LIFT, CURL, PULL (OUCH!)
Is an employer liable for its workers' fitness-related injuries?

To promote healthy living, many employers encourage physical fitness by providing on-site fitness facilities, contributing to private gym membership fees, and sponsoring recreational sport leagues.

The question often asked is: *could an employer be liable if a worker is injured while participating in these athletic endeavours?* The answer is, "yes". Regardless whether the activity takes place on or off an employer's premises, an employer can be exposed to several types of liability including: Workplace Safety and Insurance Board ("WSIB") surcharges; disability insurance claims; civil actions; and occupational health and safety orders and/or penalties.

WORKPLACE SAFETY AND INSURANCE

Under the *Workplace Safety and Insurance Act, 1997 ("WSIA")*, an injured worker may be compensated on a "no fault" basis (regardless who is at fault) if the injury occurs "in the course of employment". In return for this automatic compensation, the worker is precluded from suing the employer in civil courts and collecting short-term or long-term disability benefits.

If the WSIB finds a fitness-related injury to be compensable, the related costs will be applied against the employer's WSIB experience rating and could result in a costly surcharge.

In determining whether an injury occurred in the course of employment the WSIB considers the place, time and nature of the activity. Generally, an injury will have occurred in the course of employment if: the injury occurs: *at the workplace or a place where a worker might reasonably be expected to engage in work-related activities; during working hours or a reasonable period before or after work; and while performing a work-related duty or an activity reasonably related to employment.* The WSIB will consider the customs and practices of the employer (*e.g.* whether the employer has supported or sanctioned the activity in the past), as well as: the extent to which the employer controls or supervises the activity; whether the worker is compensated for participating; the extent to which an employer benefits from the activity (e.g. improvements to team morale, decreases in absenteeism); and whether the activity occurred in response to the employer's instructions or encouragement.

The following two decisions of the Workplace Safety and Insurance Appeals Tribunal ("WSIAT"), help illustrate how these factors are applied:

In *Decision No 999/94*, at "great financial expense", the employer established a fitness centre at its workplace and promoted an exercise program. Participation was strictly voluntary and classes were conducted after working hours with little employer supervision. While exercising at the centre, during non-working hours, an assembly line worker slipped and fractured her wrist. The WSIB determined the injury occurred in the course of employment and awarded her benefits.

At appeal and before the WSIAT, the worker alleged she was motivated to join the program after receiving a disciplinary letter for excessive absenteeism. She sought to improve her physical condition and reduce her absences. The WSIAT accepted her argument, finding the worker's participation had become a "condition of her continued employment". The WSIAT was also persuaded by the fact the activity was pursued under the advice of the employer, on the employer's premises, using the employer's equipment, and was promoted through the employer's corporate policies.

In *Decision No 1052/09*, a worker suffered a shoulder injury after falling during a soccer game with a group of co-workers in the employer's parking lot. Loss of earnings were initially denied by the WSIB's Appeals Service Division and the worker appealed. Although the injury occurred on the employer's premises within a "reasonable period after work", the denial of loss of earnings was upheld on the basis the game was a "[not] a regular, or even an occasional practice" and not sanctioned by the employer.

DISABILITY INSURANCE AND CIVIL ACTIONS

As noted above, where WSIA benefits are not applicable, either because benefits were denied, or the worker opted out of coverage (an option available in some circumstances), a worker may have further options of applying for disability insurance benefits, and launching a civil action against the employer. If a civil action is commenced, a worker will be required to prove the employer was negligent.

OCCUPATIONAL HEALTH AND SAFETY

The Occupational Health and Safety Act ("OHSA") requires an employer to take every reasonable precaution to ensure the protection of its workers. This includes ensuring equipment is well maintained, and workers are properly instructed on how to use the equipment and what to do in the event of an accident. Failure to protect workers can result in orders, significant fines and, in rare cases, imprisonment.

To determine whether a fitness-related activity creates liability under the *OHSA*, the following questions are considered:

- Does the activity take place at the "workplace"?
- Does the activity take place during working hours?
- Are workers expected and not simply encouraged to participate?
- Are workers paid to participate?
- Is the activity under the care and control (directly or indirectly) of the employer?

If the answer to some or all of these questions is "yes", fitness-related activities may create liability under the *OHSA*.

TIPS FOR EMPLOYERS

For some employers the benefits of a healthy workforce outweigh the risks associated with a fitness- related injury. To minimize the potential for liability, consider the following best practices:

- Develop a health and fitness policy specifying that use of facilities or participation in workplace related sporting endeavours is voluntary and for the exclusive benefit and pleasure of workers. Require workers to sign-off on the policy.
- Consistent with the notion of "voluntariness", a worker should not be compensated (directly or indirectly) for participation in any fitness endeavour associated with the employer.
- Where worker participation is not voluntary, either because of the bona fide requirements of the job or because the worker is "encouraged" by the employer, consider providing a customized fitness plan incorporating professional instruction and supervision. If a worker chooses not to follow the plan, and is injured while pursuing an unauthorized fitness regime, an adjudicator is more likely to find the injury resulted from a personal pursuit outside the course of employment.
- Prior to any fitness-related activity, an employer should ensure it has appropriate liability insurance in place.

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