

# Hot topics and recent developments in labour and employment law

**The webinar will begin shortly.**

**The presentation materials are attached to the right hand side of your screen.**

June 19, 2019

# Alcohol & drug testing

April Kosten

June 19, 2019

# Agenda

- Statutory Obligations to Ensure Safe Workplace
- Implications of Legalization of Cannabis
- Types of A&D Testing

# Statutory obligations to ensure safe workplace

- General duties under AB OH&S Act

*3(1) Every employer shall ensure, as far as it is reasonably practicable for the employer to do so,*

*(a) the health and safety and welfare of*

*(i) workers engaged in the work of that employer ...*

*...*

*5 Every worker shall, while engaged in an occupation,*

*(a) take reasonable care to protect the health and safety of the worker and of other persons at or in the vicinity of the work site while the worker is working, and*

*(b) co-operate with the worker's supervisor or employer for the purposes of protecting the health and safety of*

*(i) the worker,*

*(ii) other workers engaged in the work of the employer ...*

- Health & safety **joint** responsibility of management & employees

# Statutory obligations to ensure safe workplace

- AB OH&S Code imposes duties to assess & identify existing & potential workplace hazards
- Similar obligations in other Canadian jurisdictions
- A&D may constitute workplace hazard
- If hazard identified, employers have legal obligation to take corrective steps to eliminate, or if not reasonably practicable, control hazard

# Statutory obligations to ensure safe workplace

- *Criminal Code s. 217.1: Every one who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.*
- *R v Metron Construction Corp*
  - Employer pled guilty to criminal negligence causing death
  - 6 workers boarded swing stages; only 2 harnesses
  - Swing stage collapsed; 4 workers died
  - Toxicological analysis determined 3 of deceased recently ingested cannabis, including site supervisor
  - Plea included statement that permitting person under influence of drugs to work on project can be factor in establishing criminal negligence
  - Employer received fine of \$200,000; ONCA increased fine to \$750,000

# Legalization of cannabis

- Bill C-45, *Cannabis Act*, came into force October 17, 2018 – sale & recreational use legal
- *Cannabis Regulations* came into force at same time, establish applicable rules & standards
- Edible cannabis, extracts & topicals
  - Legal sale authorized as of October 17, 2019, or earlier by order
- Significant discretion left to provinces
- **Does not address cannabis in workplace**
- Medical access framework remains in place

# Cannabis use & statistics

- Employers can expect increase in employee use of cannabis with legalization
- In Colorado, prevalence for cannabis use in past 30 days for young adults (18-25), went from 21% in 2006 (pre-commercialization) to 31% in 2014 (post-commercialization)
  - *National Survey on Drug Use and Health, administered by the Substance Abuse and Mental Health Services Administration*
- Cannabis use in last 30 days among Colorado adults increased to 15.5% in 2017; significant increase in 26-34 age group (19.8% in 2014, 26.4% in 2017)
  - *Colorado Behavioral Risk Factor Surveillance Survey, Colorado Department of Public Health & Environment*

# Cannabis use & performance deficits

- ***Studies confirm correlation between cannabis use & injury***
  - Male cannabis users have 28% higher rate of hospitalization due to injury, female users 27% higher rate (Goodwin et al, 2003)
- ***Cannabis use incompatible with safety-sensitive work environments***
  - Cannabis associated with psychomotor & cognitive deficits including:
    - Visual disturbances, inability to concentrate, decreased motor control, decreased ability to respond quickly to events, inability to drive safely, poor short-term memory, increased accidents & fatalities (Couper & Logan, 2004)
  - “[A]ny situation in which safety both for self and others depends upon alertness and capability of control of [human]-machine interaction precludes the use of cannabis” (M. Huestis, 2002)

# Cannabis use & performance deficits (cont'd)

- ***Performance deficits of cannabis can last for days & users may be unaware of effects***
  - Studies show performance deficits can last up to 2 days after use of single low dose of cannabis (Heishman et al, 1990)
  - Performance can be impaired up to 24 hours after smoking moderate social dose & users may be unaware of drug's influence (Leirer et al, 1991)
- ***Additional performance deficits associated with long-term cannabis use***
  - Studies show chronic daily users have poorer cognitive & psychomotor performance deficits than occasional users during 3 week period of abstinence
  - Chronic users also slower in initiating responses & have poor performance on critical tasks (Bosker et al, 2013)
- ***Cannabis has recognized abstinence & withdrawal syndrome***
  - Heavy cannabis users can experience observable adverse effects when abstaining
  - Symptoms include anxiety, violent & aggressive behaviour, which last typically for 3 to 7 days, but can last up to 28 days (Kouri & Pope, 2000)

# Employer obligations

## *Employers must take all reasonable steps to ensure safe workplace*

- Employers are not obligated to allow employees to use A&D
- Legalization of cannabis does not give employees right to use in close temporal proximity to work given performance deficits associated with use

## *Employers should use risk-management approach to manage cannabis risk in workplace*

- Focus on managing risks known to impact safe performance, including cannabis use. Not about whether substance is legal or illegal
- Employers must manage safety risk given performance deficits associated with cannabis use
- Similar approach to alcohol

# A&D testing types

- Reasonable cause
- Post-incident
- Return to work
- Unannounced follow-up (post-treatment)
- Pre-employment & pre-access
- Certification
- Random

# Reasonable cause

- Justified when employee exhibits, or other evidence points to, performance deficits sufficient to give employer reasonable belief to suspect employee may be under influence of A&D
  - Strange behavior
  - Odours (ensure odour coming from individual not environment)
  - Slurred speech
- No need for incident to trigger test
- Assess whether both alcohol and drug test required

# Post-incident

- Employee directly involved in workplace incident or near miss
- 3 main factors to consider:
  - Seriousness of incident
  - Level of inquiry carried out before test
    - Dependent on facts
    - Investigation will be time constrained
    - Always seek explanation from employee
    - Cannot call test just because injury
  - Nexus between incident & employee
- Evidence of “impairment” not required

## Pre-employment: *Chiasson v KBR*, AHRC (2005), rev'd QB (2006), aff'd CA (2007), leave to SCC ref'd (2008)

- Pre-employment A&D testing policy
- Chiasson tested positive for marijuana & terminated
- Argued termination discriminatory
- Casual user so human rights not engaged
- Policy perceives persons who use A&D are safety risk, clear connection between policy & purpose, not breach of *Act*
  - *“Extending human rights protections to situations resulting in placing the lives of others at risk flies in the face to logic”*

## Pre-access: *Luka v Lockerbie*, AHRC (2008), rev'd QB (2009), rev'd CA (2011)

- Site owner requirement that contractors implement pre-access testing
- Luka tested positive for marijuana & denied access to site
- Alleged discrimination
- HRC found no *prima facie* discrimination
- HRC found both site owner & contractor employers under *Act*
- ABCA found site owner not employer & obligations under *Act* were contractor's

## Pre-access: *mechanical contractors v UA, local 663 (sarnia)*, ont arb (2013), aff'd ONSC (2014)

- Pre-access A&D testing required for contractors
- Found pre-access testing may be justified if demonstrated A&D problem at safety-sensitive workplace
- Onus on employer to demonstrate with evidence that testing reasonably necessary (not merely desirable) & likely to have desired effect
- No demonstrable need for pre-access A&D testing sufficient to justify invasion of privacy
- Upheld on judicial review

## Random: *Irving*, SCC (2013)

- First SCC decision regarding random testing
- Obligation to balance privacy vs. safety
- Finding workplace is dangerous is first step in determining if random testing reasonable – begins proportionality exercise:
  - *[a] unilaterally imposed policy of mandatory random testing for employees in a dangerous workplace has been overwhelmingly rejected as an unjustified affront to the dignity and privacy of employees unless there is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace*

# Random: *Suncor*

- Site-specific random A&D testing for safety-sensitive & specified positions
- Arbitration (2014)
  - Majority found random testing standard in “present form” unreasonable
  - No evidence of workplace problem
- ABQB (2014)
  - Majority decision unreasonable
  - Unwarranted elevation of *Irving* test, by:
    - Requiring evidence of “significant” or “serious” problem
    - Requiring evidence of causal connection
  - “Workplace” safety is aggregate concept, Majority unreasonably narrowed test to evidence of bargaining unit members only
  - Majority ignored & misunderstood evidence
  - Arbitration decision quashed & sent back for rehearing
- Affirmed by ABCA (2017)

# Recommendations

- Employers implementing A&D testing should consider following:
  - Incremental measures in place
  - Robust education & training
  - Evidence of ongoing problem
  - Ensure policy reviewed & updated with reasonable frequency
  - Ensure justification in context of own work environment
- *Irving* confirms if evidence of enhanced safety risk such as general workplace problem with A&D random may be justified
- Review & update existing A&D policies for gap closures
  - Employers should not build policies around signs of impairment, rather focus should be on elevated risks associated with cannabis use
    - Positive test shows performance deficits incompatible with safety-sensitive work environment

## Recommendations (cont'd)

- Need for clear prohibition against cannabis use & possession in policies
- Address impaired & drugged driving offences
- Policies prohibiting alcohol while working should be updated to include cannabis
- Policies prohibiting recreational cannabis use (citing its illegality) will also need to be changed
- Policies should account for cannabis & derivatives (e.g. rolled cannabis cigarettes, edibles, vaporizers, etc.)
- Update all related policies, such as social hosting (to prevent cannabis use in all contexts)

# Thank you

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# The latest on workplace harassment and investigations

Andy Pushalik

June 19, 2019

# THE GLOBE AND MAIL

**New data show thousands of Ontario companies violating country's toughest anti-harassment law**

# Globe and mail article findings

- More than 3,500 employers were cited for labour violations by provincial inspectors over an 18-month period ending in January, 2018
- 7,800 infractions
- Restaurants were worst offenders

# No tort of sexual harassment – *Merrifield v. Canada (Attorney General)* (ONCA, 2019)

- Mr. Merrifield alleged managerial bullying and harassment:
  - Advising Mr. Merrifield that he could not do political investigations because of a conflict of interest
  - Reminding Mr. Merrifield of his obligation to comply with RCMP policies on media appearances after appearing on radio shows as a “terrorism consultant”
  - Investigating Mr. Merrifield to determine if his credit card use contravened the Code of Conduct
- Findings:
  - Case law did not support the recognition of an independent tort of harassment – harassment is not a civil wrong
  - There are existing legal remedies available to address alleged conduct
  - No other basis to recognize an independent tort of harassment

# ***Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343***

*On April 17, 2018, Bassanese wrote to Perske about “being constantly harassed by [Dhanani] yelling and screaming at me ... telling me that I am an idiot and that I should be fired, etc, etc.” She added, **“I am sorry Chris. I have never ever filed a complaint but I want you to step in and make sure this never happens again.”***

# ***Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343***

*Perske wrote back to Bassanese the same day, on April 17, 2018, stating, “Sorry to hear that. We’re a little short-staffed this week (2 illnesses, 1 sick child and a vacation) but I’ll run it by Anne Marie, she’s our HR person.”*

# ***Bassanese v. German Canadian News Company Limited et al., 2019 ONSC 1343***

- Employer did nothing to investigate
- On June 21, 2018, Bassanese alleges Dhanani slapped her across the face three times.
- Bassanese's employment was terminated for cause that same day.
- Findings
- Company did not file a Defence and was noted in default
- Court awarded 19 months' notice PLUS \$65,000 for damages for assault and battery and punitive damages and \$10,000 in legal fees

# Why investigate? Employer liability for workplace harassment

- Damages for intentional infliction of mental suffering
- Aggravated and/or punitive damages
- Redress under the *Occupational Health and Safety Act*
- Human rights damages
- Claim for chronic mental stress under the *Workplace Safety and Insurance Act*

# 10 steps to a credible workplace investigation

1. Receive information about the incident or complaint
2. Consider whether an investigation is required in the circumstances
3. Decide what type of investigation should be undertaken
4. Consider whether there are external reporting obligations
5. Choose an appropriate investigator
6. Start the investigation – implement appropriate interim measures and notify parties involved
7. Determine the logistics of the investigation
8. Conduct interviews
9. Prepare the investigation report
10. Act on the investigation report

# Key takeaways for workplace investigations

- Ensure that investigation complies with any relevant policies/legal requirements
- Give parties opportunity to be heard
- Consider all relevant evidence
- Be impartial
- Determine the proper scope of the investigation
- Well-reasoned report and conclusions
- Respect confidentiality of investigation
- Good self-check: “What would a judge think if he or she scrutinized everything that I did?”

# Thank you

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# Update on Québec's new draft regulation concerning personnel placement and temporary foreign recruiting agencies

Ryan Martin

June 19, 2019

# Legislative amendments to the *Act respecting labour standards*

- On June 12, 2018, the Québec government adopted the *Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance* (Bill 176)
- Bill 176 brought about numerous changes to the minimum labour standards in Québec
- It also laid down the groundwork for increased regulation of personnel placement agencies and temporary foreign recruiting agencies
- Briefly, Bill 176 provides that said agencies will be required to obtain a licence from the CNESST and there will be penal sanctions for both personnel placement agencies and temporary foreign recruiting agencies operating without a licence as well as for companies doing business with unlicensed agencies
- These provisions only come into effect once the government adopts a regulation regarding said agencies

# The Draft Regulation and definition of placement agency and foreign recruiting agency

- On April 10, 2019, the government published a draft (in French only) of the *Regulation respecting personnel placement agencies and recruitment agencies for temporary foreign workers*
- The Regulation provides for a very broad definition of what is a “personnel placement agency”:
  - A person, company, partnership or other entity will be considered to be a personnel placement agency if at least one of its activities consists of offering personnel supply services by providing workers to a client enterprise to meet their labour needs
  - A person, company, partnership or other entity will be considered to be a recruitment agency for temporary foreign workers if at least one of its activities consists of offering recruiting of temporary foreign workers for a client enterprise or assists the client in the process of recruiting such workers

# Licensing

- Under the Regulation, any entity/person that falls into one of the two broad definitions mentioned previously will need to apply for a licence in order to continue operating in Québec
- The entity must provide the CNESST with :
  - ✓ the business number attributed to the entity by the Québec Business Registrar (NEQ);
  - ✓ if the entity is a corporation, a signed resolution from the board of directors authorising the respondent to request the licence;
  - ✓ an attestation from Revenu Québec confirming that the corporation or entity is not in default of filing its tax declarations and reports pursuant to fiscal law;
  - ✓ A declaration by the respondent that the corporation or entity has or has not had any criminal or penal convictions in the past 5 years as well as the names of the officers at the time of said criminal or penal convictions and provide the CNESST upon request the documentation which attests that information;
- In order to obtain a licence the corporation/entity must also:
  - ✓ Pay the annual fees (\$1780 payable in two equal payments);
  - ✓ Provide the CNESST with a \$15,000 dollar surety;
  - ✓ Not be under an order of sequestration;
  - ✓ Not be in default of respecting an order rendered by the Administrative Labour Tribunal;
  - ✓ Did not provide any false declarations when submitting the form;
- Essentially, the officers of the corporation/entity must meet a series of criteria regarding transparency, integrity and solvency.

## Licensing (continued)

- Once issued, the licence is valid for a period of 2 years and is not transferable;
- When the holder of a licence wishes to renew same, they must present a new attestation from Revenu Québec and a new declaration regarding penal and criminal convictions. The holder is not obliged however to transmit information that has already been sent to the CNESST during the initial application;
- The renewal application must be done 60 days prior to the expiration of the licence and all the initial conditions must still be respected;

# Licence holder obligations towards the CNESST and the public

- Must inform the CNESST of any changes to any of the information provided to the CNESST during the application process;
- Respond to any request by the CNESST in the timeline and in the manner provided for by the latter;
- Display the licence or a copy of the licence in an area that is readable and in sight at its head office and every one of its establishments;
- Indicate its licence number on all documents frequently used during the course of business, on any publicity and notably on its bills, contracts and website;
- Keep a copy of all contracts with all enterprise clients for at least 6 years, as well as the bills relating to said contracts. They must also, for each employee, keep the information regarding the number of hours worked per day and per week for each enterprise client;

# Licence holder obligations towards the employees

- The licence holder must provide its employees the following:
  - ✓ A document describing the work conditions that are applicable to the employee during their assignment, notably the salary offered and the name and location of the client enterprise;
  - ✓ Documents provided for by the CNESST regarding the employee's rights and the employer's obligations in employment matters;
- The licence holder may not:
  - ✓ Require any fees from the employee relating to any training costs associated with the assignment or for the assistance or advice received for interview preparations, notably for drafting of tools required for job searching (example.: CV, cover letter, etc.);
  - ✓ Impose any restrictions upon the employee which would prevent the employee from being hired by the enterprise client after a period of 6 months following the beginning of the assignment;
- Additional obligations for agencies recruiting temporary foreign workers:
  - ✓ Cannot force the temporary foreign worker (TFW) to entrust custody of personal documents or property belonging to the TFW to the Employer;
  - ✓ Cannot require any worker fees, other than those authorised in application of a Canadian government program, related to the TFW's recruitment;
  - ✓ Inform the CNESST without delay of the TFW's date of arrival, the term of the contract and, if the departure date does not coincide with the end of the contract, of the departure date and the reasons for the departure.

# Disparity in treatment

- Upon the coming into force of the new Regulation, a new section of the *Act respecting labour standards* will also come in effect:
- Section 41.2 provides that no personnel placement agency may remunerate an employee at a lower rate than that granted to the employees of the client enterprise who perform the same tasks in the same establishment solely because of the employee's status, and in particular because the employee is remunerated by such an agency or usually works fewer hours each week.

# Administrative measures and recourses

- An agency whose licence application is denied, whose licence is suspended, revoked or not renewed, or on which an administrative measure is imposed (if obligations under the Act or regulation are not complied with) may contest such a decision before the Administrative Labour Tribunal within 30 days of notification of the decision;
- Any administrative measures that are imposed upon the corporation/entity regarding the suspension, revocation or non-renewal of a licence will be made public by the CNESST by adding a mention of said measure next to the name of the Company on its list of licence holders.

# Penal sanctions

- Any person who contravenes any provision of the *Act respecting labour standards* or its regulations (including the new draft regulation) is liable to a fine of \$600 to \$1,200 and, for any subsequent conviction, to a fine of \$1,200 to \$6,000.
- These fines will apply to any corporation or entity who acts as a personnel placement agency or temporary foreign worker recruiting agency without holding the proper licence.
- Will also apply to any corporation/entity who does business with an unlicensed agency.
- It will be important for businesses who currently use these types of agencies to ensure that the agency is properly licensed when the new regulation comes into effect.

## Next steps

- The Québec Minister of Labour, Employment and Social Solidarity provided for a 45 day consultation period beginning on April 10, 2019 which has since ended;
- At the end of the 45 day consultation period, the Minister may proceed with the formal publication of the Regulation which will come into effect 15 days after the publication;
- Agencies that are already operating on the date the draft regulation comes into effect may continue to do so provided that they apply for a licence with the CNESST within 45 days of that date;
- All of the provisions relating to placement agencies under the *Act respecting labour standards* will come into effect at the same time as the Regulation

# Thank you



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