Top 5 Stories in HR Compliance that Almost Nobody Is Paying Attention To

If not burnout, you may at least be suffering from COVID-19 fatigue right now. Trust me, you're not alone. The monster virus has seemingly consumed everything in its path over the past 6 months, including the world's attention. Although understandable, the fixation on COVID-19 belies the fact that other big developments are taking place right now that may have a direct impact on your organization. So, as we move into the second half of 2020, let's step back and recognize the year's biggest non-COVID-19 stories in HR compliance that have flown under the radar due to the pandemic.

1. The Employer Response to the Black Lives Matter Movement

Reaction to the George Floyd murder has been only story to rival COVID-19 since the pandemic began. And while it goes far beyond HR, the global outrage and cry for racial justice is having a tangible impact on employers and workplaces. In the U.S., unprecedented numbers of influential corporations and CEOs have spoken up to condemn racism and taken tangible steps to combat it, e.g., by eliminating controversial brands, making massive financial donations to anti-racism social causes and adopting policies to promote minority businesses and hirings.

Things are moving more slowly on this side of the border. Prominent Black leaders are also trying to seize the moment and push Canadian companies to hire minorities for leadership positions, following roughly the same tactics used successfully to secure higher representation of women in senior executive and director positions. But they face some serious obstacles, like the fact that Black people make up only 3.5% of the Canadian population, as compared to 12.7% in the U.S. Another problem is complacency and the widespread misconception that Canada doesn't have a race problem. And that's one reason why businesses and government agencies in this country collect far less racial data than do their U.S. counterparts.

Bottom Line

Despite all of this, progress is being made, including the recent announcement that Statistics Canada would start gathering race data in its monthly labour force survey and break down numbers of certain previous reports by race. And more change may be on the way. Two weeks after the Floyd murder, a group of influential executives, investors and legislators formed a new organization called the Canadian Council of Business Leaders Against Anti-Black System Racism

that’s now calling on Canadian companies to sign a 7-point pledge, including a commitment to ensure at least 3.5% Black representation on their respective executive boards by 2025.

2. C-65 Reinvents the Model for Workplace Harassment & Violation Regulation

While Ontario was among the last jurisdictions to adopt specific workplace violence OHS rules, it made up for lost time by reinventing the model. When it took effect in 2010, Bill 168 represented the state-of-the-art and other jurisdictions began to pattern their own OHS regulations after it, particularly its: (i) inclusion of harassment as a workplace hazard; and (ii) requirement that employers investigate and resolve complaints. However, as the Me-Too Movement made painfully clear, the Bill 168 mechanisms weren’t working.

This fueled the drive for a new model culminating in federal Bill C-65, the implementing regulations for which were finally published on June 24. While both Bill 168 and C-65 both require employers to create workplace violence and harassment policies, provide training and investigate complaints, the latter requirements are much more detailed and leave less room for employer discretion. But C-65 adds some new employer requirements, including harassment assessments, emergency procedures and victim support.

Bottom Line

Most significant of all is the elaborate new process employers must use to ensure workplace violence and harassment complaints are investigated and resolved fairly and impartially. The idea is to give employees a greater say and confidence in the complaint process so that employees will actually come forward and report them the way they were afraid to do under the Bill 168 model. Expect other jurisdictions to adopt this system into their own OHS laws.

3. Court Sets Higher Bar for Marijuana Testing of Safety-Sensitive Employees

Even though it’s getting less attention, the court room conflict between employers and unions over the boundaries of drug testing as a workplace safety policy continues to rage, with nearly half a dozen important cases decided since the pandemic began. The most significant case comes out of Newfoundland and involves the perennial problem of marijuana testing, namely, that a positive test doesn’t prove *impairment at the time of testing* because continues to metabolize hours after the high is gone.

In this case, the employer wouldn’t hire a construction worker who admitted to legally vaping 1.5 grams of medical marijuana containing high THC levels after work for Crohn’s disease pain. The worker was entitled to accommodations, the Newfoundland arbitrator ruled, but without a test capable of detecting current impairment, hiring him for a safety-sensitive job would be undue hardship.

The case came to the Newfound Court of Appeal which concluded that lack of a test is too easy an excuse since all employers must do to deny employment to marijuana users is show their jobs are safety-sensitive. The standard should be higher, said the Court. Maybe there are other ways to determine a worker’s fitness for duty, like a daily pre-shift functional assessment. Employers should

have to prove they considered these alternatives and explain why they were rejected [*IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20 (CanLII), June 4, 2020].

Bottom Line

Although binding only in Newfoundland, the *Lower Churchill* case could prove influential elsewhere. There's also the chance of a Canadian Supreme Court appeal. But it's far from assured that the high court would take the case, let alone strike it down.

4. Termination Notice Limits Get Even Harder to Enforce—at Least in Ontario

Terminating an employee without cause can cost a small fortune. Consequently, employers commonly include a contract clause purporting to waive an employee's so called "common-law notice" in the event of without cause termination and agreement to accept just the entitlements required by the jurisdiction's employment standards (ESA) laws. It sounds good but these clauses are very hard to enforce. And a new Ontario case takes things to a new level.

The contract of a sales director terminated without cause had a provision limiting his notice for without cause termination to the minimum required by the Ontario ESA, in this case, 2 weeks' notice. The director conceded the clause ("Clause 1") was valid and enforceable but pointed to a drafting flaw that made the other clause ("Clause 2") dealing with termination for cause illegal under the Ontario ESA. The employer conceded that Clause 2 was illegal but claimed it was a moot point because the clause dealt with . After all, termination for cause and the director was terminated without cause.

The director claimed that Clauses 1 and 2 were a package deal and that if any one of them was illegal, the entire termination provision was illegal. And the Ontario Court of Appeal agreed. Employment agreements should "be interpreted as a whole and not on a piecemeal basis." The whole point of the ESA is to rectify the imbalance between employers and employees. And if one part of a provision violates the ESA, the whole provision is illegal, even if the employer relies on the part that's legal. Result: The Clause 1 limit on notice for termination without cause was unenforceable and the director could sue for common-law notice [*Waksdale v. Swegon North America Inc.*, 2020 ONCA 391 (CanLII), June 17, 2020].

Bottom Line

The previous standard for limits on termination notices purporting to waive an employee's common-law notice rights is that they had to be not only consistent with ESA requirements but also totally clear and unambiguous. *Waksdale* takes the scrutiny to a new level by requiring not only perfect clarity but perfection itself, at least as far as ESA compliance goes. If any part of a termination notice limit runs afoul of the ESA, the entire provision is invalid, even if the poisonous part didn't figure into the case. Adding to the angst is that the contract in *Waksdale* had a common provision known as a severability clause saying that if one part of the agreement is illegal, the parties agree to sever it and apply the rest of the contract. But the Court was unimpressed. Severability provisions can't save "termination provisions that purport to contract out of the provisions of the ESA."

5. Bill 32: Alberta ESC Gets a Pro-Employer Makeover

Most jurisdictions have revised their ESAs in response to the pandemic, e.g., by providing COVID-19 leave or extending the duration of temporary layoffs. But Alberta Bill 32, aka, *Restoring Balance in Alberta's Workplace Act*, isn't just a temporary tweak but a package of pro-employer and permanent changes designed to counterbalance the pro-employee changes contained in Bill 17, aka, *Fair and Family-Friendly Workplaces Act*, adopted by Alberta's previous Liberal government in 2017.

Bottom Line

Barring something totally unforeseen, Bill 32 will pass and take effect this year. Highlights:

- Longer temporary layoffs;
- Elimination of group termination notice requirements;
- Employer right to unilaterally impose compressed work weeks;
- Longer averaging agreements;
- Employer control over date of final earnings payments; and
- Employer right to deduct over payments without consent.