Employment law in Canada: Key considerations for international companies

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This article is part of a practical series written for international companies looking to establish, launch, operate or invest in a business Canada. Each article covers a major area of law in Canada – everything from employment laws to taxes. Access all the articles on the "Doing business in Canada: A practical guide from 'Eh' to 'Zed'" page.

Canada's employment law governs the legal rights and obligations that regulate all aspects of the employer-employee relationship. The importance of employment relationships and employment law for any business cannot be over-emphasized.

While the principles of law governing employment in Canada are derived from the common law of contracts, certain aspects of labour and employment law, such as collective bargaining and employment standards, are regulated by statutes. Every province and the federal government have enacted labour and employment legislation and each business will either be federally or provincially regulated.

Constitutional jurisdiction

The nature of the business carried on by the employer determines whether its relations with its employees are governed by provincial or federal law. The recognition of unions and the regulation of collective bargaining, as well as employment standards such as overtime and hours of work are also all regulated by federal or provincial law. Businesses that fall within the category of a "federal work, undertaking or business" (for example, navigation and shipping, railways, inter-provincial transport, air transportation, communications, broadcasting and banking), are governed by federal law. Most employers in Canada fall within provincial jurisdiction and are, therefore, regulated by provincial statutes.

Individual contracts of employment

There is extensive regulation of individual contracts of employment by both provincial and federal laws. These laws govern such matters as human rights, occupational health and safety, workers' compensation, employment insurance, pensions, minimum wages and other aspects of employment. Some provinces have as many as 25 different

statutes that touch, to some degree, on employment conditions. Individual contracts of employment may be written or oral. The courts have therefore developed a series of terms that are implied in every employment contract, unless the parties have expressly provided otherwise. In Canada, employees are considered to be hired for an indefinite period, unless there is a written or oral agreement that specifies the duration of the employment.

Generally, it is implied that the employee has both a duty of honesty and a duty to avoid a conflict of interest with his or her employer. Employees are also obliged to comply with lawful directions of their employer within the scope of their employment, and to perform their contract of service with diligence and to an appropriate standard of skill and competency. Employers, in turn, have a duty to act in good faith regarding termination of an employee.

Canadian courts have held that employees owe a duty not to injure their employer during or after the employment, for example, by disclosing confidential information or trade secrets.

Employers can better protect their interests by having a written contract of employment that includes terms restricting or limiting certain employee conduct both during the term of employment and particularly after termination of employment. These terms are called "restrictive covenants". There are three general types of restrictive covenants used in employment contracts:

- non-solicitation covenants, which restrict departing employees from soliciting clients, customers or other employees;
- non-competition covenants, which restrict departing employees from commencing employment with competitors or setting up competing businesses; and
- non-disclosure covenants, which restrict departing employees from disclosing confidential information. In the absence of a non-disclosure covenant, employees still have a common law duty not to disclose confidential information or trade secrets.

Restrictive covenants are viewed as a restraint of trade and courts will carefully scrutinize them. The enforceability of restrictive covenants largely depends on the reasonableness of their duration and geographic scope, the wording of the contract, the nature of the business and the legitimacy of the interests that the employer is seeking to protect. The law is clear that a restrictive covenant must go no further than is reasonably necessary to protect the employer's legitimate interests.

In order to be enforceable, a termination provision must comply with employment standards and it must be clear and unambiguous. Moreover, in December 2021, the Ontario government amended the province's *Employment Standards Act* to prohibit non-competition covenants altogether, with very few exceptions.

In the absence of an express and enforceable agreement regarding the consequences of and entitlements of the employee on termination, employees who are dismissed without just cause are entitled to reasonable notice of termination, and they may recover

damages if such notice is not given. In providing reasonable notice, the employer generally has two options:

- the employer may require the employee to continue to work through the notice period (otherwise known as working notice), or
- the employer may provide the employee with pay in lieu of working notice.

What constitutes reasonable notice under the common law is determined by the circumstances of each case. The courts have identified four major factors in determining reasonable notice under the common law, giving varying degrees of weight to each of the following, depending on the circumstances:

- the character of the employment;
- the length of service;
- the age of the employee; and
- the availability of similar employment, taking into consideration the employee's compensation, experience, training and qualifications.

This common law reasonable notice entitlement encompasses any statutory notice entitlement provided by applicable employment standards legislation. The reasonable notice requirement directly contrasts with the widely held view in the U.S. that workers are employed at the will of the employer and that their employment may be terminated at any time, without cause and without notice.

Unlike the United States, Canada does not have an at-will employment regime. In Canada, an employee can only be summarily dismissed without any notice or pay in lieu of notice if just cause for termination exists.

Federally regulated employers, however, are not permitted to terminate employment of non-managerial employees under the Canada Labour Code unless there is just cause, even where notice or pay in lieu of notice is provided, or the termination is due to lack of work, with limited exceptions. In the Province of Québec, where a civil law system applies, there are also a few differences regarding reasonable termination notice, as opposed to the common law system. The main differences being that employees in Québec cannot waive their right to a termination notice in advance and cannot be terminated after 2 years of service without just and sufficient cause and that what constitutes a reasonable notice is generally longer under the common law than the civil law system.

What constitutes just cause varies and requires a contextual analysis. Just cause is a very high standard to meet and asserting just cause for termination when the employer knows grounds for termination were not well founded may lead to a finding of bad faith, resulting in a larger damages award to the employee.

Employment laws do not apply to independent contractors, unless they are found by a court or an adjudicator to have been improperly classified. Employers must carefully consider whether an independent contractor relationship is appropriate and whether it is possible that the individual is, in reality, truly an employee, in order to avoid incurring employment-related liabilities. Among many other relevant factors, a court or an adjudicator will review any applicable agreement in considering whether an individual has been properly classified as an independent contractor. Therefore, care must be

taken when structuring independent contractor agreements to ensure it is clear that independent contractor is not an employee. There are a number of specific terms that are recommended for inclusion in an independent contractor agreement and employers should seek legal advice when drafting those contracts.

There are many advantages to having a written contract of employment stipulating the terms and conditions of employment, and in particular, what happens on termination. It is strongly recommended that an employer receive legal advice on whether the termination provision in its offer letters and/or employment agreements is enforceable in order to limit exposure to common law reasonable notice liability.

Employment conditions imposed by statute

Provincial and federal statutory employment standards exist for all jurisdictions. Statutes govern such matters as minimum wage rates, method and frequency of payment, hours of work and overtime pay, vacation pay, statutory holidays, emergency leave, maternity and other leaves, and minimum requirements for notice of termination of employment or pay in lieu thereof. There are also minimum standards imposed by both provincial and federal legislation governing health and safety in the workplace, including workplace harassment and violence. In most jurisdictions, there are penalties for failing to comply with these standards.

Canada's Criminal Code expands an employer's duty to protect the health and safety of a worker. In particular, anyone who undertakes or has authority to direct how another person does work is under a legal duty to prevent bodily harm to that person, and any other person, arising from that work.

In some jurisdictions, there is legislation governing the layoffs or termination of large groups of employees. Such legislation may make it necessary for the employer to give substantial advance notice to the responsible government ministry and the affected employees before implementing such initiatives. A specific government ministry in each jurisdiction has the power and duty to enforce the legislation with the imposition of payment orders enforceable by the courts.

The federal jurisdiction and most provincial jurisdictions have enacted legislation protecting workers from workplace violence and harassment. The legislation requires employers to prepare policies and maintain programs with respect to workplace violence and harassment. The programs must include measures and procedures for reporting by workers and investigation by the employer of incidents of violence or harassment. The employer is also required to train employees and proactively identify and assess the risks of violence particular to their workplace. In addition, the employer is generally required to notify workers who will be coming in contact with other workers known to have a history of violent behaviour. Recently, the federal government has legislated to ban wage-fixing and no-poaching agreements. Such agreements are now, since June 2023, criminal offences and in violation of the *Competition Act*.

Workers' compensation

Employers have a general duty to provide a safe working environment. Workers' compensation insurance protects employers from claims resulting from injuries to

employees and is mandatory for most Canadian employers that employ a stipulated minimum number of people. Under provincial legislation that provides for workers' compensation, covered employees are generally denied their common law right to sue their employer but may claim benefits under the compensation scheme. Compensation is generally payable to an employee who sustains personal injury arising out of an in the course of employment or who suffers from an occupational disease. In most jurisdictions, injured employees receive between 75 per cent and 90 per cent of their pre-injury income while disabled.

Such compensation payments are largely funded through employer contributions.

Canada pension plan

The Canada Pension Plan is a contributory, earnings-related social insurance scheme established by the federal government. It insures against the loss of income due to retirement, disability and death. It applies to anyone working in Canada, outside of Québec. An employee must contribute to the plan 4.95 per cent of all employment earnings in excess of C$3,500 up to a specified maximum of C$3,754.45 per year (in 2023). The contribution percentage will increase in 2024. Employers are required to deduct employee contribution amounts from an employee's remuneration and remit it to the federal government. Employers are also required to match employee contributions. Self-employed persons must pay both portions. The Province of Québec has its own similar program, the Québec Pension Plan, which applies for those working in Québec.

Except in Québec, there is no legislative requirement that employers establish or fund an employer-sponsored retirement plan for its employees. If, however, an employer chooses to establish such a plan, it has to comply with the governing regulations. Private retirement plans include pension and other retirement savings arrangements.

Employment insurance

The federal *Employment Insurance Act* regulates an insurance scheme to which both employers and employees must contribute. Workers who qualify for assistance receive benefits while they are unemployed, or without pay because of parental leave, temporary sickness or quarantine, or compassionate family care leave. The level of benefits an employee will receive depends on several factors, including past contributions, length of employment and previous salary. Employers are required to deduct the contribution amount from an employee's compensation and remit it to the federal government. Employers must also match the contribution at a rate of 1.4 times the employee's contribution amount.

Human rights legislation

Every provincial and federal jurisdiction has legislation designed to protect human rights. Among other things, this legislation is aimed at preventing and remedying discrimination in the workplace. Legislation differs across jurisdictions, so it is important for employers to familiarize themselves with the legislation in all jurisdictions where they will operate to ensure a clear understanding of what constitutes prohibited discrimination. Most jurisdictions prohibit discrimination on the basis of race, ancestry,

nationality, ethnic or place of origin, political belief, colour, gender expression and/or identity, religion or creed, sex, sexual orientation, marital status, family status, age, physical or mental disability, or criminal records. Sexual harassment is considered discrimination on the basis of sex.

With respect to disability, employers have a duty to accommodate employees with a disability to the point of undue hardship.
Some jurisdictions have also enacted pay equity legislation. Such legislation requires that employers provide comparable salary and benefits to employees in comparable positions regardless of gender.

Employment governed by collective agreements

Trade unions represent a significant portion of the Canadian work force. All Canadian jurisdictions recognize the right of trade unions to organize and represent employees, and to engage in collective bargaining. Collective bargaining consists of negotiations between an employer and group of employees over the terms and conditions of employment. The result of collective bargaining is a collective agreement.

Provincial and federal labour legislation provides for the following:

a) exclusive bargaining rights to certified trade unions;

b) a postponement of the right to strike or lockout until after the expiry of a collective agreement and after a conciliation or mediation process;

c) prohibition of unfair labour practices both by employers and trade unions;

d) legal recognition and enforceability of collective agreements;

e) resolution of disputes under collective agreements through a grievance procedure or arbitration, without resorting to strike; and establishment of administrative tribunals or regulatory bodies with investigative and remedial powers over the collective bargaining and organization process and other aspects of labour relations.

While the precise nature of these rights varies from jurisdiction to jurisdiction, these features are common to all Canadian jurisdictions.

Employees have the right to belong to a trade union of their choice, free of any coercion or interference by the employer, and employers have a duty to recognize and bargain in good faith with the trade union chosen by their employees. Labour relations tribunals supervise the organization of employees and, to some extent, the collective bargaining process.

This institutional arrangement largely displaces the administration of labour law by the courts, although the jurisdiction of the courts in certain labour matters, such as the issuance of injunctions and limited review of labour board decisions, remains intact.

Employers and employees have different rights and obligations under a collective agreement than under individual contracts of employment where there is no trade union.

The collective agreement governs the terms and conditions of employment of unionized workers. Generally, employers cannot enter into individual contracts with unionized employees.

Collective agreements must provide for a private system of dispute resolution, typically in the form of arbitration. Employees who are dismissed or disciplined by their employer have the right to seek redress through arbitration. Arbitrators are given the power under the collective agreement (or by statute) to reinstate dismissed employees if they find that the employer acted with insufficient cause. They also have the right to substitute a penalty of less severity than that imposed by the employer. Although unionized employees do not have the common law right to notice, employment generally may only be terminated for just cause or because of a lack of work.

Arbitrators also have the authority to settle disputes over the interpretation of the collective agreement. Their decisions are binding on the employer, the employees and the trade union. There is a limited right to judicial review from arbitration decisions.

Whistleblower protection

In Canada, it is a criminal offence for an employer to take disciplinary measures, or threaten or adversely affect the employment of an employee, with the intent to stop the employee from providing information to law enforcement officials regarding wrongful activity. Anti-reprisal provisions that protect employees who report wrongful activity of their employers are also found in various provincial employment standards legislation, in human rights statutes and in workers' health and safety statutes.

Language of work

In June 2023, the federal government enacted the *Use of French in Federally Regulated Private Businesses Act*, which, among other things, provides for rights and duties respecting the use of French as a language of service and a language of work in relation to federally regulated private businesses in Québec and in regions with a strong francophone presence.

Similarly in Québec, on June 1, 2022, *An Act respecting French, the official and* common language of Québec received royal assent and became law. The Act imposes new French language obligations affecting the language of work, commerce and business, contracts, signs, communications between the Government and businesses, education, the courts, and more. It also paves the way for significant changes to Québec's Charter of the French Language and other provincial laws, such as the Civil Code of Québec and the Consumer Protection Act.

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BLG Offices

Calgary

Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
T2P 0R3

T 403.232.9500
F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749