

Compliance Forecast: The 6 Biggest Trends in OHS Law & Compliance



Society changes much faster than the laws that regulate it. Thus, while the Industrial Revolution began in the early 19th century, OHS laws protecting workers from its ravages weren't in place until the 1970s. Nearly 40 years later, we are undergoing the next phase in the evolution of those laws. The impetus for this adjustment is the recognition that occupational hazards go beyond things like electricity, machinery and other physical forces, equipment and materials but also include social conditions affecting a worker's mental and psychological well-being. The reworking of 20th century laws for 21st century work conditions is the overarching theme of the current OHS year. And while this long term trend has been unfolding for a long time, the uncertainty and concern over legalization of recreational marijuana adds a dimension of immediacy and urgency to 2017-18.

1. Workplace Harassment Morphs into an OHS Issue

The extension of OHS regulation into the realm of social behaviour and psychological well-being began with workplace violence. Although impossible to pinpoint a precise moment, the OC Transpo massacre of April 6, 1999 in which a

disaffected and disturbed transit worker shot 5 co-workers before turning the gun on himself was a turning point prompting provinces to adopt new OHS regulations requiring employers to take specific steps to assess and control violence hazards at their own workplaces.

What started with violence has, inevitably and logically, expanded to harassment. Qu bec was the trailblazer adopting new legal protections psychological harassment in 1999 (although technically as part of the *Labour Standards Act* (LSA) and not the OHS laws). In 2010, Ontario became the first province to make protection from not just workplace violence but also harassment a duty under its OHS laws. Bill 168 also broke new ground by extending violence obligations to domestic violence in the workplace and requiring employers to investigate incidents of violence and harassment. Bill 168 has since proved a model for other provinces.

The past 12 months has witnessed unprecedented activity with no fewer than 6 different jurisdictions adopting (or in the process of) new OHS workplace violence and harassment requirements:

Table 1. New OHS Workplace Harassment & Violence Initiatives in 2017-2018

Jurisdiction	Initiative
Federal	Bill C-65 extending current OHS workplace violence protections to harassment passes and is poised to take effect
Alberta	New workplace violence protections for late night gas station and retail convenience store workers (under Bill 19) take effect June 1, 2018

New Brunswick	New workplace violence and harassment requirements (Part XXII.1) of OHS Regulations patterned after Ontario Bill 168 take effect May 16, 2018
Prince Edward Island	New OHS regulations requiring measures to prevent workplace harassment patterned after Ontario Bill 168 under public review and will soon take effect
Qu�bec	Expansion of psychological harassment protections are included in the LSA reform legislation (Bill 176) working its way through the Assembly and likely to take effect in 2019
BC	WorkSafeBC to conduct a full-scale review of its current OHS workplace harassment and bullying laws as part of 2018-20 strategic plan

Trends & Predictions: Sexual and other forms of workplace harassment have traditionally been the domain of HR. The reinvention of those protections as OHS rights will require HR and EHS managers to work together'especially as OHS authorities are stepping up their so far anemic efforts to enforce existing workplace violence and harassment laws:

- Best case scenario: Coordinated and effective inter-departmental action;
- Worst case scenario: Wasteful and distracting turf wars.

2. Expanded Coverage of Work-Related Mental Stress

The same forces driving expansion of OHS laws to workplace harassment is fueling another major trend in current OHS law: expanded workers' comp coverage for PTSD and other mental stress. Historically, such injuries were presumed to be non-work-related. To rebut the presumption, workers had to show that the mental damage was the result of a discrete event(s) that happened at work, e.g., watching a co-worker get killed

in a gory machine entanglement. Without such a discrete event, it would be impossible to rule out the likelihood that non-work causes caused or at least contributed to the mental injury. Or so the argument went.

Making it even harder to qualify for benefits was that the traumatic event also had to be 'objective.' Explanation: The fact that an event proved traumatic to that particular worker wasn't enough; an event was deemed traumatic only if a 'reasonable' worker would have found it traumatic.

As OHS protection evolves to encompass not just physical but psychological and mental hazards, liberalization of these grudging coverage rules was all but inevitable, particularly given modern scientific studies showing that mental injuries generally develop gradually over time and not in one fell swoop. Over the past decade, reform efforts have followed 2 basic patterns:

- Incremental changes to workers' comp legislation establishing the presumption that PTSD and other mental disorders are work-related when suffered by first responders, firefighters and workers in other high stress occupations;
- General workers' comp board internal policy changes extending the presumption to all workers, regardless of industry or occupation or otherwise expanding coverage of mental stress beyond traumatic events.

One of the biggest stories of the past year was the Ontario WSIB's decision to take the latter path. Policy 15-03-14, which took effect on Jan. 1, 2018 makes it easier for workers to get benefits for chronic mental stress, i.e., mental stress caused not by discrete traumatic events but 'substantial work-related stressors, including bullying.' To qualify for coverage under the new Policy, workers must:

- Get a professional diagnosis of mental stress injury

based on the Diagnostic and Statistical Manual of Mental Disorders;

- Prove they suffered a substantial work-related stressor(s) like bullying or harassment at work; and
- Prove that the stressor was the predominant cause of the diagnosed mental stress injury.

Alberta did the same as part of its Bill 30 workers' comp reforms.

Table 1. Workers' Comp Mental Stress Coverage Initiatives in 2017-2018

Jurisdiction	Initiative
Ontario	Policy 15-03-14 expanding coverage for chronic mental stress due to substantial work-related stressors takes effect Jan. 1, 2108
Alberta	New WSB policy extending presumption that PTSD and other psychological injuries are work-related which had previously applied to EMT workers to cover <i>all</i> workers takes effect April 1, 2018 (as part of Bill 30)
BC	Proposed legislation (Bill 9) making it easier for first responders and corrections officers to get workers' comp benefits for PTSD and other mental disorders gets third reading and likely to take effect before end of 2018
Nova Scotia	New legislation (Bill 7) creating presumption that PTSD suffered by emergency response worker is work-related adopted in Oct. 2017
Newfoundland	WorkplaceNL ends public review and is set to adopt changes to Policy EN-18 to expand workers' comp coverage for mental stress beyond traumatic events to stress that develops gradually over time

Prince Edward Island	WCB loosens definition of 'impairment' (under Sec. 1(1)(n) of the <i>Workers' Compensation Act</i>) to encompass not just physical but psychological conditions like PTSD and ongoing symptoms like chronic pain
Northwest Territories & Nunavut	WSCC amends Policy 03.09 to expand PTSD and mental stress coverage beyond discrete traumatic events to include stress that develops gradually over time
Yukon	Bill 8 adopted making PTSD presumably work-related for emergency response workers including paramedics, firefighters and police officers

Trends & Predictions: The PTSD coverage trend is inevitable and irreversible'even though a few holdouts remain, e.g., Saskatchewan. One dramatic example of this was the decision of the PEI Workers' Comp Board to award benefits to the widow of a worker who suffered a fatal heart attack as a result of being bullied by his supervisor at work. So, it behooves you to expand the scope of your OHS program to mental and psychological injuries and implement proactive measures such as counselling or EAP programs to help your workers cope with workplace stressors in the interest of not only preventing workers' comp claims but enhancing productivity and morale.

3. Stepped Up OHS Enforcement

OHS prosecutions and penalties have been steadily increasing for over a decade. More troubling for employers, however, are the new laws increasing not just penalties but the authority of the enforcement officials that impose them. So far this year, 4 different jurisdictions have or are in the process of adopting such laws.

Again, Ontario is in the vanguard. In addition to tripling corporate and quadrupling individual fines, Bill 177 increases liability risks by extending the statute of limitation for laying OHS charges—from 1 year from the date of

the alleged violation to 1 year from the date an inspector *becomes aware* of the violation. But because they were buried in a massive budget bill, these changes haven't gotten the attention they deserve.

Table 3. Key Ontario *OHS Act* Changes under Bill 177 (Effective Jan. 1, 2018)

<i>OHS Act</i> Provision	Previous Rule	New Rule
Maximum penalty for corporation	\$500K per charge (1)	\$1.5 million per charge (tied with Sask. for highest in Canada) (1)
Maximum penalty for individual	\$25K per charge (1) and/or 1 year in jail	\$100K per charge (1) and/or 1 year in jail
Limitation period for bringing OHS charges	1 year from date of alleged violation	1 year from date <i>inspector becomes aware of</i> alleged violation
New incident reporting requirement	NA	Employer must notify MOL Director if joint health safety committee (JHSC) or health safety representative (HSR) identifies structural inadequacies of workplace as source of danger to workers (2)

Expansion of mining and construction incident reporting requirements to other work sites	Mine owner/Constructor of mine or mining site/ project site, respectively, must give notice of an accident, premature or unexpected explosion, fire, flood or inrush of water, failure of any equipment, machine, device, article or thing, cave-in, subsidence, rockburst, or other prescribed incident to MOL Director, JHSC/HSR and union within 2 days	MOL may make regulations applying this requirement to other types of work sites (3)
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Notes

(1) Not counting automatic 25% surcharge required under *Provincial Offences Act*

(2) Doesn't apply if employers own the workplace

(3) MOL also gets authority to adopt additional requirements and stricter timelines if:

- A person is killed or critically injured at the workplace
- A person is disabled or requires medical attention due to an accident, explosion or incident of violence at the workplace
- An accident occurs at a project site or mine

In Alberta, the Bill 30 *OHS Act* reform bill includes provisions beefing up enforcement including new and expanded powers of government officers to investigate injuries and incidents, interview persons not present at the work site at the time of an incident and issue and enforce stop work and stop use orders. Bill 30 also gives courts more authority to

impose creative sentences for OHS violations.

Other examples of OHS enforcement expansions in the current year:

- WorkSafeBC adopted a new policy giving it expanded authority to impose penalties for repeat OHS offences;
- Nova Scotia enacted Bill 165 increasing the powers of OHS inspectors to crack down on companies that commit repeat violations, including the right to go to court to get an injunction enforcing a stop work order; and
- The Northwest Territories/Nunavut WSCC is getting set to finalize a policy allowing it to issue tickets for OHS offences.

Trends & Predictions: Intensification of enforcement is moving from discretionary government policy to a permanent feature of the OHS system. So, barring something dramatic and completely unexpected, inspections, orders, fines and other penalties are likely to continue climbing for the foreseeable future.

4. Stepped Up Criminal Enforcement

Serious workplace injuries, illnesses and incidents raise the risk of not just OHS investigation but also criminal prosecution. The primary threat comes from what was once known as Bill C-45, which made it easier for the Crown to prosecute companies and corporate officials for criminal negligence for egregious health and safety offences affecting work under their control. While the law has been on the books since 2005, the rate of C-45 prosecutions has been steadily increasing in recent years. Significant C-45 cases from the previous year:

- The \$2.6 million penalty, the highest ever against a corporation under C-45, that an Ontario court imposed on mining firm Detour Gold Corp. after it pled guilty to one charge of criminal negligence following a worker's acute cyanide intoxication death;
- The \$200K fine against handed down by the Court of

Qu bec against Century Mining Corp. for criminal negligence in failing to protect a worker crushed by a heavy truck even though the firm had declared bankruptcy 5 years earlier; and

- The Ontario high court's upholding of a 3.5-year prison sentence against the Metron Construction project manager stemming from the Christmas Eve swing stage scaffold collapse tragedy of 2009.

On March 1, 2018, things took a turn to the weird when the Court of Qu bec upheld the criminal conviction of an excavation contractor after a worker was killed in a trench collapse. The remarkable aspect of the so-called *R c. Fournier* case was the basis of the conviction: the contractor was found guilty of not just criminal negligence under C-45 but also *manslaughter*.

Trends & Predictions: Chances are, the *Fournier* case will prove to be more of an outlier than a trend starter'both inside and especially outside Qu bec. But even if the manslaughter approach doesn't catch on, threat of criminal prosecution under C-45 remains a very real and increasing threat.

5. Legalization of Recreational Marijuana

Effective this fall (the official date hasn't yet been announced as of this writing), it will become legal to buy, sell and use recreational marijuana in Canada (medical marijuana is already legal but only for very limited purposes). Although it's not technically an OHS issue, legalization will have an enormous and immediate impact on workplace safety. At least that's the perception.

Trends & Predictions: The reality is that legalization will have only a marginal impact—at least in terms of OHS programs. You'll still be able to enforce your anti-drug policies just the way you currently do with your anti-alcohol policies. Using and being high on pot at work will be no more acceptable than drinking and being drunk on the job are today. The real challenge is that marijuana legalization is likely to lead to increased marijuana use the way it has in several U.S. states that have legalized recreational pot. In other words, while legalization should have little substantive effect on your anti-drug policies, it will make your ability to enforce them even more significant.

The other piece of good news for safety directors is that marijuana legalization is being accompanied by legislative changes that will make it easier to crack down on workers for improper use, including:

- Indoor smoking laws that make banning of smoking/vaping in the workplace not only permissible but mandatory;
- Rules in many jurisdictions limiting legal use of recreational marijuana to residences; and
- Strict new traffic safety penalties for marijuana use or impairment while driving.

You can also expect the OHS agency of each province and territory to adopt new health and safety regulations specifically addressing marijuana use and impairment in the workplace.

6. GHS/WHMIS Deadline Looms

In 2015, Canada gave its WHMIS laws a makeover to comply with

international GHS rules. Of course, WHMIS/GHS affects not just producers, importers and distributors of controlled products (newly renamed as 'hazardous products') but the employers who use them downstream. The deadline for employers to comply with the new GHS rules is December 1, 2018.

Trends & Predictions: To comply with the new GHS rules, there are 5 things your company needs to do by the deadline:

- Revise your hazardous products inventory on the basis of the new GHS classification criteria;
- Ensure that each hazardous product has a container or workplace label that meets the new GHS label criteria;
- Go through your MSDS binder and ensure that every MSDS is replaced with an SDS meeting GHS requirements;
- Revise your written chemical safety program both cosmetically, e.g., by changing 'MSDS' references to 'SDS,' and substantively;
- Ensure that each worker who uses, works near or is otherwise exposed to controlled products has received the necessary GHS training and that such training was effectively understood and practiced.