HR Year In Review: The 5 Biggest HR Compliance Stories of 2018



In a year unprecedented for the sheer volume of significant new employment legislation, the biggest story of 2018 was one that had only a peripheral impact on HR, namely, the legalization of recreational cannabis. Much of the year was a scramble to prepare for and worry about what legalized pot would do to workplace safety, not to mention productivity. And while this was playing out, significant employment standards changes were being made across the country to help employees balance family and employment obligations. Meanwhile, the Me-Too aftershocks were driving efforts to reshape workplace harassment laws. Here's a big picture overview and look at the year's 5 biggest stories in HR.

1. **Cannabis Legalization**

On October 17, after a 3-month delay, Canada became the second country to legalize recreational cannabis. The primary impact of legalization on HR directors was to make review of current workplace drugs and alcohol policies an urgent priority. (HRI Resources: The 14 Things to Include in a Fitness for Duty Policy; How to Create Fitness for Duty Policy; Model Substance Abuse & Fitness for Duty Policy)

Trends & Predictions: Legalization was rushed through without complete consideration of its impact on workplace safety. Over the coming years, each province will face the challenge of catching up. The good news for employers is that there's enough in current legislation to not only justify but also compel vigorous efforts to ensure workers aren't impaired by cannabis—not to mention alcohol and other drugs, whether legal or illegal—at the workplace including:

- The employer's OHS law duty to take reasonably necessary measures to protect workers against known and foreseeable risks;
- The worker's OHS duty to work safely;
- Current OHS regulations banning workers from being or staying on the workplace while impaired;
- Indoor smoking laws, which have been broadened to include cannabis; and
- Traffic safety laws banning impaired driving.

2. **The Litigation War Over Drug Testing**

Although drug testing is hardly a new issue, cannabis legalization has infused it with a new sense of urgency with court and arbitration cases providing the

battleground. The war, which pits the employer's duty to ensure a safe workplace against the employee's right to privacy, is being waged on 2 fronts:

Random: Because it's suspicionless, random drug testing is the most difficult to justify. A 2013 Canadian Supreme Court case called *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp and Paper Ltd.* set the bar high. According to the Court, while a dangerous workplace and the safety-sensitive nature of job may be enough to justify *post-incident* testing, an employer must also provide evidence of a history of worker alcohol or drug use at the site to justify *random* testing. But as 2017 came to a close, an Alberta court went against even this exacting standard by not allowing Suncor to enforce a random testing policy for safety-sensitive oilsands workers *despite* evidence of rampant drug use at the site [*Unifor, Local 707A v Suncor Energy Inc*]. Just 3 weeks into 2018, a BC arbitrator ruled against random testing of coal miners due to the lack of evidence of drug problems at the site [*Teck Coal Ltd. (Fording River and Elkview Operations) v United Steelworkers, Locals 7884 And 9346*].

Post-Incident: Although less controversial than random testing, post-incident (or for-cause) testing is also problematic, especially when it's overused. In July, a Newfoundland helicopter transport company learned this lesson the hard way when a court upheld reinstatement of an offshore oil worker fired for failing a post-incident drug test. By treating each and every incident as a "significant safety incident" triggering testing, the employer essentially turned a for-cause into a random testing policy, the court reasoned [*Hibernia Platform Employers' Organization v Communications, Energy and Paperworkers Union (Unifor, Local 2121)*].

Trends & Predictions: Random drug testing will remain extremely difficult to justify. But not impossible. Keep in mind that the *Suncor* case wasn't about the legality of the testing policy itself but whether the company could enforce it before the arbitrator ultimately ruled on its legality. A similar situation occurred in Ontario last year when a court found that the Toronto Transit Commission could enforce a random testing policy and refused to issue an injunction. Still, look for companies to take a page out of Suncor's book and seek union approval of random testing rather than imposing it unilaterally.

3. **The Me-Too Harassment Shakeout**

Last year's biggest story—not just in HR but *all walks of public life*—continued to reverberate in 2018. The Me-Too explosion of workplace sex harassment and assault allegations punctured complacency among not only companies and HR directors but also lawmakers. For decades, legislative assemblies had remained exempt from the sex harassment laws they enacted for the private sector. But 2018 witnessed the end of that grotesque irony as assemblies and other government agencies across the country adopted internal codes of conduct and sensitivity training programs to promote civilized workplace behaviour and prevent harassment. The other legislative impact of Me-Too was the new or expanded workplace harassment requirements adopted in 5 jurisdictions:

Jurisdiction	New Workplace Harassment Laws Adopted in 2018
Federal	Strict new OHS workplace harassment rules under Bill C-65 took effect Oct. 25
Alberta	New OHS employer, supervisor and worker harassment duties under Bill 30 took effect June 1
New Brunswick	New workplace harassment regulations under newly created Part XX.1 of the OHS Regs. published in May and take effect April 1, 2019

Prince Edward Isl.	New OHS workplace harassment laws under Bill 42 adopted in December
Québec	Expanded LSC psychological harassment laws under Bill 176 pass in Sept. and take effect Jan. 1, 2019

Trends & Predictions: The Me-Too-induced workplace harassment law makeover will continue in 2019. Most of Canada's existing harassment laws are based on Ontario's Bill 168, which took effect in 2010 and improved on previous legislation by making prevention of workplace harassment an express duty under OHS laws and requiring employers to implement not just policies but programs addressing violence and harassment. Future laws will likely incorporate the improvements contained in newly adopted federal Bill C-65, including:

- Employee rights to have harassment complaints investigated and mediated by an objective third party;
- Stronger privacy protections for employees who file or are involved in harassment complaints; and
- Longer deadlines for employees to file harassment complaints, including for a period after their employment ends.

4. **New & Expanded Employee Family Leave Rights**

In 2017, the federal government's adopted measures to help working Canadians balance employment and family obligations, including enhanced EI maternity and parental benefits and rights and corresponding changes to *Canada Labour Code* family leave rules. This year, the provinces and territories revised (or began revising) their ESA laws in accordance with the federal changes and, in many cases, creating new employee family-based and domestic violence leave rights.

Province or Territory	Increased parental leave	New 8 weeks' extra shared parental leave	Caregiving lead extend to adult, not just child family members	New domestic violence leave	Other
Alberta	√	√	√	√	New family responsibility, long-term injury, bereavement, critical child illness and child disappearance leaves
BC	√	√	√		New child death and disappearance leaves, compassionate care leave extended from 8 to 27 weeks
Manitoba	√	√	√	Already existed	
New Bruns.	√		√	√	
Newfoundland	√	√	√	√	
Nova Scotia	√	√	√	√	Elimination of waiting period for parental and pregnancy leave

Ontario	√	√	√	√	New child death and crime disappearance, critical illness and increased family medical and personal emergency leave
PEI	√	√	√	√	Increases to adoption and compassionate care leaves and decrease to waiting period for sick leave
Québec	√	√	√	√	New child death leave and increases to child disappearance and suicide leave and paid adoption, miscarriage, organ donor and bereavement leave
Saskatchewan	√	√	√	√	
NW Territories	√	√	√	√	New family caregiver for child leave and expansion of compassionate care leave
Nunavut					
Yukon	√	√	√		New family caregiver for child leave and expansion of compassionate care leave

Trends & Predictions: Expect BC and Nunavut to add domestic violence leave to their own ESA laws in 2019.

5. **Pay Equity for the Private Sector**

Paying women less than men for equivalent work has long been illegal under human rights and employment standards laws. Most jurisdictions also have pay equity laws requiring public sector employers to take active measures to identify and eliminate gender-based pay disparities. Québec, and Ontario are the only provinces where pay equity laws also apply to the private sector. But that’s about to change. The 2018 federal budget bill, Bill C-86, extends pay equity to private companies subject to the *Canada Labour Code*. And now several other provinces are talking about adopting private sector pay equity laws of their own, including New Brunswick which has already tabled legislation.

Trends & Predictions: Expect other provinces, especially Alberta and BC, to explore pay equity legislation in the coming year. Pay equity is also likely to expand beyond gender to employment status and guarantees of equality of pay between full-time and part-time, seasonal, temporary and other employees doing equivalent work. Employment-status pay equity is part of Bill 176 taking effect in Québec on Jan. 1, 2019. It was also included in Ontario Bill 148 but was one of the provisions the new PC government revoked under Bill 47.