Employment and Labour Law in Canada

By Colin Kelly & Sven Poysa

Frequent changes in Canadian employment and labour law present a significant challenge for employers doing business here. That challenge is compounded by the fact that employers with operations across Canada may be subject to differing employment and labour laws in each province.

Both the federal and provincial levels of government have jurisdiction over employment and labour matters for certain types of employers. The level of government that has jurisdiction is determined by the industry in which an employer operates. For example, industries that are inter-provincial by nature – such as airlines, telecommunications and railways – are regulated by the federal government. Most other industries – which account for the majority of employers in Canada – fall under provincial jurisdiction.

Employment Standards

Employment standards legislation in each jurisdiction sets out mandatory minimum conditions of employment in areas such as hours of work, overtime pay, minimum wages, holidays, vacations, employee benefit plans, leaves of absence, notice of termination of employment, and severance and termination pay. Certain categories of employees may be exempt from certain standards, although these exemptions are not identical to U.S. classifications of “exempt” and “non-exempt.” As a result of the varying legislative requirements, U.S. employment policies on the above issues need to be adapted for use in Canada.

Termination of Employment

“At-will” employment does not exist in Canada. As such, unless an employer has “just cause,” which is a very high standard to meet, it cannot terminate an employee’s employment without notice (or pay in lieu thereof). Terminating employees in Canada can be costly for employers. Employees terminated without cause are guaranteed certain minimum entitlements under applicable employment standards legislation, and may also claim common law and/or contractual termination entitlements.

A) STATUTORY NOTICE OF TERMINATION

Each jurisdiction’s employment standards legislation establishes minimum written notice of termination requirements for employees terminated without cause. Employers can satisfy these individual termination requirements by providing working notice, pay in lieu thereof, or some combination of both. Statutory notice of individual terminations typically ranges from one to eight weeks, based on an employee’s length of service.
In addition to statutory notice, some jurisdictions also provide for statutory severance pay where an employee is terminated without cause, and all jurisdictions impose additional notice and other requirements in the event of a “group” or “mass” layoff or termination.

B) COMMON LAW OR CIVIL LAW REQUIREMENTS

In addition to minimum requirements under employment standards legislation, non-union employees are entitled to “reasonable” notice of termination under the common law (or under the Civil Code of Québec for employees in Québec). Such notice is often substantially longer than the statutory minimums and depends on such factors as the employee’s position, length of service, compensation, re-employment prospects and age.

In the absence of an enforceable contractual provision limiting termination entitlements, an employee who has been terminated with notice in accordance with the applicable employment standards legislation, may still sue the employer for more pay in lieu of reasonable notice. Although courts approach each case on an individual basis, court awards of a year or more are not unusual for senior management employees, with awards of up to (and sometimes exceeding) 24 months possible for long service employees.

C) CONTRACTUAL TERMINATION PROVISIONS

An employer and employee may enter into a written contract that specifies the employee’s termination entitlements. This contractual termination entitlement will displace the employee’s entitlement to reasonable notice of termination at common law, provided it meets or exceeds minimum statutory requirements. Contractual termination provisions can limit the employer’s exposure while also providing certainty to both parties. However, such provisions must be carefully drafted in order to be enforceable, and courts will strike down provisions that fail to comply with statutory requirements.

Executive Compensation

Executive compensation refers to both financial payments and non-monetary benefits provided to senior management (for example: corporate presidents; chief executive officers; chief financial officers; vice-presidents; and other senior executives of the corporation). It is a typically a mix of salary, bonuses, shares of the company’s stock, benefits, and other privileges. Designing, implementing and administering compensation and benefits arrangements for foreign businesses operating in Canada must take into account Canadian tax and employment laws, securities disclosure and compliance requirements, and heightened scrutiny by shareholders and other stakeholders, regulators and the courts.
Director and Officer Liability

If a company fails to pay its employees due to insolvency or other reasons, legislation in certain Canadian jurisdictions can impose personal liability on directors and officers of the company for unpaid wages and other amounts that may be owing to employees.

Human Rights/Non-Discrimination

All jurisdictions in Canada have legislation designed to address discriminatory practices in the workplace based on prohibited grounds of discrimination, such as race, age, sex, sexual orientation, marital status, citizenship, place of origin, family status, record of offences and disability.

Employers are required to go to considerable lengths to provide time off, modified duties and other assistance that may be required to accommodate employees. Although accommodation issues frequently arise with respect to disabled employees, employers are also commonly called up to provide accommodation in respect of other prohibited grounds for discrimination (e.g. modified work schedules to accommodate childcare arrangements or religious days of worship). Otherwise, prohibited discrimination may be permitted if the distinction, exclusion or preference is based on a bona fide occupational qualification, although the employer must be able to demonstrate that it cannot accommodate an employee without suffering “undue hardship.”

All jurisdictions in Canada also have administrative bodies that handle human rights complaints. These administrative bodies may award monetary compensation; order reinstatement of a terminated employee; and require an employer to take steps to prevent discrimination and harassment.

Labour Relations

Approximately one third of the Canadian labour force is unionized. By law, employees are free to join a union of their own choice and to participate in its lawful activities.

The rules for certifying unions vary between jurisdictions. Many jurisdictions require that a union win a vote after a minimum number of the employees have signed union cards. Other jurisdictions provide for unionization without a vote when a certain percentage of employees (usually a majority) have signed union membership cards.

An employer faced with a union organizing campaign may not make threats or promises intended to influence the employees’ decision; otherwise, the labour relations tribunal charged with adjudicating the dispute may, in certain jurisdiction, automatically certify the union. Following certification, the parties must bargain in good faith in an attempt to reach a collective agreement. Strikes and lockouts are not permitted during the term of a collective agreement.
Workers’ Compensation

Canada’s provinces and territories have no-fault insurance systems in which most employers must participate to compensate employees for workplace injuries. There is no federal workers’ compensation legislation and thus federally regulated employers often have the choice of “opting-in” to the provincial regime. Generally, an employee cannot sue an employer for an injury or an accident arising in the course of employment, but may claim compensation from the insurance accident fund. The workers’ compensation board in each province is responsible for the applicable legislation and has broad enforcement powers.

Occupational Health and Safety

Occupational health and safety legislation in every Canadian jurisdiction requires that employers provide workers with a safe workplace. Most provinces also impose a number of specific duties, including requirements that employers prepare written health and safety policies and establish joint health and safety committees. In most jurisdictions, a worker has the right to refuse unsafe work. Health and safety legislation violations can result in significant fines, criminal charges, and ultimately jail sentences for senior managers, officers and directors of corporations. Several jurisdictions have also introduced requirements to protect workers from workplace violence and harassment.

Employment Equity/Affirmative Action

Most provinces have abandoned employment equity legislation. The Canada Employment Equity Act, however, applies to federally regulated employers, as well as provincially regulated employers that have entered into a contract with the federal government valued at $200,000 or more. The Act requires, amongst other things, that employers prepare and submit annual reports about their workplaces, including information about occupational groups, salary ranges, hirings and terminations.

Pay Equity

In Canada, “pay equity” refers to wage parity between male and female job classes that perform work of equal value. Ontario’s Pay Equity Act is one of the most far-reaching pieces of legislation of its kind in any Canadian jurisdiction. For employers in the province who have not maintained pay equity arrangements, an employee complaint may result in significant potential liability in the form of retroactive wage adjustments for current and former employees. The Act provides for proactive enforcement mechanisms under which employers can be found liable for non-compliance even if no employee lodges a complaint. The Pay Equity Office ensures legislative compliance through periodic audits and by investigating complaints. Legislation in some other provinces provides for a complaint-driven process under which an employer may be held accountable only if an employee or union files a complaint.
Sale of a Business – Successor Employers

The purchaser of a business can inherit a wide variety of employment-related liabilities and obligations as a “successor employer” to the vendor. These can include termination costs, employment standards violations, workers’ compensation costs, pay equity adjustments, collective agreements and union bargaining rights. Only careful due diligence can bring to light the liabilities being acquired along with a business. To reduce exposure for such liabilities, transactions can be structured in various ways and vendors may provide appropriate indemnities.

Unique Québec Considerations

The province of Québec has language and employment law considerations that are unique to that province. For a general understanding of these laws, please see Chapter 4, Doing Business in Québec.

Osler’s Employment and Labour Department delivers clear, practical and results-oriented advice that recognizes the value and importance of human resources to an organization’s success. Colin Kelly is an associate in the department and Sven Poysa is a partner in the department.

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