

Member's Quarterly

Winter 2019 Edition

Feature

The Highlight Reel: Year End Review of Employment Law in Ontario

Keeping employers on their toes

2018 has brought no shortage of interesting developments to the employment landscape in Ontario. Both legislators and the courts have kept employers on their toes with significant legislative changes and precedent-setting judicial decisions.

As these developments continue to impact employers in Ontario, what follows is a highlight reel of some of the key developments to date, with a view of what we will be watching for in 2019.

Changes to the Employment Standards Act

The year started off with significant changes to Ontario's labour and employment legislation. Some of the key issues employers have been facing since the amendments came into force have included:

- The equal pay for equal work provisions came into effect on April 1, 2018 and have had a particularly significant impact on the cost of business to employers who rely significantly on temporary and part-time employees. These provisions require employers pay temporary help agency employees and part-time employees at the same rate of pay for permanent, full-time employees performing substantially the same kind of work.
- The formula for public holiday pay was amended on January 1, 2018, and resulted in employers paying significantly more public holiday pay to part-time and casual employees than before. As such, on May 7, 2018, the Ministry of Labour announced a new regulation that reverted to pre-Bill 148 public holiday pay. The reinstated formula came into effect as of July 1, 2018. Employers consequently had to adjust their payroll systems twice in six months.
- Employers continue to adjust to the two paid days of personal emergency leave, particularly as it relates to benefits in a collective agreement such as sick pay or floater/flex days. The debate now centers on whether collective agreements or employer policies provide a greater right or benefit than the legislation, or whether they can be offset against the minimum statutory entitlements. Judicial guidance remains minimal. However, a number of decisions are expected from labour arbitrators on the issue in the coming months.

Counting Down to Pay Transparency

On April 26, 2018, Ontario became the first province in Canada to pass legislation aimed at increasing transparency in hiring and compensation.

The *Pay Transparency Act*, 2018 places a number of new obligations on the shoulders of employers in this province. The key requirements include:

- Employers must include a salary rate or range on all publicly advertised job postings;
- Employers with more than 100 employees (or otherwise, as prescribed) must prepare and submit an annual Pay Transparency Report to the Ministry of Labour;



Dan Palayew
LL.B.

*Partner/Regional
Leader,
Borden Ladner
Gervais LLP*



Odessa O'Dell
J.D.

*Associate, Borden
Ladner Gervais LLP*

Member's Quarterly

Winter 2019 Edition

Feature continued

- Employers are prohibited from seeking information regarding past compensation history from a candidate, either directly or through an agent;
- Reprisals are prohibited against employees who inquire about compensation, disclose their compensation, and/or provide information with respect to their employer's compliance with the legislation.

The new obligations under the *Pay Transparency Act, 2018* will come into force on January 1, 2019, with the exception of Pay Transparency Reports, which will be phased in according to the size of an employer's workforce. Employers with 250 or more employees should diarize May 15, 2020 as the deadline for their first Pay Transparency Report, while employers with 100 to 250 employees will be required to submit their first report by May 15, 2021.

Workplace Harassment

With the arrival of the #MeToo era, employers across the country have revisited their policies and procedures with respect to workplace harassment. In Ontario, employers have been cautiously reviewing their obligations pursuant to Ontario's *Occupational Health and Safety Act* to ensure that they have policies, programs and investigation practices in place to deal with such complaints.

The #MeToo movement is also driving legislative reform. Changes for federally regulated workplace are on the horizon, as the federal government is currently consulting on its proposed 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*.

The legislation intends to implement a regulatory framework around its pending workplace harassment and violence legislation. The federal government has signalled that it intends to bring the proposed legislation into force within two years following Royal Assent, and as early as Fall 2019.

Cannabis is (Officially) Here

The Federal government announced that recreational marijuana will be legalized in Canada as of October 17, 2018. While employers have known this was coming for some time, a firm date from the government has prompted many employers to ramp up their preparations, namely updating drug and alcohol policies.

Yet there are still issues – namely random drug and alcohol testing, which remains in flux and without legislative guidance.

The most recent decision on the issue is from the Alberta Court of Appeal. *Unifor, Local 707A v Suncor Energy Inc.* deals with random drug testing in a safety sensitive workplace. While the Union was initially successful in grieving the testing policy on privacy grounds, the Court of Appeal rendered a positive decision for employers by indicating random testing may be allowed in some circumstances. However, the matter is far from over. The Supreme Court of Canada has ruled that it will not hear the matter; it will be sent back to a new arbitration hearing before a different panel.

While employers continue to await much needed clarity from the courts, the federal government has signalled that they may revisit the cannabis legislation to include provisions on mandatory drug testing for safety-sensitive positions. That said, it is unlikely that they will do so prior to October 17, 2018.

These are just a few of the issues that have been keeping employers busy in 2018. We have no doubt that there are more interesting legal issues to come in the months to follow, so stay tuned for further updates and articles.

Dan Palayew is Partner/Regional Leader Labour & Employment Group with Borden Ladner Gervais LLP and can be reached at dpalayew@blg.com. Odessa O'Dell is an Associate with Borden Ladner Gervais LLP and can be reached at oodell@blg.com.