



## Employment & Labour Law in Canada

by Hugh A. Christie



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Hugh Christie is a partner in Gowlings' Toronto office and the Toronto leader of the Employment & Labour Law Practice Group. His practice includes the design, interpretation and application of employment policies; compensation packages, including option and incentive plans; and disciplinary issues.

Canada boasts one of the world's healthiest, most educated, productive and skilled workforces. Foreign companies with Canadian operations put a high value on the quality and ingenuity of their Canadian-based employees.

Most businesses, both Canadian and foreign-owned, are regulated by the employment and labour laws of the individual provinces or territories in which their employees are resident, though the employees of federal undertakings such as banks and airlines are governed by the *Canada Labour Code*. While this article briefly explores general issues that are common across the country, foreign businesses will benefit from the insight of a national law firm that can balance multi-jurisdictional experience with a uniform, national approach.

Employment law in Canada is primarily governed by the *Law of Contract* under which written contracts that pass a test of enforceability and adhere to minimum standards are enforceable by Canadian courts. Where no written contract exists, a court will decide on — and enforce — the terms of an employment contract.

### **Termination and Dismissal**

Employment standards legislation provides Canadian employees with basic minimum rights to advance notice of termination or pay in lieu of notice, and in two jurisdictions certain employees are entitled to severance pay. Statutory severance pay and notice requirements for individual terminations are based on length of service. In mass termination situations, notice is based on the number of employees dismissed. If there are no express contracts, courts will award greater notice periods based on length of service, age and other factors. Employees are generally compensated for loss of salary, bonuses, options, benefits or commissions which they would have received over the notice period. Similarly, an employer who fundamentally changes the terms of an employee contract without consent may also trigger an unintended "constructive" dismissal and find themselves responsible for compensation.

### **Restrictive Covenants**

While confidentiality agreements are generally enforceable in Canada, other forms of restrictive covenants such as non-compete clauses are generally not. Employers must show that any restriction protects a legitimate business interest and that there is no other way of adequately protecting it. Even so, restrictions must be reasonable and confined to a scope that defines industry, time and geography. Agreements not to solicit customers of a former employer are subject to the same tests, but are more likely to be enforced.



# Doing Business in Canada Series

Employment & Labour Law in Canada...continued

## Government Programs

There are a number of federal and provincial programs aimed at safeguarding employee rights, enhancing workplace health and safety, and providing some protection against a temporary loss of earnings. While basic health care is publicly funded – primarily through mandatory payroll deductions – employers often provide extended coverage including drug, dental and eye care plans, either at the employer's or shared expense.

Employers enjoy enhanced protection against potential lawsuits arising from workplace accidents through an employer-funded no fault workers' compensation regime. However, employers who do not ensure a workplace that is safe and free from hazards, can face criminal liability charges and be exposed to fines or jail time. The federal government also administers robust employment insurance and pension plans that are available to all employees, in many cases including those on disability or maternity leave.

## Alcohol and Drug Testing

Workplace alcohol and drug testing must comply with human rights legislation that treats substance abuse and dependence as a disability. Most mandatory testing is allowable only if the employer can justify it as a *bona fide* occupational requirement. Pre-employment alcohol and drug testing and random drug testing are difficult to justify. In addition, in unionized workplaces, arbitrators apply a "balancing of interests" test, and to date, random alcohol testing has rarely been upheld, and random drug testing has never been upheld by an arbitrator in Canada as appropriate in a unionized workplace.

## Unionized Labour Relations

Each province and territory in Canada has enacted labour laws governing the right of employees to select a union, relations between unions and employers, and sanctions for unfair labour practices, as well as illegal strikes and lockouts. The details, application and level of unionization vary significantly from one province to another, and usually require the counsel of a legal expert in the particular jurisdiction. As mentioned, the *Canada Labour Code* governs employees of federal undertakings such as banks and airlines.

## The View from Québec

The province of Québec is unique, not just in culture and heritage, but also in its formulation and application of various provincial employee and labour laws. Most significantly, Québec adheres to the Civil

Code for property and private civil matters, versus Canadian Common Law. While largely consistent with similar provincial laws, there are a number of significant differences in Québec law that can increase the burden of compliance for employers. For example, the *Charter of the French Language* requires that many employment contracts be finalized in French, and often that French be used for employee communications. Québec employees also have the right to seek reinstatement if they are terminated without cause in many circumstances.

## National Scope and Multi-jurisdictional Insight with Gowlings

American and other foreign businesses with Canadian employees are subject to a complex, interrelated system of employment and labour laws. As one of Canada's leading national law firms with offices across the country, Gowlings has extensive hands-on experience in all types of provincial employment and labour issues. No matter where their Canadian employees live, business leaders around the world trust Gowlings' professionals with both their most routine and their most sensitive employment and labour issues.

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The Firm also provides intellectual property services in Russia and the CIS through its office in Moscow, and energy, resource and infrastructure expertise through its office in London, U.K. Visit us at [gowlings.com](http://gowlings.com).