Employment & Labor: North America

State snapshot

Key considerations

Which issues would you most highlight to someone new to your state?

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Provincial or federal legislation

Canada has a unique constitutional division of powers between the federal and provincial governments. As such, most employers in Ontario are covered by provincial legislation, but some are covered by federal legislation. The nature of an employer's business is critical in determining whether federal or provincial legislation applies. For most employers engaged in manufacturing, construction, retail, or the service sector, provincial law applies. For employers engaged in certain activities of an inter-provincial nature (e.g., shipping, railways, airlines, radio and television broadcasting, banking, and inter-provincial transport (including oil and gas pipelines)), federal law generally applies. Accordingly, where material differences between Ontario law and federal law exist, Ontario law is addressed first, followed by federal law.

No employment at will

There is no at-will employment in Canada. Rather, the employment relationship is contractual. Unless there is a written contract dealing with termination, Canadian common law requires employers to provide employees with "reasonable" notice of termination or pay in lieu of notice if employment is terminated without cause. The courts are generous when prescribing the length of notice an employer must give managerial, professional, or long-term employees where no contract provision exists on the point. Although the courts approach each case on an individual basis, case law suggests that a practical starting point for reasonable notice for management employess is one month, or pay in lieu of notice for each year of service with a minimum of three months and a maximum of 24 months, although recent decisions have held that there is no formal or informal cap and courts occasionally award notice periods in excess of 24 months.

Limitations on ability to terminate employment

The general approach is that non-unionized employees may be terminated at any time without cause, as long as the required notice is provided and the terms of any written employment contract are followed. All jurisdictions in Canada have some important qualifiers to this general rule. For example, anti-discrimination or human rights legislation restricts the ability to terminate an employee if the reason for termination is directly or indirectly connected to a protected ground or characteristic. There are also anti-reprisal or whistleblower protection rules under employment standards and occupational health and safety legislation.

Federally regulated employers are subject to special scrutiny when terminating employment. Non-managerial employees with at least one year of service may take their dismissal to adjudication under the Canada Labor Code and seek reinstatement. However, important exceptions preclude reinstatement, such as genuine layoffs.

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What do you consider unique to those doing business in your state?

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Termination issues

The major difference between Canada (including Ontario) and the United States is that Canada has no at-will employment. Hence, severance packages in Ontario are often much higher than those in the United States.

An executive's right to receive and exercise stock options on termination of employment is subject to the relevant provisions of the employer's stock option plan. These plans typically provide that an executive's options cease to exist on termination of employment. However, the Canadian courts have interpreted the words "termination of employment" in stock option plans to mean lawful termination. Accordingly, to be lawful, termination occurs at the end of the reasonable notice period, thus entitling the employee to claim damages for any lost opportunity to exercise options that

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were vested during the notice period. In many cases, the courts have found that where a stock option plan does not contain a clear triggering event, the effective date of termination is the date on which the executive would have ceased to be an executive had he or she been given reasonable notice. Accordingly, to ensure that stock option plans are correctly interpreted, employers must carefully draft their plans and grants.

Pay equity
Ontario is one of the few jurisdictions in Canada that has pay equity legislation. The legislation requires employers to develop a pay equity plan to ensure there is no gender bias in compensation. Pay equity plans should be updated to address any changes in circumstances. Federally regulated employers are subject to the pay equity requirements outlined in the Canadian Human Rights Act and other regulations.

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Is there any general advice you would give in the labor/employment area?

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New businesses should hire all employees under written employment contracts that contain provisions dealing with entitlements and obligations when employment is terminated. However, in order to be enforceable, termination provisions in an employment contract must be precisely drafted to ensure compliance with the requirements of applicable employment standards legislation, otherwise a court may declare such provisions to be void. In addition, recent Ontario jurisprudence highlights significant potential risks with entering into fixed-term employment arrangements. Therefore, employers should ensure that all employment contracts, whether they are for an indefinite or fixed term, are carefully drafted in accordance with statutory requirements and developing case law.

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Emerging issues

What are the emerging trends in employment law in your state, including the interplay with other areas of law, such as firearms legislation, legalization of marijuana and privacy?

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Marijuana Legalization
The federal government, which has constitutional jurisdiction over criminal law, has announced plans to introduce legislation that would legalize at least the possession and personal use of marijuana. The precise framework of those plans is still unclear. However, employers in Ontario are beginning to look at updating their drug and alcohol policies to reflect the changing legal and social landscape regarding marijuana use and to ensure that such policies comply with human rights legislation.

Bonus entitlements on termination
The Ontario Court of Appeal, the highest court in the province, has recently held that employees are presumptively entitled to recover damages in lieu of bonus payments at common law for the reasonable notice period, regardless of whether the employer's bonus plan or policy requires an employee to be "actively employed" throughout the full bonus year or at the time of bonus payout. As a result, many employers in Ontario are revamping their bonus plan documentation to ensure it is carefully drafted in accordance with the guidance provided by the Court of Appeal in order to avoid unanticipated termination costs related to bonus and incentive payments.

Privacy
Although Ontario has no privacy legislation covering private sector employers, case law is importing privacy concepts into the employment relationship and a recognized tort related to intentional violation of privacy ("intrusion upon seclusion") now exists.

Federally regulated private sector employers are covered by privacy legislation which regulates the collection, use, retention, safeguarding, and disclosure of employee personal information.

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Proposals for reform

Are there any noteworthy proposals for reform in your state?

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Whistleblower protections
The Ontario Securities Commision launched its widely-anticipated whistleblower program in July 2016. This program incentivizes individuals to come forward with information on securities-related misconduct by promising rewards of up to $5-million for reporting misconduct that leads to a successful enforcement action.

Although the program itself does not provide any protection against reprisals for whistleblowers, the Ontario Securities Act was amended in conjunction with the introduction of the program to prohibit retaliation by employers against employees for reporting securities violations (as well as against employees who express their intention to report such violations). Those same amendments void confidentiality provisions in employment agreements that preclude or purported to preclude employees from such reporting.

Changing Workplaces Review
The Ontario government has embarked on a process of updating the core legislation governing provincially-regulated workplaces in Ontario: the Employment Standards Act 2000 and the Labor Relations Act 1995. As part of that process, the government has commissioned a report authored by two special advisors (one a former judge and the other a union-side labour lawyer, arbitrator and mediator). In July 2016, the special advisors issued a 300+ page interim report canvassing approximately 50 separate issues and over 225 potential proposals for change, on which they invited comments. Some major proposals for change include:

- revising, limiting or restricting overtime exemptions, including for managers and supervisors;
- introducing union-like job protections for non-union employers that would potentially restrict the ability to terminate employment without cause;
- eliminating secret ballot union votes and re-introducing card-based certification for all workplaces;
- introducing joint and several liability for franchisors and franchisees in respect of the employment standards entitlements of franchisee employees.

The special advisors invited comments from stakeholders and will take those comments into account before making recommendations to the government as part of a final report. It is possible that whatever legislative changes that emerge from this consultation process could lead to profound changes for employers operating in Canada's largest province.

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Employment relationship

State-specific laws

What state-specific laws govern the employment relationship?

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The major Ontario employment-related statute is the Employment Standards Act 2000. Other important statutes affecting private employers include:

- the Accessibility for Ontarians with Disabilities Act 2005;
- the Agricultural Employees Protection Act 2002;
- the Employers and Employees Act;
- the Employment Protection for Foreign Nationals Act (Live-In Care Givers and Others) 2009;
- the Human Rights Code;
- the Labor Relations Act 1995;
- the Occupational Health and Safety Act;
- the Ontarians with Disabilities Act 2001;
- the Ontario College of Trades and Apprenticeship Act 2009;
- the Ontario Labor Mobility Act 2009;
- the Pay Equity Act;
- the Retail Business Holidays Act;
- the Rights of Labor Act;
- the Smoke-Free Ontario Act;
- the Wages Act; and
- the Workplace Safety and Insurance Act 1997.

A number of other laws affect public sector and broader public sector employers in Ontario.

For federally regulated employers, the main statute is the Canada Labor Code, although other federal legislation also governs the workplace (e.g., the Canadian Human Rights Act and the Personal Information and Protection of Electronic Documents Act).

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Who do these cover, including categories of workers?

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Generally, the laws cover “employees”; however, because the laws governing the employment relationship are public welfare laws, the courts have held that the term “employee” must be broadly and liberally interpreted. Therefore, depending on the circumstances, the definition of “employee” may include persons whom the employer has treated as independent contractors, consultants, interns, employees of affiliated employers, or employees of temporary help agencies. The Labor Relations Act 1995 also expressly includes “dependent contractors” in the definition of “employees”, granting an express right for certain non-employees to form a union and collectively bargain. In addition, health and safety law has been interpreted to include self-employed individuals and independent contractors as workers.

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Misclassification

Are there state-specific rules regarding employee/contractor misclassification?

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Yes—the rules or approaches may differ between a variety of agencies (e.g., tax, health, and safety), depending on the purpose of the specific legislation. A recognized category of “dependent” contractors are also owed reasonable notice of contract termination under common law.

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Contracts

Must an employment contract be in writing?

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Contracts need not be in writing, but all employees have a contract by operation of law. In many cases contracts are part oral, part written (e.g., offer letters or vacation policies), and part implied by the common law (e.g., the employee’s duty of loyalty and the employer’s duty to provide reasonable notice of termination, except for just cause). Nevertheless, ensuring that all employees in Ontario have a comprehensive written employment contract is the most prudent course of action. However, the format of the written contract can be as simple as a letter offering employment, which is “signed back” confirming acceptance of employment on the terms set out in the letter. In almost all cases, employment contracts should be signed before the employee actually performs any work.

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Are any terms implied into employment contracts?

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Yes—the major implied terms are the employee’s duty of loyalty and the employer’s obligation to provide reasonable notice of termination, except for just cause.

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Are mandatory arbitration agreements enforceable?

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Yes—although arbitration clauses should be drafted carefully and in accordance with the Ontario Arbitration Act 1991 to ensure that the objectives behind agreements are achieved.

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How can employers make changes to existing employment agreements?

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If a material change to an employment agreement is made without the employee's consent, he or she may be able to quit and sue for constructive dismissal or claim damages for breach of contract. Any agreed upon changes should be supported by an exchange of consideration, such as a raise. Changes can be made unilaterally as long as notice under the contract or reasonable notice is provided. Written agreements may also contain provisions which specifically address amendments.

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Hiring

Advertising

What are the requirements relating to advertising open positions?

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Job advertisements should comply with human rights legislation and generally should not contain statements, qualifications, or references that directly or indirectly relate to protected grounds.

Under the standards pursuant to Ontario's accessibility legislation, employers must state that they will provide accommodations during the hiring process for interested candidates who have a disability.

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Background checks

What can employers do with regard to background checks and inquiries?

(a) Criminal records and arrests

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In order to avoid a discrimination complaint, all background checks—including criminal record checks—should be performed only after a conditional offer of employment has been extended. A standardized process for conducting searches of a federal criminal records database exists. Individuals cannot be discriminated against based on convictions for criminal offences which have been pardoned or provincial regulatory offences, unless there is a *bona fide* occupational requirement (e.g., the job involves working with vulnerable persons).

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(b) Medical history

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Generally, medical history should not be considered in the hiring process, except where there is a *bona fide* occupational requirement. Pre-employment medical testing or medical history can be requested after a conditional offer of employment has been extended, if it can be shown that this information is directly relevant to the position.

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(c) Drug screening

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Drug and alcohol testing is a contentious issue in Canada because addiction is seen as a disability under human rights law, and because it has been held that drug testing does not actually determine whether an employee is impaired while at work. This has led to seemingly conflicting lines of case law, one from Ontario and the other from Alberta. The federal and Ontario approach is that, in general terms, testing is inherently discriminatory under human rights law. However, the law does distinguish between drug and alcohol testing, because a positive breathalyzer test for alcohol shows an existing impairment, while a drug test may not necessarily show an existing impairment.

In Ontario, this has led to a general prohibition on pre-employment drug testing. Federally, random drug testing of employees is viewed as discriminatory, even for safety-sensitive positions. This is because drug testing does not reflect actual or future impairment on the job. Even if an employee used a drug days or weeks before the day of testing, there may still be evidence of the substance at the time of testing. Random alcohol testing for safety-sensitive positions may be acceptable in some cases, but the Supreme Court of Canada recently upheld an arbitrator's decision striking down random alcohol testing for safety-sensitive positions.

Even testing that measures impairment can be justified only if it is demonstrably connected to the performance of the job (e.g., after significant accidents or "near misses"). Post-incident drug and alcohol testing must generally be part of a larger rehabilitation program for employees.

The approach taken by most Ontario and federal adjudicators is that drug and alcohol testing is inherently discriminatory and can be used only in limited circumstances. The primary reason for conducting drug testing should be to measure impairment. The Ontario Human Rights Commission has released a new drug and alcohol testing policy that provides useful guidance on the legal principles employers should take into account when designing and implementing any testing regime.

However, when employees must work part of the time in the United States (e.g., inter-provincial truckers) and drug screening is a requirement under US state law, that requirement may be found to support an employer's position that drug testing is a *bona fide* occupational requirement that should be permitted notwithstanding general human rights and privacy concerns.

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(d) Credit checks

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For provincially regulated employers, it is best practice to conduct credit checks only where it would be reasonable to do so (e.g., where the employee is handling and responsible for large sums of money or valuables). In addition, consumer reporting legislation sets out consent requirements and prescribed procedures.

Federally regulated employers are governed by the Personal Information Protection and Electronic Documents Act and can request credit checks only where it would be reasonable to do so.

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(e) Immigration status

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Employers may require proof of legal ability to work in Canada as a condition of employment, but are prohibited under human rights legislation from inquiring into a prospective employee's ancestry, citizenship, or national or ethnic origin.

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(f) Social media

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Social media checks during the pre-hiring stage increase the risk of a discrimination complaint, as a candidate's social media profile may disclose information concerning a protected ground under human rights legislation.

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(g) Other

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N/A.

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Wage and hour

Pay

What are the main sources of wage and hour laws in your state?

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The Ontario Employment Standards Act 2000 is the main source of wage and hour law.

For federally regulated businesses, Part III of the Canada Labor Code applies.

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What is the minimum hourly wage?

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The general minimum hourly wage is C$11.40.

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What are the rules applicable to final pay and deductions from wages?

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Provincial rules
Deductions from wages can be made where the law authorizes them or where an employee has provided written authorization. The amount to be deducted must be set out in the authorization or readily determinable by way of a formula. No amounts may be deducted in respect of employer losses due to faulty work, missing cash, or property losses if other persons had access to the lost cash or property.

Federal rules
Employers cannot make deductions from wages or other amounts due to an employee except under certain permitted instances, including:

- payments authorized by a federal or provincial act or regulation;
- deductions authorized by a court order or a collective agreement or other document signed by a trade union on

behalf of an employee;
- deductions authorized by the employee in writing; and
- overpayments of wages by the employer.

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Hours and overtime

What are the requirements for meal and rest breaks?

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Provincial rules
A 30-minute unpaid meal period must be provided after five hours of work, although this can be split into two 15-minute breaks with the employee's agreement.

Federal rules
There are no prescribed rest periods for federally regulated employees. However, most employers follow provincial guidelines for safety and employee relations purposes.

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What are the maximum hour rules?

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Provincial rules
Employees cannot work more than 48 hours per week; special rules apply for certain industries (e.g., construction). Excess hour permits may also be obtained. Maximum weekly hours may be exceeded under exceptional circumstances.

Federal rules
Employees cannot work more than 48 hours per week; special rules apply for certain workers in various industries (e.g., trucking, shipping, and railways).

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How should overtime be calculated?

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Provincial rules
Overtime is calculated as one and a half times the employee's regular rate for all hours worked in excess of 44 hours per week; special rules exist for certain industries.

Federal rules
Overtime is calculated as one and a half times the employee's regular rate for all hours worked in excess of eight hours per day or 40 hours per week—whichever is greater; special rules exist for certain industries.

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What exemptions are there from overtime?

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Provincial rules
The terms "exempt" and "non-exempt" are not used in Canada to differentiate between employees. In Ontario, employee entitlements to certain provisions under the Employment Standards Act 2000 (including hours of work and overtime) are generally determined based on whether the employee is considered to be in a managerial or supervisory role. However, special exemptions exist for some commissioned salespersons, professionals (e.g., lawyers, engineers,

dentists, and architects), and information systems professionals. Film and television industry employees are exempt from hours of work, but not overtime.

With respect to the main managerial and supervisory exemption, the Employment Standards Act 2000 provides that a "person whose work is supervisory or managerial in character and who may perform non-supervisory or non-managerial tasks on an irregular or exceptional basis" is excluded from the hours of work and overtime provisions. The Ontario Ministry of Labor's interpretation manual provides further guidance regarding the interpretation of the terms "irregular" or "exceptional" as follows:

- "Exceptional" suggests that non-supervisory or non-managerial duties may be performed as long as they are being performed outside of the ordinary course of the employee's duties.
- "Irregular" implies that although the performance of non-supervisory or non-managerial duties is not unusual or unexpected, these duties are unscheduled or sporadic (i.e., they do not occur at a regular or set time).

The application of the above principles will vary from case to case. Below are some general factors that are considered in Ontario when assessing whether an employee's work is managerial or supervisory in character (using a retail store environment as an example):

- What percentage of time do managers perform the same work as sales associates?
- How frequently do managers perform non-managerial work (e.g., do they perform the work of a sales associate every day or once a week)?
- Do managers perform non-managerial work on a scheduled basis (e.g., during lunch)?
- Do managers have no alternative but to perform non-managerial work?
- Do managers perform non-managerial work only for unforeseen reasons (e.g., if sales associate calls in sick or there is an unexpected rush of customers)?
- Do managers' performance appraisals include an evaluation of non-managerial work?
- Are managers performing their managerial role at the same time that they perform non-managerial work (e.g., the store manager may be on the floor for supervisory purposes, but will also assist customers if necessary)?

Federal rules
The Canada Labor Code states that the standard hours of work and overtime do not apply to employees who are managers or superintendents, exercise management functions, or are members of the architectural, dental, engineering, legal, or medical professions. The test for the managerial exemption is similar under federal law.

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Record keeping

What payroll and payment records must be maintained?

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Type of information	Ontario retention period
Employee's name, address, and the date on which he or she began employment	Three years following termination
Employee's date of birth, if the employee is a student under 18 years of age	Either three years after the employee's 18th birthday or three years after the employee's termination—whichever is earlier
Number of hours the employee worked each day and each week, unless the employee is paid a salary and overtime provisions do not apply or any excess hours are recorded	Three years after the day or week to which the information relates
Information contained in each written statement given to the employee in relation to wages, wages on termination, and vacation pay	Three years after the information was given to the employee
Notices, certificates, correspondence, and other documents relating to employee leave (e.g., pregnancy, parental, emergency, family medical, or reservist)	Three years after the date on which the leave expired
Every agreement made permitting the employee to work excess hours	Three years after the last day on which work was performed under the agreement

Every overtime averaging agreement that the employer has made with the employee	Three years after the last day on which work was performed under the agreement
Vacation time and vacation pay records, including the amount of: • vacation time earned but not taken since the start of employment (if any); • vacation time earned in the year; • vacation time taken in the year; • vacation time earned but not taken at the end of the year; • vacation pay paid out during the year (subject to certain exceptions); and • wages on which vacation pay was calculated and the applicable time period (subject to certain exceptions).	Three years following the date the record was made

Ontario also requires employers to record the hours worked by employees of temporary help agencies that are assigned to them and to retain those records for three years.

There may be different record-keeping considerations for federally regulated businesses.

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Discrimination, harassment and family leave

What is the state law in relation to:

Protected categories

(a) Age?

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Provincial—the Ontario Human Rights Code prohibits discrimination based on age (18 years of age or older).

Federal—the Canadian Human Rights Act provides no restricted definition of age.

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(b) Race?

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Under both provincial and federal law, racial discrimination is prohibited.

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(c) Disability?

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Under both provincial and federal law, discrimination based on disability—which includes actual (or, in Ontario, perceived), physical or mental disability and addiction—is prohibited.

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(d) Gender?

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Under both provincial and federal law, gender discrimination is prohibited. In Ontario, gender identity and gender expression discrimination are also prohibited, and a bill under consideration in the federal Parliament (and likely to pass) would add gender identity and gender expression as additional protected grounds under federal law.

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(e) Sexual orientation?

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Under both provincial and federal law, discrimination based on sexual orientation is prohibited.

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(f) Religion?

Canada > Ontario

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Under both provincial and federal law, discrimination based on religion is prohibited.

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(g) Medical?

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Under both provincial and federal law, medical discrimination based on a disability is prohibited.

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(h) Other?

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Ontario legislation prohibits discrimination on the basis of:

- citizenship;
- race;
- place of origin;
- ethnic origin;
- color;
- ancestry;
- disability;
- age;
- creed;
- sex or pregnancy;
- gender identity;
- gender expression;
- family status;
- marital status;
- sexual orientation;
- receipt of public assistance; and
- record of offence.

Federal legislation prohibits discrimination on the basis of:

- race;
- national or ethnic origin;
- color;
- religion;
- age;
- sex;
- sexual orientation;
- marital status;
- family status;
- disability; and
- a conviction for which a pardon has been granted or a record suspended.

Gender identity and gender expression are likely to become additional protected grounds under pending federal legislation.

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Harassment

What is the state law in relation to harassment?

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Under both federal and provincial human rights laws, harassment is prohibited to the extent that it qualifies as discrimination based on a protected category; employers may be liable for any harassing conduct of their employees.

Under the Ontario Occupational Health and Safety Act, employers are required to prepare workplace harassment and violence policies which must include complaint and investigation procedures. All employees must be trained with respect to workplace harassment and violence. Further, emergency procedures must be in place to deal with workplace violence.

Recent changes to the law in Ontario now require employers which become aware of incidents of workplace harassment and violence to conduct investigations, regardless of whether a complaint is made. In addition, complainants and respondents now have a right to be informed of the outcome of any internal investigations, including any corrective action taken by the employer. Government inspectors also have the power to order an employer to engage and pay for a third-party investigator.

The Canada Labor Code requires all federally regulated employers to prepare sexual harassment policies and bring these to the attention of their employees. However, it is best practice also to provide training and extend harassment policies to cover all types of harassment and workplace violence.

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Family and medical leave

What is the state law in relation to family and medical leave?

Canada > Ontario

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The unpaid statutory leaves outlined below relate to provincially regulated businesses. There are minimum service requirements for some categories of leave. If an employee takes one category of protected leave, that does not reduce his or her entitlements with respect to other categories of leave.

Different statutory leaves apply under federal law.

Pregnancy leave/parental leave
In Ontario, pregnancy leave is for a maximum of 17 weeks.

All employees (both male and female) who have become the parent of a child or who have a child come into their custody for the first time are entitled to parental leave. Parental leave for pregnant employees must begin immediately following pregnancy leave and can last for a total of 35 weeks. For other employees in Ontario, parental leave can last for a maximum of 37 weeks and must be taken within 52 weeks of becoming a parent.

Family medical leave
Employees are entitled to up to eight weeks of family medical leave to provide care or support to an immediate family member. In order to qualify for family medical leave, a qualified health practitioner must issue a certificate stating that the family member has a serious medical condition and that there is a significant risk that the person will die within 26

weeks.

Family caregiver leave
Employees are entitled to up to eight weeks of annual family caregiver leave in order to care for an immediate family member with a serious medical condition. Family caregiver leave must be taken in at least one-week increments; periods of less than one week count as one full week.

Critically ill childcare leave
Parents or guardians of children under 18 years old who have life-threatening injuries or illnesses are entitled to take up to 37 weeks of annual critically ill childcare leave. This leave must be taken in at least one-week increments; periods of less than one week count as one full week.

Crime-related child death or disappearance leave
Parents or guardians of children under 18 years old who die or disappear as a result of a crime are entitled to 104 weeks of leave in the event of a death and 52 weeks of leave in the event of a disappearance.

Organ donor leave
Persons who undergo surgery to donate organs are generally entitled to 13 weeks of leave. This can be extended if medically necessary.

Reservist leave
Employees who are military reservists and are deployed to an international operation or to an operation within Canada that is or will be providing assistance in dealing with an emergency or its aftermath (including search and rescue operations) are entitled to unpaid leave for the time necessary to engage in that operation.

Personal emergency leave
Employees working for an employer with at least 50 employees in Ontario are entitled to 10 days' annual unpaid emergency leave, which can be taken together or individually. This leave may be taken for personal illness, injury, or medical emergencies. It can also be taken for the death, illness, injury, or a medical emergency or urgent matter relating to immediate family members.

Reinstatement after taking statutory leave in Ontario
Employees returning from statutory leave in Ontario must be reinstated to the position that they most recently held before taking leave. Even if another person is doing the job, the returning employee is entitled to reinstatement as long as the work is still being done and the job still exists. If the position no longer exists, the returning employee must be reinstated to a comparable position at a wage rate that is equal either to what he or she most recently earned or to what he or she would have been earning had he or she not taken leave—whichever is greater. Whether a position is comparable will depend on various factors, including:

- the location of the job;
- hours of work;
- quality of the working environment;
- degree of responsibility;
- job security;
- possibility of advancement; and
- prestige and perquisites.

The importance and weight of each factor will vary from case to case.

No reinstatement obligation will apply where an employee's employment ended solely for reasons unrelated to leave. If a complaint is brought against an employer, the employer's conduct and rationale will be subject to careful scrutiny. Under the Employment Standards Act 2000, employment standards adjudicators have the power to order reinstatement for breach of this obligation.

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Privacy in the workplace

Privacy and monitoring

What are employees' rights with regard to privacy and monitoring?

Canada > Ontario

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Provincial rules
While no private sector privacy legislation is in place, several cases have found video monitoring—particularly in less public places—to breach the employment contract. The Ontario Court of Appeal recently introduced the tort of "intrusion on seclusion"; it is unclear whether it will be extended to the workplace or monitoring in the workplace. Privacy rules in the broader public sector (including education and healthcare) exist.

Federal rules
Federal privacy law and privacy commissioner decisions require monitoring to be reasonable. Typically, video

monitoring is permitted for safety or security reasons in public cases. Video monitoring of work areas is much more controversial and must not be used for productivity or performance issues.

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Are there state rules protecting social media passwords in the employment context and/or on employer monitoring of employee social media accounts?

Canada > Ontario

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Provincial rules
Ontario has no private sector provincial privacy legislation. However, the Ontario Human Rights Commission warns that social media monitoring increases the risk of discrimination complaints, as employers may inadvertently obtain information from social media accounts that discloses information concerning a protected ground under the Human Rights Code.

Federal rules
The same human rights considerations apply for federally regulated employers. However, the federal privacy commissioner has expressly stated that employers should have social media policies that advise employees as to whether social media will be monitored. Failure to warn employees that their personal information is being collected by way of social media monitoring could violate federal privacy legislation.

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Bring your own device

What is the latest position in relation to bring your own device?

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There are no statutory provisions regarding “bring your own device” policies and practices. It is recommended that employers address any rules and expectations regarding “bring your own device” in a workplace policy that is brought to the attention of all employees.

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Off-duty

To what extent can employers regulate off-duty conduct?

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Off-duty conduct is generally not the employer’s concern. Ontario courts recognize some relationship between certain kinds of misconduct and an employer’s legitimate business interests—for example, an employer that carries on business activities related to children may be justified in terminating an employee who is charged with offences against children.

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Gun rights

Are there state rules protecting gun rights in the employment context?

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No.

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Trade secrets and restrictive covenants

Intellectual Property

Who owns IP rights created by employees during the course of their employment?

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Employers generally own IP rights, although there may be exceptions in common law based on the nature of the employee's job. In addition, any moral rights which employees have over their work products can be waived only in writing. As such, it is always best practice to have employees sign ownership of invention and IP agreements at the time of hire to avoid disputes.

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Restrictive covenants

What types of restrictive covenants are recognized and enforceable?

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Non-compete clauses
Canadian courts generally consider non-compete covenants to be a restraint of trade and therefore illegal and unenforceable, unless an employer can establish that the covenant:

- goes no further than is necessary to protect rights which the employer is entitled to protect;
- does not unduly restrain the employee from making use of his or her skills and talent; and
- is not contrary to public interest.

Non-compete clauses must also be reasonable in duration, geographic scope, and all other aspects (e.g., scope of activity covered) in light of the interest that the employer seeks to protect. However, the courts cannot "read down" a restrictive covenant in any material respect in order to make it enforceable.

The courts will not enforce non-compete clauses unless the employer can demonstrate that a non-solicitation clause is insufficient to protect the employer's proprietary interest. Non-compete clauses found in agreements for the purchase and sale of a business are more likely to be enforceable because the courts will usually consider that the two parties are more likely to enjoy relatively equal bargaining power, and because the clause may be necessary to ensure the buyer's newly acquired business is not subverted by the previous owners, some of whom may be former managers and executives.

Non-solicitation clauses
Canadian case law suggests that while the courts are adverse to non-compete clauses, they are more sympathetic towards and more inclined to enforce non-solicitation clauses. However, before the courts enforce a non-solicitation covenant, the employer must show that it is necessary in the context of the nature of the business and the type of employment of the employee. The employee must be someone who not only has acquired knowledge of the employer's customers, but also has influence over them through his or her business dealings. However, the level of reliance on this provision may vary with the sophistication of the client. Non-solicitation clauses should be restricted only to customers with which the employee has dealt (e.g., clauses should not cover customers with which the employee did not deal or of which the employee has no knowledge).

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Non-compete

Are there any special rules on non-competes for particular classes of employee?

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The less “important” an employee is to his or her employer and its business, the more difficult it will be for the employer to enforce a non-compete agreement.

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Labor relations

Right to work

Is the state a “right to work” state?

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No; however, if a union collective agreement requires employees to be members of a union, the employer can employ only union members in the bargaining unit. The Ontario Labor Relations Act 1995 specifies that employers must agree to union demands requiring all employees in the unit to pay dues, but they are not required to agree that all employees must be union members. However, employees who—at the time the collective agreement is first entered into—have a genuine religious objection to becoming a union member or paying union dues may be excused from this requirement. This exemption does not apply to persons who join the employer after a collective agreement is in place.

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Unions and layoffs

Is the state (or a particular area) known to be heavily unionized?

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Overall, the unionization rate in Canada is approximately 30%; the public sector influences this percentage.

In the private sector, approximately 16% of workers are unionized. In the public sector, the percentage increases to approximately 70%.

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What rules apply to layoffs? Are there particular rules for plant closures/mass layoffs?

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Provincial rules
Depending on the express or implied terms of the employment contract, including the presence or absence of any workplace layoff policies, temporary layoffs for non-unionized employees may be considered a constructive dismissal at common law, particularly for white-collar workers. Under the Employment Standards Act 2000 a temporary layoff is permitted subject to the rules set out in the Employment Standards Act 2000 and the regulations. An indefinite layoff (a temporary layoff can become an indefinite layoff) is treated as a termination of employment under the Employment Standards Act 2000.

If 50 or more employees are indefinitely laid off or terminated in a four-week period, eight weeks’ notice or more is required and a filing must be submitted to the provincial Ministry of Labor. The notice increases with the number of employees affected. This is in addition to individual statutory severance pay to which employees may be entitled. Most employees with five or more years of service with an employer that has an annual payroll of more than C$2.5 million are entitled to statutory severance pay of one week per year of service.

Where the employer carries on business at more than one location, separate locations constitute one establishment for the purposes of mass termination if:

- the separate locations are located within the same municipality; or
- seniority rights cover both locations by virtue of a collective agreement or a written contract of employment such that employees of one location may displace employees at the other location.

The Employment Standards Act 2000 and its regulations set out a variety of other exclusions and qualifications.

For unionized employees, layoffs are generally governed by the collective agreement.

Federal rules
If 50 or more employees are laid off or terminated in a four-week period, 16 weeks' notice or more must be provided to the federal Ministry of Labor. This notice period is separate from the individual notice and statutory severance pay to which employees may be entitled. Federally regulated employees with at least 12 months' service are entitled to statutory severance pay of either two days' pay for each completed year of service or five days' pay—whichever is greater.

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Discipline and termination

State procedures

Are there state-specific laws on the procedures employers must follow with regard to discipline and grievance procedures?

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No; however, the common law rule regarding "just cause" termination requires employers to undertake an investigation and present any allegations to the employee so that he or she can provide an explanation.

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At-will or notice

At-will status and/or notice period?

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Notice period.

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What restrictions apply to the above?

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In an employment contract, the employer and employee can agree to the employee's entitlements on termination, as long as those entitlements satisfy the minimum requirements under applicable employment standards legislation.

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Final paychecks

Are there state-specific rules on when final paychecks are due after termination?

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Under Ontario law, final pay must be provided either seven days after termination or the next pay date—whichever is later. Under federal law, final pay must be provided within 30 days.

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