



Employment Law

Doing Business In Canada

Employment law in Canada is a complex mix of contract, statute and the common law or, in the case of Québec, civil law. With the exception of federally regulated industries such as banks, telecommunications, railways and airlines, employment law in Canada is provincially regulated. While most provincial employment standards statutes share some common features, Canadian employers should be mindful of the differences and ensure that their policies, practices and contracts are compliant with the legislation of the province in which they are operating.

No At-Will Employment

The most profound difference between Canadian employment law and American employment law can be summarized in one sentence: In Canada, there is no such thing as at-will employment. By statute, every employee who is terminated without just cause is entitled to notice of termination or pay in lieu of that notice. Where there is no contract of employment in place, the amount of notice to which an employee is entitled is determined with reference to the common law concept of “reasonable notice of termination.” Reasonable notice varies based on the age, length of employment, compensation and position of the affected employee. There is no set formula for determining reasonable notice of termination but it can be as much as one month per year of service, up to a usually recognized maximum of 24 months. Employers can satisfy this obligation via working notice or pay and benefits in lieu of such notice, at their option.

Employers have the opportunity to limit the amount of notice of termination that is provided to their employees by having employees enter into a valid employment agreement that prescribes a particular notice period or severance

entitlement that is equal to or greater than the minimums prescribed by applicable employment standards legislation but less than reasonable notice of termination. Such contracts must be carefully drafted and must be signed by the employee before that employee begins working in the role. Courts in Canada are loathe to enforce agreements that may be perceived to be unfair to employees. Our Courts have made several broad statements regarding the primacy of work in the life of the individual, the inherent imbalance of power between individuals and their employees and the duty that all employers have to administer the employment relationship in good faith. They consistently apply these principles to any litigation between an employer and its former employee.

Employment Standards Legislation

As noted above, each province in Canada has legislation that prescribes certain minimum entitlements for employees working in that province. It is important to understand that employees do not have the option of contracting out of these statutory minimums. Contracts or offer letters that purport to offer the employee less than their minimum statutory entitlements will be found to be void, even if the employee voluntarily signed off on the arrangement.

Minimum Wage, Hours of Work and Overtime

Each province has a minimum wage rate as well as overtime pay requirements. For example, Ontario’s *Employment Standards Act, 2000* (the “**ESA**”) requires an employer to pay overtime wages at 1.5 times the employee’s regular wage rate after an employee has worked more than 44 hours in a week.



It is important to note that salaried employees are not automatically exempt from overtime entitlements. All employees are entitled to overtime, unless their role is managerial or supervisory in nature, or they fall within certain regulated exemptions based on their profession. For example, accountants, information technology professionals and lawyers are all precluded from claiming overtime. Unpaid overtime has been a popular basis for attempted class actions in Canada, so it is wise to pay special attention to compliance with applicable regulations.

In addition to overtime entitlements, there are limits on the number of hours employees are permitted to work in any given day or week. Employees are also entitled to have a certain amount of rest between scheduled shifts. The maximum number of daily and weekly hours of work varies from province to province. In Ontario, it is eight hours a day and 48 hours per week. Exemptions are available to employees who fall within certain prescribed classes or where the employer has applied to the Ministry of Labour for permission to have its employees work extended hours up to 60 hours per week.

Vacation and Holidays

Employees in Canada are entitled to both vacation and paid statutory holidays. Statutory holidays are prescribed by legislation. Provinces typically prescribe between nine and eleven statutory holidays each year. Some provinces permit employers to require employees to work on statutory holidays; others do not. It should also be noted that employees who work on a statutory holiday will typically be entitled to both holiday pay and premium pay, resulting in a wage rate of 2.5 times their normal rate of pay.

Vacation entitlements are broken into two constituent elements: vacation time and vacation pay. Most provinces mandate at least two weeks of vacation time each year. Some provinces, such as British Columbia, mandate at least three weeks of vacation after the employee has achieved a certain seniority. Vacation pay is expressed as a percentage of the employee's wages. If an employee is entitled to two weeks annual vacation, the vacation pay obligation will be 4% of regular wages. Three weeks of vacation will be 6% of wages.

A key compliance issue for employers is what kinds of compensation are included in the definition of "wages." The term does not just refer to base salary but includes

commission, overtime pay and non-discretionary bonuses. Employers who simply continue an employee's base salary during vacation and do not provide compensation for lost commission during that vacation will find themselves out of compliance with applicable employment standards legislation.

Protected Leaves of Absence

All provinces in Canada provide employees with certain job-protected leaves of absence, including pregnancy and parental leave. Ontario's ESA provides employees who are birth mothers with 17 weeks of unpaid pregnancy leave, as well as 35 weeks of unpaid parental leave. Birth fathers and adoptive parents are entitled to 37 weeks of unpaid parental leave. Other leaves of absence vary by province but include leaves to attend to ill or dying family members, personal emergencies, organ donor procedures and reservist duties. All of these leaves are unpaid but the employee may be eligible to apply for benefits from the government Employment Insurance fund, depending upon the circumstances. Time spent on leave is considered to be active employment for the purposes of assessing all seniority-based rights.

Employers are prohibited from reprisals against employees for making use of these statutory leaves. Reprisal can take many forms, but most commonly includes dismissal during or immediately following the leave of absence, or a failure to reinstate the employee to his or her former role. Employees who believe that they have been reprimed against have the option of making a complaint to the applicable Ministry of Labour. Employers must tread very carefully when making any changes to the terms and conditions of employment for an employee on leave.

Termination and Severance

As noted in our discussion regarding at-will employment, there are certain statutory minimums that must be satisfied in the event of a without cause termination. These minimums vary from province to province but range from one to eight weeks of notice or pay and benefits in lieu, depending on length of service. Ontario provides an additional entitlement for employees who work for a company with an annual Ontario payroll in excess of \$2.5 million and who have five or more years of service. Such employees can receive an additional five to 26 weeks of severance pay.



Pay Equity Legislation

Certain provinces prohibit employers from discriminating between men and women in rates of pay for substantially the same work. Pay equity provisions under the ESA and Ontario's *Pay Equity Act* apply to all employers in the private sector in Ontario with 10 or more employees, and to all employers in the public sector. Ontario's *Pay Equity Act* provides that female job classes must receive the same rate of pay as male job classes where the work performed is of equal or comparable value.

Human Rights Legislation

Each of the provinces has legislation in place prohibiting discrimination and harassment on the basis of certain protected grounds. Ontario's *Human Rights Code* prohibits discrimination on the basis of ancestry, race, ethnic origin, place of origin, citizenship, creed, colour, sex, sexual orientation, gender identity, gender expression, marital status, family status, record of offences, disability and age. This prohibition applies to all aspects of the employment relationship, including hiring, discipline, promotion, work assignments and firing. Provincial commissions and/or tribunals may investigate and award damages for loss of income and other damages arising out of a discriminatory practice. They also have the discretion to order non-pecuniary remedies such as training, apologies or changes to workplace practices and policies. It should be noted that employers are not permitted to use mandatory retirement policies as they have been found to constitute age discrimination.

Occupational Health & Safety Legislation

Ontario's *Occupational Health and Safety Act*, and like legislation in the other provinces, provides comprehensive rules that impose duties on employers and employees in worker health and safety matters. Many provinces have included the prevention of and response to workplace violence and harassment as an employer obligation in their occupational health and safety regimes. Employers and supervisors have significant obligations under occupational health and safety legislation and can face hefty fines and even prison time for serious breaches of the legislation. It should be noted that occupational

health and safety requirements apply to workers, not just employees. Independent contractors, agency and temporary employees and interns will all be protected by the legislation and should be included in all safety and training initiatives.

Workplace Safety & Insurance Legislation

Each province in Canada has created a provincial workplace insurance fund that provides employees who have been injured in the workplace with access to certain health care benefits and reimbursement for lost earnings. Participating employers contribute to an insurance fund based on the employer's claims history and the sector in which the employer operates. By way of example, an employer operating in the mining industry will typically pay higher premiums than a retail operation. Injured employees who have recovered from their injuries generally have the right to return to the same or a similar job with their pre-injury employer.

The Unionized Workplace

Employees in Canada have the right to be members of a trade union. A union that becomes certified has the exclusive right to bargain collectively for all of its members and the employer must bargain with the union in good faith. Certifications in most, but not all, jurisdictions require a vote, but the time between the application and the vote is generally very short. Employers must not threaten or intimidate employees in the context of a union certification application or they may find themselves automatically certified for having committed unfair labour practices. Once certified, an employer remains so, even if it sells its business. In most circumstances, the purchaser will be required to recognize the union and honour any collective agreement in effect as a successor employer.

Privacy

Privacy law in Canadian employment law can be divided into two categories: statutory and common law. Some provinces, including British Columbia, Alberta and Québec, have adopted privacy legislation that specifically regulates employers' collection, use and disclosure of their employees' personal information. Even where there



is no privacy legislation, employers need to be mindful of an employee's reasonable expectations regarding the collection, use and disclosure of their personal information. These issues typically manifest themselves when the employer tries to secretly monitor or record an employee's activities, whether in or out of the workplace, but can also be a concern when a company is performing due diligence in connection with a proposed transaction. Even where there is no specific privacy legislation in place, improper collection, use and disclosure of an employee's personal information can lead to legal action based on the tort of invasion of privacy or intrusion upon seclusion.

Working in Canada

The *Immigration and Refugee Protection Act* governs the admission of foreign nationals into Canada. No work permit is required for business visitors who visit Canada to meet with Canadian clients or to assess trade or business opportunities. Work permits are required for foreign nationals who will be providing their services in Canada. A number of programs exist to facilitate work permits and entry to Canada.



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