

Employment Law

Section E of Stikeman Elliott's *Doing Business in Canada*



Employment Law

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Employment Law

GENERAL

Legislative jurisdiction over labour and employment is shared by the Canadian provincial and federal governments. Most businesses fall under provincial jurisdiction, with the federal government having jurisdiction over specifically designated federal works and undertakings, including inter-provincial transportation, banking, telecommunications and radio broadcasting. For the purposes of labour and employment laws, businesses either fall under federal or provincial legislation, but not both.

Generally, the employment relationship is governed by the laws of the jurisdiction in which the services are rendered, although the employer and employee may agree that the laws of a specific jurisdiction will govern the contract of employment. Obligations of the employer include compliance with minimum standards legislation (which, as discussed below, are broad and cannot be contracted out of) and the maintenance of a safe working environment. The obligations on the employee include a duty of loyalty, a responsibility to perform the work in a diligent manner and obligations of confidentiality.

With the exception of Quebec, provincially governed employment contracts are governed by applicable provincial legislation and the common law. In Quebec, the *Civil Code* is the governing legislation.

MINIMUM STANDARDS LEGISLATION

The federal and provincial governments regulate certain basic terms and conditions of employment. While the legislation varies from jurisdiction to jurisdiction, it is generally of broad application, applying in most workplaces and to most kinds of employment. Generally, employees are guaranteed certain minimum rights with respect to the terms and conditions of their employment. Terms and conditions established by legislation include, but are not limited to, minimum wages, hours of work, overtime pay, daily and weekly rest periods, vacations and vacation pay, statutory holidays, pregnancy and parental leave, equal pay for work of equal value, minimum periods of notice of termination and/or severance pay, and terms that govern the treatment of employees upon the sale of a business (or part of a business). The *Canada Labour Code* (which governs federal undertakings such as banks and the telecommunications industry) and Quebec legislation have specific unjust dismissal provisions that can result in the reinstatement of a terminated employee.

As noted above, employers and employees cannot contract out of, or waive, these legislated terms and conditions. Where the contract of employment provides for terms and conditions of employment exceeding statutory

minimum standards, these more favourable terms usually become binding upon the employer and can be enforced as a “minimum standard”.

LABOUR RELATIONS LEGISLATION

Federal and provincial labour laws grant employees the right to form or to join a trade union for the purpose of bargaining collectively with employers. Labour legislation obliges employers to recognize a trade union’s exclusive bargaining rights with respect to the “bargaining unit” that it represents and to bargain in good faith with the union. It also endeavours to protect employees and employers against unfair labour practices on the part of employers and trade unions, respectively.

Canadian labour legislation also provides for the certification of trade unions as bargaining agents, compulsory collective bargaining, compulsory postponement of strikes and lockouts during the bargaining process, government intervention by way of a conciliation process in situations where the parties have been unable to negotiate a collective agreement, the right of employees to strike and the right of employers to lock out. Each jurisdiction also provides for the imposition of a collective agreement by way of arbitration. For example, Ontario’s *Labour Relations Act, 1995* provides, in certain circumstances, for first contract arbitration where parties have been unable to negotiate an agreement. Some provincial legislation restricts the use of replacement workers during a strike or lockout.

When all or part of a unionized business is sold, the union’s bargaining rights will generally be preserved unless the appropriate labour board, or similar body, declares otherwise. In essence, the purchaser will be bound by the vendor’s collective agreement and will be a party to any proceedings that were pending when the transaction was completed. In addition, there exist “related employer” provisions, which seek to prevent the erosion of bargaining rights by employers transferring work to entities under common control or direction.

Canada’s most heavily unionized jurisdictions are Quebec, Newfoundland & Labrador and the western provinces (with the exception of Alberta, the least unionized province). Of note is the *Labour Relations Statute Law Amendment Act, 2005*, which amended the Ontario *Labour Relations Act, 1995* in a manner favourable to unions. Included in the amendments is the ability for the Ontario Labour Relations Board to automatically certify a union during a certification drive. The most heavily unionized industries are manufacturing, public administration, transportation and communications.

HUMAN RIGHTS LEGISLATION

Human rights legislation prohibits discrimination in all aspects of employment, including recruitment and hiring. Although they differ somewhat from province to province, generally speaking, prohibited grounds of discrimination include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences, marital status, family status and handicap. Further, human rights legislation in most Canadian jurisdictions includes specific harassment (including sexual harassment) provisions.

Human rights legislation has sweeping application. For example, it affects the ability of employers to make hiring decisions on the basis of background checks. Quebec legislation has included psychological harassment as a ground. British Columbia, Ontario, New Brunswick, Saskatchewan, Manitoba, NWT, Yukon and Nunavut human rights legislation recognize damages for loss of dignity. A breach of human rights legislation can also form the basis for a claim of constructive dismissal by an employee.

The remedial powers contained in the various provincial statutes are broad and may include monetary compensation, reinstatement, and cease-and-desist orders. One area that has caused difficulty to Canadian businesses is the limited ability to do any drug or alcohol testing, particularly, pre-employment testing. Discriminatory standards may be adopted by the employer in certain specified circumstances, but the employer will have to establish that the standard is a *bona fide* occupational requirement and that the employee cannot otherwise be accommodated (which, given the legal test to justify this, can be quite difficult to achieve). For example, it may be permissible to reject an applicant based on their record of offences if reasonably related to the position.

In addition to federal and provincial human rights statutes, the *Canadian Charter of Rights and Freedoms*, a constitutional bill of rights that applies to both federal and provincial governments, has had a significant effect on labour relations in the public sector.

EMPLOYMENT EQUITY AND PAY EQUITY

General

In the 1980s, Canadian governments began to introduce policies and legislation intended to reduce certain social inequalities and (in some cases) to redress prior discriminatory practices. Two such programs are “employment equity” and “pay equity”. Employment equity is essentially the same in concept as American affirmative action programs insofar as it relates to employment. That is, it is designed to improve the employment prospects of groups that have traditionally not enjoyed equal success in the Canadian labour market. Pay equity, meanwhile, is the policy of equalizing

wage rates as between mainly male and mainly female job classifications requiring similar levels of skill. This can include retroactive compensation for past imbalances.

Employment Equity

Employment equity legislation mandates affirmative action in employment practices with respect to certain designated groups, including women, aboriginal peoples, persons with disabilities and persons who are, because of their race or colour, in a “visible minority” in Canada. Such affirmative action measures typically involve a workforce survey and analysis, a review of employment systems, the development and implementation of an employment equity plan and reporting and monitoring of the plan.

Federally regulated employers with 100 or more employees are subject to federal employment equity legislation. In addition, employers with 100 or more employees and bidding on federal government goods or services contracts worth \$200,000 or more are required to comply with the federal government’s Federal Contractors Program, the requirements of which are similar to those under the federal *Employment Equity Act*.

At the provincial level, all jurisdictions except Alberta, Ontario and Newfoundland have employment equity policies. These apply within the public sector only, although Quebec has instituted a similar program that applies to public or designated employers with more than 100 employees.

Pay Equity

Pay equity legislation exists at the federal level (with respect to federally regulated industries), as well as in Manitoba, New Brunswick, Nova Scotia, Ontario, Prince Edward Island, Quebec and the Yukon. With the exceptions of Ontario and Quebec, the legislation generally only applies to public sector employers. British Columbia and Newfoundland have introduced administrative pay equity program for their public sector employees.

Pay equity legislation creates obligations to address gender discrimination with respect to the payment of female employees. The principle underlying pay equity is that men and women should receive equal pay for performing the same or substantially the same work. The measures aimed at achieving this goal are detailed, technical and vary between jurisdictions. Typical pay equity measures involve the development of a pay equity plan and adjustment of compensation as required, with retroactive application.

WORKERS’ COMPENSATION

The workers’ compensation system is designed to replace the right of an employee to sue an employer for losses arising out of an accident in the workplace by providing the employee with the right to claim compensation from a statutorily established accident fund. Workers’ compensation

legislation establishes entitlement to compensation with respect to injuries occurring in the workplace as a matter of right, no matter who, if anyone, was at fault. Thus the workers' compensation system replaces the tort system in the context of injuries suffered in employment. An injured worker has no other legal recourse against his or her employer, co-workers or any other person to whom the workers' compensation legislation applies.

Most employers are required to contribute to a government fund, and the contributions are based on the employer's payroll, the type and nature of business carried on, and the employer's "experience rating" based on the employer's particular accident record. Certain types of business are excluded from mandated workers' compensation coverage. These exclusions vary from province to province and are generally limited in nature. Where an employer falls within such an exclusion, provincial workers' compensation boards are typically empowered to extend coverage to the particular employer, usually at the employer's request.

Compensation and medical expenses for injured workers are based on an injured worker's lost earnings, awarded by an administrative tribunal and paid out of the fund. No contribution to the fund by employees, either directly or indirectly, is permitted. In Ontario, the *Workplace Safety and Insurance Act* provides, in certain circumstances, for the mandatory reinstatement of injured workers and penalties if an employer terminates an employee as a result of the injury.

OCCUPATIONAL HEALTH AND SAFETY

Occupational health and safety laws exist federally and in every province. The legislation – which is generally similar in each jurisdiction – combines an "external" system of legislated minimum standards and duties, enforced by inspections and penalties, with an "internal" system whereby employer and employees co-operate in assuming certain responsibilities for safety in the workplace. Under the external system, an employer's duties include the duty to make every employee aware of every known or foreseeable safety or health hazard in the work area and to comply with warning and labelling rules for hazardous materials. For their part, employees are required to take all reasonable and necessary precautions to ensure the health of their co-workers. Under the internal system, health and safety legislation requires employers (in companies surpassing a designated minimum size) to establish "joint workplace safety committees" made up of workers and managers. These committees resolve complaints, keep records, and oversee workplace safety programs.

Central to the occupational health and safety system is an employee's right to refuse work that he or she reasonably believes to be unsafe. Occupational health and safety statutes in most jurisdictions prohibit an employer from dismissing or disciplining an employee for exercising this right. Failure to

comply with occupational health and safety legislation can result in significant fines against the employer if an employee is injured as a result of such a violation (in fact, in recent years, most provinces have considerably increased the fines). Under the regimes in Ontario and other provinces, health and safety inspectors can ticket employees, supervisors and workers for certain violations of the regulations associated with the legislation.

In 2004, the *Criminal Code* was amended to impose criminal liability for unsafe workplaces. This liability extends to all organizations, including corporations, public bodies, firms, partnerships, trade unions, municipalities and other forms of associations. The amendments created a legal duty for all persons directing work to take reasonable steps to ensure the safety of workers and the public and set out rules attributing criminal liability to organizations for the acts of their representatives. In addition to the penalties that are already in place under health and safety legislation, the amendments imposed significant penalties, providing for a fine ranging between \$25,000 and \$100,000 in the case of a summary conviction offence. There is no limit, however, on the fine that can be imposed on more serious, indictable offences.

Employers should also be aware of the recent enactment in June 2010 of the *Occupational Health and Safety Amendment Act (Violence and Harassment in the Workplace), 2009* (Ontario), which imposes significant new obligations on employers in Ontario with respect to violence and harassment in the workplace. The principle of “workplace harassment” extends beyond the prohibited grounds under human rights legislation and, accordingly, includes actions such as bullying in the workplace. Among other things, the Act requires employers to prepare and regularly review policies with respect to workplace violence and harassment. In addition, employers are required to develop and maintain programs to implement these policies in accordance with the requirements of their workplace (for example, employers are required to devise procedures for reporting and investigating incidents of workplace violence and harassment).

EMPLOYMENT INSURANCE, PENSION AND BENEFITS PLANS, AND EMPLOYER HEALTH TAX

Both employers and employees are required to make contributions pursuant to the federal *Employment Insurance Act* (EIA) and the legislation establishing the Canada Pension Plan (CPP) (or in Quebec, the Quebec Pension Plan). Such contributions may be deducted by the employer for tax purposes. Several jurisdictions in Canada, including Ontario and Quebec, have also established an employer health tax whereby employers who have a permanent establishment in the province generally are required to pay an annual tax at a graduated rate depending on the total annual remuneration paid to employees.

Employment Insurance

The EIA requires all employers and employees to make contributions to an Employment Insurance Fund administered by the federal government. In 2010, the premium payable by employees was 1.73% of insurable earnings up to \$42,300 (resulting in a maximum premium of \$747.36). The employer contributes at a rate 1.4 times the employee's premium and remits the total to the Canada Revenue Agency (CRA) (or in Quebec, Revenue Quebec), Canada's (or Quebec's) equivalent of the IRS or HM Revenue & Customs in the U.K. An employer's contributions to the Employment Insurance Fund are deductible for Canadian income tax purposes as a business expense. In order for employees to be eligible for employment insurance benefits, an employee must be employed for a specified number of weeks in the preceding 52-week period, such number varying between regions. Employees are entitled to insurance benefits in the event of loss of employment due to termination without cause, layoff, maternity, or illness, provided that they meet a number of eligibility criteria.

Canada Pension Plan

The Canada Pension Plan (CPP) is operated by the federal government in the common law provinces. Quebec has a separate, independently operated plan, the Quebec Pension Plan (QPP). The CPP/QPP provide for retirement pensions for contributors, survivor benefits for widows and dependent children of contributors, and certain disability benefits. With a few exceptions, all employers, employees and self-employed individuals are required to contribute. The CPP/QPP require that equal contribution of premiums be made by both the employer and the employee. Under the CPP, an employer is required to withhold an employee's premiums from wages and remit them, together with the employer's premium, to the CRA. The employer is required to deduct 4.95% of the employee's earnings up to the maximum pensionable earning amount of \$47,200 for 2010. The maximum annual contribution payable by each of the employee and employer for 2010 is \$2,163.15. The employer's contribution under the CPP is deductible for Canadian income tax purposes as a business expense.

Employer Sponsored Pension and Retirement Plans

Employers may choose to provide employees with pension or other retirement savings benefits. Plans that provide for pensions for employees must be registered under and administered in accordance with the federal *Income Tax Act* and *Pension Benefits Standards Act, 1985* (PBSA) or a similar provincial statute such as Ontario's *Pension Benefits Act*. The legislation provides for certain minimum standards for membership, benefits and funding. The PBSA applies to pension plans for employees employed in a federal undertaking and provincial legislation applies to pension plans for all other employees. Benefits under a registered pension

plan cannot exceed certain maximums imposed under the *Income Tax Act*. Pension benefits in excess of those maximums may be provided under a supplemental plan. Non-pension retirement savings arrangements can be provided through a Registered Retirement Savings Plan (similar to a 401(k) plan in the U.S.) or deferred profit sharing plan.

Employer Sponsored Health Benefits

Health and welfare benefits vary among employers and no legislation mandates the provision of such benefits. In Ontario, the public health insurance plan (OHIP) is partly funded by an employer health tax which is payable by employers who have a permanent establishment in Ontario and whose Ontario payroll exceeds \$400,000. A similar employer health tax is levied in Quebec and certain other provinces including Newfoundland and Manitoba.

EMPLOYEE PRIVACY

Although privacy legislation is not entirely new, the increased use in our daily lives of email, social networking and the internet generally has created more complex workplace privacy issues. Employers should be aware of the *Personal Information Protection and Electronic Documents Act* (PIPEDA), which is intended to address concerns about the collection of personal information. PIPEDA applies to all information collected in the course of commercial activities, regardless of whether the undertaking is federally regulated. However, PIPEDA does not apply to employee information of a provincially regulated employer. Privacy legislation has been introduced in Alberta and British Columbia and applies to the collection, use and disclosure of personal information (including employee information) for provincially governed employers operating in those provinces. In Quebec, the *Civil Code* specifically provides for the respect of the right to privacy.

Employers wishing to monitor employee e-mail and internet use must bear in mind the existence in some Canadian provinces of a statutory tort of invasion of privacy. In other common law provinces, the possibility remains that a suitably disposed court might be able to fashion a common law remedy for an employee whose privacy had been interfered with, even though there is no common law tort of privacy in Canada. Whatever the formal legal basis of such an action might be, the case would probably turn, at least in part, on whether the employee's expectation of privacy had been reasonable. Therefore, it is advisable for an employer operating in Canada to adopt and publicize a policy on this issue.

TERMINATION OF EMPLOYMENT

There is no concept of “at will” employment in Canada, and accordingly, in terminating the employment of an employee without cause, an employer must provide notice of termination or pay in lieu of notice to the employee in accordance with applicable provincial employment standards legislation and in the case of non-unionized employees, at common law.

Notice

Provincial statutes (for example, in Ontario the *Employment Standards Act, 2000*) set out minimum standards of employment applicable to all employees (union and non-union) and, in particular, the length of notice and severance pay required upon termination of employment. It should also be noted that each province has legislation dealing with mass terminations (which require certain governmental filings). Individual notice requirements range from one to eight weeks depending upon the length of service of individual employees, whereas the mass notice requirements range from eight to sixteen weeks. If notice is not provided in accordance with the relevant provincial minimum standards legislation, an employer must make a payment to the employee in lieu of notice of termination and must continue benefits for the relevant notice period. To be effective, the notice must be in writing. Ontario and federal legislation also provide for mandated statutory severance pay.

Written employment contracts may provide for notice or pay in lieu of notice so long as the notice is not less than that which is required by minimum standards legislation. Absent a written contract, the common law courts have consistently determined reasonable notice to be within a range from the minimum standards set out under the relevant employment standards legislation to a “rough upper limit” of 24 months. The reasonableness of the notice is generally determined based on the individual’s age, length of service, position, compensation and availability of similar employment at the date of termination. The employee is to be made “whole” during the notice period and accordingly, all elements of compensation, including bonuses and stock options must be considered.

In Quebec, Nova Scotia, and pursuant to the federal *Canada Labour Code*, there is a special remedy of possible reinstatement for employees who are dismissed without cause.

WHISTLEBLOWER PROTECTION

It is a criminal offence for an employer (and certain of their employees) to threaten or retaliate against an employee who blows the whistle on the conduct of an employer that the employee believes is in breach of a provincial or federal law. Some provincial legislation (for example, environmental legislation) also provides for whistleblower protection.

EMPLOYMENT LITIGATION

Most employment-related litigation in Canada is focused on the entitlements of an employee on termination. These cases are effectively known as wrongful dismissal claims. In addition, claims for breach of human rights legislation are common. Jury trials are rare and as a result of court decisions rendered in the last few years, it is becoming more difficult for employees to succeed in claiming aggravated or punitive damages resulting from termination. Finally, the last few years have seen an increase in class action claims in the employment litigation sphere, particularly relating to claims for overtime pay.

Key Differences Between Canadian and U.S. Employment Law

1. The U.S. concept of “employment at will” does not apply in Canada where a contractual employer/employee relationship is implied by law, whether or not a formal written agreement has been entered into.
2. Legislative jurisdiction over labour and employment in Canada is shared by the provincial and federal governments. Employers either fall under federal or provincial legislation, but not both.
3. Canadian law requires that minimum notice periods prescribed by statute be observed when terminating an employee. If a notice period has not been provided for in the employment contract, Canadian common law requires an employer to give “reasonable” notice of termination.
4. Canadian courts tend to be cautious about enforcing post-employment non-competition and non-solicitation agreements, and will only uphold them in certain circumstances. In particular, such post-employment covenants must be reasonable in duration and scope, and must not be broader than is necessary to protect the employer’s legitimate business interests. Canadian courts do not recognize the concept of inevitable disclosure.
5. Employees are not classified as exempt or non-exempt for overtime purposes and there are fewer overtime exemptions for employees.

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The firm's clients can expect a consistently high level of service from each of its eight offices who work together on major transactions and litigation files, and regularly collaborate with prominent U.S. and international law firms on cross-border transactions of global significance. The firm has invested heavily in leading-edge knowledge management systems in order to assure our clients of advice of the highest quality, grounded in the accumulated expertise of Stikeman Elliott's national and international practice.

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This publication is intended to provide general information about developments in the law and does not constitute legal advice.

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