

Proxy discrimination can influence access to and pricing of employee benefit plans, hindering employers' efforts to provide comprehensive benefits in more diverse workplaces. The authors examine how proxy discrimination may be adversely affecting minority groups in their interaction with the insurance industry.

# Proxy Discrimination and Its Influence on Employee Benefit Plans

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plans & trusts  
education | research | information

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Employee benefit plans are a crucial aspect of compensation, providing essential coverage for health, disability and life insurance. However, issues of fairness and equality arise as the collection and analysis of larger and more complex data sets as well as the increasing use of artificial intelligence enable governments and organizations to categorize individuals in more intricate ways. While insurance providers' risk selection process may be based on correlations regardless of causation, the reliance on factors such as health status or disability can disproportionately affect specific communities and can result in higher premiums and reduced coverage.

The Ontario Human Rights Code includes exemptions, known as *carveouts*, that apply specifically to the insurance industry.<sup>1</sup> These carve-outs allow insurers in Ontario to differentiate between individuals based on certain *prohibited grounds*, such as age, sex, marital status, family status and disability, when designing and pricing insurance products, provided that the distinctions are made “on reasonable and bona fide grounds.” Insurance companies will generally argue that their ability to rely on data regarding such grounds is essential to ensure that their businesses are viable and that insurance pricing is fair.<sup>2</sup>

Discrimination based on the permitting carveouts may be adversely impacting employees who share human rights protected grounds to which the carveouts do not apply, such as race, ancestry, place of origin, colour and ethnic origin (collectively referred to herein as “race”). More specifically, permitting discrimination based on disability may make it more expensive for racialized Ontarians to obtain health, sickness and disability, and/or life insurance coverage and for employers to provide robust employee benefit plans to more diverse workplaces. Insurers and policymakers in Ontario must substantially ramp up their race-based data collection to enable a fulsome assessment of the scope of proxy discrimination arising from current practices in the sector.

### Part I: Legislative Framework

#### *Employee Benefit Carveouts*

Sections 1, 3 and 5 of the *Code* underscore the importance of equal treatment, stating that “every person has a right to equal treatment . . . without discrimination” in respect of services, goods and facilities; contracts; and employment in relation to various prohibited grounds, which include col-

lectively “race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability.”

However, section 22 clarifies that the right to equal treatment under sections 1 and 3 (services, contracts) “is not infringed” by automobile, life, accident, or sickness or disability insurance between an insurer and an association or person (other than an employer or a life annuity) that differentiates or makes exclusions or preferences based on age, sex, marital status, family status or disability, provided that the relevant distinctions are made on “on reasonable and bona fide grounds.”

The legal framework that applies to employee pension and benefit plans is more complex. First, subsection 25(1) of the *Code* provides, generally, that the right to equal treatment concerning employment is infringed if an employee benefit, pension, superannuation plan or fund, or a contract of insurance between an insurer and employer makes a distinction, or provides for an exclusion, based on a prohibited ground.

However, subsections 25(2) and (2.1) provide that the right to equal treatment “is not infringed” if such a plan, fund or contract makes a distinction based on age, sex, marital or family status provided that the plan, fund or contract complies with the *Employment Standards Act, 2000* (the ESA).<sup>3</sup> In conjunction with certain ESA regulations, these provisions permit, for example:

- Discrimination based on marital or family status, if the purpose is to provide health benefits to an employee’s spouse or child<sup>4</sup>
- Discrimination based on marital or family status, if the purpose relates to spousal benefits under a pension plan<sup>5</sup>
- Discrimination based on sex, if the purpose is to set employer contribution rates for a pension plan and if the differentiation is made on an actuarial basis in order to provide equal benefits under the plan<sup>6</sup>
- Discrimination based on age, if the purpose is to set pension payment amounts and the differentiation is permitted under the *Pension Benefits Act*.<sup>7</sup>

In addition, and most importantly for our purposes, subsection 25(3) permits employee benefit and pension plans to incorporate distinctions based on preexisting disabilities, provided that the distinction is reasonable, bona fide and

based on a preexisting disability that “substantially increases the risk” to the plan.<sup>8</sup>

## Part II: The Role of Personal Characteristics in Risk Assessments and Underwriting

Risk assessments are a core component of the insurance industry. In simplest terms, insurers establish *risk classes* based on data they believe has predictive value for determining the financial risk associated with a particular coverage.<sup>9</sup> Insurers may charge more to cover certain risk classes or, in some cases, decline to provide coverage at all.

Where permitted under the law, personal characteristics—such as age, sex or marital status—may be used as a proxy for risk. For example, it is generally accepted that section 22 permits insurance companies in Ontario to charge drivers higher auto insurance premiums if they are under age 25, male or single, based on statistical data demonstrating that these criteria correlate with auto insurance claims.<sup>10</sup>

Underwriting for individual insurance policies generally involves collecting substantial information about an individual’s characteristics and circumstances.<sup>11</sup> For example, insurers may require an attending physician’s statement as well as an individual’s medical history, vital measurements, and blood or urine test results. Individuals with certain medical conditions or at risk of certain medical conditions may be denied health, disability or life insurance or charged exceedingly high rates.

For group insurance policies covering employee benefit plans, insurers generally conduct risk assessments when pricing new plans, renewing existing plans, adding new coverage and

in periodic reviews.<sup>12</sup> Initial underwriting is generally based on the claims experience of similarly sized groups, adjusted based on the group’s demographics, such as the average age of employees, the female/male ratio, the geographic region, characteristics of the industry, turnover rates and salary. On renewal, insurers will generally also look at the group’s claim patterns, costs and demographic changes.

## Part III: Understanding the Risk of Proxy Race Discrimination

*Proxy discrimination* occurs when insurers discriminate based on facially neutral traits that (i) are correlated with membership in protected groups and (ii) are predictive of losses precisely because of that reason.<sup>13</sup> One example recognized in literature in the United States is charging higher insurance premiums to individuals with more prevalent health conditions among some groups.<sup>14</sup>

Subsection 25(3) allows the insurance industry to draw distinctions based on disability in the context of employee benefit plans, but the identity of people who are disabled is not singu-

lar or linear. At the intersection of race and disability is an expansive amount of research and lived experience, which includes racial and ethnic predispositions to certain medical issues.

A Canadian report published in 2009 analysed nationally representative survey data to explore the idea that since “processes of racialization are fundamentally processes of power and inequality, they likely have repercussions for health and well-being.”<sup>15</sup> By exploring the statistics of disease and medical conditions, researchers can identify where certain racialized or ethnic communities are diagnosed at disproportionate rates, in comparison to their nonracialized peers.

For instance, researchers identified that Indigenous respondents reported some of the highest risks of diabetes and poor self-rated health in the study sample. Black, Filipino and South Asian respondents also reported higher predispositions to diabetes than their White counterparts. Disproportionately higher rates of diabetes among racialized Canadians were more recently corroborated by a 2022 report

### Takeaways

- Discrimination based on the permitted carveouts may adversely impact employees who share human rights protected grounds to which the carveouts do not apply, such as race, ancestry, place of origin, colour and ethnic origin.
- Permitting discrimination based on disability may make it more expensive for racialized Ontarians to obtain health, sickness and disability, and/or life insurance coverage and for employers to provide robust employee benefit plans to more diverse workplaces.
- Insurers may require an attending physician’s statement as well as an individual’s medical history, vital measurements, and blood or urine test results. Individuals with certain medical conditions or at risk of certain medical conditions may be denied health, disability or life insurance or charged exceedingly high rates.
- *Proxy discrimination* occurs when insurers discriminate based on facially neutral traits that are correlated with membership in protected groups and are predictive of losses precisely because of that reason.

by the Public Health Agency of Canada, examining the inequalities of the health of racialized adults in Canada. This report revealed that compared to White adults, the prevalence of diabetes is 2.3 higher for South Asian adults, 1.9 higher among Black adults and 1.8 times higher among Arab/West Asian adults.<sup>16</sup>

Black and Filipino respondents have reported relatively higher rates of hypertension than White respondents.<sup>17</sup> In a separate study, Black respondents reported hypertension more than five times that of Asian, South Asian and White respondents, revealing, as Gary Veenstra writes, “that beliefs and perceptions about the relative worth of racial identities in society may also be enmeshed with discrimination as predictors of health.”<sup>18</sup>

Digging deeper into an additional intersection, “poor Black women in Canada experience a multiplicative jeopardy of hypertension that is higher than expected given the distinct jeopardies of being poor, being Black, and being women.”<sup>19</sup> During the COVID-19 pandemic, Public Health Ontario reported, “COVID-19 rates are three times higher in areas where there are more racialized people; hospitalization and ICU rates are four times higher; and mortality rates are doubled. According to Toronto Public Health, ACB [African, Caribbean and Black] people comprise only 9% of the city’s overall population, yet they make up 21% of reported COVID-19 cases.”<sup>20</sup>

A 2023 Statistics Canada report exploring cause-specific mortality rates among Black Canadians revealed disproportionate mortality rates faced by Black Canadians for specific causes of death. For instance, Black males face a

markedly increased risk of dying from HIV/AIDS, prostate cancer, diabetes and cerebrovascular disease compared to their White counterparts. Black females were at increased risk for six causes of death. Importantly, increased risk compared to White Canadians persisted for most causes of death, even after adjusting for specific social determinants of health.<sup>21</sup>

Proxy race discrimination has been a focus for the United States’ National Association of Insurance Commissioners (NAIC) Special Committee on Race in Insurance Underwriting, whose mandate includes identifying issues relating to race, diversity and inclusion in the context of the insurance sector in the United States, including access to insurance products as well as insurance sector practices that may disadvantage racialized people or other historically underrepresented groups.<sup>22</sup> Concerning underwriting, the Committee is developing analytic and regulatory tools to assist state regulators in identifying and addressing unfair discrimination. These tools include identifying proxy variables for race; assessing correlation versus causation, including “spurious correlation”; and identifying potential bias in underlying data.

To date, the issue of proxy race discrimination has received some attention in Ontario, particularly with respect to race and auto insurance. In July 2022, the Financial Services Regulatory Authority of Ontario (FSRA) Auto Insurance Data and Analytics Strategy Technical Advisory Committee issued its report titled *Fair Treatment of Consumers in Uses of Big Data Analytics in Auto Insurance*. This report noted a concern that big data models may be “exposed to bias” against a pro-

tected class, including income and race. Importantly, the report distinguished “disparate impact” and “disparate treatment” as follows.

- **Disparate impact** is when a negative effect is observed on protected classes, regardless of cause. It refers to intentionally neutral models that nevertheless result in disproportionate negative outcomes for members of a protected class.
- **Disparate treatment** is when a negative effect is observed on protected classes, and it can be shown that it occurs deliberately. It refers to the intentional use of prohibited classes in models.<sup>23</sup>

The report notes that Ontario’s legal framework for risk assessments and underwriting “applies the disparate treatment standard” in that there are “prohibited variables,” such as income or race, but “is less clear about disparate impact.”<sup>24</sup>

FSRA is now working on collecting the necessary data to determine whether auto insurance rating factors have a disproportionate impact on vulnerable groups. In a panel discussion in January 2023, then FSRA executive vice president of auto/insurance products, Tim Bzowey, recognized that while relevant research existed south of the border, “Nobody’s ever done that work [in Ontario].”<sup>25</sup>

### Part IV: Proxy Discrimination and Group Benefit Pricing

Against this backdrop, it’s possible that proxy discrimination may be impacting access to health, sickness and disability, and/or life insurance coverage for racialized groups as well as group benefit plan pricing, effectively making

it more expensive to provide robust employee benefits to more diverse workplaces. There is sufficient evidence to raise concern that this may be the case and, as a result, it undermines the social incentive to promote employment diversity.

In a July 2022 statement titled “Big data and risk classification: Understanding the actuarial and social issues,” the Canadian Institute of Actuaries (CIA) outlined the benefits and bias implications of risk assessment in the Canadian insurance industry.<sup>26</sup> The CIA identifies areas in which risk assessment in underwriting based on personal characteristics (such as race) and even contextual factors (such as area of residence) can generate bias. This includes the use of postal codes in auto insurance ratings and the use of health risks in calculating insurance premiums, as discussed in more detail below. The CIA proposes that industry underwriters should be allowed to proceed with the data available, and it should be the role of policymakers and legislators to address “perceived social inequalities that result.”<sup>27</sup>

While it would be beneficial for policymakers and legislators to focus on the insurance industry, addressing the inequities caused by proxy discrimination should be a shared effort. Particularly, if one of the effects of proxy discrimination is higher insurance costs for diverse groups, dedicating more time and resources to collecting data on the intersection of rising assessments based on enumerated grounds could lead to significant positive changes.

What emerges from this cursory look at the research outlined above is a potential for discrimination that is inherently multidimensional, far more than the carveouts relating to disability in section 22 and subsection 25(3) appear designed to capture. If racialized people are disproportionately experiencing certain health risks, then there is reason to expect that they are engaging with the insurance industry and insurance policies in unique ways compared to nonracialized people. For example, given that premiums tend to be increased based on the presence or risk of medical conditions, underwriting practices for individual policies result in higher insurance premiums for racialized people. Further, group insurance policies may incur higher premiums for covering groups of racialized employees, either indirectly through facially neutral criteria known to correlate with minority groups, such as geographic location, or directly given the impact of claims experience on renewal pricing.

In sum, individuals predisposed to vulnerability based on their intersectional racialized identities may be facing dis-

## BIOS

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crimatory treatment in their interaction with the insurance industry—precisely as a result of their racialized identities—which is treatment that likely cannot be saved under section 22 or subsection 25(3).

### Alternative Models

While the purpose of this article is exploratory, aimed at revealing the risk that proxy discrimination may be adversely

impacting minority groups' experience in their interaction with the insurance industry, we touch briefly on where the conversation about alternatives or reforms to the existing scheme could begin.

Notably, some jurisdictions have moved away from permitting insurers to rely on personal characteristics in the design and pricing of their products. For example, Alberta, Saskatchewan, Nova Scotia and Québec do not permit discrimination based on disability. Alberta, Saskatchewan, New Brunswick, Newfoundland and Labrador, and Saskatchewan do not permit discrimination based on sex. We urge Ontario legislators and policymakers to consider adopting this approach.

However, insurers and policymakers in Ontario must be willing to go further and ramp up their race-based data collection substantially to enable a fulsome assessment of the scope of this issue. Robust data collection and research should be undertaken to determine the scope of the risk that proxy discrimination—including discrimination based on apparently neutral traits—is impacting Ontarians as a result of current industry practice. 📧

## Endnotes

1. RSO 1990, C H 19.
2. Canadian Institute of Actuaries, "Big data and risk classification: Understanding the actuarial and social issues" (July 2022).
3. SO 2000, c 41.
4. O Reg 286/01: BENEFIT PLANS ("Reg 286/01"), paragraph 9(c).
5. Reg 286/01, subsection 3(1).
6. Reg 286/01, subsection 2(1).
7. Reg 286/01, section 4.
8. Under paragraph 25(3)(b), an employee benefit or pension plan that is an employee-pay-all plan with less than 25 members can incorporate a distinction or exclusion based on a preexisting disability if the distinction is reasonable and bona fide.
9. For a discussion, see CIA, *supra* note 2.
10. FSRA, "What determines your auto insurance rate?" online.
11. Some Canadian insurance companies have published their under-

writing guidelines for health, life and critical illness insurance. See for example: Empire Life, *Life and Critical Illness Insurance Underwriting Guide* (December 2021), online (pdf); Canada Protection Plan, *Product and Underwriting Guide* (January 2022), online (pdf); BMO Insurance, *Underwriting Guidelines* (July 2016), online (pdf).

12. For example, see: "Everything Employers Need to Know About Group Insurance Underwriting" (9 March 2021), online: *Benefits by Design*; "Renewal Rate Analysis," online: *Group Benefits*; and "Renewal Analysis/Pricing," online: *Group Benefits*.

13. See Anya E.R. Prince & Daniel Schwarcz, "Proxy Discrimination in the Age of Artificial Intelligence and Big Data" (2020) 105 Iowa L Rev 1257, online.

14. Dr. Dora Hughes, "Current Racially Based Challenges within the Insurance Sector" (delivered at NAIC Special Session: Race & Insurance—A Candid Dialogue on the Role of the Insurance Sector in Addressing Racial Inequality and Promoting Diversity in the Insurance Industry, 13 August 2020), available online via YouTube.com.

15. Gerry Veenstra, "Racialized identity and health in Canada: Results from a nationally representative survey" (2009) 69 Soc Sci & Med 538 at 539 [Veenstra].

16. Public Health Agency of Canada, "Inequalities in health of racialized adults in Canada" (7 July 2022), online (PDF).

17. Veenstra at 542.

18. Gerry Veenstra, "Expressed racial identity and hypertension in a telephone survey sample from Toronto and Vancouver, Canada: do socioeconomic status, perceived discrimination and psychosocial stress explain the relatively high risk of hypertension for Black Canadians?" (2012) 11:58 Int J Equity Health 1 at 9.

19. Thierry Gagné & Gerry Veenstra, "Inequalities in Hypertension and Diabetes in Canada: Intersections between Racial Identity, Gender, and Income" (2017) 27:4 Ethnicity & Disease 371 at 376. See also Gerry Veenstra, "Race, gender, class, sexuality (RGCS) and hypertension" (2013) 89 Soc Sci & Med 16; Gerry Veenstra & Andrew C Patterson, "Black-White Health Inequalities in Canada" (2016) 18 J Immigrant & Minority Health 51.

20. Josephine Etowa & Ilene Hyman, "Unpacking the health and social consequences of COVID-19 through a race, migration and gender lens" (6 Jan 2021) 112 Can J Pub Health 8 at 9-10.

21. Michael Tjepkema et al., "Mortality inequalities of Black adults in Canada" (15 February 2023), online: (DOI).

22. NAIC, Special (EX) Committee on Race and Insurance, 2024 Adopted Charges, available online.

23. FSRA Auto Insurance Data and Analytics Strategy Technical Advisory Committee, Fair Treatment of Consumers in Uses of Big Data Analytics in Auto Insurance (July 2022), at p. 12.

24. *Ibid.*

25. Roosevelt C. Mosely Jr., Carole Piovesan, Tim Bzowey, "Auto Rate & Underwriting Regulation Reform: Fairness in Auto Insurance" (delivered at FSRA Exchange 2023, 19 January 2023), available online via YouTube.com.

26. *Supra* note 2.

27. *Ibid* at p. 12.

