

Mental Health in the Workplace: Legal Obligations and Practical Solutions

Speakers:

Alwin Rajasurya

Suzanne Arockiaraj

Slides Prepared by:

Abu Zar Bin Johan

25th February 2024

AR ALWIN RAJASURYA
ADVOCATES & SOLICITORS

1

DISCLAIMER

These brief slides have been prepared for ease of reference and sections referred to in the Statute have been paraphrased.

You are advised to refer to the actual wording of the Statute for a complete appreciation of its legal implication.

Professional advice should be sought before making decisions based on this general presentation.

AR ALWIN RAJASURYA
ADVOCATES & SOLICITORS

2

Understanding Mental Health in the Workplace

AR ALWIN RAJASURYA
ADVOCATES & SOLICITORS

3

Definition of Mental Health (Employment Context)

- Mental health encompasses an individual's emotional, psychological, and social well-being, influencing their ability to handle stress, work productively, and interact with colleagues.
- In the **employment context**, good mental health enables employees to manage stress, collaborate effectively, and maintain productivity at work.

“a state of mental well-being that enables people to cope with the stresses of life, realize their abilities, learn well and work well, and contribute to their community.”

World Health Organization (WHO)

AR ALWIN RAJASURYA
ADVOCATES & SOLICITORS

4

Common Workplace Mental Health Challenges

Stress

- Resulting from heavy workloads, long hours, and workplace conflicts.

51% of our workforce have had work-related stress
 (“Mental health protection for the workforce” -The Star)

5

Common Workplace Mental Health Challenges

Depression

- Depression in the workplace is often linked to burnout, bullying, and lack of work-life balance.
- Employees may struggle with low motivation, sadness, and reduced productivity

Anxiety

- Anxiety disorders can arise from job insecurity, performance pressure, and hostile work environments.
- Employees may experience excessive worry, restlessness, and fatigue.

According to an Australian study, psychological distress can decrease productivity by 26 per cent. In the United Kingdom, it is around 40%. **Depression** alone accounts for over 15 per cent of loss in productivity.

- CodeBlue -

6

Legal Obligations for Employers

AR ALWIN RAJASURYA
ADVOCATES & SOLICITORS

7

Occupational Safety and Health Act (OSHA) 1994 (Act 514) and Mental Health

- In Malaysia, there is no specific law dedicated exclusively to protecting employees' mental health.
- However, the **Occupational Safety and Health Act (OSHA) 1994** obliges employers to ensure, as far as practicable, the safety, health, and welfare of employees at work.
- While the Act primarily focuses on physical safety, a broader interpretation supported by the Department of Occupational Safety and Health (DOSH) guidelines includes mental well-being as part of workplace health.
- Employers should take reasonable steps to create a work environment that reduces mental health risks, such as excessive stress, burnout, and workplace harassment, to comply with their duty of care under OSHA 1994.

AR ALWIN RAJASURYA
ADVOCATES & SOLICITORS

8

The Department of Occupational Safety and Health (DOSH) has issued “Guidelines on OSHA 1994”, which provide a **broader interpretation** of health in the workplace.

Health is defined as :

“A state of complete physical, mental, and social well-being and not merely the absence of disease.”

The working environment includes:

“the workplace itself; all plants at the workplace; the physical environment and the psychological environment.”

Based on these guidelines, it can be argued that an employer’s duty of care under OSHA 1994 extends to safeguarding employees’ mental health. However, this obligation is limited to what is considered “**practicable**,” meaning employers are only required to take reasonable steps based on:

- The severity of the risk to employees’ mental health.
- The availability of measures to mitigate such risks.
- The cost and feasibility of implementing those measures.

What is “Practicable” Under OSHA 1994?

Under OSHA 1994, the term “practicable” refers to the extent of an employer’s duty in ensuring workplace safety, including mental health considerations. The law assesses what is reasonably achievable by evaluating the following factors:

1. The severity of the hazard or risk involved – The greater the risk to employees’ health, the stronger the obligation on the employer to address it.

2. The level of knowledge regarding the hazard or risk and available solutions – Employers are expected to take action based on the information available to them.

3. The availability and suitability of methods to eliminate or reduce the hazard or risk – Employers must consider practical solutions that effectively minimize workplace health risks.

4. The cost of implementing such measures – Employers are required to balance safety measures with feasibility, ensuring that reasonable actions are taken without imposing excessive financial burdens.

Employment Act 1955: Handling Mental Health Leave

- The Employment Act 1955 is the primary law governing employment relationships in Malaysia.
- While it does not explicitly address mental health, Section 60F can be interpreted to cover mental health-related absences.
- **Section 60F:** Employees are entitled to paid sick leave if they are certified unfit to work by a registered medical practitioner.
- This entitlement applies to both physical and mental health conditions, meaning an employee diagnosed with a mental health issue (e.g., anxiety, depression) may take sick leave upon medical certification.

Does an Employee Have an Obligation to Disclose Their Mental Health History to the Employer?

- The obligation to disclose mental health history depends on the terms of the employment contract and company policies.
- Employers **commonly require** employees to disclose pre-existing health conditions that may impact their ability to perform their job.
- However, disclosure is generally only necessary if the condition is ongoing and affects work performance.
- If an employee has previously experienced a mental health condition, such as depression, but has fully recovered and it no longer impacts their ability to work, disclosure may not be required.
- If an employee is currently experiencing a mental health condition that affects their job performance, informing the employer may be necessary.

Can an Employee Lose Their Job Due to Mental Illness?

Section 10 of the Employment Act 1955 –

- Employers must specify termination conditions in employment contracts.
- Some contracts may include clauses allowing termination if a mental or physical illness significantly affects job performance.

Sections 12 & 13 of the EA 1955 -

- If an employee is terminated due to illness without notice, they are entitled to compensation and may file an unfair dismissal claim.

Section 14, EA 1955 –

- An employer may dismiss an employee without notice if they fail to fulfill contractual obligations.
- For example, being absent for three (3) or more consecutive days without informing the employer may lead to dismissal.

Handling Mental Health-Related Grievances

Practical Steps for Handling Complaints and Supporting Employees with Mental Health Challenges

Employers should take a proactive and compassionate approach when addressing mental health concerns in the workplace.

Encourage Open Communication:

Create a safe environment where employees feel comfortable disclosing mental health issues without fear of stigma or retaliation. Regular check-ins and mental health awareness sessions can help normalize these discussions.

Provide Reasonable Accommodations:

Consider flexible work arrangements, reduced workloads, or temporary deadline adjustments to support employees facing mental health challenges.

Confidentiality and Privacy in Managing Mental Health Disclosures

Confidentiality is essential when handling employees' mental health information. Employers must balance their duty of care with the employee's right to privacy.

Data Protection Law: Under the Personal Data Protection Act (PDPA) 2010, mental health conditions are classified as sensitive personal data. Employers must obtain explicit consent before collecting, using, or disclosing such information.

Secure Storage: Mental health records should be stored separately from general personnel files to prevent unauthorized access and maintain confidentiality.

Limited Disclosure: Mental health information should only be shared on a need-to-know basis, typically with HR personnel and the immediate supervisor. Disclosing such information beyond this without consent may breach privacy laws.

Case Law: Constructive dismissal due to poor handling of mental health issues

CIMB Bank Bhd v Ahmad Suhairi bin Mat Ali & Anor [2023] 5 MLJ 829 (COA)

- The claimant was transferred to a lower position without any support staff.
- The employer then imposed unrealistic performance targets, creating immense pressure.
- Despite the claimant repeatedly raising concerns via email, the employer remained unresponsive.
- The Court of Appeal ruled that the employer's lack of support and response caused significant mental and emotional distress, justifying the claimant's resignation and claim of constructive dismissal.

Eugene Ma Chee Yu v Orient Europharma (M) Sdn Bhd [2022] ILJU 16 (IC)

The claimant was subjected to verbal abuse, intimidation, and humiliation by his superior, including:

- Being called a “damn salesman” and having his emails labeled as “stupid.”
- Being shouted at, threatened with immediate dismissal, and coerced into resigning.

The court found that this hostile work environment severely impacted the claimant's mental health.

He was diagnosed with Acute Stress Disorder, prescribed 18 days of medical leave, and supported by a psychiatric evaluation, which the employer failed to address.

The court ruled that the claimant had been constructively dismissed, and the dismissal was without just cause and excuse.

Other Case Laws:

Rosmini bt Chumani v Bintang Jaya Express Sdn Bhd [2020] 3 ILJ 10 (IC)

- The claimant was terminated shortly after giving birth, which led to severe mental distress. Her mental health further deteriorated when her request for reinstatement was denied.
- Seeking to assess her ability to return to work, she underwent medical evaluation and treatment for her mental health condition at Kota Sentosa Hospital.
- The claimant argued that her mental illness was a direct result of the termination, which she claimed was unfair and unjust.
- However, the Industrial Court dismissed her claim, ruling that her termination was with just cause and excuse due to the company's financial losses.
- Despite dismissing her claim for unfair dismissal, the court awarded her RM3,266.55 in termination and lay-off benefits.

7-Eleven Malaysia Sdn Bhd v Ashvine Hari Krishnan [2023] 3 MLJ 469 (COA)

- The Plaintiff (Respondent) filed a constructive dismissal claim in the Civil Court instead of the Industrial Court, also seeking damages for tort.
- The Appellant (7-Eleven Malaysia) applied to strike out the writ and statement of claim (SOC), but the High Court dismissed the application.
- The Plaintiff alleged that her poor performance appraisal was due to harassment and bullying from her superior. She resigned, citing a toxic work environment, which led to mental health issues, trauma, and emotional distress. She claimed RM500,000 for mental distress, harassment, and trauma, and an additional RM96 million for constructive dismissal and tort.
- Court of Appeal's Decision: The appeal was allowed, and the case was struck out.
- The Court ruled that constructive dismissal must be handled by the Industrial Court, and filing it in the Civil Court was an abuse of process.
- It also held that the RM96 million claim was excessive and had no legal basis, emphasizing that employees cannot bypass the Industrial Relations Act 1967 to seek high damages in civil court.

Creating a Supportive Workplace Culture

21

Implementing Employee Assistance Programs

What is it?

Employee Assistance Programs (EAPs) provide confidential counseling, support services, and mental health resources to employees. These programs can improve workplace well-being, reduce absenteeism, and enhance productivity.

A study involving 197 employees from two Fortune 100 companies found that within 90 days of receiving EAP counseling, employees experienced:

- Reduced absenteeism and presenteeism
- Lower workplace distress
- Improved life satisfaction

(Source: Evaluating the Workplace Effects of EAP Counseling)

22

Implementing Employee Assistance Programs

Potential Services in an Employee Assistance Program

Employee Assistance Programs (EAPs) provide a range of services to support employees' well-being and address various challenges, including:

- **Mental health awareness training** – Educating employees and managers on recognizing and managing mental health concerns.
- **Counseling for mental health** – Providing professional support for stress, anxiety, depression, and other mental health issues.
- **Counseling for marital, family, or financial difficulties** – Offering guidance to employees facing personal or financial challenges.
- **Substance abuse treatment** – Assisting employees in overcoming addiction-related concerns.
- **Conflict resolution in the workplace** – Helping employees and teams manage disputes and improve workplace relationships.
- **Navigating childcare and eldercare** – Providing resources and advice for employees balancing work and caregiving responsibilities.
- **Legal advice** – Offering access to legal guidance on work-related and personal matters.

Policies to Encourage Open Communication About Mental Health

Fostering open discussions about mental health helps reduce stigma and build trust between employees and employers. Organizations should integrate mental health considerations into their policies, culture, and daily practices.

Implementation

Appoint Mental Health Ambassadors: Designate trained employees to advocate for mental health awareness and provide peer support.

Develop a Mental Health Policy: Clearly outline the organization's commitment to mental health, available support systems, and procedures for seeking help.

Policies to Encourage Open Communication About Mental Health: Implementation in Malaysia

Several organizations in Malaysia have taken proactive steps to integrate mental health awareness into their workplace culture:

PwC Malaysia – Through its “Be Well, Work Well” initiative, PwC promotes mental health awareness and encourages employees to prioritize well-being.

CIMB Group – As highlighted in its Sustainability Report 2021, CIMB has introduced mental health policies to support employees and foster a healthier work environment.

Policies to Encourage Open Communication About Mental Health: Implementation in Malaysia

Our Be Well, Work Well framework

The six well-being dimensions

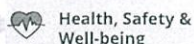


What does well-being mean to PwC?

Be Well, Work Well is about forming everyday healthy habits that help fuel our six dimensions of well-being – Physical, Emotional, Mental, Spiritual, Financial and Social – which are proven drivers of performance, fulfillment and engagement. This goes beyond the traditional employee wellness programs focused mostly on physical health; it's a holistic approach to a more happier and healthier life.



- Malaysia**
- CIMB Wellness - Mental Health, a holistic programme that offers mental health assessment and education, remote one-on-one therapy, and an always-on counselling hotline
 - Webinars by mental health professionals, which were attended by more than 2,000 employees in Malaysia and across the region. Topics included Managing Pandemic Fatigue and Battling Burnout
 - More than 900 employees are making use of the online mental health assessment, coaching and professional advice by our partner, Nalun
 - Mental Health Well-being training for over 1,000 people managers



Launched **PERMANENT HYBRID WORKING** arrangements

Rolled out **MENTAL HEALTH SERVICES** to support employees

Organisational Health Index score of **75/100**

Training Managers and HR Personnel to Recognize and Address Mental Health Issues

Employees can train managers and HR professionals to identify early signs of mental health struggles and respond effectively. Proper training ensures that employees receive the necessary support and accommodations when facing mental health challenges.

Implementation

Mental Health First Aid (MHFA): Equip managers with basic knowledge to recognize, respond to, and support employees experiencing mental health challenges.

Malaysian Employers Federation (MEF) initiative: has emphasized the importance of mental health training for employers and HR practitioners to promote a mentally healthy workplace

Strategies to Minimize Legal Risks

Risk Assessments and Addressing Workplace Stressors

Conducting risk assessments helps identify potential mental health issues in the workplace and prevents them from escalating. Employers should evaluate workplace stressors and implement strategies to minimize psychological harm.

Implementation

Identify Stressors: Assess factors such as heavy workloads, long working hours, lack of support, or ineffective management that may contribute to employee stress.

Consult Employees: Use surveys, focus groups, or one-on-one discussions to understand workplace stress triggers and employees' mental health concerns.

Implement Preventative Measures: Adjust workloads and set reasonable deadlines, encourage work-life balance through flexible working arrangements and promote EAPs.

Medical Leave and Termination While Complying with Legal Requirements

Employers must exercise caution when managing employees with mental health conditions to avoid legal disputes, including wrongful dismissal claims. Malaysian employment law mandates fair treatment and due process in such cases.

Handling Medical Leave and Termination While Complying with Legal Requirements

Medical Leave Entitlements (Employment Act 1955):

Employees are entitled to paid sick leave based on their length of service: (S60F)

- Less than 2 years: 14 days
- 2 to 5 years: 18 days
- More than 5 years: 22 days

If an employee requires prolonged medical leave due to a mental health condition, employers should not rush to terminate. Instead, they must make reasonable efforts to accommodate the employee's recovery.

Termination Consideration:

- Termination should be a **last resort**.
- Employers must seek medical opinions and allow reasonable time for recovery before considering dismissal.
- Any decision to terminate must be justified, well-documented, and in compliance with employment laws to prevent potential unfair dismissal claims.



QUESTIONS?

THANK YOU

For any queries, please contact:

Email

general@arlegal.my

alwin@arlegal.my

Telephone no.

03-7613 7605

AR ALWIN RAJASURYA
ADVOCATES & SOLICITORS