Federal Post

A Changing Legislative Landscape

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Welcome to the latest edition of our Federal Post. In this issue we discuss:

- Best practices for minimizing the risk of workplace sexual harassment
- The new prohibition on use of vaping products in federally regulated workplaces
- Latest developments on the sanctions under the *Canada Labour Code* (CLC) and the *Criminal Code* for health and safety violations
- Being proactive about CLC compliance in light of the incoming power of the Minister of Labour to order an employer to perform an internal audit – see our CLC "Compliance Checklist"

The Changing Landscape of Workplace Harassment and the Federal Sector

Workplace sexual harassment is now, more than ever, at the forefront of public discourse. This new landscape has put additional pressure on employers to not only ensure that they respond appropriately to complaints of workplace harassment and sexual harassment, but also to ensure that they take measures to prevent this harassment from occurring.

The right to be free from harassment because of sex in the workplace has long been protected in Part III of the CLC, which requires employers to take positive action to prevent sexual harassment in the workplace.

The CLC defines sexual harassment as "any conduct, comment, gesture, or contact of a sexual nature that is likely to cause offence or humiliation to any employee; or that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on any opportunity for training or promotion."

In late 2017, Bill C-65, *An Act to amend the Canada Labour Code (harassment and violence), the Parliamentary Employment and Staff Relations Act and the Budget Implementation Act, 2017, No. 1*, was introduced. If passed, the Bill will amend the CLC to strengthen the existing framework for the prevention of harassment and violence, including sexual harassment and sexual violence, in the work place. In particular, Bill C-65 adds a definition of "harassment and violence" to mean "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment".

On June 18, 2018, the Bill passed Third Reading in the Senate. For a discussion of the proposed changes under Bill C-65, please see our *Federal Post* of November 27, 2017 "Changes to the *Canada Labour Code* and PIPEDA are Coming."

A recent case, *Watson v The Governing Council of the Salvation Army*, also provides cautionary guidance that a full and final release may not necessarily guard individuals from liability for workplace harassment. In *Watson*, the plaintiff sued her former manager for sexual harassment after she had settled the termination of her employment with the employer. As part of her settlement, the plaintiff signed a release with respect to all issues arising out of employment. Despite this language, the Court held that the release was not "all inclusive" and that sexual harassment is not necessarily connected to employment alone. This concerning decision demonstrates the value of preventing and effectively addressing complaints in the first instance to avoid the uncertainty associated with litigation wherever possible.

Best Practices for Employers

In light of the proposed changes to the CLC, we encourage employers to adopt the following best practices:

1. **Understand your scope of responsibility**: Employers have broad responsibilities with respect to workplace harassment and sexual harassment. Assume that the "workplace" includes any location where your organization's business is being carried out, and other locations such as during business travel, work-related gatherings, or other locations where the behaviour may have a subsequent impact on the work relationship, environment or performance. This might include on social media.
2. **Raise awareness**: It is important to raise awareness and encourage constructive dialogue about workplace sexual harassment. Ignoring the issue and hoping it will never affect your workplace is counter-productive. Minimizing the issue inhibits understanding and change, and could make it more difficult for victims to come forward. This could in fact put your workplace at risk.
3. **Provide training**: Don't assume that your staff understand the meaning of "workplace sexual harassment," the scope of the "workplace," or how your organization will address complaints. Educate staff about workplace sexual harassment, their rights and obligations, and the importance of reporting and also engaging open and victim-sensitive dialogue. Maintain good records of what training was provided and to whom.
4. **Encourage**: Foster a workplace atmosphere that is receptive to the reporting of sexual harassment. Coming forward with allegations of workplace sexual harassment is difficult. Employers should encourage reporting from both victims and witnesses. Emphasize that all complaints will be investigated, and will be addressed in a confidential manner to the extent possible.
5. **Develop robust policies**: No matter the size of your organization, you should have policies and procedures in place regarding workplace sexual harassment.
6. **Act promptly**: It is important to respond to allegations of workplace sexual harassment as soon as they are brought to your attention. Delay only exacerbates the problem and leaves the organization exposed.
7. **Take complaints seriously**: All complaints must be taken seriously, whether or not the allegations are filed in a formal complaint document. It is equally important that your organization be seen to have taken a complaint or allegation of workplace sexual harassment seriously. Perceived indifference or reluctance will only exacerbate the problem and discourage future reporting.
8. **Offer quick and effective accommodation**: Immediately upon learning of alleged sexual harassment in the workplace, consider what measures can be taken to accommodate the concern while the investigation is being completed. This might include temporarily altering reporting relationships, work locations, relieving the victim from attending work, or perhaps even suspending the alleged perpetrator with pay pending the outcome of the investigation.
9. **Lead by example and ensure consistency**: Managers and supervisors should model appropriate workplace behaviours and foster a positive, inclusive work atmosphere. Your organization's expectations should be uniform across the organization, and its response to violations of its workplace sexual harassment policy should be consistent, no matter what position the perpetrator holds

Did You Know? – Federal *Non-Smokers' Health Act* Now Regulates Vaping Products

Federal employers now have a duty to ensure that persons refrain from using vaping products such as e-cigarettes in the workplace, in addition to tobacco.

The federal *Non-smokers' Health Act* (Act) was recently amended by Bill S-5 *An Act to amend the Tobacco Act and the Non-smokers' Health Act and to make consequential amendments to other Acts* to regulate the use of vaping products in the workplace. Bill S-5 received Royal Assent on May 23, 2018 and Part 2 of Bill S-5, which amends the Act, came into force on that date.

The duty of employers under the Act includes ensuring that persons refrain from smoking in any work space (as defined) under the control of the employer, subject to exceptions and designations of smoking areas.

Under the new amendments, the definition of smoke now means “to smoke, hold or otherwise have control over an ignited tobacco product or to vape using a vaping product”. A definition of “vaping product” has also been added:

vaping product means:

(a) a device that is intended to be used to simulate the act of smoking a tobacco product and that emits an aerosol that is intended to be inhaled, including an electronic cigarette, an electronic cigar and an electronic pipe; and

(b) a device that is designated to be a vaping product by the regulations.

Federally regulated employers should update their non-smoking policies to prohibit vaping, ensure employees are aware of the additional restriction and take steps to consistently enforce the updated prohibition.

Prosecutions and Penalties under the *Canada Labour Code*

Federally regulated employers and their representatives who fail to satisfy their obligations under the CLC face an array of compliance measures, including monetary fines and regulatory prosecutions. Even criminal proceedings may result where employers or their representatives do not meet the requisite standard of care towards workers that is imposed by the *Criminal Code*.

Criminal Proceedings

Amendments to the *Criminal Code* made in 2003 impose a duty of care on persons directing work:

Everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task. (section 217)

This provision was applied in a recent significant decision of the Ontario Court of Appeal, *R. v. Kazenelson*. The Court upheld a prison sentence of 3.5 years for a project manager employed by Metron Construction after he was found guilty under the *Criminal Code* of “wanton and reckless disregard for the lives or safety of other persons” (contrary to s. 219 of the *Criminal Code*) and failing to take reasonable steps to prevent bodily harm to a person that he had the authority to direct in the performance of his work (contrary to s. 217).

The accident in question involved the death of four workers, and a serious injury to a fifth, when they fell from a swing stage. The Court of Appeal upheld the trial judge’s decision that the project manager’s behaviour in allowing the workers to board the swing stage without appropriate safety measures in place, such as lifelines, was a marked and substantial departure from what a “reasonable supervisor” would have done in the circumstances. The trial judge stated that both the *Criminal Code* and the Ontario *Occupational Health and Safety Act* impose a duty on supervisors to take reasonable steps to prevent harm to workers. The Court of Appeal agreed with the trial judge that a “worker’s acceptance of dangerous working conditions is not always a true voluntary choice”, and upheld the 3.5 year prison sentence. This was the project manager’s first offence.

Kazenelson is one of the most significant decisions to date under the 2003 amendments to the *Criminal Code*, which were meant to facilitate prosecutions for serious workplace accidents due to criminal negligence by employers and their representatives. Most notably, the decision confirms that courts will impose prison sentences on individual managers and supervisors where their actions fail to meet the required standard of care.

Although the *Kazenelson* decision did not involve a federally regulated employer, it is an important reminder for all employers of the significant liability that can be imposed for workplace health and safety violations. In addition to *Criminal Code* liability, federally regulated employers continue to face potential liability for prosecution under Part II of the CLC. Among other

obligations, the CLC mandates that every employer shall ensure that the health and safety at work of every person employed is protected. A conviction for an offence under the CLC can lead to a fine of not more than $1 million, or imprisonment for up to two years. This can apply even in cases where wilful contravention or knowledge of the risk is not required.

New Administrative Monetary Penalties

Bill C-44, the *Budget Implementation Act, 2017, No 1,* has added a new Part IV to the CLC, Administrative Monetary Penalties. Part IV, which is not yet in force, will implement a system of monetary fines to enforce compliance with Parts II and III of the CLC as an alternative to the existing regulatory prosecution system.

Under Part IV, any person or department who commits a violation, or any party to any corporate violation who is an officer, director, agent, senior official or person exercising managerial or supervisory functions, may be liable for a penalty, even if no compliance measures are taken against the employer. While accused persons will continue to be able to invoke existing defences to regulatory prosecutions, most notably the defence of due diligence, the new Part IV provides that the defences of due diligence and acting on honest and reasonable belief will **not** be available to a person or department subject to an administrative monetary penalty.

The maximum fine under Part IV for a single violation will be $250,000. We expect that the actual amounts of fines for specific violations will be established by regulation, which has not yet been published.

Once Part IV is in effect, the Minister of Labour will have a choice of addressing violations of the health and safety provisions of the CLC through a range of enforcement mechanisms. A number of factors may impact the Minister's decision on whether to proceed by way of a monetary fine rather than a regulatory prosecution, including:

- Any prior incidents of non-compliance
- The significance of the offence (particularly whether it is administrative or involved injury or illness to a worker), and
- Whether it is anticipated that the employer could invoke the defences of due diligence or reasonable and honest belief in response to a prosecution, in which case a monetary penalty under Part IV would be more likely.

Conclusion

As illustrated by the foregoing, the sanctions for violations of the CLC or the *Criminal Code* (as seen in the *Kazenelson* decision) can be severe. It is more important than ever for employers and their representatives to be proactive and consistent in ensuring compliance with legal obligations for workplace health and safety. Make sure that your organization adopts and follows a "safety first" culture, at all levels.

Canada Labour Code Internal Audit Compliance: Are You Prepared?

Bill C-44, the *Budget Implementation Act, 2017, No. 1*, received Royal Assent in June 2017. In addition to the Administrative Monetary Penalties discussed above, Bill C-44 contains key amendments to the CLC of which all federally regulated employers should be aware.

Significantly, Bill C-44 adds new compliance mechanisms to the CLC (which are not yet in force). Once in force, the Minister of Labour will be permitted to order an employer to perform an internal audit of its compliance with Part III of the CLC (Standard Hours, Wages, Vacations, Holidays) and to provide the Minister with a corresponding report, identifying any incidents of non-compliance. The Minister can then choose to enforce compliance through one of the available enforcement tools.

By taking steps now to ensure compliance with the existing provisions and upcoming changes to the CLC, *prior* to receiving a self-audit order, employers can minimize the risk of:

- discovering violations at the eleventh hour
- being required to report incidents of non-compliance to the Minister of Labour, and
- being liable for costly administrative monetary penalties and possible orders for the payment of wages going back 24 months (currently payment orders may only go back 12 months).

Compliance checklist*

**NOTE: this checklist does not address every aspect of each standard under Part III of the CLC, and focuses instead on key compliance issues. We note that minimum standards may not be waived and the CLC provides that where the employment contract confers rights or benefits more favourable, they shall prevail over the provisions of the CLC*.

1. **Hours of Work**

The CLC establishes a variety of rules related to hours of work. The standard work day is 8 hours and the standard work week is 40 hours. Employees are generally entitled to at least one full day of rest per week (normally Sunday where practicable). Hours worked in excess of standard hours must be paid at the overtime rate, but there are numerous exemptions from the standard hours of work. First, the CLC permits averaging of hours in industrial establishments where irregular distribution of hours is required with some limitations. Second, the CLC permits the establishment of “modified work schedules” such as compressed work weeks and flexible hours of work in certain circumstances. Third, there are special hours of work regulations in several industries such as trucking, railway and broadcasting

(a) Averaging

Averaging is only available if employees have irregular hours that are due to seasonal or other factors, resulting in employees having no regularly scheduled hours or having regularly scheduled hours which vary from time to time. In such circumstances hours of work are calculated as an average over the “averaging period.”

In unionized workplaces, averaging agreements must be agreed to in writing between the employer and the trade union, and the agreement will remain in place for the time period agreed to by the parties.

Any averaging agreement in non-unionized workplaces may only remain in effect for three years.

Before engaging in an averaging of hours of work under the CLC, employers must post a notice of intention to average hours of work (or a notice of change for subsequent modifications) at least 30 days before the averaging or change is to take effect and provide a notice of the change to the regional director and to the union.

(b) Modified Work Schedules

Modified work schedules allow schedules which exceed the standard hours if the average hours of work for a period of two or more weeks does not exceed 40 hours a week. Modified work schedules must be agreed to in writing with the union, or, in non-unionized workplaces, must be approved by at least 70% of affected employees.

In light of all these rules related to hours of work, to verify compliance with daily and weekly hours of work requirements, assess the following:

- Do your employees have at least one full day of rest in a week (where practicable Sunday)? If your workplace has a modified work schedule, does the schedule provide at least the same number of days of rest as there are number of weeks in the work schedule?

- If your workplace utilizes an averaging agreement or modified work schedule, has a notice of the averaging or the modified work scheduled been posted for at least 30 days prior taking effect (this includes any modifications or cancellations) and does the notice remain posted while in effect?
- If your workplace utilizes an averaging agreement, was a copy of the averaging notice provided to the regional director and to the union representing affected employees?
- If your workplace has a modified work schedule, do you have a signed agreement with the trade union? Or if your workplace is not unionized, do you have proof of support of 70% of affected workers?
- Are employees provided with 24 hours' notice of a change to a period or shift or an additional shift or period of work? *(Note: this change is not yet in force)*

The maximum number of hours that may be worked by any employee in any week may not exceed 48 hours absent averaging agreements, emergencies or exceptional circumstances (in which case an employer may apply for a permit from the Minister of Labour and post the application in the workplace for at least 30 days). Accordingly if you require employees to work in excess of 48 hours in a week due to:

- **an averaging of hours:** ensure that the maximum hours of work in the averaging period does not exceed 48 hours times the number of weeks in the averaging period
- **an emergency**: have you reported all such incidents in writing to the regional director within 15 days after the end of the month in which the maximum was exceeded providing the prescribed information (nature of the emergency, number of employees working in excess of maximum hours and number of additional hours worked by each employee)?
- **exceptional circumstances in an industrial establishment**: do you have a ministerial permit authorizing the work and did you post the application in the workplace for at least 30 days prior to the proposed effective date?

2. **Overtime**

Generally, overtime pay is paid to eligible employees at a rate of one and one-half the employees' regular wages after 8 hours in a day or 40 hours in a week, unless an averaging arrangement or modified work schedule is in place or where a work practice permits an employee to work in excess of the standard hours for the purposes of changing shifts.

The CLC was recently amended to allow employers to provide employees with one and one-half hours of **time off in lieu** of each hour of overtime worked. If this has become your practice:

- Do you have a written agreement with each employee providing that they will receive time off in lieu?
- If so, does this agreement specify the period in which the time off must be taken?
    - If so, is this period less than 12 months following the pay period in which the overtime was worked?
    - If not, do you ensure that time off is taken within three months of when the overtime is worked?
- Do you ensure that any overtime that is not taken as time off within the designated period is paid out?
- Upcoming amendments to the CLC will allow employees to refuse to work overtime due to a "family responsibility." Have you drafted and are you ready to adopt a policy addressing such refusals?

3. **Minimum Wage**

The minimum wage under the CLC is the minimum wage applicable in the province where the employee is usually employed. As minimum wages increase periodically, ensure that your employees are paid the current minimum wage in force in the province where they are usually employed.

The current general minimum wage rate in each province (as of June 2018) is as follows:

British Columbia	$12.65 (going up to $13.85 on June 1, 2019)
Alberta	$13.60 (going up to $15 on October 1, 2018)
Saskatchewan	$10.96
Manitoba	$11.15 (going up to $11.35 on October 1, 2018)
Ontario	$14.00 (going up to $15 on January 1, 2019)
Québec	$12.00
New Brunswick	$11.25
Nova Scotia	$11.00
Prince Edward Island	$11.55
Newfoundland & Labrador	$11.15
Yukon	$11.51
Northwest Territories	$13.46
Nunavut	$13.00

Under upcoming changes to the CLC, a payment order may be made for the recovery of wages and unpaid vacation pay up to 24 months prior to the date on which the order to provide a report was served (in the context of a self-audit) or a complaint was filed. An error in the payment of wages or vacation pay could result in a significant retroactive payment.

4. **Sexual Harassment Policy Statement**

The CLC requires employers to issue a policy statement concerning sexual harassment, after consulting with employees or employee representatives. Employers should ensure that they have a policy statement, and that it meets the requirements established by Part III the CLC.

Does your policy statement include:

- A definition of sexual harassment substantially the same as the one in the CLC?
- A statement that every employee is entitled to employment free from sexual harassment?
- A statement that the employer will make every reasonable effort to ensure that no employee is subjected to sexual harassment?
- A statement that appropriate disciplinary measures will be taken against any person who subjects any employee to sexual harassment?
- A clear complaints mechanism?
- An assurance of confidentiality, except where disclosure is necessary to investigate the complaint or take disciplinary measures in relation to the complaint?
- Information regarding redress available for sexual harassment under the *Canadian Human Rights Act*?

Finally, ensure that you have made each person under your direction aware of the policy statement and that your policy

statement is posted in your workplace.

(NOTE: there are a number of other potential changes to Part II of the CLC with respect to harassment and violence that may be introduced if Bill C-65, discussed above, receives Royal Assent. Bill C-65 has just passed its Third Reading in the Senate)

5. **Pay Statement**

Employers must provide employees with a pay statement in writing at the time of making any payment of wages, which must include the following information:

- The pay period
- The number of hours for which payment is made
- The wage rate
- Details of the deductions
- Net amount of wages being paid to the employee

6. **Record-Keeping**

The CLC requires employers to maintain a variety of records for prescribed periods of time – typically 3 years from either the last day of employment (e.g. date of commencement of employment) or 3 years after the record was created and/or provided to the employee. This is particularly important as the new Part IV of the CLC will now impose administrative monetary penalties for violations of Part III requirements, including record-keeping.

Employers are required to keep records of the following which include the following information (*for a complete list of record-keeping requirements see s. 24 of the Canada Labour Standards Regulations (C.R.C., c. 986)*):

- Name, address, SIN, occupational classification and sex of the employee
- Age, where the employee is under 17 years of age
- Start and end date of employment
- Wage rate (hourly, weekly, monthly or other) and date and particulars of any change in rate
- Hours worked each day for employees who are not exempt from overtime
- Actual earnings (pay periods, amounts paid each pay day, overtime payments, vacation pay, general holiday pay, bereavement leave with pay, any termination pay/pay in lieu of notice and severance pay, details of deductions made and net amount paid each pay day)
- Time away from work:
    - Information regarding leaves granted to the employee (date of commencement and end, interruption, medical certificate submitted in respect of the leave)
    - Vacation (dates of commencement and termination)
    - Bereavement leave granted to the employee
    - Detailed reasons for an employee's absence due to work-related illness or injury (including a copy of medical certificate indicating the employee is fit to return to work)
- Written agreement between the employer and employee to postpone or waive entitlement to annual vacation
- Notice of averaging, posting dates as well as periods of averaging (including start date)
- Notice of modified work schedule and proof of agreement to the work schedule by at least 70% of affected employees, schedules, votes and posting dates.

Conclusion

The new power that the Minister of Labour will have to order internal audits is a significant change meant to enforce compliance with minimum standards under the CLC. If your workplace is governed by the CLC, it's important to take proactive steps **now**, to ensure that your organization is in compliance once the changes take effect and avoid discovering your organization is non-compliant in the course of a mandated internal audit.
