

## Five New Year's Resolutions for Ontario Employers

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Ontario employers can be forgiven for a lack of enthusiasm in ringing in 2018. Several significant changes to the *Employment Standards Act, 2000* (the "ESA") come into effect as of January 1, 2018 and many employers are scrambling to ensure that their policies and practices are up to date. However, the ESA amendments are not the only employment issues that should be on your radar for 2018. We've put together a short list of suggested New Year's resolutions to help employers proactively address potential workplace issues in 2018 and beyond.

### 1. Conduct a Compliance Check with the New ESA Requirements

As of January 1, 2018, the following new (or revised) employment standards are in effect in Ontario:

- General minimum wage: \$14.00 per hour
- Paid vacation: 3 weeks per year after 5 years of service
- New formula for calculating public holiday pay wherein the calculation is to be based on number of days actually worked in the pay period immediately preceding the public holiday
- Employees who work in more than one position for an employer must be paid overtime calculated on the rate for the position that they are working in during the overtime period
- Employees of temporary help agencies have the right to receive one week of notice or pay in lieu if an assignment that was scheduled to last longer than 3 months is terminated early, unless another assignment of at least one week is offered to the employee

In addition, the following new or updated leaves of absence come into effect:

- Personal emergency leave: 10 days, the first 2 of which must be paid (50-employee threshold eliminated; Employers prohibited from requiring a doctor's note for this leave)
- Family medical leave: 28 weeks in a 52-week period
- Pregnancy leave for still births/miscarriages: 12 weeks
- Child death leave: 104 weeks following the death of a child
- Crime-related child disappearance leave: 104 weeks
- Domestic or sexual violence leave: 10 days and 15 weeks in each calendar year, the first five days of which must be paid

### 2. Update Your Policies to Address Legalized Cannabis

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As of July 1, 2018, cannabis will be legalized across Canada. Ontario is still in the process of developing its procedure for regulating the purchase and sale of cannabis products but currently there is no indication of explicit guidance from the province on workplace impacts. Employers must assess how best to respond to the legalization of cannabis in light of their commitment to provide employees with a safe and productive workplace. We recommend reviewing and, if necessary, updating your drug and alcohol policies to ensure that marijuana is not referred to as an “illegal drug.” We also recommend focusing your policies on concepts of safety and impairment. Regardless of whether or not cannabis is legal, no employee has the right to report to work unfit for duty. Supervisors and human resources professionals should be provided with education on how to identify and respond to potential impairment. They should also be cautioned against jumping to conclusions when a cannabis product is found on the worksite. Certain cannabis products do not cause impairment and can be used safely at work.

### **3. Focus on Internal Investigations**

Under the *Occupational Health & Safety Act*, Ontario employers have an obligation to investigate any claim of workplace harassment in a manner that is “appropriate to the circumstances.” The Ministry of Labour retains the right to order the employer to retain an external investigator or to re-investigate the complaint if the Ministry inspector is not satisfied that the initial investigation was sufficient. In addition to these statutory obligations, we have seen recent court decisions holding employers liable for damages caused by allegedly faulty workplace investigations. For instance, in *Lalonde v. Sena Solid Waste Holdings Inc.* (2017 ABQB 374 (CanLII)), an Alberta decision, Mr. Lalonde was awarded \$75,000 in aggravated damages after the Court found that his employer had conducted an improper investigation into his alleged misconduct and then fired him without just cause. Having an internal resource who has been trained on how to conduct a sound, procedurally fair and compliant investigation into alleged workplace misconduct puts employers in a position to respond promptly to internal complaints and avoid unnecessary litigation risk.

### **4. Front Line Training on Accommodation and Disability**

Most employers have excellent policies on disability and accommodation. Risk arises when there is a gap between policy and practice. Although your human resources team and legal counsel may be well-positioned to respond appropriately to disability in the workplace, the reality is that front line supervisors and managers are most often the first line of communication for requests for accommodation. Anyone who manages people on behalf of your company should receive a primer on the significance of a request for accommodation on the basis of disability and how to respond to such requests, whether they are formal or informal. They should also be trained on the potential legal risks for the company where disability issues are mismanaged or ignored.

### **5. Review Bonus and Commission Templates – Again**

After *Paquette v. TeraGo Networks*, 2016 ONCA 618 and *Lin v. Ontario Teachers’ Pension Plan*, 2016

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ONCA 619 in 2016, 2017 gave us more decisions considering how and when employees who have had their employment terminated can seek payment of incentive during the contractual or common law notice period. Two Court of Appeal decisions (*Styles v. Alberta Investment Management Corporation*, 2017 ABCA 1 (*Styles*) and *Kielb v National Money Mart Company*, 2017 ONCA 356) gave employers helpful guidance on how to craft their incentive plans to ensure that bonus monies are not paid out to employees who have been exited from the company. As always, the focus should be on creating clear and unambiguous language that deals specifically with entitlement post-termination without falling afoul of the ESA. A simple reference to “active employment” may not be sufficient. We encourage employers to use these decisions to review their incentive agreements and policies to ensure that they accurately reflect their expectations regarding eligibility for payout.

Another developing issue to keep an eye on is the Ontario government’s review of exemptions under the ESA. It is expected that 2018 will bring even more changes to the ESA, primarily focused on industry-based exemptions to standards regarding overtime, hours of work and public holiday pay. Any Ontario employers who rely on such exemptions should keep a close watch to see what emerges from the Ontario government’s latest review. If it is anything like the Changing Workplaces Review, we can expect to see some significant changes.

For further information on these issues or for assistance with making your own HR New Year’s Resolutions, please reach out to any member of the Cassels Employment & Labour law group.

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