



Employment Law



1. Introduction

Employment and labour law can be complex for foreign and domestic employers alike.

It is important to determine which set of laws and regulations apply. Approximately 10 to 12 per cent of the workforce is governed by federal laws, such as the *Canada Labour Code* and the federal *Employment Equity Act*. The remainder is governed by provincial laws. In addition, there is a well-developed body of common law or jurisprudence that applies.

Even if employers are federally regulated, they must still conform to certain provincial laws. Other employers are completely regulated by provincial laws and, if located in multiple jurisdictions, are required to comply with provincial variations. In many cases, the laws are substantially similar across the country, but minor variations regarding minimum wage and hours, vacation entitlements, entitlements upon termination and basic health and safety add complexity to managing a workforce in Canada.

The bulk of the discussion that follows assumes that the employee is non-unionized, as there are very specific requirements imposed on the employer once a union and a collective agreement are in place. Some of these requirements are discussed later in this section under “Labour Relations.”

2. The Contractual Nature of the Employment Relationship

Canadian employment law is based on the premise that the employment relationship is one of contract. In the absence of written contractual terms, the courts will imply a host of contractual obligations on both parties. The general law of contracts (such as offer and acceptance, duress, and frustration) also plays an important role in employment law.

While there are some narrow exceptions for certain industries and sectors, most employment contracts are assumed to be of indefinite duration and can only be terminated by specific events such as:

- Resignation of the employee;
- Termination for just cause;
- Termination without cause;
- Death; or
- Frustration of the employment relationship.

Employees governed by federal, Québec and Nova Scotia laws enjoy significant protection against termination without cause not afforded to employees in other jurisdictions. These protections are outlined later in this section.

Limited-term contracts are expected to be the exception to the norm and need to be established on the evidence. The best evidence is, of course, a written agreement. However, the courts have deduced the existence of a term contract from the parties’ conduct, job titles and/or the wording in a job posting. Term contracts come to an end at a predetermined point in time or in some cases, when a specific event or milestone is reached. Subject to certain statutory requirements, limited notice or other formalities are required upon the end of a term contract.

3. Termination of Employment

As previously stated, most employment relationships are considered to be of indefinite duration. In Canada, “at will” terminations are generally not permitted unless the employer can prove just cause. As such, the vast majority of employer-initiated terminations will be terminations without cause or terminations with just cause.

a. Termination Without Cause

In most cases, an employee that is terminated without cause is entitled to notice of termination or pay in lieu of notice. However, certain employees governed by federal, Québec or Nova Scotia laws have special protections against terminations without cause of which employers need to be aware.

i. General

In general, an employee’s entitlement to notice is derived both from statute and the common law (i.e., “reasonable notice”). The applicable provincial and federal employment statutes prescribe only the minimum period of notice or payment in lieu of notice that must be given to a dismissed employee. It is a common and serious mistake to assume that the statutory mini-

mums are the only obligations on the employer in the event of a termination without cause. Statutory minimums usually range from one to eight weeks of notice. In Ontario, some employees are also entitled to an additional lump-sum payment known as “statutory severance,” which ranges from five to 26 weeks of regular earnings.

There may be separate and additional obligations in situations involving the termination of a group of employees, including the obligation to provide additional notice and the obligation to provide advance notice to a specific government department.

In the absence of a contractual stipulation to the contrary, judges will routinely imply an obligation on the employer to provide far more generous notice periods than prescribed by the statute. Factors that the courts have reviewed in determining what constitutes reasonable notice include:

- Years of service;
- Seniority within the organization;
- Salary and other compensation;
- Employee’s chances of employment upon termination;
- Employee’s health;
- Employee’s education;
- Promises of job security, even if not enforceable at law; and
- Whether the employee was enticed from secure employment.

There have been cases where employees with long-term service have been awarded 24 months of notice or compensation in lieu of notice. If the employee is successful in finding other employment, the earnings from mitigation will be deducted from any award otherwise payable by the employer. However, mitigation does

not reduce the employer’s obligation to provide the statutory minimum notice and, in Ontario, severance if applicable. A failure to act reasonably in terms of mitigation can also reduce damages.

Provincially regulated employees outside of Québec can contract out of the obligation to provide reasonable notice at law. However, the contract cannot and should not make any effort to contract out of the statutory minimum notice or severance. Where a contract does not comply with the minimum standards in the applicable statute, the offending provision will be considered void. The courts will not simply impose the minimum statutory notice required by the statute, but will order “reasonable notice,” which will no doubt be significantly greater than the notice period the employer intended.

ii. Québec

The *Civil Code of Québec* specifically provides that employees may not contractually waive their right in advance to obtain damages for insufficient notice of termination or where the manner of “resiliation” (the *Civil Code* term for termination) is abusive.

Therefore, it is important that a contractual termination clause reflect the prevailing norms in jurisprudence regarding what is fair and appropriate notice upon termination.

It should be noted that in Québec, an employee who believes that he or she was dismissed without cause can challenge the employer’s decision if the employee has at least two years of uninterrupted service with the same employer.

Therefore, when employees have more than two years of uninterrupted service, an employer needs good and sufficient cause to terminate their employment or must be able to demonstrate that the termination was a result of a genuine restructuring, such as an overall reduction in force. An employee may apply to the *Commission des normes du travail* (Québec’s provincial labour relations board) in order to seek reinstatement or damages in lieu of reinstatement.

iii. Nova Scotia

In Nova Scotia, an employee with 10 years of service may seek reinstatement or damages in lieu of notice through the Nova Scotia Labour Standards Tribunal. An employer would have to prove good reason or just cause for the termination. The Tribunal has the power to order reinstatement with back wages or an appropriate alternate remedy if the employee does not wish to return to work. The employer can attempt to avoid reinstatement (but not compensation for reasonable notice) by proving that the termination was related to a genuine restructuring, such as downsizing or plant closures.

iv. Federally Regulated Employers

Federally regulated employers, such as banks, interprovincial trucking companies and airlines, are protected by the *Canada Labour Code*. Non-managerial employees with 12 months of service may challenge their termination and seek reinstatement from the Canada Labour Board or seek damages in lieu. The onus is on the employer to establish just cause for the dismissal. The Canada Labour Board has established significant case law that it will review the employee's job functions and role in the organization in determining whether an employee was managerial or not. Job titles are not determinative of the issue.

b. Termination With Cause

If an employer wishes to terminate an employee due to the employee's conduct without providing notice or compensation in lieu, the employer must establish just cause. This is a heavy onus to discharge in the courts and tribunals in Canada. Effectively, the employer must establish that the employee's conduct amounted to a repudiation of the employment contract. Examples of just cause include serious acts of dishonesty, gross misconduct such as violence or harassment, breach of the duty of confidentiality, persistent neglect of duties or gross insubordination.

c. Resignation

Employees may resign their employment. While the law implies a duty to provide reasonable notice, there are very few cases where an employer has been able to obtain redress from the courts or tribunals due to inadequate notice. These usually involve high-placed executives or professionals and are often coupled with serious misconduct, such as theft of a corporate opportunity, flagrant solicitation of clients or misappropriation of employer trade secrets.

d. Resignation by Employee due to Constructive Dismissal

In certain cases, employees may resign their employment on the basis that the employer has made unilateral and fundamental changes to the employment relationship. Examples of constructive dismissal include a significant reduction in pay, changes to the structure of compensation, a relocation outside the normal commuting area or a demotion in the corporate hierarchy (even if pay and job title are grandfathered). In some cases, employees have successfully argued that workplace harassment or discrimination constituted constructive dismissal. An employee who establishes constructive dismissal is able to sue for damages equivalent to the notice the employer would have had to pay upon termination of employment.

Employers contemplating significant changes to an employment relationship should implement strategies to avoid a claim of constructive dismissal, including providing advance notice of any changes. Written contracts of employment may also preserve an employer's right to implement certain types of changes that would otherwise be considered a constructive dismissal.

4. Duty of Confidentiality

All employees have an obligation to keep secret the confidential information of their employers. It is prudent to have a written agreement regarding what constitutes confidential information and to implement procedures to maintain the confidentiality of sensitive

information. Courts are prepared to enforce the duty of confidentiality with an injunction, which is akin to a temporary restraining order or restraining order under American law.

5. Restrictive Covenants

Employers often wish to implement post-termination restrictions on employees' business activities. These clauses are usually divided into two categories: non-solicitation and non-competition clauses. The general rule is that any restrictive covenant must be what is strictly necessary to protect the employer's legitimate interests, must be reasonable and cannot be contrary to public policy.

Courts typically examine reasonableness in terms of duration, scope and geographic limits. The clause must be clear and precise. Courts will generally not "blue-pencil" or redact unenforceable clauses in order to make them enforceable. According to Canadian law, there is a strong public-policy interest in permitting individuals to work freely in the workplace.

Non-solicitation clauses limit the employee's ability to solicit customers or employees. Although the courts generally enforce well-drafted non-solicitation clauses, care must be used to ensure that the scope of the clause is not excessive.

Non-competition provisions are enforceable only in exceptional cases and the onus is on the employer to establish why the non-competition clause is necessary and why a non-solicitation clause is inadequate. Different rules apply, however, if the non-competition clause is part of an overall corporate acquisition, where it can be established that the purchaser required the clause in order to preserve the value of the assets or shares purchased.

In certain cases, courts will enforce a restrictive covenant with an injunction, which, as previously noted, is akin to a temporary restraining order or restraining order under American law.

Legal advice should be obtained regarding the proper drafting of confidentiality, non-solicitation and non-competition clauses.

6. Legislation Governing the Employment Relationship

The Canadian workforce is heavily regulated. As previously discussed, depending on the industry and type of business, an employer may be regulated federally, provincially or a mix of both. The following are the main types of legislation that exist in virtually every jurisdiction.

a. Employment Standards

All jurisdictions provide minimum standards with respect to the minimum terms of employment. Typically, employees are not permitted to contract out of the minimum protections afforded by the statute. The specific provisions vary by jurisdiction, but can be easily verified by checking governmental Internet resources or calling the appropriate department's information line.

Employment standards can be quite complex and the legislation can often be varied by obscure regulations that apply to specific industries. Certain exemptions apply to certain types of employees, such as managers or professionals, regardless of industry. There are often methods to obtain special permits to obtain exemptions to the minimum requirements by applying to the appropriate ministry or department.

i. Hours of Work

The statutes will typically provide for maximum hours per day and per week, as well as mandatory intervals between shifts. There are often methods for obtaining exemptions to these rules by applying to the relevant authority.

ii. Overtime Pay

The legislation will typically set a threshold of hours per week beyond which employees will be entitled to

overtime. The threshold varies across the country, but typically ranges between 40 to 44 hours per week. The legislation often establishes methods to “average” overtime over a longer period of time in order to permit different types of scheduling. Time off in lieu of overtime pay at the employee’s request is generally permitted.

iii. Public or Statutory Holidays

Canadians generally enjoy at least eight public holidays: New Year’s Day, Good Friday, Victoria Day (last Monday before May 25), Canada Day (July 1), Labour Day (first Monday in September), Thanksgiving Day (second Monday in October), Christmas Day and Boxing Day (December 26).

The first Monday in August is often observed as an additional holiday in many provinces. In certain parts of Canada, the third Monday in February is observed as an additional holiday. Remembrance Day (November 11) is a holiday that is observed by all provinces except Ontario, Québec and Manitoba. In Québec, according to the *National Holiday Act*, employees are also entitled to payment on St. Jean Baptiste Day (officially known as *Fête nationale du Québec*), which is June 24. Businesses are typically required to be closed on statutory holidays, although many exemptions exist. Employers usually have to pay a significant premium to employees who work on a statutory holiday.

iv. Vacation

Employment standards laws generally prescribe minimum vacation entitlements. The minimum vacation entitlement is typically two weeks per year. The employer may determine when employees take vacation. In certain provinces, vacation entitlements increase after a predetermined number of years of service.

v. Pregnancy Leave

Most pregnant employees are entitled to 17 weeks of unpaid leave. An employer cannot force or require an employee to go on pregnancy leave.

vi. Parental Leave

New parents and adoptive parents are entitled to take parental leave of approximately 37 weeks. Birth mothers who took pregnancy leave are entitled to take an additional 35 weeks’ leave.

At the end of the pregnancy and/or parental leave, an employee is entitled to be reinstated. The rules regarding the nature of reinstatement differ slightly across jurisdictions. In Ontario, the requirement is to reinstate to the same job if it still exists, or to a comparable job if it no longer exists. In Québec, if the employee has taken a parental leave longer than 12 weeks, the reinstatement obligation is to the same or comparable position. If the parental leave is shorter, the employee must be reinstated to the same position as before.

vii. Emergency Leave/Family Responsibility/Bereavement

Most jurisdictions permit employees to take a certain number of unpaid days off for personal reasons. Each jurisdiction deals with it slightly differently. In some cases, leave due to the death of a family member is dealt with under a specific bereavement-leave section, while in other jurisdictions, the statute establishes a number of reasons why an employee can take a limited number of days off. These reasons include the death of a family member, but can also include the illness of the employee or immediate family members, accidents, a household crisis or unexpected interruptions in child-care plans.

viii. Family Medical Leave/Compassionate Care Leave

Employees who need time off to take care of a seriously ill or dying relative are entitled to leave without pay ranging from eight to 12 weeks, depending on the jurisdiction. Employees may be entitled to benefits under the *Employment Insurance Act* during this period. To date, however, Alberta does not have this type of job protection.

ix. Military/Reservist Leave

All jurisdictions provide job-protected leave for members of the reserve forces who are called into active duty or are required to participate in reservist training.

x. Sick Leave/Organ Donor Leave

Depending on the jurisdiction, there may be specific protection granted to employees who need to take time off due to illness. In Ontario, special protection is granted to employees who need time off to donate an organ.

xi. Jury Duty

All jurisdictions provide job protection in order to enable an employee to serve on a jury. In addition, many jurisdictions will fine an employer significant amounts for not permitting an employee to serve on a jury.

xii. Equal Pay for Equal Work

Canadian employers are prohibited from differentiating between male and female employees who perform substantially the same kind of work in the same establishment, requiring substantially the same skill, effort and responsibility. In such circumstances, different rates of pay are prohibited, except where differences are attributable to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex. The courts and tribunals have established that titles are not determinative and that careful regard should be paid to the actual duties.

xiii. Pay Equity

Québec, Ontario and federally regulated employers are subject to pay-equity obligations. The scope of obligations differs with the size of the workforce. The legislation is an effort to redress the gender gap in compensation. In essence, it seeks to ensure that there is equal pay for work of equal value. It requires employers to analyze jobs across their organization and review them for value (based on a number of statutory criteria) and examine whether there are compensation

disparities between male-dominated and female-dominated jobs within the organization. Where female jobs are underpaid, the legislation prescribes a schedule for pay increments that have to be implemented to redress the balance. Although other jurisdictions have similar legislation, the scope is limited to the public sector.

xiv. Benefit Plans

Employers are not required to provide employee benefit plans. In Canada, spousal plans must cover both common-law and same-sex spouses.

b. Human Rights

Human rights codes across Canada prohibit discriminatory practices with respect to employment. Generally, these codes provide that every person has a right to equal treatment with respect to employment without discrimination based on race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (e.g., a conviction for which a pardon has been granted), marital status, same-sex partnership status, family status or disability. Discrimination on the basis of pregnancy is defined as discrimination on the basis of sex. Employees also have a right to freedom from harassment due to any of the foregoing prohibited grounds in the workplace by the employer, an agent of the employer or by another employee.

At one time, mandatory-retirement policies were very common across Canada. However, mandatory retirement is increasingly treated as a form of age-related discrimination, unless the employer can establish a bona fide occupational reason why an employee must retire at a certain age as opposed to undergoing individualized fitness or aptitude tests. There is no legislated mandatory-retirement age. In large part, however, pensions are structured around a presumed retirement date of age 65 and it may be financially disadvantageous for an employee not to start retirement at age 65.

c. Employment Equity

The federal *Employment Equity Act* provides for employ-

ment equity for women, Aboriginal peoples, disabled people and visible minorities. It is designed to remove inequality in the workplace by eliminating systemic barriers facing historically disadvantaged groups. The Act applies to all federally regulated employers who employ 100 or more people. Employers must identify and remove offending policies and practices, and, in place of these policies, employers must institute positive policies and practices to achieve a proportionate representation of people from historically disadvantaged groups in the employer's workforce.

Such employers must also file annual reports concerning the number of persons they employ and the number of persons they employ in designated groups, with a breakdown by occupational groups and salary ranges.

The Federal Contractors Program applies to suppliers of goods and services to the federal government that have 100 or more employees and are bidding on contracts worth \$200,000 or more. It imposes on such private-sector employers obligations to implement employment equity in the workplace. Federal contractors can be audited for compliance and, where the results are unsatisfactory, given a specific time period for remedying any gaps. Québec has also instituted the Québec Contractors Program, which is designed to promote the employment of women, visible and ethnic minorities, and Aboriginal peoples.

d. Occupational Health and Safety

The provinces regulate workplace health and safety in Canada to ensure that employers provide a safe work environment. There are stringent rules requiring the posting of safety legislation, the existence and updating of written policies, the establishment of workplace safety committees, safety training, the use of personal protective equipment, and the handling of hazardous materials. Employers, supervisors and workers all share obligations to maintain a safe workplace. It should be noted that a failure to maintain a safe workplace can lead to both civil and criminal consequences. Under the *Criminal Code*, directors and executives may

face criminal prosecution for negligence that leads to serious injury or death. Under the various occupational health and safety laws across the country, there are significant fines and penalties if an employer fails to comply with applicable legislation. Fines can be as high as \$500,000 where death or serious injury occurs, and fines in the range of \$100,000 to \$150,000 are quite common.

e. Canada/Québec Pension Plan

The Canada Pension Plan (or, in Québec, the Québec Pension Plan) is administered by the government and requires contributions from both employers and employees at prescribed rates. Employers are required to deduct a percentage of an employee's pensionable earnings and remit that amount to the federal government together with an equal amount contributed by the employer.

In 2011, the contribution rate was 4.95 per cent of annual income, to a maximum of \$2,217.60 for both the employer and employee.

f. Private Pensions

Private pensions are heavily regulated. Federal and provincial laws regulate the terms, conditions and administration of private pensions.

7. Labour Relations

Canadian law recognizes the right of employees to unionize. Each jurisdiction has enacted comprehensive legislation with respect to the right of workers to unionize that outlines the obligations of employers in a unionized workplace. The legislation also establishes how a union may be certified and decertified.

Once a union is certified, the employer is required to negotiate a collective-bargaining agreement that governs the workplace. The legislation also provides for grievance arbitration of workplace disputes. In addition, the legislation forbids a broad range of unfair labour practices (ULPs) such as the use of threats,

intimidation or coercion in the course of a union drive. Complaints about ULPs can be brought against both the union and the employer. Canadian labour boards have broad remedial powers. Successor-rights provisions are designed to ensure that bargaining rights survive the sale or divestiture of a business.

A sophisticated body of case law interpreting both federal and provincial labour laws has been developed by the Canada Industrial Relations Board, the provincial labour relations boards and various arbitration panels appointed pursuant to the laws. Although the courts have the power to review the decisions of the labour boards, considerable deference is given to their specialized expertise.

8. Public Health Insurance

Canada has a public health-care system that covers almost all legal residents of Canada. The public health-care system, often referred to as “medicare,” is limited. For example, visits to physicians are covered, but prescription drugs and routine dental visits are not. Certain vaccines are included, but others are not. Because of the gaps in the public health-care system, many employers also provide their employees with private extended medical coverage, the particulars of which can vary greatly.

9. Workers’ Compensation

a. Introduction

Workers’ compensation is a system of disability benefits payable to a worker who is injured on the job or while performing job duties. The scheme is intended to relieve the injured worker of the delay, cost and difficulty of suing an employer in a tort action or in a civil action for negligence in the workplace. Compensation is to be provided expeditiously and without proof of fault. In turn, employers are required to fund the system through payroll assessments, but are shielded from the risk of lawsuits and damages from employees injured on the job.

In practice, the Canadian schemes operate by having assessments levied upon employers, which are then gathered into a common fund from which benefits are paid to workers who are disabled as a result of their employment. Administration and adjudication are carried out by a statutory corporation known in most provinces as the Workers’ Compensation Board, but known as the Workplace Safety Insurance Board in Ontario and the *Commission de la santé et de la sécurité du travail* in Québec.

b. Determination of Employer Contributions

The legislation governing workers’ compensation is provincial in scope, so the particulars of each statute may vary from province to province. However, the statutes generally apply automatically and the coverage is compulsory for most employers.

Where an industry is excluded from the compulsory coverage, it may be possible to opt in. The employer may apply to the appropriate board for the coverage of the business or undertaking. If the application is accepted, which is the normal practice, the business or undertaking of that employer will be covered.

Rates are usually established by examining the employer’s industry group and then adjustments are made based on claims experience. Surcharges arising from actual claims can be significant. The money is collected into an accident fund from which benefits are paid. Employers are prohibited from seeking any indemnity or contributions from workers for assessments or other liabilities under the applicable legislation.

c. Benefits

Injured workers are entitled to income replacement if the injury results in an inability to work. In addition, benefits will cover health-care needs arising from the injury, such as prescription drugs, assistive devices and therapy. Workers may also be entitled to a lump-sum amount if the injury results in a permanent impairment.

d. Duty to Accommodate Rehabilitated Workers

The legislation generally requires an employer to re-employ a worker injured on the job either to the pre-injury position or to other suitable employment. This obligation is intended to reduce the accident costs arising from workers' compensation claims as well as to encourage reintegration of injured but rehabilitated workers into the workplace. Where reintegration into the former workplace is not feasible due to the nature of the injury, an employee may also qualify for job retraining.

10. Employment Insurance

The federal government, through Human Resources and Skills Development Canada, administers a program called Employment Insurance (EI), which provides payments for a period of time to workers who lose their jobs. The purpose of the program is to cushion the blow of unemployment for a worker while also encouraging the worker to search for new employment. The program is paid for through premiums collected from employees and employers through a payroll deduction made by the employer and submitted to the government.

Almost all full-time employees as well as part-time and casual employees are covered under the Employment Insurance program, provided they meet specified minimum requirements. An employee will not be entitled to benefits if he or she resigned without good reason or was fired for cause.

Employment insurance also provides income replacement during maternity and parental leaves. In Québec, however, employees must apply to the Québec Parental Insurance Plan (QPIP), which provides more generous benefits to new parents. One interesting feature of the QPIP is that it provides certain benefits that can only be used by the new father and cannot be transferred or shared with the new mother. This benefit is designed to encourage new fathers to take an active role in parenting a new infant right from the beginning.

11. The Québec Charter of the French Language

This legislation is designed to make French the default language of work in Québec. It requires that written communications to staff in general (e.g., employee handbooks, benefit booklets, memos, etc.) be in French only or bilingual (French/English). Employers should be careful to respect the requirements of this legislation in terms of workplace intranet and computer-software resources.

Communications with a specific employee, such as offers of employment, disciplinary memos, and notices of promotions or salary increases should also be in French, unless the employee requests that they be in English. If so, there should be a written directive from the employer that communications ought to be made in English.

It is illegal to make knowledge of any language other than French a job requirement, unless the employer can establish that such language skills are truly required.

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