Labour and Employment Regulation and Benefits

Doing Business in Canada

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Responsibility for labour and employment legislation in Canada is split between the federal and provincial or territorial governments in accordance with the nature of the undertaking in which the employer is engaged. Employees of businesses which fall under federal jurisdiction are subject to federal labour laws. These include such businesses as broadcasting, interprovincial trucking, banks, airlines and railroads. Employees of businesses which are not "federal undertakings" will fall under the applicable provincial or territorial jurisdiction.

The core labour and employment legislation in Canada consists of legislation governing employment standards and further, a framework for dealing with the establishment of labour rights and relations. The federal government and each province and territory have legislation dealing with these areas. In addition, the federal, provincial and territorial governments each have additional employment-related legislation dealing with human rights and occupational health and safety. Workers' compensation legislation exists in each province and territory. Many jurisdictions have legislation aimed at pay equity and/or transparency, employment equity and employee privacy.

In every Canadian jurisdiction, the rights of employees on termination of employment are governed in part by statute and in part by common law, except where there is a union representing employees, in which case the terms of the collective agreement apply. The obligations of an employer to provide notice or payment in lieu of notice at common law may be augmented or limited where appropriate by the terms of any contract entered into between the employer and the employee, which contract must generally be entered into prior to the commencement of employment. However, the employer cannot provide payments or other benefits that are below the minimum thresholds and protections contained in the applicable employment standards legislation.

Employment and labour legislation is consistently being amended to respond to the realities of Canadian workplaces. As an example, both the federal government and provincial governments took considerable steps to amend employment standards and labour legislation to respond to issues arising from the COVID-19 pandemic and its aftermath, including the rise of remote or hybrid working relationships.

EMPLOYMENT STANDARDS LEGISLATION

Each jurisdiction in Canada has minimum standards by which employers must abide. While an employer and employee may agree to benefits in excess of these minimum requirements, they may not "contract out" of the minimum standards. Areas that are the subject matter of legislation include: (a) minimum wage; (b) hours of work, overtime pay and rest periods; (c) vacation time, vacation pay and holidays; (d) leaves of absence such as bereavement leave, sick leave, compassionate care leave, court leave, family responsibility/emergency leave, reservist leave and education leave; and (e) layoff and termination of employment.

Notice of Termination

As will be discussed more fully under the heading "Employee Rights and Obligations Under Common Law," unlike in other countries, there is no "at-will" employment in Canada. When an employer terminates the position of an employee in Canada (without cause), the employee is generally entitled to a minimum amount of notice from the employer by statute, and in some provinces, severance pay. Each statute provides for the circumstances that constitute termination, and the length of notice required in those circumstances. Notice may be given in advance of the termination date (working notice) or paid to the employee in a lump sum or as salary continuance while the employee does not attend work (pay in lieu of notice). The requirements vary widely across Canada, but an employer is generally obliged to provide an employee with one to two weeks' notice per year of service, currently up to a maximum of eight weeks' notice. For federally regulated industries, an employee is entitled to two weeks' notice of termination after three months of service to a maximum of eight weeks' notice. Statutory notice may be greater where there is a mass or temporary layoff.

In addition to the notice of the termination of an employee's employment, employees working in Ontario or for federal undertakings may also be entitled to severance pay when their employment is terminated. The provincial severance pay provisions generally provide for payment of a lump sum equivalent of an employee's wages calculated based on their length of service. Thresholds for payment can include the employer's payroll and the employee's length of service.

Note that the requirement to provide notice of termination (or pay in lieu of notice) and severance pay (where applicable) is a minimum requirement. Reasonable notice at common law (which generally applies across Canada except for Quebec) and is discussed below, addresses the often greater notice requirement where there is a termination without cause.

Mass and Temporary Layoffs

Generally, where an employer terminates the employment of 50 (but as little as 10 in select jurisdictions) or more employees at an establishment within a four-week period, a special set of termination rules apply. The notice period for employees in a mass termination is determined by the number of employees affected. As well, notice of mass termination must be sent to the applicable Ministry of Labour.

For federally regulated businesses, employers must give the federal government 16 weeks' notice and set up a joint planning committee to reduce the number and impact of terminations.

Employment legislation varies across provincial and territorial jurisdictions on the permissible length of temporary layoffs. In addition, non-unionized employees have common law protections against wrongful dismissal, which include notice provisions that may extend beyond those imposed by statute. If an intended temporary layoff is found by a court to be constructive dismissal, the employee may be deemed to have been terminated at the time the layoff commenced.

The estimate of "common law" reasonable notice is more of an art than a science. In estimating the appropriate "reasonable notice period," Canadian courts will consider the employee's age, length of service, overall remuneration and position, as well as the existence of any employment agreement and inducement or enticement from former employment. The "common law" period of reasonable notice is inclusive of any statutory amounts and is subject to the concept of mitigation, which means monies earned by the employee during the reasonable notice period could be deducted from any common law damage award (but not from the statutory minimum).

Human Rights

Human rights legislation protects people from discrimination in a number of situations, including employment.

Employees are protected from unfair treatment in Canadian workplaces based on the following prohibited grounds: race; religion; age; disability; sex/gender; marital status; and pregnancy/childbirth. Other grounds are defined in only some provinces, including ancestry; nationality/citizenship; language; civil status; drug or alcohol dependence; family status; family affiliation; gender identity; gender expression; political beliefs and activity; criminal conviction; and social condition. However, most jurisdictions will imply broad protections even if not specifically defined in the statute. Employers are prohibited from making employment decisions, including hiring, firing and promoting employees, based on any of the prohibited grounds. In addition, they must not condone or ignore discrimination, violence or harassment (or threats) in the workplace.

An employer may end employment if related to a prohibited ground only if the work restriction is related to a *bona fide* occupational requirement of the workplace/position and the employer is otherwise unable to accommodate the individual. If the discrimination relates to a non-prohibited ground, human rights tribunals do not have the jurisdiction to deal with the complaint.

Damages for a breach of human rights legislation have been expanded significantly by courts and tribunals across Canada over the last few years.

PAY EQUITY AND PAY TRANSPARENCY

Jurisdictions across Canada have different types of pay equity/equal pay legislation, which represent different principles. These laws generally prohibit against discriminatory pay practices or require that classes of jobs performed on a majority basis by men be compensated similarly to comparable classes of jobs performed on a majority basis by women.

Further, select jurisdictions across Canada have implemented pay transparency legislation, which is distinct from pay equity/equal pay legislation. These laws vary across jurisdictions but can require employers to disclose certain information with respect to compensation in publicly advertised job postings, such as compensation ranges, or prohibit employers from making inquiries about a job applicant's current compensation or compensation with a previous employer.

EMPLOYMENT EQUITY

Employment equity is a concept that addresses the barriers to equal treatment of employees and the process of ensuring such equal treatment. People with disabilities, people of minority backgrounds and others may face discrimination in hiring, promotion and payment of benefits, as well as inadvertent systemic discrimination. Quebec and the federal government are currently the only jurisdictions that have employment equity legislation. In Ontario, the *Employment Equity Act* was in force for just over a year in the 1990s before it was repealed. Most other jurisdictions deal with employment equity through human rights legislation.

ACCESSIBILITY

As of January 1, 2012, all employers in Ontario who provide goods or services to members of the public or other third parties, and that have at least one employee in Ontario, must comply with various regulations pursuant to the *Accessibility for Ontarians with Disabilities Act, 2005* (the "**AODA**"). This legislation was enacted to make the province of Ontario fully accessible to disabled persons by 2025. The AODA requires, amongst other things, that employers establish policies and procedures which ensure that goods or services are provided in a manner that respects the dignity and independence of persons with disabilities and affords them equal opportunity to use or benefit from the goods or services and train its employees with respect to these requirements. Organizations with 20 or more employees are required to file an AODA compliance report. The AODA also requires employers to implement policies and procedures that integrate accessibility within the workplace and the career advancement of employees with disabilities.

OCCUPATIONAL HEALTH AND SAFETY

Workplace health and safety in Canada is regulated by both the federal government and each province and territory.

Businesses that are defined "federal undertakings," such as banks, shipping companies, transportation companies, aeronautics and railway businesses, and their employees, are governed by the *Canada Labour Code, Part II*. There are numerous regulations and codes prescribed under that legislation. Orders to comply can be issued to persons found to be in breach of the legislation. There does not need to be an injury or death for there to be such a prosecution.

All other businesses and individuals are regulated by the workplace health and safety laws of the individual province or territory in which they operate. Each province or territory has its own statute and regulations, which address a wide variety of activities, including construction projects, industrial establishments, mines, training and designated substances, such as lead, mercury and asbestos. There is strong enforcement and an emphasis on issues that include, but are not limited to, longstanding and recurring injuries and deaths from lack of guarding of manufacturing and industrial equipment, and lack of proper fall arrest equipment. There is also particular emphasis on health and safety concerns regarding workplace harassment, sexual harassment and workplace violence, both provincially and federally. Companies are required to have complaint policies and procedures, and to provide appropriate training, monitoring, supervision and investigations on those policies and procedures. The legislation sets out which workplace party has what legal duties to workers. All persons, from the individual workers to senior management to company directors, have obligations. The provincial regulations are very specific with respect to the manner in which workplace tasks are to be performed or workplace safeguards are to be put in place.

In Ontario, the main governing legislation is the *Occupational Health and Safety Act*, which sets out procedures for dealing with workplace hazards and enforcement, and the *Workplace Safety and Insurance Act, 1997*, which governs a mandatory insurance system for work-related injuries and diseases.

Provincial workplace obligations are generally viewed as part of an Internal Responsibility System, under which each party, including individuals, have their own duty. It is no defence to such a prosecution to say that another party also breached its duty. Provincial legislation sets out broad definitions of those who have duties, including employers, supervisors and constructors. This is in order to make it clear that such persons owe health and safety obligations not only to their direct employees, but also to the workers of their contractors. This broad obligation has recently been confirmed by the Supreme Court of Canada.

Provincial authorities, for example the Ministry of Labour, Training, Immigration, Skills and Development in Ontario, commonly have the authority to issue workplace orders to those they find to be in contravention of the legislation. This can be during an inspection or during an investigation. These orders have the force of law, and failure to comply often results in prosecution. Inspection "blitzes" are announced in advance for a particular industry or sector.

Prosecutions under provincial legislation are done on the basis of strict liability. This means that once the prosecution proves, beyond a reasonable doubt, that an offence has occurred (e.g., a worker was not wearing the prescribed safety equipment), in order to escape liability, the defendant must prove, on a balance of probabilities, that it took all reasonable precautions to prevent the offence from occurring, commonly referred to as "due diligence." Corporations, as well as individuals who are not under investigation, have a positive duty to co-operate with provincial investigators. Therefore, the

prosecution can often prove the offence and attack the due diligence defence through the interviews and evidence of company personnel.

The purpose of provincial health and safety legislation is prevention. There does not need to be an injury or death for there to be a breach and a prosecution.

Sentencing courts have increasingly less tolerance for preventable offences. Financial penalties for businesses can be significant for serious cases, in the hundreds of thousands of dollars. For individuals, most provinces have a lower maximum fine, but there is also the possibility of jail time for repeat or egregious offenders or when deterrence otherwise requires it. Recently in Ontario, maximum financial penalties have been raised to C$500,000 for individuals (from C$100,000) and C$2 million for corporations (from C$1.5 million). The possibility of jail time for individuals remains the same. In line with the recent and increasing attention being paid to deterrence by way of sentencing, the maximum financial penalty for director and officer offences in Ontario has now been raised to C$1.5 million (from C$100,000).

Cases of a serious workplace injury or death are often investigated by both provincial health and safety personnel and the metropolitan police service in the jurisdiction in which the incident takes place. In 2004, following a severe mining accident involving fatalities, the Canadian government made changes to the federally enforced *Criminal Code of Canada* that created clear criminal liability obligations on businesses for the negligent conduct of their decision makers related to workplace safety. As well, the legislation created a defined workplace duty on those businesses and individuals who have the authority to direct how another person does work or performs a task, to take reasonable steps to prevent bodily harm to that person, or to any other person, arising from that work or task.

In a criminal prosecution related to workplace safety, there must be an injury or death for there to be an offence. As well, the burden of proof throughout remains on the prosecution to prove all of the elements of the offence beyond a reasonable doubt.

Criminal prosecutions and jail sentences for workplace injuries and deaths are still relatively rare in Canada as compared to provincial prosecutions. However, we have seen some increase in criminal charges over the last several years, which is in keeping with trends in other countries. In Canada, there is every indication that this trend will continue.

In a tragic incident, five workers died when a swing stage on which they were working collapsed. One worker was severely injured. There were insufficient tie offs on the swing stage. The company pleaded guilty to provincial OHSA charges and was sentenced to a fine of C$200,000. The Ontario Court of Appeal raised the fine to C$750,000, despite the company's lack of financial resources. The Court said that this penalty survived any bankruptcy of the company. The project manager, who had also gone up on the swing stage, was convicted of five counts of criminal negligence causing death and one count of criminal negligence causing bodily injury. This was the first criminal conviction of an individual in Canada for a workplace incident. The project manager, who had been a "stickler for safety" prior to the incident, was sentenced to 3 ½ years in prison on each count, served concurrently. The trial judge said that on this occasion, the project manager had preferred the interests of the company in getting the job done, over the safety of his workers. On January 30, 2018, the appeal court upheld both the conviction and the sentence.

The federal government has recently amended its legislation to include specific anti-harassment, anti-sexual harassment and anti-violence provisions and duties.

WORKERS' COMPENSATION

Workers' compensation legislation creates a provincially or territorially regulated no-fault insurance program that is funded by employers in most industries. Workers' compensation legislation is intended to facilitate the recovery and return to work of employees who sustain injuries arising out of and in the course of employment or who suffer from an occupational disease. The legislation provides compensation and other benefits to workers and the survivors of deceased workers. Employers in businesses or industries specified in the regulations pay annual premiums based on the risks associated with worker activities in their industry. In some jurisdictions, premiums are adjusted to reflect the employer's claim history, permitting rebates for employers who have relatively injury-free workplaces or increasing premiums for workplaces that have proven more dangerous than expected.

LABOUR RELATIONS LEGISLATION

Each province and territory has legislation that regulates the relationship between employers and employees of provincially regulated industries where a union represents or seeks to represent a business' employees. Such legislation also governs

the establishment of union collective bargaining rights, and the negotiation and administration of collective agreements once such rights have been established. The *Canada Labour Code* regulates labour relations for federal works, undertakings or businesses.

Each province or territory, and the federal government, has a labour relations board that adjudicates labour relations disputes. When a provincially or territorially regulated employer carries on business in multiple jurisdictions, unions must seek certification from the labour board of the applicable province.

Labour relations legislation has two main purposes: (a) to permit employees to organize without interference from their employers; and (b) to permit collective bargaining between employers and employees represented by bargaining agents. The legislation governs the formation and selection of unions, collective bargaining procedures, the conduct of employees and employers in unionized workplaces, and the adjudication of complaints alleging a violation of the particular legislation.

Certification of Unions

Rules concerning the certification of unions vary and applicable legislation sets out the manner in which unions can establish bargaining rights, as well as the rules surrounding the termination of such rights. Once a union is certified as the representative of a bargaining unit and has given notice to the employer, the employer has a duty to bargain with that union in good faith to reach a collective agreement.

Each provincial labour relations legislative framework also specifically deals with employers involved in the construction industry. These vary from province to province, as well as federally, and are often quite different from the normal rules for non-construction employers.

Disputes between an employer and union once certified (that is, once a collective agreement is negotiated) are referred to a sole arbitrator or Board of Arbitration for adjunction. Labour relations legislation requires a collective agreement to have this dispute resolution process in place.

Strikes and Lockouts

Before a bargaining unit can strike or its employer can lock them out, certain statutory conditions must be satisfied. In all jurisdictions, a strike or lockout is unlawful while a collective agreement is in effect. In certain jurisdictions a lawful strike or lockout can only begin once attempts at negotiation and conciliation have been exhausted.

The labour relations board in each jurisdiction can make declaratory orders with respect to the legality of a strike or lockout and the order can be filed in court to become enforceable as a judgment. In addition, a court may issue an injunction, prohibiting a strike or lockout, or restrict legal picketers where there is illegal conduct which includes the risk of physical injury or property damage.

Employers are prohibited from hiring permanent replacement workers during the course of strike. However, some jurisdictions permit the employer to hire workers while its unionized employees are on strike.

Picketing

Picketing is regulated by labour relations statutes, tort law and criminal law in Canada. Lawful picketing includes communication of information; however, intimidation, threats, assaults and blocking of premises is unlawful. It is lawful for striking workers to picket at the employer's place of business as long as there is a legal strike/lockout in effect. Depending on the nature of the picketing and interference, it is also generally lawful to picket the premises of third parties who deal with or are affiliated with the employer as long as such picketing is for informational purposes.

Impact on Sale of a Business

If all or part of a business is sold, bargaining rights are protected. However, if the nature of the business has changed substantially, the labour relations board may terminate the bargaining rights of the union.

There are also successorship provisions which bind any purchaser of the business to a validly executed collective agreement to which the employer is bound. The definition of "sale" is very broadly worded for the purposes of determining a successorship.

EMPLOYEE RIGHTS AND OBLIGATIONS UNDER COMMON LAW

All Canadian provinces and territories are common law jurisdictions, with the exception of Quebec (where the *Civil Code of Quebec* governs). Common law rights can be characterized as those established by the courts based on jurisprudence—or judge-made law—also called the common law. Common law employee rights exist in addition to the rights granted by employment standards legislation,

however, any payments made by an employer under the applicable employment standards legislation will be deducted from the common law assessment.

In Canada, certain contractual terms are implicit in a written employment contract (subject to permissible contract provisions to the contrary) or where no written contract of employment exists.

Employee Duties

All employees have at least three duties that are implied terms (unless there are explicit terms) of their employment: (a) duty of good faith and fidelity to their employer; (b) duty to exercise skill and care; and (c) duty to obey.

After employment has terminated, all employees have an implied duty to not remove confidential information and not misuse confidential information. Non-fiduciary employees are free to compete as soon as employment has terminated, subject to a valid restrictive covenant (discussed below) prohibiting such competition.

Fiduciary employees have more extensive duties than those that apply to all other employees. Generally stated, fiduciary employees are those who have authority to guide the affairs and affect the direction of the employer. In most cases, top management are considered fiduciary employees and, in certain situations, other employees who fulfill a sufficiently critical role and to whom the employer has a particular vulnerability ("key personnel") may be found to be fiduciaries. A fiduciary's general duties have been described as requiring loyalty, honesty, good faith with a view to the employer's best interests and avoidance of conflicts of interest, and a prohibition regarding self-dealing.

Termination of Employment & Reasonable Notice

Whether termination of employment occurs with or without cause will determine the rights and obligations of the employer.

Termination with cause follows from an employee's breach of an express or implied term of the employment contract. "Cause" is narrowly construed by Canadian courts. If an employer intends to terminate the employment of an employee *with* cause, the employer is not required to provide the employee with notice of termination. Due to such consequence, with-cause terminations are generally reserved for serious cases of misconduct. If an employer intends to terminate the employment of an employee *without* cause, the employer must provide the employee with reasonable notice of termination, during which the employee continues to work under the normal terms of employment, or pay in lieu of notice.

An employer may not contract out of the statutory minimum notice period (discussed above) and severance pay, if applicable. However, a contract of employment that includes a term limiting reasonable notice to the period prescribed in employment standards legislation may be valid, provided that the limit is clear and was the subject of consideration and, further, that such term appropriately and unambiguously provides for statutory minimums. Absent an enforceable limiting term, an employee whose employment is terminated without cause will be entitled to reasonable notice of termination at common law. Although determining a reasonable notice period is not based on a static formula, reasonable notice is calculated based on assumptions about how long it will take the employee to find alternative work of a similar nature. The assumptions are based on a number of factors, including the following: the character of the employment; the employee's length of service and remuneration; the age of the employee; and possibly the availability of similar employment having regard to the experience, training and qualifications of the employee and, in some cases, whether there has been inducement/enticement from formerly secure employment.

If an employer has not provided an employee with adequate notice, the employee may commence an action for wrongful dismissal, seeking damages equivalent to what the employee might have earned (which includes a calculation of benefits and perquisites) during the "reasonable notice period" which is established by the court. Also, employers should note that if a former employee can prove that the employer's conduct in the manner of termination caused him or her mental distress or was done in bad faith, additional damages may be awarded to the former employee. Reasonable notice periods typically do not exceed 24 months, although recent case law suggests that this limit is no longer considered a "ceiling."

Any period of "reasonable notice" determined by a court of competent jurisdiction is subject to the employees' duty to "mitigate" their damages by seeking alternate or self-employment. Generally, damages at common law for wrongful dismissal will deduct any monies earned by the employee during the common law period of reasonable notice.

Restrictive Covenants

Restrictive covenants are explicit contractual obligations that survive the termination of employment. They typically consist of non-competition or non-solicitation clauses. Restrictive covenants may also include protection of the employer's intellectual property beyond those protections already afforded to employers by common law and statute.

To be enforceable, such covenants must be reasonable in both scope (geographically) and application to the specific industry. There is a strong policy inclination in employment law disputes towards ensuring an individual's ability to make a living doing what he or she knows best and avoiding restraints on trade. Therefore, restrictive covenants and, in particular, non-compete provisions are highly scrutinized by Canadian courts. Courts have the discretion to strike down a restrictive covenant that limits the employee's ability to compete, if it is found to be excessively broad in time, geography or scope of activities prohibited. Non-solicitation covenants, providing they are reasonable and validly executed, are far more defensible. However, restrictive covenants which constitute consideration arising from a sale or legitimate business arrangement are more likely to be enforceable.

Notably, non-competition clauses and non-competition agreements are now statutorily prohibited in Ontario, with only two narrow exceptions: in the context of a sale of a business (provided certain requirements are satisfied) or for certain C-suite, executive-level employees. Other restrictive covenants, such as non-disparagement and non-solicitation agreements, remain permissible. Although other provinces have not yet followed suit in expressly prohibiting non-competition clauses or agreements, such clauses remain subject to intense scrutiny, as outlined above.

EMPLOYMENT AND RETIREMENT BENEFITS

Old Age Security & Canada Pension Plan

Old Age Security and Canada Pension Plan ("**CPP**") are federally legislated pension programs. CPP is administered as a joint federal-provincial program.

Employment Insurance

The federal Employment Insurance Plan ("**EI**") is employer and/or employee-funded insurance regulated by the federal government which covers employees in every jurisdiction in Canada.

Employers deduct premiums from employees' insurable earnings and remit these deductions along with the employers' premiums. Employer premiums are paid at a rate of 1.4 times the amount of the employee's premiums. Employer contributions are a business expense that can be deducted from the calculation of income.

EI benefits are paid to employees whose employment is terminated without cause or who are on maternal, parental, sick or compassionate care leave, or other permitted statutory leave, and who satisfy the regulatory requirements, which include a minimum period of employment. No benefits are generally paid to employees who quit their employment or who are terminated with cause. Since January 2011, self-employed individuals have been able to access EI special benefits, notably maternity, parental, sickness and compassionate care (and other statutory) benefits.

Regular benefits (i.e., paid to those whose employment has been terminated) last for a maximum of forty-five weeks depending on unemployment rates in the individual's region and the number of qualified insurable hours accumulated during the prior period of employment. Benefits paid are taxable income for the individual.

Employers can reduce their EI premiums by providing equal or superior benefits to employees through private insurance plans.

Health Plans

In Canada, a public health-care system provides almost all critical medical services to legal residents. Currently, Canada's public health-care system does not cover supplementary health-related costs such as prescription drugs and routine dental visits.

Employers in Canada do not have an obligation to provide benefit packages to employees. However, it is common for employers to provide their employees with private supplemental health coverage, the particulars of which can vary greatly. If an employer chooses to offer supplemental health-care coverage, employers cannot discriminate in the scope of the coverage.

Wage Earner Protection Program ("WEPP")

For workers of an employer in bankruptcy or receivership, the WEPP provides compensation if employment has been terminated with unpaid wages, vacation pay, severance pay (if applicable) and termination pay. Such compensation is limited

to wages and certain other types of pay which accrued between the date six months prior to a restructuring event and the date of the bankruptcy or the imposition of receivership. If there is no restructuring event, then compensation is provided for wages and certain other types of pay for the six-month period preceding the date of the employer's bankruptcy or receivership. Under the WEPP, the employee will receive no more than the equivalent of seven weeks' maximum insurable earnings under the *Employment Insurance Act*, minus certain prescribed amounts.

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