Top 5 Stories in OHS Compliance that Almost Nobody Is Paying Attention To Because of COVID-19

If not burnout, you may at least be suffering from COVID-19 fatigue right now. And you're not alone. The monster virus has seemingly consumed everything in its path over the past 6 months, including the world's attention. Although understandable, the fixation on COVID-19 may distract you from the other significant developments affecting your company and its OHS program. Here's a look at the 5 most significant non-COVID-19 stories of 2020 and the compliance challenges and opportunities they pose.

1. New OHS Harassment Laws

Although workplace violence existed, it wasn't recognized as a 'thing' back in the late 70s and early 80s when the provinces first began adopting their OHS laws. It would another take several decades to fix that problem and add violence protections to OHS laws. That same pattern has recurred with regard to harassment over the past decade. It began in 2010, when Ontario adopted Bill 168 requiring employers to implement measures to prevent and respond to not only violence but also harassment in the workplace. Many provinces soon followed suit. The past 2 years have seen the completion of the cycle with 6 jurisdictions adding new workplace harassment rules patterned after the Bill 168 model to their own OHS regulations, most recently in PEI where the new requirements took effect on August 1. The other 5 are NB, NL and the 3 territories.

The Compliance Challenge

The Bill 168 model requires employers to adopt a workplace harassment code of practice or program that includes 4 basic elements:

- A corporate statement condemning harassment;
- Mechanisms workers can use to report harassment;
- Procedures for investigating and resolving harassment complaints, including via imposition of discipline where necessary; and
- Training and education on harassment and the harassment program.

2. C-65 Reinvents the Model for Workplace Harassment & Violation Regulation

Ironically, the Bill 168 model that finally took nationwide hold in 2020 may become obsolete on Jan. 1, 2021 when the federal C-65 system goes into effect. The recent Me Too Movement made it painfully clear that the Bill 168 model wasn't doing enough to prevent harassment in the workplace and that a reboot was needed. The C-65 system is the answer to that call. And while it applies only to federally regulated employers, C-65 is likely to become the new state-of-the-art that catches on in other jurisdictions the way that Bill 168 did when it debuted.

The Compliance Challenge

C-65 requires employers to do everything Bill 168 does but also adds new duties, including the obligation to:

- Perform workplace harassment hazard assessments;
- Implement workplace violence and harassment emergency procedures; and
- Provide support to victims.

Most significant of all is the elaborate new process employers must use to ensure workplace violence and harassment complaints are investigated and resolved fairly and impartially. The idea is to give employees a greater say and confidence in the complaint process so that employees will come forward and report them the way they were afraid to do before.

3. Ramped Up OHS Enforcement

While relaxation of regulatory requirements and enforcement efforts was a commonly used pandemic relief measure, employers got no relief on the OHS front. In fact, OHS enforcement intensified in much of the country. Even though in-person inspections were reserved for the most serious cases, OHS agencies remained very much open to field calls and complaints, which apparently came in at unusually high volumes. Enforcement was particularly aggressive in Ontario, which hired 58 new MOL inspectors and maintained its aggressive targeted industry inspections campaign without interruption during the pandemic. Qu□bec also stepped up OHS enforcement, deploying more than 1,000 CNESST inspectors to focus on retail, personal care, manufacturing, finance and other sectors, especially in Montreal.

The Compliance Challenge

OHS enforcement pressure will continue to intensify as inspectors return to the field to concentrate not only on the 'usual suspects' like falls and machinery but also on whether employers are obeying COVID-19 public health guidelines, emergency decrees and municipal bylaws.

4. New OHS Penalties

Continuing previous trends, many jurisdictions have or are considering adopting new laws to increase OHS penalties and broaden the powers of government inspectors and investigators. Notable examples from 2020:

- New Administrative Monetary Penalties (AMPs) of up to $50,000 took effect

in the federal jurisdiction;
- AMPs for OHS violations also took effect in New Brunswick;
- BC tabled Bill 23 allowing WorkSafeBC investigators to search and seize evidence without a warrant and authorize courts to order convicted defendants to publish embarrassing notices describing the details of their OHS offences; and
- The Manitoba Assembly is considering legislation (Bill 12) to double maximum penalties for a WSHA violation to $500,000 for a first offence and to $1 million for a second and subsequent offence.

The Compliance Opportunity

The step up in enforcement and penalties, which has been going on for many years and in many jurisdictions, can help you persuade your CFO of the value of your OHS program and defend, if not increase, your department budget.

5. Court Sets Higher Bar for Marijuana Testing of Safety-Sensitive Employees

Even though it's getting less attention, the courtroom conflict between employers and unions over the boundaries of drug testing as a workplace safety policy continues to rage, with nearly half a dozen important cases decided since the pandemic began. Arguably, the most significant case comes out of Newfoundland and involves the perennial problem of marijuana testing, namely, that a positive test doesn't prove *impairment at the time of testing* because continues to metabolize hours after the high is gone.

In this case, the employer wouldn't hire a construction worker who admitted to legally vaping 1.5 grams of medical marijuana containing high THC levels after work for Crohn's disease pain. The worker was entitled to accommodations, the Newfoundland arbitrator ruled, but without a test capable of detecting current impairment, hiring him for a safety-sensitive job would be undue hardship.

The case came to the Newfound Court of Appeal which concluded that lack of a test is too easy an excuse since all employers must do to deny employment to marijuana users is show their jobs are safety-sensitive. The standard should be higher, said the Court. Maybe there are other ways to determine a worker's fitness for duty, like a daily pre-shift functional assessment. Employers should have to prove they considered these alternatives and explain why they were rejected [*IBEW, Local 1620 v Lower Churchill Transmission Construction Employers' Association Inc.*, 2020 NLCA 20 (CanLII), June 4, 2020].

The Compliance Challenge

Although binding only in Newfoundland, the *Lower Churchill* case could prove influential elsewhere. There's also the chance of a Canadian Supreme Court appeal. But it's far from assured that the high court would take the case, let alone strike it down.