

Can Workers Sue Employer for Exposure to Second-Hand Smoke? – Quiz



No, if the resulting illness is covered by workers comp.

Once upon a time, the only real legal option for workers who got hurt on the job was to sue their employer for money damages. But that wasn't a realistic option in the real world where workers generally can't afford lawyers, especially since the worker had the burden of proving that the employer was at fault to win the case. Workers comp did away with that injustice by ensuring that workers who suffered work injuries would get benefits, regardless of who was at fault. The trade-off for no-fault benefits is that workers had to give up their right to sue employers for money damages. The following scenario illustrates how this 'historic trade-off' plays out.

SITUATION

A collective agreement requires a prison to make reasonable provisions for the safety and health of guards and other prison workers. Guards claim that the prison violated the agreement by allowing inmates to smoke, thus exposing them to second-hand smoke. Some of the guards sue the prison for the health damage they claim they suffered due to the inmates' smoking. A few also file workers comp claims.

QUESTION

Do the workers have a valid claim for money damages against the prison'

1. No, because workers comp bars the lawsuit.
2. No, because workers comp doesn't cover health damage resulting from second-hand smoke.
3. Yes, but under the OHS law not the collective agreement.
4. Workers who filed workers' comp claims can't sue but those who didn't file claims can.

ANSWER

1. **The guards don't have a valid claim because workers' comp bars workers from suing their employers for work-related illnesses.**

EXPLANATION

This hypothetical is based on an Ontario case in which about 235 workers who claimed to have been exposed to second-hand smoke filed grievances against a prison. The union also filed a grievance asking for a declaration that the prison had violated the collective agreement, general damages for this violation and future damages for workers who later become sick from exposure to second-hand smoke.

The Grievance Settlement Board dismissed the case, citing the workers comp 'historic trade-off.' The bar on suing applies regardless of the theory on which the worker's lawsuit is based, the Board noted. In other words, it applies regardless of whether the worker's lawsuit is based on a tort like negligence or, as in this case, the breach of a contract or collective agreement.

WHY WRONG ANSWERS ARE WRONG

B is wrong because, as in most jurisdictions, workers comp in Ontario does, in fact, cover illness resulting from work-related exposure to second-hand smoke. To the extent the guards suffered real health injury, their recourse was to claim workers comp benefits.

C is wrong because OHS law **doesn't** permit workers to sue their employers for damages resulting from safety violations. Employers who violate the law can be fined, shut down and even jailed; but they can't be sued for damages by their workers.

D is wrong because the workers' comp bar against suing employers applies whether or not the worker actually files a workers' comp claim as long as the injury or illness would be or would have been compensable under workers' comp. In other words, the bar covers both who filed workers comp claims **and** those who didn't.

SHOW YOUR LAWYER

[*Ontario Public Service Employees Union v. Ontario*](#), [2010] CanLII 28621 (ON G.S.B.)