

FTR Quarterly

FTR Quarterly – Issue 8

Date: December 21, 2017

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10 Top Developments in Human Resources Law in 2017

By: [Amanda Lawrence-Patel](#)

2017 was quite a year for news – with harassment revelations that have rocked institutions across North America, a new U.S. president, and continued Brexit turmoil among other things.

While events in the entertainment and political worlds will always grab the headlines, there were a number of “newsworthy” changes in the Ontario human resources arena in 2017. Bill 148 was the headline human resources law story of 2017, but it wasn’t the only important legal development impacting Ontario workplaces. Here are our Top 10 key changes worth noting as we prepare for the New Year.

1.

Bill 148 Receives Royal Assent

[Bill 148, the *Fair Workplaces, Better Jobs Act, 2017*](#), received Royal Assent on November 27, 2017 and brought with it substantial changes to the *Employment Standards Act, 2000* (ESA) and the *Labour Relations Act, 1995* (LRA). Changes to the ESA already in force include the prohibition of employee misclassification and amendments to the parental leave and critical illness leave provisions. In 2018, changes to the minimum wage, public holiday pay, vacation and personal emergency leave provisions, amongst others, will come into force, as will a number of changes to the LRA.

2.

Reduction in the Employment Insurance (EI) Waiting Period

Effective January 1, 2017, the waiting period to receive benefits set out in the federal *Employment Insurance Act* (EI Act) was [reduced from two weeks to one week](#). This change impacts the waiting period for all EI benefits, including maternity benefits, parental benefits and sickness benefits – and may require employers to review and revise their top-up and supplementary benefits policies sooner rather than later.

3.

Extended EI Benefits

Effective December 3, 2017, amendments to the federal EI Act provide for [increased flexibility of EI maternity and parental benefits](#). The amendments;

- allow for the payment of parental benefits over a longer period (61 weeks) and at a lower benefit rate (33% of regular weekly earnings)
- allow maternity benefits to be paid as early as the 12th week before the expected due date
- create a benefit for family members to care for a critically ill adult and allow for benefits to care for a critically ill child to be payable beyond parents to prescribed family members.

Coordinating amendments were also made to extend or add new leaves under the *Canada Labour Code* and Ontario's ESA.

4.

Superior Court Confirms the Tort of Harassment

In *Merrifield v. The Attorney General (Merrifield)*, the Superior Court recognized the tort of harassment as a cause of action separate and apart from the tort of intentional infliction of mental suffering. While the Superior Court acknowledged that there is some overlap in the tests for each tort, it clarified that the test for the tort of harassment is as follows:

- Was the conduct of the defendant(s) toward the plaintiff outrageous?
- Did the defendant(s) intend to cause emotional stress or did they have a reckless disregard for causing the plaintiff to suffer from emotional stress?
- Did the plaintiff suffer from severe or extreme emotional distress?
- Was the outrageous conduct of the defendant(s) the actual and proximate cause of the emotional distress?

In *Merrifield*, the plaintiff received damages against the defendants for harassment and intentional infliction of mental suffering in the amount of \$100,000.00.

5.

WSIA Amended to Allow Benefit Entitlement for Chronic Mental Stress

Bill 127, the *Stronger, Healthier Ontario Act, 2017*, received Royal Assent and will amend the *Workplace Safety and Insurance Act, 1997* (WSIA) to allow benefit [entitlement for chronic mental stress for workplace injuries](#) that occur on or after January 1, 2018, subject to certain transitional provisions outlined in Bill 177, *Stronger, Fairer Ontario Act (Budget Measures), 2017*. Pursuant to the amendments and the new Traumatic or Chronic Mental Stress Operational Policy, benefit entitlement for chronic mental stress will require a substantial work-related stressor(s) and may include workplace bullying or harassment.

6.

Balancing of Rights in Accommodation

While always the case, there has recently been a renewed emphasis on the balancing of rights between individuals seeking accommodation and the rights of others. For example, in [E.T. v. Hamilton-Wentworth District School Board](#), the Applicant claimed a breach of his freedom of religion pursuant to the *Canadian Charter of Rights and Freedoms* and a breach of the

Human Rights Code. In dismissing the appeal on the basis that there was no evidence of an actual violation, the Court of Appeal also delivered the clear message that public education is to be welcoming to all students. This cannot occur in the absence of the values of equality, inclusivity and acceptance.

In addition, those employers dealing with competing rights in the accommodation context may find the decision of *McCreath v. Victoria Taxi (1987) Ltd.* from the British Columbia Court of Appeal of assistance. In that case, a conflict had developed between a customer of the taxi company who was accompanied by a guide dog and a taxi driver who was allergic to the dog. In dismissing the application, the Court found that the taxi company had implemented a policy that was reasonable in the circumstances to avoid discrimination against either party.

7.

Pay Equity, 30 Years Later

In recognition of the 30th anniversary of the *Pay Equity Act*, the Pay Equity Office is pursuing a number of new initiatives that impact Ontario employers. These initiatives include targeted reviews of particular employer groups in 2017, 2018 and beyond. These initiatives include the following:

- Federal Contractors Program Monitoring
- Vendor of Record Monitoring
- New Employer Monitoring
- Innovation Sector Monitoring in 2018 and Beyond
- Engagement Survey for Unionized Workplaces.

Employers who are included in these programs – or who will be targeted by these initiatives – should ensure their compliance with the *Pay Equity Act* and be aware that approximately 25 new Review Officers have been hired to implement the initiatives.

8.

The HRTO Clarifies the Test for Family Status Discrimination

In *Ananda v. Humber College Institute of Technology & Advanced Learning*, the Human Rights Tribunal of Ontario (HRTO) was provided with the opportunity to revisit the [correct approach to be used in assessing a family status discrimination claim](#). In doing so, the HRTO confirmed that to establish family status discrimination, an applicant must demonstrate that “a rule or requirement had an adverse effect on her or him because of requirements or needs relating to or arising out of the parent-child relationship.”

With this focus on the “need” or “requirement” arising from the family status relationship, we recommend that employers closely examine when a request for family status accommodation is received, as an emphasis on “self-accommodation,” as it was described in *Misetich v. Value Village Stores Inc.*, may land employers in hot water before a decision maker at the HRTO.

9.

Severability Clauses Can’t Save a Flawed ESA-Only Termination Clause

In *North v Metaswitch Networks Corporation*, the Ontario Court of Appeal firmly reminded employers that when a termination provision limits an employee’s entitlements upon termination to their ESA entitlements only, the clause must be clear,

unambiguous and lawful. Moreover, the Court of Appeal confirmed that a severability clause within an employment agreement cannot be used to save a clause that is, in part, in breach of the ESA.

10.

Amendments to the Executive Compensation Framework

Regulation 304/2016, [Executive Compensation Framework](#), to the *Broader Public Sector Executive Compensation Act, 2014* was amended on June 8, 2017. This new process includes significant changes to the rules governing salary increases and the mechanism used to determine an employer's "envelope," out of which executive compensation must be paid.

For those employers who implemented an executive compensation program prior to the amendments, there are grandfathering provisions that apply. However, employers should be aware that if they wish to make changes to the program, they may be required to bring their entire program into compliance with the new Executive Compensation Framework process.

The Road Ahead: Key 2018 Implementation Dates

By: [Tierney Read Grieve](#)

As highlighted in our companion article, *10 Top Developments in Human Resources Law in 2017*, it's been a milestone year for legislative reforms both in Ontario and at the federal level.

To help you in planning for compliance and implementation of these pending changes, here are the key 2018 implementation dates of interest to employers and human resources professionals.

Employment Standards Act, 2000 (ESA)