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Year in Review: Key Human Resources Law Developments of 2018

By: Shivani Chopra

This past year, there were a number of noteworthy legal developments in human resources law that impacted workplaces across Canadian jurisdictions. We've highlighted some of them below.

Cannabis

On October 17, 2018, Canada made headlines around the world by legalizing the use of recreational cannabis. The provinces have each established statutory frameworks to deal with the legalization which, among other things, set out the age at which persons can buy, possess, use and grow recreational cannabis (in Ontario, for example, that age is 19). Our most recent FTRQ has more details and resources to help you manage cannabis in your workplace.

Do benefit providers have a legal obligation to provide coverage for medical cannabis? On April 12, 2018, the Nova Scotia Court of Appeal answered this question in the negative, stating that an administrator of a benefit plan may choose what specific drugs and medications will be covered by a plan – and that the exclusion of medical marijuana is not discriminatory under human rights legislation. Notably, the Human Rights Tribunal of Ontario followed suit in a decision issued on October 26, 2018. Read more about it in our publication, Tribunal Finds that Denial of Coverage for Medical Cannabis under Employer's Benefit Plan is not Discriminatory.

The *Smoke-Free Ontario Act, 2017* (SFOA)

The same day recreational cannabis was legalized, Ontario proclaimed the SFOA into force. Of significance is the fact that persons may now use cannabis in the same places where consumption of tobacco is permitted, subject to any restrictions placed on consumption in public places by municipalities. The SFOA also regulates the use of e-cigarettes or vaping, and sets out new signage requirements for employees, proprietors and others. We outline the key posting requirements for the signs in our recent blog post.

Bill 148 Reforms Repealed

On November 21, 2018, Bill 47, *Making Ontario Open for Business Act, 2018* (Bill 47), received Royal Assent, undoing many key changes to workplace laws implemented by Bill 148 – including, provisions with respect to equal pay, paid personal

emergency (PEL) days, scheduling, card-based certification for certain industries and the requirement that employers provide unions with contact information for employees where they demonstrate that they have 20% support. Contact your Hicks Morley lawyer to receive your complimentary Client Toolkit comparing the Bill 148 and Bill 47 amendments in a convenient, at-a-glance chart – or read about the changes in our detailed FTR Now, End of the Bill 148 Era: Ontario Bill to Reverse Employment and Labour Reforms.

Termination Clauses in Employment Contracts

Ontario courts continued to grapple with termination language in 2018, including so-called "ESA-only" clauses. While the common message remains that these types of provisions must be clearly drafted to limit an employee's entitlement to those set out under the *Employment Standards Act, 2000* (ESA), and rebut the presumption of any entitlement to common law notice, one key development attracted some attention.

The Court of Appeal in *Amberber v. IBM Canada Ltd.* did not specifically consider an "ESA-only" termination clause but nonetheless provided helpful guidance to employers on this issue. It noted that termination clauses must be read as a whole, rather than being parsed into individual components, to assess their meaning. The Court also noted that the use of a "fail-safe" provision could be properly used to "read up" a termination clause to comply with the ESA, where some deficiency exists. Key takeaways from the decision and related tips are outlined in our FTRQ article, 5 Key Things for Employers to Consider in Drafting Termination Clauses in Employment Contracts.

The *Police Record Checks Reform Act, 2015*

The much-anticipated *Police Record Checks Reform Act, 2015*, came into force on November 1, 2018. Police services in Ontario now offer three types of records checks: criminal record checks, criminal record and judicial matters checks and vulnerable sector checks. The types of information that are authorized for disclosure in respect of each type of check is now standardized, and the disclosure of non-conviction information in all but vulnerable sector checks will be limited. For more information on this legislation, see our Human Resources Legislative Update.

The New Chronic Mental Stress Policy

On January 1, 2018, the Workplace Safety and Insurance Board's Chronic Mental Stress Policy came into force, entitling a worker to benefits for chronic mental stress where: 1) there is an appropriate diagnosis; and 2) where the injury is caused by a substantial work-related stressor arising out of and in the course of employment. Learn more in our FTR Now, WSIB Issues Final Chronic Mental Stress Policy: What Employers Need to Know.

Workplace Sexual Harassment

Complaints and allegations about workplace sexual harassment continued to be a key focus for employers. In 2018, the federal government passed legislation aimed at preventing harassment and violence in the workplace, and as we previously reported, recent decisions from the courts have further explored the scope of potential liability for employers with respect to employee sexual harassment – including sexual harassment between employees. In one case, the Federal Court of Appeal found that the Public Service Labour Relations and Employment Board (Board) was unreasonable in failing to award damages for an applicant's pain and suffering caused as a result of harassment in the workplace by a co-worker. The Board had concluded that the employer failed to provided a harassment-free workplace but it declined to order compensation as it concluded the co-worker's behaviour was not the sole cause of the applicant's medical condition.

For key practical initiatives and strategies that employers can take to proactively prevent or reduce claims of workplace sexual harassment, see our FTR Views. So what's in store for employers in 2019? Keep reading to find out!

The Road Ahead: Human Resources Trends and Issues to Watch in 2019

By: Will T. McLennan

As outlined in our prior article, 2018 was a year of change – and with a new government in Ontario and an incumbent government in Ottawa gearing up for the 2019 election campaign, there's more of it on the horizon for Canadian employers. Below are some of the key issues your organization should be thinking about as it prepares for the road ahead.

1. More Reforms to Workplace Laws

In addition to Bill 47, discussed above, Ontario employers can expect more changes to workplace regulation throughout 2019. Bill 57, *Restoring Trust, Transparency and Accountability Act, 2018* will indefinitely postpone the *Pay Transparency Act*. And in December, the Ontario government introduced Bill 66, *Restoring Ontario's Competitiveness Act* (Bill 66). If passed in its present form, the Bill will in part amend the *Employment Standards Act, 2000* (ESA), the *Labour Relations Act, 1995*, the *Pension Benefits Act, the Child Care and Early Years Act, 2014*, and the *Education Act*. In particular, all employers should be aware of the coming changes to the ESA:

- Employers in Ontario will no longer be required to post a copy of the Ministry of Labour's ESA poster in the workplace, but would still be required to provide a copy of the poster to each employee.
- Employers in Ontario will no longer be required to seek the approval of the Director of Employment Standards to seek agreement with employees to work more than 48 hours per week, and the current maximum of 60 hours per week will be removed.
- Employers in Ontario will no longer be required to seek the approval of the Director of Employment Standards to enter into agreements averaging an employee's hours of work to determine entitlement to overtime. Averaging agreements will be permitted for periods of up to four weeks.

2. Employment Contracts and Bonus Entitlements

In addition to the interpretation of contractual termination provisions – a perennial "hot topic" – the issue of bonus entitlements will remain front and centre following the Ontario Court of Appeal's decision in *Bain v. UBS Securities Canada Inc*. As we reported, the Court awarded damages for the part of a discretionary bonus that *could* have been "earned" during the employee's notice period. The Court cited its earlier decision in *Paquette* and stated that a requirement that the employee be "actively" employed in order to receive a bonus, "does not prevent the [employee] from receiving, as part of his wrongful dismissal damages, compensation for the bonuses he would have received had his employment continued during the period of reasonable notice." The Court rejected the employer's argument that it had discretion to award the bonus, stating that employers had to exercise that right reasonably, including into the notice period.

While we will continue to monitor the case law as it develops in this area, employers should remain mindful of this decision. Review our client communication for more background information, Appellate Court Finds Employee Entitled to Bonus Which Vested after the End of the Notice Period.

3. Federal Pay Equity.

On December 13, federal Bill C-86, *Budget Implementation Act, 2018*, received Royal Assent. In addition to its many changes to the *Canada Labour Code*, Bill C-86 introduces a framework for achieving pay equity in the federal sector. Both private and public federally regulated employers with more than 10 employees will be required to implement a pay equity plan within

three years from the time that the Bill comes into force. Certain employers will also have to establish pay equity committees to create those plans. In addition, the federal *Pay Equity Act* will require employers to achieve and maintain pay equity through "proactive means." The Canadian Human Rights Commission and its newly-created Pay Equity Commissioner will have expanded powers to ensure compliance.

These obligations will start when the *Pay Equity Act* comes into force. While there will be a three year period to establish the required pay equity plan from the coming into force date, employers should begin preparing as soon as possible. Pay equity compliance is complex and failure to comply can attract significant consequences. As the *Pay Equity Act* itself points out, federal employers will want to be "proactive" in addressing pay equity in 2019.

Learn more in our recent communication, Federal Government Proposes Significant Workplace Law Reforms.

4. Sexual Harassment in the Workplace

We will continue to monitor case law developments on issues relating to workplace sexual harassment in 2019. With the increased profile and scrutiny on sexual harassment issues, employers should continue to adopt a proactive approach to complaints and allegations, including periodic reviews of training protocols and policy compliance.

Contact your Hicks Morley lawyer for an Employer Guide on Preventing Workplace Violence and Harassment.

5. Workplace Drug and Alcohol Testing

As outlined in our previous article, 2018 saw the legalization of recreational cannabis. However, as recently noted in *International Brotherhood Lower Churchill Transmission Construction Employers' Assn. Inc. and IBEW, Local 1620 (Tizzard)*, there is still no reliable way to measure impairment from marijuana. Going forward, employers will continue to grapple with impairment issues due to alcohol, cannabis, and other drugs, as well as with the complications of identifying impairment in the workplace, through testing or otherwise. Employers may need to revisit their policies and training protocols to ensure that they are tailored to their workplaces, and take into account employee privacy and accommodation concerns, as well as workplace safety – particularly in the context of workplaces with safety-sensitive jobs.

6. Splitting of Employment Insurance Parental Leave Between Partners

Presently, eligible parents can choose to receive Employment Insurance (EI) parental benefits at either (1) 55% of average weekly earnings over a 35-week period (Regular Parental Benefits) or (2) 33% of average weekly earnings over a 61-week period (Extended Parental Benefits).

On March 17, 2019, the federal budget's proposed addition of a Parental Sharing Benefit will come into effect. The Parental Sharing Benefit reforms will introduce additional Regular Parental Benefits of up to 5 weeks (or up to 8 weeks of Extended Parental Benefits) to be used by two-parent families, where the second parent agrees to share the parental leave (subject to certain minimum periods of leave for the second parent).

The additional weeks will be available if both parents of a newly born/adopted child(ren) choose to take a parental leave and share the available EI benefits. Only parents with children born or placed for adoption on or after March 17, 2019, will be eligible for the Parental Sharing Benefit. The new benefit will not apply to leaves commenced before that date.

7. Electronic Beneficiary Designations and New Responsibilities for Plan Administrators

As noted above, in 2018, the Ontario government introduced Bill 57, *Restoring Trust, Transparency and Accountability Act, 2018* (Bill 57). Over the coming months, Bill 57 will introduce a number of changes to tax-, pension-, benefit-, and employment-related legislation that will affect workplaces and pension plan administration. One significant change which

came into force in late 2018 is the amendment to the *Pension Benefits Act* (PBA) to allow pension plan administrators to accept electronic beneficiary designations. The current legislative frameworks governing testamentary dispositions and electronic signatures do not provide clear legislative authority for electronic beneficiary designations. Instead, handwritten or “wet” signatures continue to be required for pension benefit designations. The new provision would allow electronic beneficiary designations, overriding anything to the contrary in the *Succession Law Reform Act*. All plan administrators, which includes many employers, will be required to comply with any prescribed requirements regarding electronic beneficiary designations, but none have been prescribed yet. Many plan administrators will want to consider whether to implement electronic beneficiary designations, the steps for doing so and any implications.

Featured Topic

Diversity and Inclusion

Hicks Morley is committed to fostering a culture of equity, diversity and inclusion within our firm, and to cultivating awareness of how unconscious biases or assumptions impact our professional interactions and decision-making, in all areas of our practice and client service. We strongly believe that embracing each of our different and unique perspectives and experiences based on factors such as our cultural and racial backgrounds, citizenship, creed, sex, gender identity and gender expression, sexual orientation, age, marital and family status, and ability and disability brings value to the firm as a whole – and to your business.