Canadian Employment Law Overview for U.S. Employers

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This guide is not legal advice or a substitute. You are encouraged to seek legal advice to ensure proper appreciation and compliance with the law.

I. Introduction

Canada and the U.S. share many similarities in their respective legal systems, but there are significant differences between the two countries in the area of employment laws. A common perception among U.S. employers is that the legal balance is Canada is tilted in favour of employees. Although this may be true in many respects, particularly when it comes to employee dismissals, employers can face lower exposure to liability in certain other respects.

The purpose of this guide is to provide U.S. employers with a general overview of Canada's employment law regime and key areas where it differs from the U.S. The potential pitfalls for U.S. based employers operating in Canada can often be avoided with knowledge of these differences and taking appropriate measures to minimize risk of liability.

II. Legal System

Canada is a federal state like the U.S. Both federal and provincial governments have authority to regulate labour relations and employment. Whether an employer is subject to federal or provincial legislation depends on the nature of their business.

Unlike the U.S., most employers are subject to the jurisdiction of provincial legislation and provincial labour boards for unionized employee matters, rather than to a single federal tribunal.

The courts have jurisdiction over most non-union employee matters. Canadian courts generally award legal costs in favour of the successful party at trial.

Specialized government agencies and tribunals, such as ministries of labour and labour relations boards, have jurisdiction over certain areas of the employment relationship, including enforcement of human rights, unionization, workers' compensation and employment standards.

III. Employment Standards Legislation

Employment standards legislation sets minimum standards for all employees relating to hours of work, public holidays, vacation, leave entitlements, minimum wages, and entitlements upon termination of employment.

Employees may enforce their rights by filing complaints with the applicable provincial or federal ministry of labour, which will then investigate the complaint and order the employer to comply with the legislation, and usually pay damages to the employee. The courts also have jurisdiction in Ontario to accept lawsuits based on a breach of employment standards.

Class-action lawsuits for unpaid overtime claims are not as prevalent in Canada as in the U.S., but a number of high profile lawsuits have been launched in recent years. The law regarding

when it is appropriate for an overtime claim to proceed as a class-action is still developing. These multi-million dollar lawsuits have many employers worrying they may be next.

IV. Unionized Employees

The level of unionization of Canada's workforce is much higher compared to the U.S. Approximately 30% of the Canadian workforce is represented by a union, though only about 16% in the private sector. While this number has been relatively constant over the last several decades, Canadian unions have faced serious challenges in attempting to grow their membership.

Several large unions dominate the organized labour scene. Among the most significant national unions are the Canadian Autoworkers Union (now Unifor) and the Canadian Union of Public Employees. International unions of significance include the United Steelworkers, the Labourers International Union of North America, the United Food and Commercial Workers, the International Association of Machinists, and the Teamsters.

The process by which unions obtain the right to represent employees varies from province to province. In some provinces unions must win a vote in each case. In other provinces unions can gain the right to represent employees by signing up a sufficient number of employees as members (often called "card-check certification"). Unlike in the U.S., which has introduced a new quick vote system, most Canadian jurisdictions have had a snap-vote for decades. Rather than weeks or months as in the U.S. system, most Canadian jurisdictions provide that a vote must take place in five days.

Canadian "unfair labour practice" rules are similar to those found in the U.S.; however, the penalties for breaking these rules in Canada can be more severe. There are limits to what an employer can and cannot do in response to a union organizing campaign. For instance, employers may not threaten (or impliedly threaten) employees with loss of employment if a union is certified. Most labour boards have the power to automatically certify a union as a bargaining agent if the employer is found to have committed an unfair labour practice, regardless whether the union achieved sufficient employee support.

The period of time for employers to respond to an application for certification from a union is generally much shorter than in the U.S. This means it is important for employers who are at risk of unionization to be ready to respond quickly to an application before it is even received. Employees may apply to de-certify their union during "open window" periods defined by legislation. Employers are prohibited from supporting or initiating such applications.

Once an employer is organized through the certification process, they must bargain in good faith with the union to reach a collective agreement. In Ontario, a union may apply to have a first collective agreement imposed by arbitration if the employer does not bargain in good faith.

Once a collective agreement is settled, employees may not legally go on strike for the duration of the collective agreement. Employers also may not lockout employees. In the event of an illegal strike, employers may apply to the applicable labour relations tribunal to order employees to

return to work. It is also possible to seek criminal charges and damages against organizers of illegal strikes.

Canadian labour legislation imposes a process for all parties in a legal strike or lockout position. However, the great majority of collective agreements in Canada are negotiated without resorting to strikes or lockouts. About 95% of collective agreements are negotiated without job action occurring.

V. Human Rights

Canadian human rights legislation prohibits discrimination and harassment on certain specified grounds such as gender, race, religion, sexual orientation and disability. The exact prohibited grounds of discrimination vary between jurisdictions.

Human rights tribunals have jurisdiction to decide cases involving allegations of discrimination in employment from employees. These tribunals have broad powers to reinstate employees who are terminated due to discrimination as well as to award both compensatory and general damages. However, the typical amount in damages awarded is usually less than what U.S. courts award. Labour arbitrators in the unionized setting also have the power to enforce human rights laws. In Ontario, the courts now also have authority to award damages for breaches of human rights in the context of wrongful dismissal lawsuits.

Among the most onerous obligations for employers is the duty to accommodate employees who are disabled. The nature of physical and mental limitations pertaining to the duty to accommodate is broad.

Drug testing is an area where the laws of the U.S. and Canada diverge significantly. The rights of employers in Canada are far more restricted compared to the U.S. Random drug and alcohol testing programs are generally deemed to violate Canadian human rights laws on the basis that they are a form of discrimination against employees who suffer from substance addictions, which is considered a disability. Drug and alcohol testing may be permitted in certain limited circumstances, but generally speaking a blanket or random screening policy will be unlawful.

VI. Occupational Health and Safety

Each Canadian jurisdiction has its own legislation (and detailed regulations) to protect health and safety in the workplace. All workplace parties: workers, management, and employers have a personal responsibility to comply with the legislation. Breaches of these obligations can lead to personal liability.

Significant fines can be imposed for health and safety violations. Corporate defendants may be fined up to $500,000 per violation, and individuals may be fined up to $25,000 per violation and face up to one year in jail. In serious cases, criminal charges can be brought against managers, company officers, and directors.

Workplace health and safety committees are required by law. Such committees usually have employer and employee representation proactively dealing with health and safety issues in the workplace.

In Ontario in recent years, the government has taken an aggressive approach to enforcing health and safety laws. New inspectors have been hired and new initiatives launched for the targeting of employers with a history of workplace injury and violation, and the laws have been updated to address and prevent workplace violence and harassment.

Employers can protect themselves with an effective system of health and safety "due diligence". Such "due diligence" has been recognized by the courts as a defence to charges.

VII. Workers' Compensation

Unlike the U.S., in Canada private insurance companies play little or no role in providing workers' compensation coverage. All provinces have government-run workers' compensation systems that provide income replacement to workers absent from work as a result of workplace related illness or injury. In return, workers are not permitted to sue their employers for injuries or illnesses suffered in the course of their employment.

Participation is generally compulsory for employers engaged in an industry or activity covered by the insurance scheme. In some provinces such as Ontario, employers in low-risk activities (for example, strictly clerical operations) are not required to participate but may opt-in.

Generally, employers are required to contribute to plans in accordance with a rate schedule categorized by the type of industry or activity. Employers are required to pay a premium to the workers' compensation fund based upon a dollar amount for each hour worked by employees. In return for participating in the workers' compensation scheme, employers are relieved of tort liability to the employee as a result of workplace accidents. The employee's claim is limited to the compensation and other benefits provided for under the plan.

Most workers' compensation schemes pay the injured worker a percentage of his/her normal salary subject to maximums established under the legislation. The legislation provides for both temporary benefits for recovering employees and permanent benefits for employees who suffer permanent impairment of their earning ability. Organizations responsible for administration of workers' compensation systems also provide rehabilitation services through their own facilities and/or the facilities provided by external agencies and professionals.

Employers doing business in any province are required to register with the provincial workers' compensation agency and make payments required under that legislation. Employers are also responsible for reporting employee accidents and injuries to the compensation agency.

The Federal Government does not operate a workers' compensation scheme. Employees of federally regulated companies are covered under the provincial scheme in the province out of which they work.

VIII. Workplace Privacy

The Federal Government and some provinces have privacy legislation. The federal legislation, the *Personal Information Protection and Electronic Documents Act* (PIPEDA), applies to commercial activities in provinces without equivalent legislation. Currently, British Columbia, Alberta and Quebec are the only provinces with their own privacy statutes of general application.

PIPEDA governs the handling of personal employment information in relation to employees of federally regulated employers. The use of personal information relating to employment by provincially regulated employers is governed by provincial legislation in provinces that have enacted privacy legislation. In provinces without privacy statutes the use of personal information by employers in the private sector is currently not regulated. However, even in provinces without privacy statutes there are statutes of application, as well as specific privacy requirements, for specific classes of employees, such as public sector employees.

Canadian courts and arbitrators have been moving toward recognition of certain limited, free-standing rights of privacy, relying on constitutional and tort principles. In particular, care should be taken to determine the applicable laws and approach in a jurisdiction before engaging in, or preparing policies regarding, electronic communications and off-duty employee surveillance.

Recently, the Ontario Court of Appeal recognized a new tort of "intrusion upon seclusion". The tort is intended to address socially offensive invasions of privacy. General damages of up to $20,000 are available for the tort, in addition to damages to compensate for related losses. As such, despite the absence of privacy legislation applicable to employees in Ontario and other provinces, this new tort cements the importance of taking privacy into account. Employers may be held liable not only for violating their employees' privacy, but also vicariously should their employees violate the privacy of others.

All Canadian jurisdictions have legislation governing the privacy of personal health information. Employers that receive and retain personal health information related to their employees must comply with those regulations.

IX. Executive Transfers

The *North American Free Trade Agreement (NAFTA)* contains special provisions for companies wishing to transfer executives, managers and specialized knowledge workers from the U.S. or Mexico to Canada on a time limited basis, *The Canada-Chile Free Trade Agreement (CCFTA)* contains almost identical provisions for Chilean nationals.

Employers wishing to transfer personnel from countries other than Mexico, Chile, and the U.S. or those wishing for longer-term transfers than NAFTA allows, can consider using the schemes available under G.A.T.S. or the Code E15 statutory exemption.

Employees working in Canada under the provisions of NAFTA can apply for permanent residence in Canada if they wish to stay beyond the duration of their work permit.

X. Pensions and Benefits

Employers are not obliged to provide any pension or benefits coverage to employees. Employers who provide benefit plans may be obliged to continue them in certain circumstances. Each jurisdiction has its own complex laws for the administration of pension plans. Strict rules apply for the funding of pension plans.

Given the complexity and substantial cost of funding pension plans, many employers are opting instead to contribute to employees' RRSPs (Registered Retirement Savings Plan) or provide group RRSPs. RRSPs are similar to 401(k) plans in the U.S.

Canada has a government-run universal health system. Some provinces fund the system through general tax revenues. In Ontario, a payroll tax is imposed on employers to raise revenue for the system. Draws are also made from general tax revenue.

Employees are generally responsible for their own prescription and dental care costs. Many employers provide privately held group benefits insurance to cover these costs as well as provide other benefits not covered by the public system.

XI. Termination of Employment

The concept of "at-will" employment does not exist under Canadian law. Non-unionized employees are entitled to "reasonable notice" of termination of employment under the common law unless they have an employment contract that provides some other entitlement.

Most Canadian employees have minimum entitlements to notice of termination or pay in lieu of notice under employment standards legislation. This notice is determined by a formula set out in the applicable legislation. In some jurisdictions, including Ontario, the employer must also continue benefits for the applicable notice period. Some jurisdictions provide employees with severance pay in addition to notice depending on length of service. In the event of mass termination (termination of large groups of people over prescribed periods of time) additional notice requirements may apply.

Employees in some jurisdictions, such as Quebec and federally regulated employees may have the right to apply for reinstatement to their jobs if the dismissal was "unjust" or there was no economic justification for the dismissal. Most collective agreements provide that a dismissal must be for "just cause" or the result of an extended layoff initiated in order of seniority. Otherwise, employers in Canada are free to dismiss employees provided it is not for an unlawful reason, such as discrimination prohibited by human rights law or as a reprisal for seeking to enforce health and safety standards.

There is no formula for determining the amount of reasonable notice under the common law. The courts consider the following main factors in assessing what is reasonable notice: 1) length of service, 2) age, 3) nature of the position, and 4) re-employment prospects.

Unfortunately for employers in Canada, the courts have become increasingly generous and unpredictable in the amount of common law notice being awarded. Compounding the potential liability for employers was the proliferation of claims from dismissed employees of harsh or "bad faith" conducts by employers in carrying out the dismissals. Punitive and aggravated damages in excess of one million dollars have been awarded in recent cases, though such significant awards remain the exception. Accordingly, it has become more important than ever for employers to seek legal advice before dismissing employees.

XII. Sales of Business and Corporate Restructurings

Purchasers of Canadian businesses may inherit a wide range of legal liabilities to the employees of the seller. These can include the carrying over of employees' prior services for the purpose of employment standards and termination entitlements, as well as for collective agreements, union bargaining rights, pension and benefits plans, workers' compensation premiums, and health and safety liabilities.

Labour tribunals closely consider whether a "sale of business" occurred for the purpose of transferring collective agreements and labour bargaining rights. This case-law is vast and quite complex. Suffice it to say that companies acquiring substantial assets from a unionized company need to carefully consider the risk of acquiring a union before completing the transaction.

A purchaser of assets from a bankrupt company should not assume that they will come free and clear of any employment liabilities. The courts and tribunals hold that union bargaining rights and collective agreements can survive insolvency where a purchaser acquires a business.

Fortunately for purchasers, they can often limit the risk and scope of such liabilities through careful due diligence and structuring of the transaction to address the particular risk factors presented. This often requires a deep understanding of the legal issues involved.