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Employment Law Issues for Technology Companies

Christopher M. Andree and W. David Petras

To foster creativity and achieve their business goals, many tech companies try to avoid a "legalistic" approach to employment relationships. However, failure to appreciate the legal ramifications of these informal employment practices can undermine the value of the business.

For U.S. stakeholders, an appreciation of the differences between U.S. and Canadian employment laws and practices is critical to a successful Canadian venture.

Some of the key employment law issues for tech companies include:

- Identification and protection of confidential information;
- Ownership and protection of intellectual property;
- Protection of customer, supplier and employee relationships;
- Compliance with applicable legislation; and
- Minimizing the costs of terminations.

The Employment Relationship

Unlike most U.S. jurisdictions where "at will" employment is common, in Canada the employment relationship is a contract between the employer and employee. Because of the power imbalance

employees are vulnerable to the behaviour of employers, particularly at the time of termination. Accordingly, employers are held to a high standard.

Legislation

Unlike in the U.S., most Canadian employers are subject to provincial rather than federal legislation, with variations from province to province. Subjects addressed by legislation include minimum wage, maximum hours of work, overtime pay and paid vacation, as well as safety standards, collective bargaining rights, freedom from discrimination and pay equity.

One significant difference from U.S. law is that Canadian employees have the right to notice of termination without cause (or pay in lieu). In Ontario, for example, the *Employment Standards Act, 2000* (ESA) requires that an employee terminated without cause receive one week of notice (or pay in lieu) for every year of service, to a maximum of eight weeks. In addition, if the terminated employee has five or more years of service, and the employer has an aggregate annual payroll in excess of C\$2.5 million, the employee must be paid an additional week's pay for each year of service, to a maximum of 26 weeks. Legislative compliance is mandatory, and waiver by

employees, even in writing, is ineffective. Failure to comply can result in penalties, fines, interest and even director and officer liability.

Common Law

Employers are also subject to common law obligations that begin prior to employment (misrepresentation), govern formation of the contract (offer/acceptance) and intensify after commencement of employment to include restrictions on changes to the terms of employment (constructive dismissal), rights on termination (wrongful dismissal) and post-employment behaviour (restrictive covenants).

An employee terminated without cause is entitled to reasonable notice (or pay in lieu). The notice is based on a court's assessment of the expected period of unemployment having regard to age, length of service, position and other factors, and often exceeds the ESA. In extreme cases, a long-time senior employee might receive as much as two years' notice (or pay in lieu).

Protection of Assets

Identifying and protecting confidential information and intellectual property are critical to a tech company's success and value. It should identify the types of assets it seeks to protect and require employees to sign a non-disclosure and intellectual property ownership agreement (NDA) confirming that all intellectual property created by the employee belong to the company. The employee should also agree to execute all documents required to confirm such ownership and to support intellectual property registrations.

Canadian copyright laws give the author of a copyrighted work (e.g., a software developer who writes code) certain "moral rights" (i.e., the right to be identified as the author or to remain anonymous) and the right to prevent interference with the integrity of the work). These moral rights cannot be assigned, but should be waived in writing.

In order for the NDA to be enforceable, an employer must provide consideration (value) to the employee when the agreement is signed. It could be the initial job offer or, if the agreement is signed after employment has begun, a salary increase or grant of stock options.

Strategies to prevent unfair competition by former employees (e.g., solicitation of customers, disruption of supplier relationships, or "poaching" of employees) are strongly encouraged. In Canada, however, in contrast to many American states, employee non-competition covenants are generally unenforceable. A prohibition against an employee's active solicitation of customers with whom the employee had dealings for the purpose of selling competitive products and services, as well as a reasonable covenant prohibiting the solicitation of other employees, is more likely to be enforceable.

Independent Contractors

Tech companies often seek to characterize key individuals as independent contractors rather than employees. Should such a relationship come to be regarded as employment, however, the business could be subject to fines, interest and penalties for failing to comply with legislation related to tax withholdings, Canada Pension Plan, workers' compensation premiums, employment insurance and wages. The tests to determine status are complex and inconsistent and include the level of control and degree of integration into the business, the supplier of the facilities to perform the services and the opportunities to earn a profit or suffer a loss.

Written Employment Agreements

Written employment agreements provide predictability and serve to enhance the value of a tech company. If an employer uses a well-drafted offer of employment, employees are aware of their rights and obligations at the outset, and the enforceable terms outlined in the offer can protect assets, help with compliance and minimize liability.