

Possible Threats to Psychological Safety: Employee Privacy vs. Employer Responsibility

Employers are caught in a bind. On one hand, they have a legal responsibility to respect employee privacy; on the other hand, they have an increasing obligation to be informed about – and act upon – situations that could threaten the psychological safety of employees.

Employers are expected to minimize threats, but determining possible threats to employees' psychological safety can be challenging. The nature of a threat can be ambiguous. Further information may be required, but the search for this information places employers in a complicated situation.

Generally, privacy laws clearly prevent employers from asking intrusive questions or having access to protected information (e.g., health-related records). At the same time, provisions in the Canadian Human Rights Act and related legislation and case law make it clear that employers should ascertain vulnerabilities that could place certain employees at higher risk of mental injury from acts or omissions that would not be harmful to most people in most cases. For example, some employees are more sensitive to the stress of excessive job demands, and are more likely to suffer adverse consequences as a result.

The duty of care in relation to more vulnerable employees is the same as for all employees: *make reasonable efforts to observe the effects work is having on them, and adjust accordingly*. This does not usually mean that they need "protective reassignment," but rather that they may require better support from supervisors and resource providers. If it is known, however, that a person has already suffered some form of mental distress as a result of work-related pressures, then the duty of surveillance becomes elevated, and a higher standard of diligence is required. In relatively rare cases, there may be a mismatch of person and job. In these situations, some form of reassignment may be required in order to avoid reasonably foreseeable harm.

Overall, the most prudent protection for employers who wish to minimize legal liability is to exercise due diligence with regard to the identification and abatement of practices that might lead to reasonably foreseeable harm.

In addition to reducing legal liability, this course of action creates and maintains a culture of enhanced trust between employers and employees. Employees are more likely to believe that their employers are well intentioned and have their best interests in mind when making decisions. In such an atmosphere of trust, employees will likely feel more comfortable disclosing information that can help employers act responsibly and respectfully. In such work environments, employees will be more likely to trust their employers not to abuse the privilege of having access to their private information by using it against them.