



# Extending Mandatory Workplace Safety and Insurance Board Coverage to Personal Support Workers and Developmental Support Workers

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and Skills Development

**Submitted by:** Ontario Bar Association



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## Introduction

The Ontario Bar Association (the “**OBA**”) appreciates the opportunity to provide this submission to the Ministry of Labour, Training and Skills Development (the “**Ministry**”) in response to its consultation to extend mandatory Workplace Safety Insurance Board (“**WSIB**”) coverage under the *Workplace Safety and Insurance Act* (the “**WSIA**”) so as to include Personal Support Workers (“**PSWs**”), Developmental Support Workers (“**DSWs**”) and those working in residential care facilities.

## The OBA

Established in 1907, the OBA is the largest voluntary legal association in Ontario and represents approximately 16,000 lawyers, judges, law professors and law students. The OBA is pleased to analyze and assist government with dozens of legislative and policy initiatives each year - both in the interest of the profession and in the interest of the public.

This Report was prepared by the Workers’ Compensation Section of the OBA. The Workers’ Compensation Section includes counsel for employers; injured workers, both in a unionized and non-unionized environment; and neutral lawyers who work at the WSIB and the Workplace Safety and Insurance Appeals Tribunal (WSIAT). Our members represent injured workers and employers at the WSIB, before the WSIAT and with private insurance claims and this submission has been developed with input and consensus from both employer and worker counsel.<sup>1</sup> Further, it has been reviewed by the OBA’s Health Law and Elder Law Sections.

The Ministry Consultation Paper includes a series of questions that address the various implications of extending coverage to all employers of PSWs and DSWs. As stated in the consultation paper, this consultation is occurring in the context of recognition of the vital frontline role that PSWs and DSWs have been playing in the response to COVID-19. All members of the OBA recognize and applaud the work they have done in extremely trying circumstances.

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<sup>1</sup> Our neutral members do not get involved in policy development within the workplace insurance system.



## Comments

### Definition Issues

As an initial issue, we would like to highlight that there may be some issues with defining “Personal Support Worker” and “Developmental Support Worker” which would need to be resolved in determining the scope of the changes. The OBA would be happy to provide further input as the Ministry develops these definitions.

### **Question 1 - The WSIB covers work-related injuries and occupational diseases (including infectious diseases like COVID-19). Would extending mandatory coverage to all employers of PSWs and DSWs help improve worker protections?**

The first question addresses whether extending mandatory coverage would “help improve worker protections”. From a worker perspective, extending coverage would do so.

Currently, PSWs and DSWs who might be injured or suffer an occupational disease must have recourse either to whatever paid sick days they are entitled to through the benefit plan/private insurance their employer provides, or to a civil action against their employer under Part X of the WSIA. An action under Part X includes proving negligence, although there are some provisions making that somewhat easier for workers to do that than in other types of civil actions. Nevertheless, workers or survivors would need to retain counsel and run all the usual risks of civil actions – including the possibility that they will not succeed and perhaps have to pay their employers’ legal costs. If covered by the WSIA, these workers would lose their right of action against their own employer. In most instances, they would claim statutory benefits and receive the various supports and services available to them under the WSIA. Under certain limited circumstances, they might have a right of action against another employer or fund.

In addition, because there would be reporting and monitoring by WSIB of occupational injuries and diseases, workers would be more “on the radar” for prevention efforts by the Ministry.

Further, employer benefit plans/private insurance often pay worker a lower percentage of their pre-accident/illness income than WSIB loss of earnings benefits. Therefore, WSIB loss of earnings benefits often come closer to fully compensating a worker for their lost earnings while sick.

For PSWs/DSWs who do not have paid sick days, WSIB coverage would provide them more income security if they have symptoms related to a contagious illness (e.g. COVID-19). This would also protect the PSW/DSW’s co-workers and patients from being exposed to a contagious illness where the PSW/DSW comes to work while sick because they cannot afford to stay home without income.

From the employer perspective, there would also be benefits to extending coverage.



There would be the benefit of reducing uncertainty and risk, including reputational risk, by having the workers' right of action taken away. This would also mean that WSIB premiums would be payable and that the employer would no longer have to insure against the risk of civil action. Given the no-fault nature of the WSIB scheme, employers' financial liability would also be limited as compared to the potential costs that they might incur through civil litigation proceedings. On the other hand, WSIB premiums might exceed the cost currently incurred for private insurance.

## **Question 2 - What benefits and services would WSIB coverage provide to PSWs and DSWs that are not provided under private insurance schemes?**

While private insurance schemes are customizable and therefore vary across insurance providers, there are several significant benefits and services that private schemes simply do not provide that are provided by the WSIB regime. It is our submission that the added benefits and services that would be made available to PSWs and DSWs under WSIB are essential to properly dignifying and respecting these important workers.

### **COVID-19 / Occupational Illness**

Given our current context of COVID-19, the most relevant benefit that PSWs and DSWs would receive under WSIB coverage that is not provided by *any* private scheme is coverage for COVID-19. While some private insurers will offer a "contagious disease benefit", such benefits are typically limited to narrowly defined diseases such as Hepatitis A, Hepatitis B, Hepatitis C and Tuberculosis. No private insurance scheme provides occupational illness coverage that extends to include the definition of an illness such as COVID-19. Given the unknowns of the variants and the increasing cases of "long COVID" this would be a significant benefit to PSWs and DSWs provided by WSIB. In the longer term, WSIB coverage would provide workplace insurance protection from future pandemic viruses as well.

### **Mental Stress Benefits**

Another benefit relevant to COVID-19, among other things, is the benefits offered by WSIB for mental stress, whether chronic or triggered by a traumatic event. PSWs and DSWs are subjected to increasing pressure and stress in their work environments as a result of COVID-19. Accordingly, it would be an enormous benefit for them to have access to the mental stress benefits if necessary. The mental stress benefits offered through WSIB coverage are not mirrored in the private insurance regimes. Some of them will offer coverage for psychological treatment but that does not extend to the time off work a worker may experience as a result of their mental stress.

### **Return To Work Services**

One of the key services that sets WSIB apart from all private insurance schemes, is Return to Work (RTW) services. These services often include assignment of a Return to Work Specialist to act as a



mediator between the employer and injured worker, if necessary, in order to negotiate a return to work that is mutually satisfactory. The Return to Work Specialists are neutral third parties that can make decisions that bind the employer and employee and serve important roles in ensuring employers are compliant with their obligations under the law. Some private insurance schemes do offer occupational retraining benefits but they are limited to scenarios where an injured worker is totally disabled. They do not get involved in negotiating an appropriate accommodation with the employer that respects their obligations under the *Ontario Human Rights Code*<sup>2</sup> and WSIA<sup>3</sup>, like the RTW Specialists do, leaving employees in the hands of their employer vis-à-vis workplace accommodations.

### **Right of appeal**

Another essential service provided by WSIB that is not provided by private insurance schemes is an embedded dispute resolution system or right of appeal. PSWs and DSWs without WSIB coverage are subject to the decisions of the private insurance adjuster assigned to their case and are left with no recourse in the event of a misinterpretation of facts or the wording of the contract. However, WSIB coverage would provide PSWs and DSWs the added service of an adjudication regime that allows for multiple stages of appeal all the way to the WSIAT as well as an automatic reconsideration of a decision each time relevant new information is added to an injured worker's file.

Absent a dedicated adjudication regime, workers' options are limited to either drawn-out litigation in the civil courts against the insurer and/or the employer or filing a grievance against the employer in unionized contexts (depending on the wording of the collective agreement).

### **Access to Specialists**

One of the known services that WSIB provides is access to a network of medical specialists, which permits injured workers much quicker access to specialists than through the traditional referral route through a family doctor. These appointments are often months sooner than would otherwise be possible and they allow for a greater likelihood of an injured worker's early and safe return to work.

### **Question 3 - Would extending coverage to all employers of PSWs and DSWs help with recruitment and retention of these frontline workers?**

The OBA has no submissions on this question.

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<sup>2</sup> R.S.O. 1990, c. H.19

<sup>3</sup> 1997, S.O. 1997, c. 16, Sched. A



**Question 4 - The recommendation to extend mandatory WSIB coverage to DSWs and PSWs did not speak to what threshold to consider as a standard to extend coverage (i.e. PSWs and DSWs who make up a significant portion of an employer's workforce be covered, as opposed to an employer who may employ a single PSW or DSW in their organization). What might be an appropriate threshold (i.e. the proportion of PSWs/DSWs working for an employer) to consider as a standard to extend coverage**

To create a threshold based on the percentage of PSWs and/or DSWs of the overall employer's workforce would be a departure from the WSIB's traditional approach to the coverage vs. non-coverage debate.

An employer's obligation to be insured under the WSIB regime is based on two factors: (1) what is the employer's industry, and (2) does that industry require mandatory WSIB coverage. The size of the employer and make-up of the workforce is irrelevant.

In the current WSIB framework, even a small family-owned business that employs family members must pay premiums on the insurable earnings of its workers if the business is classified as a Schedule 1 employer. Moreover, workers who are not engaged in the core services of the employer are still considered ancillary to the employer's primary business activities. The result is that the employer must pay the same premiums on their wages.

There is, however, an existing channel for employers to reduce their overall premium rates in the event that their business activities fall across two premium rates. For example, although an employer requires mandatory WSIB coverage, it *may* be able to segregate its payroll so that its office staff, or another department within its business, falls under a lower premium group. This will only be successful, however, if the employer can demonstrate that the other business activity is **significant** and **is not integrated** with the employer's other operations.

According to the WSIB, "significant" means that the other business activity generates at least 20% of the employer's overall annual insurable earnings or it generates annual insurable earnings of at least five times the maximum insurable earnings ceiling for the premium year.

Further, "integrated" means either that a substantial share of its staff, supplies, equipment or processes are combined with the other business activity **or** the product or service of the business activity is primarily offered to external, unaffiliated clients together with the product or service of the employer's other operations.

It is clear that the significant test and/or integrated operations is a large hurdle.



To conclude, the OBA takes no position on the issue of threshold. However, it is important to bear in mind WSIB's traditional approach to mandatory coverage<sup>4</sup> and that reform in other areas of the scheme may be appropriate when considering the unique circumstances of employers who only have a small portion of their workforce employed as DSWs or PSWs.

## Conclusion

The OBA appreciates the opportunity to make this submission on a proposed extension of mandatory coverage under the WSIA and would be pleased to provide further assistance to the Ministry in addressing the issue.

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<sup>4</sup> Both the current inclusionary model of coverage and the proposed exclusionary model of coverage (as set out in the WSIB Operational Review Report) are classified by industry and not occupation.