occurred during the course of employment. She also argued that taking a lunch break was a "comfort activity" that also benefited her employer. This case came before the Commission des normes, de l'équité, de la santé et de la sécurité du travail (CNESST), which sided with Gentile-Patti. Air Canada appealed the decision to the Administrative Labour Tribunal, Occupational Health and Safety Division. The judge in this case, Philippe Bouvier, analyzed the Act respecting industrial accidents and occupational diseases and found that the wording did not make a distinction between an unforeseen and sudden event occurring on the employer's premises or elsewhere in determining whether the event happened during work. Citing previous case law, he outlined several criteria such as the location and time of the event, whether the employee was being paid during the event, the employer's authority over the employee and the degree of subordination, the purpose of the activity carried out during the incident, whether the activity was incidental or optional to the working conditions, and how related and useful the activity was to the job. While Judge Bouvier commented that none of the above criteria are predominant, he pointed out that the "relationship of subordination, the purpose of the activity carried out and its connection to the performance of the work" are particularly important. Judge Bouvier found, despite the fact that a telecommuter will more frequently shift from personal to work activities, such a worker must benefit from the same protection under the Act as an employee who carries out their work activities purely on the employer's premises. He also found that the employer's lack of control over Ms. Gentile-Patti's home was immaterial, as that question relates more to occupational health and safety legislation than coverage under workers' compensation legislation. Judge Bouvier also commented on the fact that there have been several cases involving unforeseen and sudden events occurring during work that resulted in a compensable injury where the premises were controlled by a third-party including locations such as hotels, convention centres and parking lots. Despite the fact she was no longer working on her lunch break and was no longer being remunerated by Air Canada at the time of her accident, Ms. Gentile-Patti had suffered an employment-related injury.

- **Sample Documents—Sample Employment Policies Dealing with Illness and Disability in the Workplace—**

**Menstruation in the Workplace**—While menstruation is a normal biological function and should not automatically be treated as an illness or disability, some individuals may experience pain or discomfort relating to menstruation, which may require some form of accommodation. Period pain (or dysmenorrhea) can be quite debilitating and may result in abdominal cramps, lower back pain, nausea, diarrhea and other symptoms. This is different from premenstrual syndrome (PMS), which occurs prior to menstruation. PMS can present symptoms such as bloating, irritability, food cravings and depression. It may be necessary to provide some form of accommodation for individuals experiencing either of these conditions. Nevertheless, it is important not to make any assumptions. Many individuals experience mild symptoms that do not get in the way of performing their jobs. As the sample policy provided indicates, menstruation should never be used as a reason for bullying or harassing anyone or to demean or patronize them (e.g., by joking that certain behaviours are the result of the “time of the month”). Privacy and confidentiality are important. It is also important to remember that not everyone who menstruates identifies as a woman. Note that as of December 15, 2023, federally regulated employers are required to provide menstrual products to employees in their workplaces. This is the result of an amendment to the *Canada Occupational Health and Safety Regulations* under the *Canada Labour Code*. Employers may therefore wish to develop a policy to communicate the existence of this program and the availability of menstrual products in the workplace.

- **New Developments—Recent Court, Arbitration and Human Rights Decisions Currency: January 2025 to July 2025**—Numerous case digests were added relating to illness and disability in the workplace from courts, human rights tribunals and labour arbitrations and board decisions.

## ProView Developments

Your ProView edition of this product now has a new, modified layout:

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