

HR LAW CONVERSATIONS

2017'S BIGGEST ISSUES IN CANADIAN EMPLOYMENT LAW

By Heather Hudson



Marijuana, vacation pay claims and Bill 148 are just a few of the pressing topics on the minds of the Human Resources Professionals Association (HRPA)'s HR Law Conference co-chairs, David A. Whitten and James D. Heeney.

HR Professional sat down with the seasoned lawyers to get a sneak peek of what they'll be discussing and advising HR professionals about at this year's conference.

VACATION PAY CLAIMS

David Whitten: We've seen a real emergence of vacation pay claims as they relate to workers in the financial services, insurance, banking and other industries who are heavily compensated with bonuses or commissions. Some employers are contributing vacation pay based on a modest base salary, not the total earnings. As a result, there are a lot of class action lawsuits brewing. Employers have significant exposure and I advise them to get their heads out of the sand. The days of glossing over these entitlements are long gone. You can read more about vacation pay claims in this issue of *HR Professional* on page 37.

One thing for HR professionals to note is that there's normally a limitation period that limits damage claims going back two years, but if there's an ongoing violation, that limitation may not apply. Practically this means that employers could be hit with vacation pay claims that go back far beyond two years, which is a huge exposure.

James Heeney: If you have this problem with one employee, you probably have it with all your employees. It can really compound. [To ensure due diligence], one of our clients proactively looked at a whole bunch of issues from the perspective of the Ministry of Labour to try to help them identify problems. It's not an expensive process to do and it can help identify risk areas.

BILL 148, FAIR WORKPLACES, BETTER JOBS ACT, 2017

Whitten: Bill 148 goes far beyond what is necessary in Ontario to right some wrongs in the workplace and is a classic example of pol-tricking. The Wynne government released this sweeping bill with no regard to how it will impact employers. Some of the changes are good, but the vast majority of them ignore the impact on small- to medium-sized businesses, including increasing minimum wage.

I think we'll see that employers, particularly in the service industry, may start to do things like staff at a bare-bones level to compensate. People who do go in will be overwhelmed, causing increased stress and injuries on the job. Bill 148 will encourage employers to relocate manufacturing outside of Ontario. It really could be the death knell of manufacturing in Ontario.

Heeney: Increased rights for employees are great but if you don't do it in a slow, measured way it can negatively impact the very people you're trying to help. Bill 148 may take jobs, particularly in manufacturing. Is that better? I don't know that it is.

Read the feature article about Bill 148 in this issue of *HR Professional* on page 22.

EFFECTS OF MARIJUANA LEGALIZATION IN THE WORKPLACE

Heeney: In one respect, this issue is a bit of a red herring because, as an employee, you can't be under the influence of a prescription drug and perform your duties. It would be no different than having rules for taking serious back medication and driving a forklift. When it comes to safety-sensitive jobs, the rules won't change.

It's the desk jobs where there's no safety issue that will be harder to work out. If someone doesn't have a safety-sensitive job, can that person take marijuana and then go back to their job and work? Will it have some influence on their ability to do their duties?

Whitten: In a workplace, you need a medical note confirming that you need to smoke during the day and that note needs to include specific parameters. Just because you have a prescription for medical marijuana doesn't mean you get a free pass when it comes to accountability and performance. This will unfold in the workplace in curious ways.

Heeney: Yes, one of the largest issues employers and employees have with disability management is the effort some doctors put into prescription parameters compared to others. As the medical marijuana issue continues to grow, an emphasis will be on employers to take steps to be sure there are detailed instructions and that doctors have thought it through.

Whitten: Employers can exercise their right to ask questions. If you get a doctor's note that this person needs to smoke marijuana, that's not enough. You're entitled to delve deeper about how frequently it's administered, whether there are alternatives and if it's long-term. Be clinical when asking questions to tailor policies around it.

Read the article about marijuana and the workplace on page 35.

HOW HR PROFESSIONALS CAN GET THE MOST OUT OF THEIR RELATIONSHIP WITH EMPLOYMENT COUNSEL

Whitten: Employers need to get a better understanding of why lawyers recommend what we do. Sometimes a disconnect with employers happens when we suggest the two paths: one is expensive litigation and one is to make it quietly go away with a confidentiality agreement and payment. At this year's conference, we'll share what we're thinking when we advise you, what you should be thinking about when taking advice and what information you should provide to ensure we can come up with best strategy.

Heeney: The average human rights complaint award is between \$15,000 and \$20,000. If you have a complaint asking for \$35,000, even if the facts don't support it, you have to weigh how bad it might be for the brand. Sometimes you have to give more than you want to in the best interest of closure.

This year's HRPA HR Law Conference is October 19, 2017 in Toronto. For more information and to register, visit hrpa.ca and search "HRPA HR Law Conference" or click [here](#). ■