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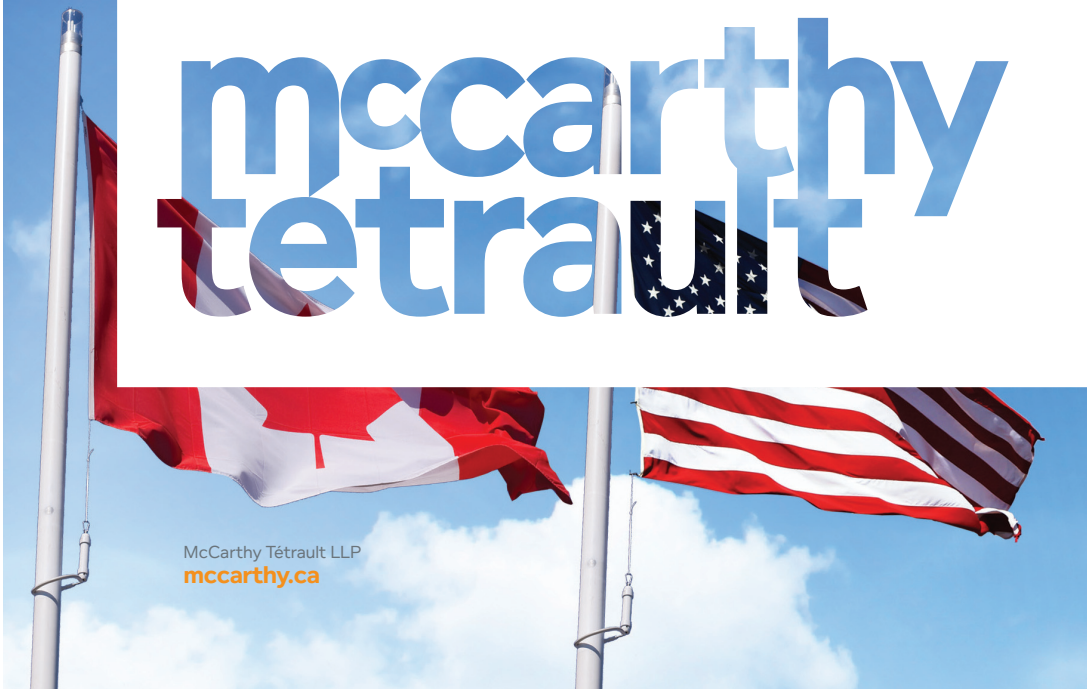
Cross-Border

Navigating Canadian Employment Law Guidebook



McCarthy Tétrault LLP
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McCarthy Tétrault would like to express our deepest thanks to David Anderson for brightening the pages of our guidebook. David is one of Canada's foremost cartoonists and illustrators, widely known for his creative work for leading international corporations and a variety of print publications including the Canadian HR Reporter (davidandersonillustration.com).

Every effort has been made to ensure the accuracy of this publication, but the comments are necessarily of a general nature, are for information purposes only and do not constitute legal advice in any manner whatsoever. Clients are urged to seek specific advice on matters of concern and not rely solely on the text of this publication.

Preface

This Guidebook was prepared based on extensive interactions with our U.S. clients, their attorneys, general counsel and Human Resources Department personnel. Much of the information contained in this publication reflects commonly asked questions about Canada's employment laws.

Throughout the Guidebook we have cross-referenced helpful information which is also available on our website. McCarthy Tétrault is Canada's National Labor and Employment law firm with labor and employment attorneys located in Canada's key business centers. We provide legal advice on all of the complex legal issues which employers must deal with in Canada.

This Guidebook is designed to provide general information on Canada's labor and employment laws. This Guidebook does not provide legal advice on specific issues. You are encouraged to consult with legal counsel should you require assistance in addressing a particular issue or concern.

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Introduction

Navigating Canadian Employment Law

Welcome to McCarthy Tétrault! We are Canada's National Labor and Employment law firm. With a large group of labor and employment attorneys in Canada's key business centers, our attorneys have handled numerous mandates involving employees, workplaces and human resources issues. This Guidebook is a collaborative effort, and deals with the issues we address with our U.S.-based clients daily. We have organized the contents on the basis of what you may need to consult, whether it is a high level overview or a detailed summary of how Canadian law relates to a specific issue.

First, however, let me share some background information on how we can assist you in navigating Canadian employment laws.

Our cross-border expertise stems from decades of collaboration between our attorneys and U.S. companies. We also maintain strong professional ties through a network of colleagues, and active memberships in industry associations such as the American Bar Association.

McCarthy Tétrault is recognized as the frontrunner by leading international directories. *Chambers Global 2011* ranks us as the leading Canadian law firm.

McCarthy Tétrault Labor & Employment Group

McCarthy Tétrault has one of the largest labor and employment law practices in Canada, offering a full range of advice to U.S. clients, with cross-border presence on local labor, employment, and human resources issues:

- employment contracts, including severance, discipline, termination-at-will, pay equity, overtime exemptions, pension, and benefits
- collective bargaining
- employment standards, human rights, occupational health and safety
- employee complaints, including harassment complaints, privacy, access to information, mediation, and conciliation

Similar... But Different

While U.S. and Canadian employment laws are similar, there are distinct statutory considerations that go into managing the Canadian workplace. Given the breadth and complexity of legislative, regulatory, and common law rules affecting employment relationships, we collaborate with our U.S. clients and offer timely advice to avoid costly mistakes and missteps.

Our labor and employment attorneys are well-versed in the nuances that differentiate U.S. and Canadian laws, business practices, and human resources policies. We assist our U.S. clients in:

- understanding Canadian federal and provincial labor laws
- adopting Canadian business practices and employee standards on issues, such as accommodating sick or disabled employees
- Canadianization of employee handbooks
- reviewing human resources policies, including alcohol and drug testing policies
- ensuring regulatory compliance on wages and other employment matters
- unions and labor law advice, including union avoidance

We trust our Guidebook will assist you in navigating Canadian employment law. Happy reading!

Jacques Rousse
Practice Group Leader
Labor & Employment Group

Ten Key Differences Between Canadian and U.S. Employment Law

Based on our interaction with U.S. employers, we identify in this section 10 key differences between U.S. and Canadian labor and employment law.

Although many of the legal principles governing human resources matters are similar between the two countries, there are some profound differences that U.S. employers must bear in mind when maintaining workforces in Canada.

1. Canadian Employment Law is Largely a Provincial Matter, Not a Federal Government Matter

In Canada, approximately 90 per cent of the workforce is regulated by provincial governments. Each province regulates labor and employment matters in a similar, though not identical manner. The remaining 10 per cent of the workforce is federally regulated. Unlike employers in the United States, there is no National Labor Relations Board governing the entire country's unionized workforce. Likewise, hours of work and overtime are regulated (for 90 per cent of the workforce) by the provincial government in the province where the employee is actually employed.

The significance of this difference between Canada and the United States is that if your business has multiple locations in Canada then each set of HR policies, employment agreements, etc. must be reviewed having regard to that jurisdiction's particular laws.

There are also nuances as to how similar governmental agencies in each different province approach the same issues (for instance, human rights tribunals may approach age discrimination claims differently, depending on whether the complaint arose in Alberta or in Ontario).

2. No At-will Employment

In the United States, an employer may be able to terminate its employee "at-will."

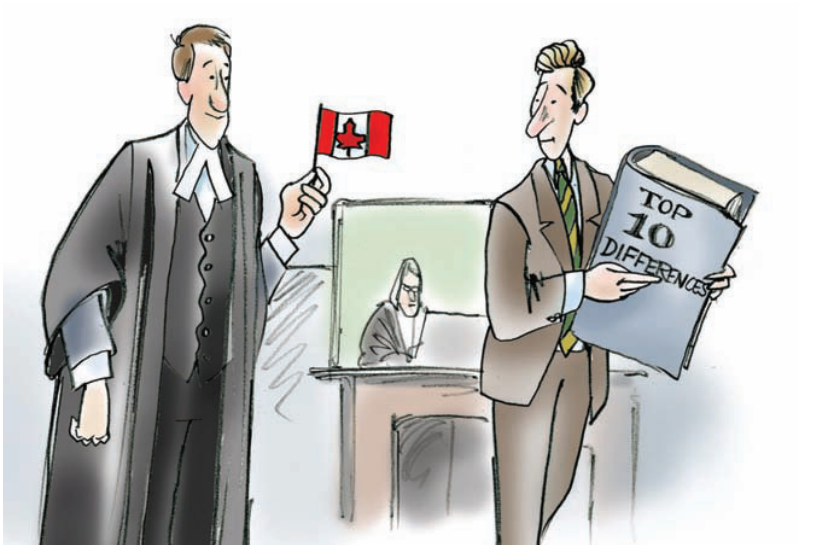
In Canada, unless there is a legal justification for the employee's termination (or the employee has a written employment agreement specifying a termination package), the employer is obligated to provide reasonable notice or pay in lieu of notice.

Practically speaking, it can be difficult to prove the legal justification to terminate an employee, resulting more often than not, in the Canadian employer providing a severance package to employees (whether for a plant closure, work performance issue, etc.).

In certain Canadian jurisdictions, notably the federal jurisdiction, Québec and Nova Scotia, certain employees who have reached particular thresholds of years of service may not be discharged without just cause. In such jurisdictions, providing notice or pay in lieu of notice may not be sufficient to end the employment relationship, and a qualifying employee may be able to claim a right to be reinstated in his or her employment depending on the circumstances of his or her termination.

3. Overtime Exempt Positions

In Canada, whether an employee is overtime exempt is governed by the applicable jurisdiction's employment standards legislation. Generally speaking, unlike in the United States, the employer and employee cannot establish a policy or enter into a contract to determine whether overtime is payable. In Canada, unless the employee is employed in a supervisory/ managerial capacity, or is in an exempted occupation (i.e., accountant or engineer), or other exempted category, then the employer must pay overtime on all hours worked in excess of the statutory threshold.



4. Employees With Disabilities

Like in the United States, an employer is prohibited from engaging in discriminatory practices, unless it meets a stringent *bona fide* occupational requirement (BFOR). In Canada, the employer must accommodate a disabled employee. However, the level of accommodation is to the "point of undue hardship." This standard will vary depending upon the employee's disability and the scope of the employer's operations.

Unlike in the United States where accommodation may have a low financial threshold before discharging this legal obligation, in Canada there are no prescribed compliance requirements. Each case is examined on its own merits. Human rights commissions will expect a large employer to examine the use of adaptive technologies or re-assignment of work duties among employees to determine if all solutions, short of undue hardship, are exhausted before exonerating an employer from its human rights obligation to accommodate a disabled employee.

5. Constructive Dismissal

In Canada, the employer constructively dismisses an employee if it changes a fundamental term of the employment relationship without the employee's consent. A decrease in salary, reduction of hours and relocation of the employee are examples of what may be constructive dismissal. Because there is no termination-at-will in Canada, a constructive dismissal can be tantamount to actually firing an employee, and thereby triggering the obligation to provide a costly severance package.

6. Workplace Privacy

Workplace privacy has become a key statutory compliance matter in Canada. Workplaces in British Columbia, Alberta, Québec, and federally regulated employers, must comply with stringent requirements regarding the collection, use and disclosure of employee personal information. In Canada, unlike the U.S., privacy legislation regulates almost all aspects of employee privacy and data collection in workplaces, and not, for instance, just employee medical information.

Some privacy commissions have considered whether the use of a "GPS" in employer-owned vehicles is a reasonable collection of data about an employee's driving habits. Likewise, the use of video and audio surveillance systems has also attracted the attention of privacy commissions for the similar reason.

7. Maternity and Parental Leaves

Canadian employees may take a continuous 52-week unpaid maternity and parental leave from the employer, and in Québec, mothers may take up to 70 weeks and fathers up to 57 weeks of unpaid continuous maternity or paternity and parental leave. Governmental (and in some cases private health care) schemes provide for modest financial assistance. The regulations vary between the jurisdictions, but a Canadian employer under employment standards legislation will be obligated to make the employee's position (or a comparable position) available upon his/her return from maternity/paternity/parental leave. In many instances, the full 52-week leave is used by Canadian workers. Non-compliance with maternity and parental leave obligations under employment standards legislation have also triggered human rights complaints on the basis of discrimination due to family status. Termination of employment due to the use of maternity and parental leaves has resulted in costly wrongful dismissal lawsuits.

8. Alcohol and Drug Testing

Mandatory drug testing can be a common feature of employment in the U.S. In Canada, several restrictions apply, either because of human rights legislation, or because of collective agreement limitations.

Generally speaking, where testing occurs in Canadian workplaces, it is rarely conducted randomly and most often involves alcohol testing, rather than drug testing. Moreover, testing is generally restricted to reasonable cause, post-incident or return-to-work from rehabilitation scenarios.

The Canadian Human Rights Commission has recognized that employees working in safety sensitive positions may be subject to testing, but a broad company-wide testing procedure would not be acceptable. While the U.S. approach to workplace alcohol and drug testing has highlighted the need for safety, in Canada, by contrast, a human rights approach focused on impairment caused by a disability has been the focus.

9. Jury Trials and Punitive Damages

In Canada, most employment related lawsuits occur before judges only and rarely are jury trials utilized.

In Canada, judicial precedent has limited the awarding of punitive damages in wrongful dismissal lawsuits. Typically, the court will determine the length of reasonable notice that an employer ought to have given to the employee,

and then calculate the wages, benefits and other amounts that the employee would have earned over the notice period. In the few instances where punitive damages have been awarded against employers, the amounts have been modest in comparison to U.S. awards.

10. Plant Closures

Most jurisdictions have statutory obligations that must be followed when an employer plans a mass layoff or plant closure. Typically, additional advanced notice must be given to employees and to the government. There may be enhanced severance obligations, or in the case of employers subject to federal regulation, requirements to meet with affected employees to devise ways to minimize the impact of the layoffs, if at all possible.

Employment Law Considerations When Operating a Business in Canada

This section provides a high-level overview of Canada's employment laws and how all the laws work together to regulate Canadian workplaces.

Employment

Employment in Canada is a heavily regulated area, governed by either federal or provincial legislation. Most of Canada's employers are covered by provincial legislation, with the exception of "federal works or undertakings," which include businesses involved in banking, shipping, railways, airlines and airports, interprovincial transportation and pipelines, and broadcasting and telecommunications.

The types of employment related legislation with which U.S. employers operating in Canada should be familiar include:

- employment standards
- labor relations
- human rights
- occupational health and safety
- federal and provincial privacy
- employment benefits, including pension, employment insurance and workers' compensation

The employment relationship in Canada is affected by myriad regulations, legislation and common law principles. In the province of Québec, which is a civil law rather than a common law jurisdiction, the *Civil Code of Québec* (CCQ) provides underlying rules which are generally analogous to common law principles. Employers need to be aware of the various legal concerns so they can avoid unnecessary liability in the workplace.

Employment Standards

All jurisdictions in Canada have enacted legislation that governs minimum employment standards. Generally, employment standards acts (ESAs) are broad and cover all employment contracts, whether oral or written. The standards defined in ESAs are minimum standards only, and employers are prohibited from contracting out of, or otherwise circumventing, the minimum

standards set out in the legislation. These laws spell out which classes of employees are covered by each minimum standard, and which classes of employees are excluded.

Although standards vary in each province, many topics covered are common to all ESAs, including: minimum wages; maximum hours of work; overtime hours and wages; rest and meal periods; statutory holidays; vacation periods and vacation pay; termination and severance pay; and leaves of absence. The leaves of absence protected by ESAs vary across provinces, but may include: sick leave; bereavement leave; maternity/parental/adoption leave; reservist leave; and compassionate care/family medical leave.

Unlike employers in the United States, Canadian employers may not terminate employees at-will. Employers must adhere to notice requirements unless they have sufficient cause to terminate an employee without notice. The length of the required notice period varies among jurisdictions, but generally increases with an employee's length of service with different maximums in each jurisdiction.

Employers are required either to give "working notice" of an employee's job termination, or provide pay in lieu of notice, unless an employee is terminated for cause. "Cause" includes only the most serious misconduct or disobedience. Certain classes of employees, including construction workers, employees on a temporary lay-off and employees terminated during or as a result of a strike or lockout, may be exempted from the termination notice provisions of the legislation in each jurisdiction. In most jurisdictions, special provisions apply where a large number of employees are terminated within a short period of time. These provisions include, at the very least, written notice to the Director of Employment Standards.

Some jurisdictions provide severance pay as an additional benefit to employees. For example, under the federal scheme, all employees who have been employed for 12 consecutive months are entitled to severance pay in the amount of five days of regular pay or two days of regular pay for each completed year of service, whichever is greater.

In Ontario, an employee with five or more years of service may be entitled to severance pay if the employer, as a result of the discontinuation of all or part of the employer's business, terminates 50 or more employees in a six-month period, or if his or her employer has a payroll of C$2.5 million or more. Severance pay is calculated on the basis of an employee's length of service, and may reach a maximum of 26 weeks of regular pay. As with pay in lieu of notice of termination, employees may be disqualified from receiving severance

pay if there is cause for termination, or if they fall within other exceptions specified in the legislation.

In addition to minimum statutory termination pay and severance pay entitlements, a terminated non-union employee, without a contract limiting the employer's liability, may be entitled by common law or the CCQ to further reasonable notice of termination or pay in lieu of notice. This right may be enforced in the courts. The amount of notice will depend on the employee's individual circumstances, including length of service, age, the type of position held and the prospect for future employment. The manner in which an employer treats an employee at the time of dismissal is also important, because notice periods may be increased for "bad faith" by the employer in the manner of termination. Employers who wish to avoid or limit this additional liability should have clear terms in written contracts. In the province of Québec, it is not possible to limit liability for reasonable notice of termination by way of a written contract.

Labor Relations

Canada and each province have enacted legislation governing the formation and selection of unions and their collective bargaining procedures. In general, where a majority of workers in an appropriate bargaining unit are in favor of a union, that union will be certified as the representative of that unit of employees. An employer must negotiate in good faith with a certified union to reach a collective agreement. Failure to do so may lead to the imposition of penalties. Most workers are entitled to strike if collective bargaining negotiations between the union and the employer do not result in an agreement; however, workers may not strike during the term of a collective agreement.

Human Rights

The *Canadian Charter of Rights and Freedoms* (Charter) is a constitutional charter that governs the content of legislation and other government actions. It contains anti-discrimination provisions that may be enforced by the courts. In addition, all Canadian jurisdictions have human rights legislation that specifically prohibits various kinds of discrimination in employment, including harassment. Whereas the Charter applies only to the actions of government, human rights legislation applies more broadly to the actions of non-government entities, such as employers of virtually every description.

Human rights legislation states that persons have a right to equal treatment and a workplace free of discrimination on specified prohibited grounds. These vary somewhat from one jurisdiction to another, but generally include: race; ancestry; place of origin; color; ethnic origin; religion; gender (including pregnancy); sexual orientation; age; marital status; family status; and, physical or mental disability, among others. The law prohibits direct discrimination on such grounds and also constructive or systemic discrimination, whereby a policy that is neutral on its face has the effect of discriminating against a protected group. However, employers may maintain qualifications and requirements for jobs that are *bona fide* and reasonable in the circumstances.

The first step in the analysis of discrimination is for an employee to demonstrate that discrimination has occurred, or that he or she has been treated differently in a term or condition of employment, on the basis of one of the prohibited grounds. Once an employee or former employee can demonstrate that discrimination has likely occurred, the employer must establish that the offending term or condition of employment is a BFOR.

The duty to accommodate arises when considering whether a workplace requirement or rule is a BFOR. An employer must demonstrate that the workplace rule was adopted for a rational purpose and in the good faith belief that it was necessary, and that it is impossible to accommodate individuals without undue hardship. "Undue hardship" is a high standard: it requires direct, objective evidence of quantifiable higher costs, interference with the rights of other employees, or health and safety risks. The employer must assess each employee individually to determine whether it would be an undue hardship to accommodate his or her particular needs.

Occupational Health and Safety

All federal and provincial jurisdictions have enacted laws designed to ensure worker health and safety, as well as, compensation in cases of industrial accident or disease. Employers must set up and monitor appropriate health and safety programs. The purpose of occupational health and safety legislation is to protect the safety, health and welfare of employees, as well as, the safety, health and welfare of others entering worksites.

For further information, read the article *"The Occupational Health and Safety Inspector is at the Door… Now What?"* available on our website.

Occupational health and safety officers have the power to inspect workplaces. Should they find that work is being carried out in an unsafe manner or that a workplace is unsafe, they have the power to order the situation to be rectified, and to make "stop work" orders if necessary. Contraventions of health and safety laws are treated very seriously, and may result in fines or imprisonment. Recent changes to the *Criminal Code* have also increased potential employer liability for failing to ensure safe workplaces.

Workplace Violence and Harassment

As part of maintaining a safe workplace, most Canadian jurisdictions have a workplace violence and harassment component to the provincial health and safety legislation. In the province of Québec, psychological harassment in the workplace is addressed in employment standards legislation. The aim of workplace violence and harassment legislation is to provide a safe and healthy workplace where everyone involved should be able to work without the fear of harassment or violence.

The requirements of workplace violence and harassment legislation vary from jurisdiction to jurisdiction. Employers need to ensure that they are aware of

their obligations and that they remain in full compliance. Although variances exist, some of the key features of the legislation require employers to:

- assess risk in the workplace, based on a number of prescribed factors;
- develop policies and procedures relating to workplace violence and harassment, and protocols for making such guidelines available to employees;
- train employees in the employer's policies and procedures, potential risks in the workplace, the appropriate response to workplace violence and obtaining assistance. The legislation also stipulates how often training must occur; and
- develop employer's procedures for investigating incidents of workplace violence and harassment.

Privacy

Employers in Canada must be aware that Canada has privacy obligations regarding the collection, use, disclosure, storage and retention of personal employee information. This is especially important in Québec, Alberta and British Columbia, which have enacted privacy legislation separate from the federal legislation.

Employment Benefits

The Canada Pension Plan is a federally created plan that provides pensions for employees, as well as, survivors' benefits for widows and widowers and for any dependent children of a deceased employee. All employees and employers, other than those in the Province of Québec, must contribute to the Canada Pension Plan. The employer's contribution is deductible by the employer for the purpose of calculating income for tax purposes. Québec has a similar pension plan that requires contributions by employers and employees within Québec.

In addition to the Canada Pension Plan, both employees and employers must contribute to the federal Employment Insurance Plan, which provides benefits to insured employees when they cease to be employed, when they take a maternity or parental leave and in certain other circumstances. In Québec, employers and employees must also contribute to the Québec Parental Insurance Plan, which provides paternity leave benefits, as well as, enhanced maternity and parental leave benefits. The employer's contribution to these plans is deductible for income tax purposes.

All provinces provide comprehensive schemes for health insurance. These plans provide for necessary medical treatment, including the cost of physicians and hospital stays. They do not replace private disability or life insurance coverage. Revenue collection varies from one provincial health insurance plan to another. In some provinces, employers are required to pay premiums or health insurance taxes. In others, individuals pay premiums. Still, in others, the entire cost of health insurance is paid out of general tax revenues. Employers commonly also provide extended health insurance benefits through private insurance plans, to cover health benefits not covered by the public health insurance plan.

Sick or injured worker benefits, in the form of workers' compensation, are provided by mandatory government schemes to which employers must contribute. This benefit compensates injured workers for lost income, health care and other costs related to their injury. Workers' compensation also protects employers from being sued by their workers if they are injured on the job. Other laws in Canada address additional benefits, such as private pensions and private benefit plans. For example, most Canadian jurisdictions have pension standards legislation that establishes minimum requirements for private pension plans.

Hiring Employees

This section outlines important considerations when hiring employees in Canada.

Recruiting

An employer has a duty during the pre-employment phase to exercise reasonable care and diligence in making representations regarding the employment opportunity. Employers should be careful not to make false promises or misrepresentations, or to exaggerate the opportunity. A failure to meet this duty may lead to significant legal exposure.

Employers should also note that aggressively recruiting or enticing an employee away from another employer, may result in added liabilities if in the future the employee is dismissed without cause.

Privacy Considerations

Some of the Canadian provinces (British Columbia, Alberta and Québec) and federally regulated employees have personal information protection legislation that applies to employees and prospective employees. While employers regulated by provincial law in other provinces may not have statutory privacy obligations, we advise all employers to take privacy laws into account in all their practices, including reference and background checking.

Privacy law requires employers to notify prospective employees of their intent to collect, use and disclose personal information, and to state the purpose for doing so. The term "personal information" includes any information about an identifiable individual, or information that allows an individual to be identified, but does not generally include business contact information (i.e., name, title, business address, telephone, facsimile, and email address).

For further information, read the article *"Conducting Reference Checks Without Running Afoul of Privacy Legislation"* available on our website.

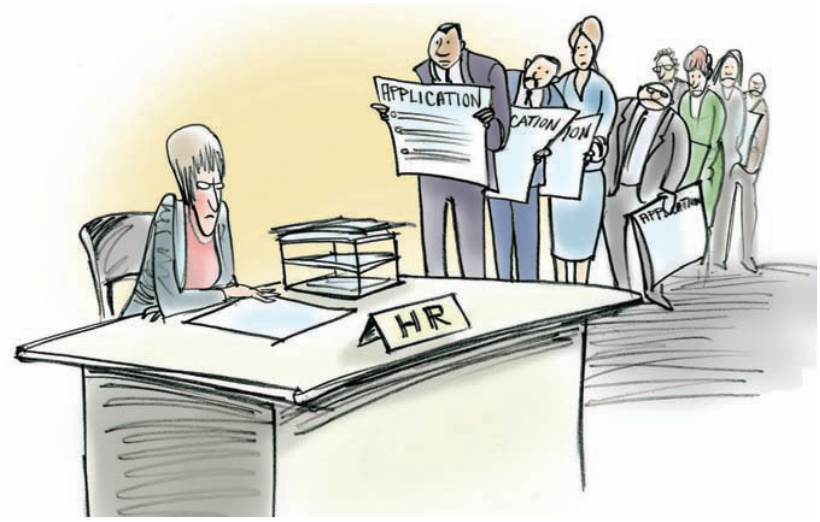
The most important general principle of Canadian privacy law is that any collection, use or disclosure of personal information must be reasonable and necessary. In recruitment, that means employers should only gather information that is necessary to make the hiring decision.

Employers may assume that an applicant who has provided a reference has consented to the employer collecting personal information from the referee which is reasonably related to the job requirements. In all other circumstances, employers should obtain express consent, or at least notify the applicant of the intention, to do further reference checks.

Human Rights

Every jurisdiction in Canada has human rights legislation that prohibits discrimination in employment on certain protected grounds. The legislation affects everything from advertising for employees, through job applications and hiring decisions, to termination. The prohibited grounds of discrimination commonly include:

- race, color, ethnic origin, ancestry, place of origin
- religion or creed
- age
- physical or mental disability (includes drug and alcohol dependence)
- sex or gender (includes pregnancy and childbirth)
- sexual orientation
- marital status
- family status



- source of income
- political belief
- record of criminal conviction

In the hiring process, subject to the BFOR exception that will be discussed below, employers should try not to ask any question that might generate information about a prohibited ground. For example:

- Do you have any disabilities?
- What is your age?
- What is your nationality?
- Are you married?
- Are you pregnant, or do you intend to have children in the near future?
- What is your religion?
- Which primary and secondary schools did you attend and when? (this could elicit identification of religious observance)
- Do you have any memberships in clubs or other organizations?

Throughout the application or interview process, employers may inadvertently obtain information about some of the prohibited grounds. Obtaining such information is not necessarily improper. However, it is improper for an employer to make a hiring decision based on a prohibited ground (unless it is a BFOR).

Even if the decision is properly made, having information related to a prohibited ground of discrimination could lead to a costly and damaging human rights complaint. If challenged, employers should be prepared to establish the reason why the applicant was not offered the job. In addition, they should be able to demonstrate that the prohibited ground played no part in the decision.

Employers may ask questions about the following:

- name and contact information
- whether they can legally work in Canada
- employment history
- Are you able to perform the following duties [insert duties]? If not, what is the nature of any accommodation you require?
- Are you available to work certain shifts? If not, what accommodation would you require?

In addition, employers may ask questions that relate to a BFOR of the job.

To qualify as a BFOR, the employer will have to show:

(a) a rational connection between its requirement and the job function

(b) good faith in adopting the requirement

(c) the inability to accommodate without undue hardship

A simple example of a BFOR is the requirement for someone being hired as a truck driver to have the required license. An applicant without the required license can be denied the job, even if the reason they cannot get the license is related to a prohibited ground of discrimination, such as a disability. On the other hand, if the job only requires occasional driving, the need to have a license is only a BFOR if the job requirements cannot be adjusted or met in some other way without causing the employer undue hardship.

Criminal Records Checks

Many employers want to carry out a criminal records check before hiring an employee. Different provinces in Canada treat criminal records differently. In some provinces, such as British Columbia and Québec, you may only discriminate on the basis of a *Criminal Code* conviction if the conviction is related to the job for which the applicant is being considered. In other provinces, such as Ontario, there may be more leeway, but employers may not discriminate against a candidate on the basis of a conviction, if the candidate has been pardoned for a *Criminal Code* conviction or if the conviction is for a provincial offence.

Employers are not prevented from obtaining a criminal record check. However, before an employer can rely on the criminal records check in making a hiring decision, it will have to establish that the conviction or criminal record relates to a BFOR.

Employers who want to obtain a criminal records check should note that privacy law, requires an employer to obtain consent from an employee to conduct a criminal records check and to any related use or disclosure of personal information produced by the criminal records check. Ideally, an employer will obtain express written consent in advance.

For further information, read the article *"Pre-Employment Screening: Changes to the Criminal Records Check Process"* available on our website.

Employers should not conduct a criminal records check until after a conditional offer of employment is made. This reduces the risk that a candidate who was not going to be offered a job in any event can claim that an unrelated criminal record was part of the reason.

Medical Testing

In some circumstances, an employer may require an employee to submit to a pre-employment medical evaluation if it can be established that the medical evaluation is reasonably required for the purpose of establishing the employment relationship, and that the desired medical fitness is a BFOR. Again, such testing should only be required after a conditional offer of employment is made.

Drug Testing

Canadian courts have held that, subject to certain exceptions, pre-employment drug testing is unlawful, regardless of the job duties, because this type of testing cannot measure current impairment. For this reason, employers should exercise significant caution before requesting or implementing pre-employment drug testing.

Terms and Conditions of Employment

Every employee in Canada has an employment contract. The contract is typically a mixture of written, oral, statutory and implied terms. The employer's goal should be to have as much of the contract in clear, written form as possible. To do that requires some discipline and systems at the point of hiring.

The Offer

A common problem is making an oral offer of employment that does not contain all the important terms and conditions. If the employee accepts the offer, there is a binding contract and it may not be possible to introduce or enforce other terms and conditions of employment.

For that reason, no offer of employment should be made until all important terms are outlined in writing. The prospective employee should be given adequate time to carefully review, consider, ask questions, and if desired, obtain independent legal advice before signing to confirm acceptance of the offer. All this should happen **before** the employee shows up for the first day of work.

The Employment Terms

Where the written terms of employment are silent, the common law implies certain terms into every employment contract, even if such terms have never been discussed by the employer and the employee. In Québec, the CCQ imposes terms that are similar to those implied by the common law.

In addition, there are various statutory obligations imposed on employers in Canada. The most important of these implied and statutory obligations are outlined below.

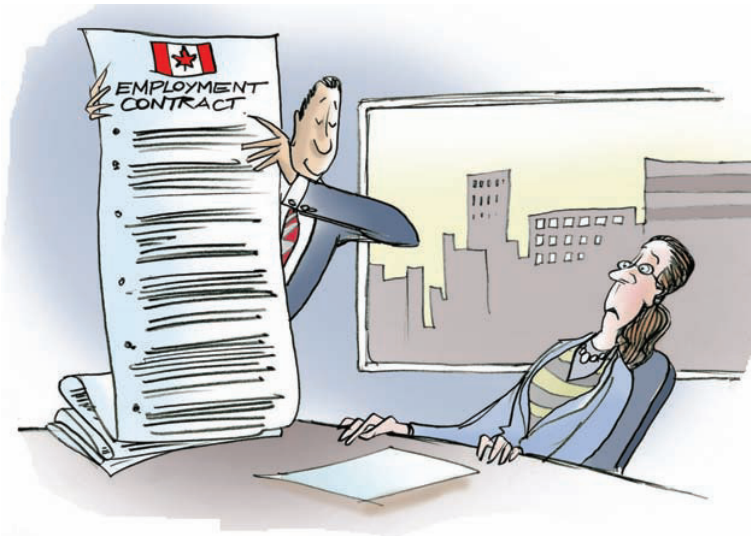
Implied Terms

Every employee is required by law to:

- serve the employer with loyalty and good faith;
- protect confidential information; and
- give the employer the benefit of the employee's inventions and ideas related to the employment.

Every employer is required by law to:

- provide work for the employee;
- provide compensation;
- meet minimum standards of employment legislation (this will be discussed further below);
- comply with human rights law, including the duty to accommodate; and
- provide a safe workplace.



Desirable Terms

While it is not necessary to have a comprehensive employment agreement, it is important to explicitly state the terms that are key to the needs and operations of the employer, and to include terms that will limit an employer's exposure upon termination of the employment contract. Key terms to consider include:

- parties
- position
- pre-conditions
- term
- probationary period
- duties
- compensation
- benefits
- vacation
- intellectual property: inventions, patents, copyright
- restrictive covenants: non-disclosure, non-solicitation, non-competition
- termination for just cause
- termination without cause
- resolution of disputes

Employment Policies and Handbooks

As was discussed in section two, there is no at-will employment in Canada. That means that employers do not have to worry about employee handbooks creating security of employment that does not already exist. Employers should consider referring to employment policies, handbooks, codes of conduct and the like, as part of the terms of the employment offer and should provide copies for review prior to acceptance of the offer.

A Note About Contractors

Some employers try to avoid employer obligations by classifying a person as a contractor, not an employee. It may be assumed that the person can be paid without deductions and without contributions to plans such as the Canada Pension Plan and Employment Insurance, and that the person can be terminated with little or no cost.

In most cases, such "contractor" relationships do not stand up to scrutiny and can lead the employer into greater liability than if a proper employment contract was completed. The parties' characterization of the relationship is not determinative. Instead, Canadian courts will look at: (i) the exclusivity of the engagement; (ii) ownership of "tools" required to do the work; (iii) the chance of profit and risk of loss; (iv) the degree of integration of the person into the organization; and (v) control over how the work is done. The analysis undertaken by courts in Québec is distinct but largely similar.

For further information, read the article *"The Dependent Contractor"* available on our website.

Before entering into a "contractor" relationship, an employer should be satisfied that the person is truly an independent contractor, not an employee, and that the particular "contract" benefits to be enjoyed by the employer are clear, legal, and enforceable.

Statutory Minimums

In all Canadian jurisdictions there is employment standards legislation that sets the minimum standards of employment for employers and employees in the workplace. While the specific requirements differ from province to province, the legislation generally establishes minimum standards of employment for:

- payment of earnings
- payroll records
- wages
- hours of work and hours free from work
- overtime and overtime pay
- vacations and vacation pay
- holidays and holiday pay
- leaves: maternity, parental, family responsibility, compassionate care, reservist, jury duty, bereavement, etc.
- termination of employment

Employers must ensure that they comply with the minimum standards in all their employment practices. This is something that should be taken into consideration before the commencement of an employment relationship, including at the time of formulating and making an offer.

Employers should recognize that employment standards legislation outlines minimum requirements and these requirements can be increased by contract and common law. If the employment contract is silent, the common law may imply terms into the employment contract that are more favorable to employees than the statutory minimums.

It should be noted that certain employees, such as managers, may be exempt from some of the minimum standards. The employment standards legislation in each province must be considered.

Termination Pay

As was noted above, we do not have at-will employment in Canada and employees must be given notice or pay in lieu of notice upon termination without cause.

Employment standards legislation in each province sets out the minimum amount of notice to be provided to an employee upon termination. The amount of notice depends solely on the length of service of the employee. Employment standards legislation generally provides for approximately one week of notice per year of service, to a maximum of eight weeks. Some provinces also require additional severance pay, again usually based on length of service.

These notice and severance requirements are minimums. Unless there is an enforceable employment contract that meets or exceeds these minimum requirements, courts will use the common law to imply an amount of reasonable notice into the contract of employment. This is known as "common law notice." In the province of Québec, the CCQ provides for "reasonable notice" which is analogous to "common law notice" with the notable distinction that, reasonable notice cannot be limited or renounced in advance in a contract of employment.

The amount of common law notice that a court will imply will depend on several factors, including: the employee's age and length of service with the employer; the nature of the employment and the availability of similar employment having regard to the skills; and training and qualifications of the employee. In most circumstances, courts will award higher (and often significantly higher) notice awards than the minimum requirements.

In Canadian jurisdictions other than Québec, an employment contract may limit notice to the minimum requirements, but in order to do so it must be carefully drafted. If the provision limiting notice contravenes or could contravene the minimum statutory requirements, it will be unenforceable

and the employee will be entitled to common law notice upon termination. Under Québec law, an employment contract cannot limit an employee's right to reasonable notice. It is therefore important to be aware that notice of termination provided for by an employment contract in Québec is always potentially subject to review and evaluation by a court.

Retaining and Managing Employees

This section addresses key considerations for retaining and managing employees in Canada.

Changing Terms and Conditions of Employment Without Constructive Dismissal

In Canada, a unilateral, fundamental change to the terms of an employment relationship constitutes a "constructive dismissal." Where a constructive dismissal occurs, an employee, in most cases, will be entitled to terminate the employment relationship as if he or she had been wrongfully dismissed. The employee can then sue the employer for damages.

There is no hard and fast rule as to what changes to the terms of employment will amount to a constructive dismissal. Each case must be examined on its own facts and all of the surrounding circumstances. Canadian courts have found that the following changes resulted in constructive dismissal:

- a significant reduction in compensation
- a change in compensation structure (e.g. from salary to commission)
- a reduction in hours of work
- a change in benefits
- a geographic relocation (if the employment contract does not contemplate such a change)
- a change in job duties
- a change in status
- a demotion
- a change in working conditions

A constructive dismissal will usually take place after one significant unilateral change. However, it is also possible for cumulative effect changes to result in a fundamental change giving rise to a constructive dismissal.

Constructive dismissal will not be found if an employee accepts or condones a fundamental change to his or her terms and conditions of employment. Acceptance can occur either expressly or by conduct. At a certain point, an employee who remains in the job after a fundamental change without objection will be said to have condoned the change.

If an employer wants or needs to make changes to an employment contract, it is best to give the employee reasonable notice of the impending change. Reasonable notice for a significant change would be similar in length to the amount of notice to which an employee would be entitled upon termination of his or her employment. During the notice period, the employer should maintain the existing terms and conditions of employment.

Employers who give reasonable notice of an impending change will significantly minimize the risk of constructive dismissal. However, reasonable notice may not be sufficient to create an enforceable new employment contract. Employers should take special care with an employee who objects to notice of a fundamental change to their employment contract and continues working. Once an employee expresses an objection to the change, employers should either seek to secure the employee's acquiescence to the change at the end of the notice period, or give the employee working notice of dismissal along with an offer to rehire the employee subject to the new terms at the expiry of the notice period.

It should be noted that employees have an obligation to mitigate losses arising from a constructive dismissal, which may include continuing to work under the new terms of employment, while looking for other employment. However, an employee does not have to stay in the job where the employment relationship is acrimonious or otherwise untenable, or where the change is humiliating or embarrassing for the employee.

For further information, read the article *"Lessons Learned – Action Needed"* available on our website.

Disciplining Employees

Despite the best of intentions, employees make mistakes or conduct themselves in a manner worthy of discipline, performance management or even dismissal. When time comes for an employer to discipline an employee or engage in some corrective action, it is essential to do so in a diligent and appropriate manner, in accordance with any applicable laws and regulations.

When deciding on issues of discipline and performance management, it is essential that employers have a well thought out plan. Each situation is unique and not all issues of discipline should be approached or conducted in the same manner.

Often, the appropriate steps will depend on several factors, including:

- *The specific employee conduct at issue:* is the employee a poor performer or has the employee engaged in culpable misconduct (e.g. harassment)?
- *The specific circumstances of the employee:* does the employee have a disability? Is the employee an active employee or on leave? What is the employee's length of service?
- *The prior record of the employee:* does the employee have a history of discipline? Has the employee undergone training on employer policies?
- *Employer policies:* is there an employee code of conduct?
- *How the conduct impacts the employer's business interests and other employees:* has the employee caused injury to the employer's business or caused harm to another employee?

Poorly conducted discipline can result in a number of undesirable consequences for the employer, including morale and staffing issues. In addition, a judge or an adjudicator will consider all of the circumstances leading up to the discipline, leading to a risk of liability based on the employers conduct. This is so, in wrongful and constructive dismissal proceedings, human rights complaints, employment standards complaints, or grievance arbitration (for unionized employees). In addition, improper handling of discipline or employee corrective action can result in inefficiencies in an employer's business. For example, multiple members of management may be forced to deal with the repercussions of a poorly handled dismissal.

For further information, read the article *"Tips for Employers on Carrying Out Effective Discipline"* available on our website.

Serious Misconduct

Theft, harassment, dishonesty and breach of trust may be some of the more serious issues that employers will have to deal with. The disciplinary response should be reasonable and proportionate to the instance of the misconduct. However, due to the nature of the conduct, and the potential consequences to the employee's reputation resulting from such allegations, an employer must carefully investigate the alleged misconduct and, depending on the finding, implement the decision carefully.

Canadian courts do not look kindly upon arbitrary actions of an employer which occur without an adequate investigation or without providing the

employee with an opportunity to be heard. The purpose of an investigation should be to gather information in an organized, complete and fair manner, in order to arrive at accurate findings of fact. Some general guidelines for carrying out a proper investigation are as follows:

- First: after any incident of serious misconduct, the employer should ensure that the situation is brought under control.
- Second: the employer should consider the nature of the incident. For example, was the employee off-duty? Is it criminal in nature? Is there a potential human rights issue? What are the rights of the complainant?
- Third: the employer should consider whether there are any legal obligations with respect to the alleged misconduct and the manner in which the investigation is carried out.
- Fourth: the employer should identify the investigator and investigation team. There should be an unbiased investigation team with the necessary expertise and authority to conduct a thorough investigation. An employer may wish to seek external assistance, such as a consultant or lawyer, if the investigation cannot be completed in an unbiased manner, or if some special expertise is required.

With respect to the actual investigation, the following process should occur:

- Interview people who were involved in the incident or who witnessed the incident.
- Collect documentary evidence, as appropriate.
- Collect actual evidence, such as recovery of stolen property, taking photographs of evidence of damaged property.
- Record evidence by means such as video surveillance and photographs.
- Produce an incident report. The confidentiality and intended use of the report should be made clear throughout the investigation.

Performance Problems

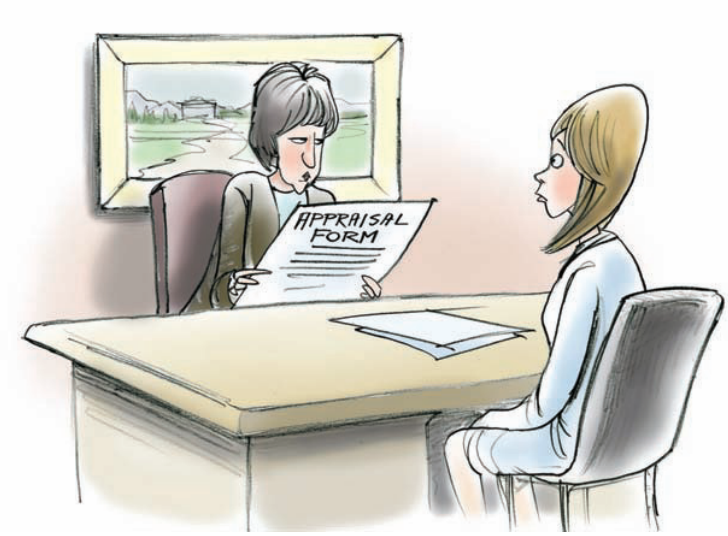
It is a fundamental term of employment that an employee must attend to the employee's employment duties. The essence of any employment relationship is that an employee is to perform competent services in exchange for wages. Neglect of duties or incompetence, may, therefore, form the basis for disciplinary action, where the employee remains incapable of performing

the work for which the employee was hired after corrective action, warnings and coaching by the employer. A heavy onus will be placed on employers to demonstrate to an adjudicator that the employee has failed to meet objective, reasonable standards of performance. Therefore, prior warnings, coaching and performance reviews play a significant role in legitimizing disciplinary responses to poor performance.

When there is a performance problem, the employer should analyze what is causing it and determine whether it is a short or long-term difficulty and whether it is a remediable or permanent issue. Proper analysis of the problem allows the employer to intervene in a manner that would assist the employee in improving performance, which can benefit the employer's operational interests and productivity, while avoiding inefficiencies resulting from termination and hiring.

An employee's supervisor along with human resources should be involved early in the process with performance management techniques such as, performance improvement plans, coaching, warnings, and training. These methods should be used in a *bona fide* way to assist the employee in correcting performance.

Warnings should be clear, direct and documented. In evaluating whether discipline or dismissal is appropriate for a poorly performing employee,



adjudicators will examine the history of warnings provided to the employee and consider whether:

- the employee was warned that his performance must improve or that he/she would be subject to further discipline (including possible termination);
- the employee understood the nature of the warning and the corrective action required;
- the employee was given a reasonable opportunity to rectify the deficiencies; and
- the deficiency is related to sub-standard employee performance and not independent factors external to the employee.

Handling Employees

It is inevitable that employees will be dealing with illnesses that may affect their ability to continue with their job functions, or which require the employer to make accommodations to the work environment. Employers must be careful when requesting or obtaining medical information as this has the potential to increase liabilities and risks.

For further information, read the article *"Good News for Attendance Management"* available on our website.

Medical Information

Employers should always proceed with caution when requesting information about an employee's medical status. Human rights legislation in each of the provinces prohibits discrimination on a number of grounds, including disability. Privacy laws, applicable in British Columbia, Alberta, Québec and the federal jurisdiction may also impact on the collection, use and disclosure of medical information.

Disability has been defined and interpreted broadly and can include not only bodily injury and illness, but also discrimination on the basis of health or the perception of (a non-existent) disability. The prohibition on discrimination applies during all phases of the employment relationship: hiring; employment testing; training; scheduling; transfer; promotion; lay-off; and termination.

An employer should only ask for and obtain medical information which is reasonably necessary for the purpose. Requests for unnecessary medical information may expose an employer to claims of discrimination on the basis of disability or to claims of breach of privacy laws or of the terms of

the employment contract. Furthermore, employers who obtain medical information about employees are obligated to store and protect such information in compliance with privacy laws and regulations in applicable provinces, which can be an additional burden and cost for the employer.

Medical evidence may be requested and required for the following reasons:

- to establish a valid absence: a dated doctor's note confirming the dates the employee was unable to work;
- for an extended leave of absence: a dated doctor's note confirming the employee is unable to work due to illness or injury, is receiving medical treatment and the estimated date of return, if known; and/or
- fit to return to work/accommodation: a dated doctor's note, with a full assessment based on a detailed, functional description of the job requirements.

Consent

The best method to obtain medical information about an employee, even where you have the right to such access from a statute or employment contract, is with the employee's written consent. Generally, employers should not proceed unilaterally to obtain an employee's medical information without first asking for the employee's consent. Consent is implied when the employee tenders a doctor's note.

The Duty to Accommodate

The duty to accommodate arises when an employee is unable to perform the duties of the employee's position because of an individual characteristic protected by human rights legislation. Once an employee establishes that a workplace requirement or rule has a discriminatory effect on the employee because of a disability, the duty to accommodate arises.

Employers have an obligation to accommodate employees up to the point of "undue hardship." The courts have acknowledged that some hardship in accommodating employees is acceptable. Some of the factors considered when determining whether hardship reaches the point of being "undue" include: the extent of financial costs to the employer, the interchangeability of the workforce and facilities, and the effect of the change on workplace morale and safety.

The Supreme Court of Canada has addressed the issue of accommodation for disabled employees and placed a limitation on the obligation of employers in this regard. Essentially, Canada's highest court held that the employer is not required to prove that it is impossible to integrate an employee who does not meet its attendance standards, but only that doing so would result in undue hardship. What constitutes undue hardship can take as many forms as there are circumstances. In that vein, the court said that the test is not whether it is impossible for the employer to accommodate the employee's characteristics, and furthermore, the employer is not required to change working conditions in a fundamental way, but rather to adjust the employee's existing working conditions or duties, provided that this can be done without causing the employer undue hardship.

The duty to accommodate rests on the employer and the employee. The employee has a duty to inform the employer of the needs required. Simultaneously, the employer has a duty to actively consider and inquire when circumstances or behavior are such that the employer should know that there may be an issue with a particular employee.

The *Accessibility for Ontarians with Disabilities Act, 2005* (AODA)

The AODA places specific disability accommodation requirements on various categories of organizations in Ontario. The goal of the AODA is to provide accessibility for all those with disabilities. The obligations on employers and businesses are slowly coming into place.

Five standards have been proposed, each of which will apply to organizations depending on the type of activity in which they are involved:

- Customer service
- Transportation
- Information and communications
- Built environment
- Employment

The *Accessibility Standard for Customer Service* became legally enforceable as of January 1, 2010. The next standard in force is expected to be one which applies specifically to employers, providing a new set of obligations which will need to be addressed. The purpose of the employment standard is to help employers create equal employment opportunities for people with disabilities. Employers will have to fulfill the following requirements under the

employment standard of the AODA:

- Develop, adopt and maintain an accessible employment policy statement within one year of the legislation coming into force.
- Create disability awareness training (for employers with more than five employees) to be completed between three and five years from the time the standard comes into force.
- Develop, adopt and maintain procedures for accommodating employees in the recruitment, assessment, selection and hiring stages.
- Requirements related to posting and advertising of available positions.
- Procedures governing accommodation plans in place.
- Materials regarding policies and procedures which support employees with disabilities and information on how to request accommodation.

The AODA is the first of its kind in Canada. Other provinces may follow suit in time. Employers will need to ensure that their workplaces are compliant with the requirements by soliciting the help of a consultant or lawyer.

For further information, read the article *"Another Layer to Employers' Accommodation Obligations"* available on our website.

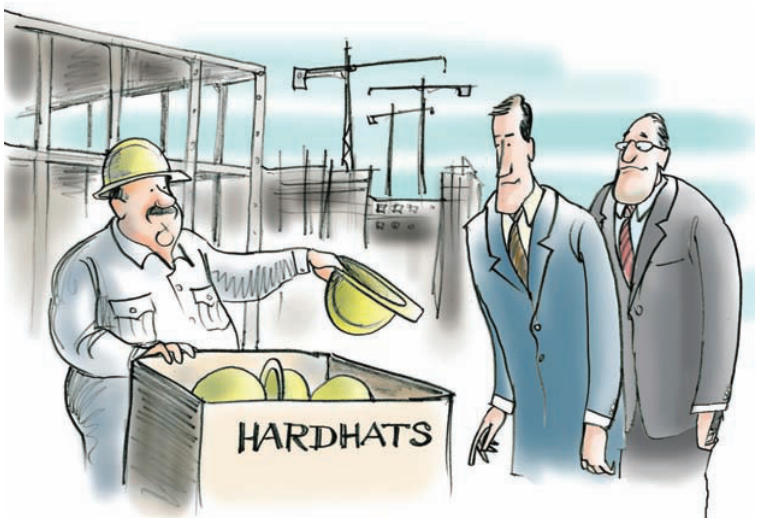
Safe Workplaces

Occupational health and safety legislation across the country is in place in order to protect workers and employers against health and safety hazards. Procedures for managing workplace dangers and enforcement measures are provided where compliance by workers and employers has not been achieved voluntarily. Accordingly, the legislation sets out the responsibilities of the parties, requiring them to identify potential problems and develop solutions.

Although each province and the federal jurisdiction have their own governing body of health and safety legislation, common themes can be found among them:

- *Joint Committees:* depending on the size or nature of the work performed, joint health and safety committees comprised of worker and employer representatives will be charged with identifying workplace hazards, investigating work refusals and serious injuries, and making recommendations to the employer, among other tasks. A strong emphasis is placed on worker-employer co-operation.

- *Right to Refuse Unsafe Work:* where workers believe that the work they have been asked to perform or the physical state of the workplace poses an immediate danger to them or another worker, the legislation provides for an "on-the-spot" right to refuse. A protocol for refusals and employer follow-up is detailed in the legislation.
- *No Reprisal for Enforcement:* the legislation prohibits employers from penalizing employees for complying with or seeking enforcement of the legislation. Remedial measures are available to rectify instances of reprisal.
- *Criminal Sanctions:* both the *Criminal Code of Canada* and health and safety legislation create corporate criminal offences for certain violations of the legislation and regulations. Individuals can also be charged with offences under the health and safety regime.



In addition to the responsibility that workers and employers share in the furtherance of the legislation's goals, workplace inspectors ensure compliance with the legislation by:

- visiting workplaces;
- investigating complaints;
- issuing reports and orders;

- making recommendations; and
- providing workers and employers with information.

The frequency of inspections is determined by various factors, including the nature and size of the workplace and the workplace's past record of health and safety. The powers of an inspector are often quite broad and employers should familiarize themselves with the authority granted to inspectors under the relevant legislation.

For further information, read these articles *"Workers' Compensation Can Work for Employers Too"* and *"New Amendments to Ontario Occupational Health and Safety Legislation"* available on our website.

Parental Leave

Legislation in each of the Canadian provinces offers new parents unpaid, job-protected time off to care for a newborn or an adopted child. In general, employees who meet the eligibility requirements are entitled to leave which ranges from 12 to 70 weeks.

Parental leave, as it is generally referred to, is available for either the mother or the father of the child. For the mother, an additional unpaid, job-protected leave called maternity leave is also available. The legislation generally requires that mothers who take parental leave must do so immediately following maternity leave. In the province of Québec, fathers are entitled to up to five weeks of unpaid, job protected paternity leave, in addition to being entitled to parental leave.

In Alberta, New Brunswick, Yukon and the federal jurisdiction, parental leave can be split between the two parents provided that the total leave does not exceed the prescribed maximum. In the remaining provinces and territories, the leave can be taken by both eligible parents.

Continuation of Benefits During Parental Leave

Employees, both mothers and fathers, are eligible to maintain their participation in the employer's benefit plans during their parental leave. In some jurisdictions, the employee is responsible for paying the premium to maintain participation in the benefit plans.

Federal Insurance Plan

Under the federal Employment Insurance (EI) plan, eligible contributing employees may receive up to 15 weeks of maternity benefits and up to 35 weeks parental benefits. In order to qualify for EI benefits, employees

must have worked a minimum of 600 hours of "insurable employment" in the last 52 weeks prior to claiming the benefit.

Eligible contributing employees in Québec receive maternity, parental and/or paternity benefits from the Québec Parental Insurance Plan (QPIP) rather than through the federal EI plan.

Although maternity, paternity and parental leaves are unpaid under the legislation, some employers elect to provide employees with the difference between the EI or QPIP benefit and the employee's regular salary for a portion or the duration of the maternity, paternity or parental leave. This "top up" mechanism is solely at the discretion of the employer and not a requirement of the program.

Court's Approach to Workplace Violence and Harassment

Courts have taken a broad approach to the interpretation of "workplace violence," "workplace harassment" and "psychological harassment." However, the courts have been consistent in finding that performance management, normal supervision and direction of employees and the application of sanctions, and even dismissal are generally not considered "harassment."

In assessing the boundaries of workplace harassment, courts have said that harassing behavior does not have to degrade or humiliate the victim and can include things like standing in the way of a colleague or pulling a colleague's hair. Jokes and teasing may also be considered harassment if the targeted person clearly voices disapproval and a desire to have the conduct stop. The general guideline of the courts has been to assess harassing conduct as that which is known or ought reasonably to be known to be unwelcome.

Federal Legislation

Employers covered by federal legislation will be subject to the regulations contained in the *Canada Labour Code*. "Workplace violence" is described in the federal legislation as follows:

Any action, conduct, threat or gesture of a person towards an employee in their workplace that can reasonably be expected to cause harm, injury or illness to that employee.

For further information, read these articles *"Bill 168: Workplace Violence and Workplace Harassment Amendments to the Occupational Health and Safety Act"* and *"Developing a Policy on Workplace Violence"* available on our website.

The key features of the federal legislation require employers to have:

- a workplace violence and harassment policy;
- conducted workplace violence risk assessment;
- established controls in place;
- emergency notification and dispute resolution procedures; and
- training conducted every three years, at least.

Employees Who Work Alone

Many jurisdictions also have legislation governing the safety of employees who work alone. For example, British Columbia, Alberta, Saskatchewan, Manitoba and New Brunswick and have specific regulations addressing these issues. Included are such things as procedures for checking in on employees who are working alone or in isolation, and training for employees who work under those conditions, etc. Employers need to be aware of their obligations for these important safety concerns.

Departing Employees

This section considers how Canadian employers end the employment relationship.

Departing Employees

There are many different circumstances under which the employment relationship can come to an end. The applicable legal principles are generally consistent across Canada, including the province of Québec. There are, however, some very important differences in the legal approach to departing employees between Canada and the United States. As indicated throughout this publication, the most notable difference is that there is no at-will employment in Canada.

Firing an Employee

The starting point in understanding the law in Canada with respect to dismissing an employee from their employment is to understand the concept of providing reasonable notice of termination. In most situations an employer cannot terminate a contract of employment without giving reasonable notice, or pay-in-lieu thereof. Some exceptions are the rare instances where a contract has become frustrated or where the employer has cause for termination. Except where a contract of employment has become frustrated (i.e. impossible for the employee to fulfill), any termination of employment by the employer will be either "with cause" or "without cause."

Termination for Cause

Terminations for cause will arise only in situations of serious employee misconduct. In order to establish that an employer has cause to terminate the employment relationship, the employer must point to serious employee misconduct, most frequently exemplified by instances of theft, dishonesty, violence or harassment, or other serious breaches of employer policy. The burden of proving the misconduct is on the employer and courts and arbitrators in Canada require clear, cogent and convincing evidence of misconduct, as well as, a compelling explanation as to why termination is required. In many cases it is incumbent on an employer to demonstrate a clear chain of progressive discipline depending on the severity of the misconduct. In the event that an employer has cause for termination, they may dismiss the employee immediately with no further obligations to that employee beyond any outstanding remuneration that has already been earned, such as unpaid wages or unpaid vacation pay.

Where employers have written policies regarding discipline and misconduct, they need to be followed carefully in order to make a termination for cause effective. In a unionized environment, collective agreements typically provide for the system of progressive discipline and past practice will also frequently come into play.

Termination Without Cause

If an employer does not have "cause" for termination, then the dismissal is "without cause" and the employee is entitled to reasonable notice of that dismissal. In other words, the employer is not entitled to dismiss the employee with immediate effect unless it has already provided reasonable notice of that termination, or is willing to provide pay in lieu of that reasonable notice.

The entitlements of an employee in a dismissal without cause are primarily governed by three inter-related elements:

- the minimum standards established in federal or provincial employment legislation;
- the "common law", which is judge-made law, or, in the province of Québec, the CCQ; and
- the terms of any written contract of employment, including a collective agreement.

The employment relationship is a contractual one; typically, contracts of employment are committed to writing but they can range from a simple letter offer to a more detailed and comprehensive agreement. They may also take the form of a collective agreement in the case of a unionized workforce. In the absence of a written contract, or in instances where the written contract is silent, the common law will imply contractual terms. Although there are variations amongst the pieces of legislation, each province in Canada has legislation governing minimum standards for employment. These minimum standards cannot be written away by a contract; in most situations it is possible to vary the standards but only in a fashion that provides a greater right or benefit. A contractual provision that tries to provide an entitlement, that is less than that which is guaranteed by the employment standards legislation, will be void and unenforceable.

The various pieces of employment standards legislation in each of the provinces sets out a minimum requirement for the notice of termination to which an

employee is entitled. For example, in Ontario an employee is entitled to one week of notice per year of completed service (with slight variations in the first two years of employment) up to a maximum of eight weeks' notice of termination or pay in lieu thereof. In addition, an employer is required to maintain the same terms and conditions of employment, including wages and benefits, during that notice period. Frequently, legislation will also include special provisions that increase the notice entitlement in circumstances of mass terminations.

In addition, some jurisdictions (such as Ontario and the federal jurisdiction) provide for additional severance pay that is not technically notice of termination, but rather compensation for the loss of long standing employment. For example, in Ontario, employees with five years or more of completed service are entitled to an additional week per year of service up to a maximum of 26 weeks. In order to qualify for severance pay in Ontario an employee must be employed by a company (or group of related companies with a payroll of $2.5 million or more), or have had their employment terminated because of the permanent discontinuance of a business where 50 or more employees are severed within a six month period. Severance pay must be paid in a lump sum amount following termination, unless the employee agrees in writing to accept the payments in installments.

The concept of a notice period is based upon the employee having an adequate amount of time to find comparable replacement employment. Courts have been awarded common law notice (and reasonable notice under the CCQ) for periods far in excess of those required by employment standards legislation. Absent a contractual provision limiting the amount of notice that an employee is entitled to upon termination, the common law standard will apply. In Québec, an employee's entitlement to reasonable notice cannot be limited by contract. The amount of notice that an employee is entitled to is determined by a series of factors including:

For further information, read these articles *"Termination of Employment of Employees on LTD in the Context of a Plant Closure"* and *"Employer's Computer-Use Policy Supports Termination for Cause"* available on our website.

- the age of the employee at the time of termination;
- the length of the employee's service;
- the nature and status of the position;
- the availability of comparable jobs; and
- whether the employee was induced to leave other secure employment.

The reasonable period of notice can vary widely based upon these factors, but only in very rare circumstances does it exceed a period of 24 months.

Structuring the Termination

Under the common law (or the CCQ), an employer is permitted to give "working notice" of termination. For example, if an employer determines that an employee is entitled to six months' notice of termination, they can advise the employee that their employment will be terminated on a certain date in the future. In this fashion, an employer can limit the amount of liability owed at the actual termination date by providing working notice or a combination of working notice and pay in lieu thereof. It is important to note, however, that the amounts paid on termination must always provide at least what is guaranteed by the applicable employment standards legislation. For example, an employee in Ontario with five years of service or more will be entitled to receive severance pay which cannot be provided through working notice.

When an employer decides to terminate an employee, without cause effective immediately, the employer must provide pay in lieu of notice. By argument, pay in lieu of notice may be paid over a period of time (depending and always subject to the minimum employment standards legislation), or it can be paid in a lump sum on termination. Employees who have had their employment terminated are required to mitigate their damages by seeking alternate employment. As such, during a period where an employee is receiving pay in lieu of notice, they are obligated to seek employment. Any income that is gained from such employment during the period of notice is deducted from the pay in lieu of notice provided by the employer.

There are several combinations of arrangements that can be agreed upon at termination or that can be agreed upon at the time the contract is formed. For example, an employer can make an offer of payment that is somewhat less than the full entitlement to reasonable notice, where that payment is made in a lump sum, thus relieving the employee of the duty to mitigate. This can be an attractive offer. Alternatively, an employer may decide to continue paying an employee through the notice period and incentivize them to find other employment by offering to deduct only 50 per cent of the pay in lieu of notice payments when the employee finds new work.

In certain Canadian jurisdictions, notably the federal jurisdiction, Québec and Nova Scotia, certain employees who have reached particular thresholds of years of service may not be discharged without just cause. In such jurisdictions, the payment of notice or pay in lieu of notice will often not be

sufficient to end the employment relationship, and a qualifying employee may be able to claim a right to be reinstated in his or her employment, depending on the circumstances of the termination. In Québec, an employee with two years of continuous service can claim such a right, while under federal jurisdiction, an employee must have 12 months of continuous service; certain categories of employees are exempt from these.

Absent clear contractual language otherwise, it is important to also remember that compensation during the notice period is very inclusive. Essentially, the court will look to place the employee in the shoes that he or she would have been in had they worked during this notice period. As a result, the employee is entitled to their full package of remuneration and the value of any lost benefits. Employers are cautioned in Canada regarding the continuation of benefits during the notice period. It is not uncommon for employers to discontinue benefit coverage following expiry of the statutory period, but during the common law notice period. This practice has an inherent risk because the employee is to be placed in the position that they would have been in had they been working. If the employee were to become injured during the notice period, then the employer could find themselves in the shoes of an insurer for the purpose of long term disability benefits. Although many employers have often considered this a minimal risk, just such a case has been recently reported resulting in substantial liability.

The various pieces of employment standards legislation also have certain requirements regarding the payment of any unpaid wages, or accrued but unused vacation pay, in a short period following the date of termination.

Employees Who Quit

When an employee resigns, absent a specific contractual provision otherwise, an employer has no further monetary obligations to that employee except to pay for any unpaid wages or remuneration that has already been earned, including accrued but unused vacation pay. Much like an employer is required to provide notice of termination, an employee is required under the common law (and the CCQ) to provide notice of their resignation. The amount of notice required is dependent on the seniority of the employee and their importance to the organization. The period of notice of resignation to be provided by an employee will generally be far less than the notice of termination required by an employer to give to an employee. An employer may elect to waive the notice period before a resignation, but they cannot choose to unilaterally end the employment early, and stop paying the employee's salary.

Upon departure, an employee will continue to owe his or her employer the duty to keep confidential information confidential. Unless a contract indicates otherwise, a departing employee is not restrained from competing with their former employer, or soliciting other employees to leave, or soliciting the customers or business of their former employer. The exception to this is fiduciary obligations for key employees who owe positive duties not to compete unfairly or to seize corporate opportunities that rightfully belong to their previous employer.

During their employment and leading up to a point where they may resign, an employee owes a general duty of fidelity. Employees are not prevented from planning their exit or from even undertaking steps to prepare for competition; however, they are not permitted to misuse confidential information.

One circumstance in which an employee can resign from employment but still be entitled to compensation is when a constructive dismissal arises. A constructive dismissal occurs when an employer makes a unilateral and fundamental change to the terms of the employment relationship. Although the employer may not have any intent to actually dismiss the employee, the unilateral action by the employer is treated as a repudiation of the contract entitling the employee to resign; the matter is then treated as though the employee had been dismissed without cause.

It is difficult to determine precisely the boundaries of constructive dismissal. It is possible for an employer to change certain terms of an employment relationship, for example, specific duties and perhaps titles and even remuneration. However, the ability to make significant changes must be supported by very clear language in the contract.

For further information, read these articles *"Basic Employee Obligations on Termination or Resignation"* and *"Post-Employment Reference Letters: Guidelines for Employers"* available on our website.

Mandatory Retirement

The issue of mandatory retirement engages concerns regarding prohibited discrimination. Recently, most provinces have amended human rights legislation to prohibit discrimination on the basis of reaching a particular age. Previously, some jurisdictions permitted discrimination with respect to those above 65 years of age. Age discrimination, such as mandatory retirement at age 65, may still be permitted where the employer is able to establish that the distinction is based upon a BFOR, that prevents an employee from performing the work after a specific age, and that the matter cannot be accommodated without imposing undue hardship.

As such, any contracts, collective agreements or policies, can no longer require retirement or create any distinct treatment for employees age 65 and older, unless a BFOR can be established.

In the federal jurisdiction, it is not discriminatory to terminate an individual's employment when they reach the "normal age of retirement" for employees who work in similar positions. Under that specific provision of the *Canadian Human Rights Act*, mandatory retirement is permitted for employees governed by the federal jurisdiction.

Enforcing Non-competition and Restrictive Covenants at the Time of Departure

It is a situation of great concern to an employer when an employee resigns from employment and then begins to compete or otherwise interfere in the business of their former employer. All employees owe a general duty of fidelity during their employment, but after the employment ends, they are not restricted from competing or soliciting against their former employer. Employees must respect confidential information of their former employer on an ongoing basis even after departure. Apart from that, there are generally no restrictions on employees once they have decided to leave their employment.

Key employees who are determined to be "fiduciary employees" do have certain obligations to their employer that survive the date when employment ends. Employers should be cautious and aware, that fiduciary duties are not imposed lightly and are reserved for senior employees whose unfair competitive activities would damage their former employer.

In order to attempt to inject some certainty into the equation, employers may include written contractual terms, known as "restrictive covenants," designed to limit the abuse of confidential information, the solicitation of employees or clients, or competition against a former employer. These types of provisions are considered to be a restraint of trade and courts only enforce them with great caution. It is crucial that these provisions are drafted with a specific view to the details of the situation. A cut and paste or boiler-plate approach will typically lead an employer into error, such that their provisions have no utility whatsoever.

Unlike the variety of approaches found in the United States, the law regarding the application of restrictive covenants is very similar across Canada, including Québec. Recent decisions from the Supreme Court of Canada have reaffirmed that Canadian courts are not to fix or redraft a restrictive covenant in order to make it reasonable and enforceable. Specifically, courts will not

give broad or purposeful interpretations to vague wording. The language chosen by the employer must be precise. If an employer seeks to hold its employees to these types of restrictive provisions, the employee must know, with certainty, the meaning of the provisions. Even where a court is invited by the contract to adopt the position that it finds reasonable, it will refuse to do so. For example, provisions that invite the court to select from a decreasing period of enforcement, for example: "if not two years then one year, if not one year then six months". This type of provision lacks certainty and will not be enforced by the courts in Canada.

For further information, read the article *"Supreme Court of Canada Rules on Respective Covenants and National Severance"* available on our website.

Keys to Enforceability

Apart from the requirement that the wording be precise and unambiguous, these types of agreements must contain at least three key elements.

First, the provision must have a reasonable and clear temporal scope. It is not uncommon to see employers who seek non-competition or non-solicitation clauses that last for two years. However, it would only be in an exceptional situation, with a key employee, that such a long period might be justified. The temporal scope must be limited to only what is necessary in order to protect the company in a reasonable fashion. For example, how long would it take the company to introduce a new customer representative to preserve the relationship with the company? The consideration of the reasonableness of a temporal scope can be influenced by any severance compensation that the employee is set to receive.

Second, the provision must be precise and reasonable with respect to its geographic limitation. Certainly, the specific nature of the business in question will impact the reasonableness or necessity of a broader or narrower geographic limit, but a prudent employer will consider the geographic areas in which the particular employee operated as a reasonable starting point.

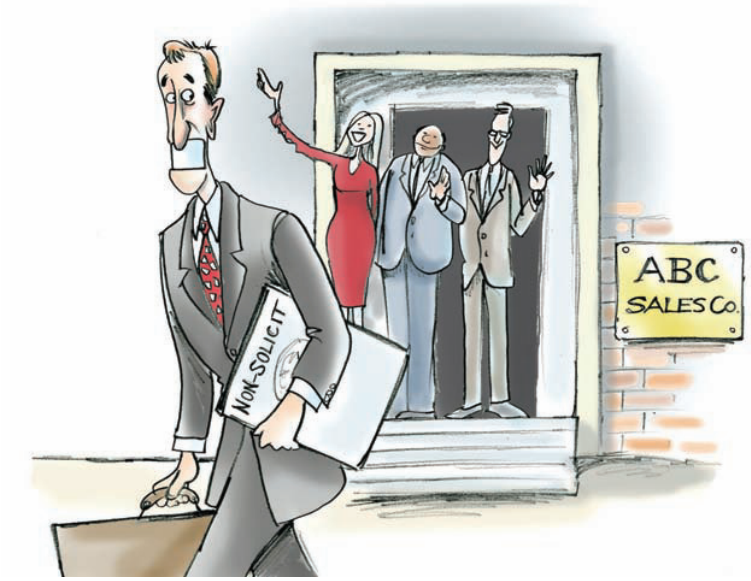
Third, the scope of the activity that is described must be precise and reasonable. The type of competitive behavior, for example, that is sought to be restricted, should relate to the duties, knowledge and responsibilities of the particular employee in question. When drafting a non-solicitation provision, it is wise to limit the restriction on solicitation to clients or customers with whom this employee actually dealt or has some particular knowledge of.

Confidential Information

Canadian courts have little reluctance in enforcing a provision regarding confidential information. This is not to say that a court won't carefully examine whether the information is actually confidential in character, but the principles of protecting the employer's proprietary right are not in direct conflict with the employee's ability to earn a living at new employment. The difficulty in dealing with the abuse of confidential information is proving the actual breach itself.

Non-competition Clauses

A non-competition covenant is the most restrictive of the covenants mentioned above. A non-competition covenant will only be appropriate where the mere presence of the former employee in the marketplace, will do clear damage to the former employer, by virtue of the knowledge or goodwill generated jointly with the employee and former employer during the employment period. A non-competition covenant will only be enforceable where a non-solicitation covenant could not serve to reasonably protect the former employer. This is not commonly the case.



Non-solicitation Clauses

Non-solicitation clauses are very common and can be an effective and fair way to place reasonable restrictions on employees who could do harm to the business of their former employer. Provided that the provision is carefully tailored to the activities and role that the employee filled with the company, a non-solicitation covenant is also not as limiting toward the employee's ability to earn a living as a non-competition covenant is. That being said, it is important to bear in mind that clients and customers are free to choose their goods or service provider as they see fit.

Enforcement

When an employer is faced with what they see as a breach of a restrictive covenant, the most frequent recourse is to immediately seek injunctive proceedings to ensure that the breach stops. The enforceability and determination of restrictive covenants is typically done in a quick fashion given the nature of immediate injunctive relief. However, some employers decide to warn the former employee and then "wait and see" as to what damage, if any, results, and then choose to bring legal action seeking damages for breach of contract instead.

It is also important to consider the reason for termination of employment. Cases have clearly demonstrated that an employee who is dismissed from their employment is in a more sympathetic situation, compared to an employee who has resigned voluntarily perhaps with the very purpose of competing. Likewise, successful arguments have been made that where restrictive covenants have been agreed to in the sale of a business, where the bargaining power is typically more equal, this can assist an employer in supporting the covenant as more reasonable in certain circumstances. The CCQ provides that an employer who dismisses an employee without cause loses the benefit of a non-competition covenant in the employer's favor.

Remaining Union Free

This section addresses the key aspects of unionization in Canada and what happens when there is a union in the workplace.

As mentioned previously, Canada's employment laws are mostly governed by provincial governments. Likewise, with labor laws. Unless the employer is an interprovincial operation like a bank, international transportation company or pipeline, or a telecommunications business, employers are regulated by provincial labor laws.

Labor laws in Canada were patterned after the *U.S. National Labor Relations Act* (1935). Many of Canada's labor law concepts have an U.S. origin. However, with the passage of several decades of jurisprudence by labor boards, there are many nuances as how key issues in union certification drives and unfair labor practice complaints are handled by the various labor boards. Indeed, even between provinces, for example, British Columbia and Alberta, there are differences in legislation and approach by the labor boards on the same issues.

Proactive and progressive human resources practices remain the best option to stay union free in Canadian workplaces. Our experiences show that unresponsive and autocratic management styles may drive Canadian employees to seek union representation.

Canada's rate of unionization in the private sector varies between jurisdiction and industry. Generally speaking, unions are smaller and less prevalent in Canada than they were a generation ago.

Often the employer will see or hear about a union drive during the formative stages. It is critical to seek legal advice early in the process. Most jurisdictions permit "employer free speech" during a union drive however, any actions or comments that can be perceived as coercive are likely to be challenged by the organizing union as an unfair labor practice.

Ferreting out supporters, staging captive audience meetings with employees and changing terms and conditions of employment during a union drive are all prohibited under Canadian labor legislation.

All jurisdictions require that a union applying to certify a group of employees as a bargaining unit must demonstrate a specified threshold of support, ranging from 35-45 per cent. Thereafter, the appropriateness of the union's application

will be reviewed by the labor board. Once the required preconditions are established then a secret ballot vote, organized by the labor board, will be scheduled. Typically, 50 per cent plus one of the employees who actually vote will decide the outcome. In most jurisdictions, employees vote early in the process – typically, within 7-14 days of an application being submitted by the union. Unfair labor practices complaints, if any, will sometimes be adjudicated after the employees votes, but before the ballots are counted. In some cases, the ballot box will be sealed pending the adjudication of any disputes. In Canada the voting process is designated to move quickly so as to reduce the time that either party may engage in prohibited activities. Unlike in the U.S. where the time between an application and a vote can be lengthy, the opposite is the norm in Canada. Thus, it is imperative that an employer: 1) adopt proactive and progressive human resource policies before any situation arises; and 2) manage its "employer free speech" rights aggressively and appropriately during a union certification campaign.

Collective Bargaining

Unions that have become the certified bargaining agent are entitled to engage in collective bargaining. In some jurisdictions, specific rules exist to facilitate and conclude a first time collective agreement and thereby purposely curtail a stalemate at the bargaining table.

Another unique and distinguishing feature of Canadian collective agreements is their end date. Most jurisdictions require "bridging."

Bridging is the continuance of the collective agreement from its end date, until a new one is concluded through the collective bargaining process or it is ended by virtue of a labor dispute. Thus, in most jurisdictions, collective agreements do not necessarily end as of their expiry dates.

Labor Unrest

Union strikes and employer lockouts happen in Canada, but in less than two per cent of the cases.

Each jurisdiction regulates how and when a strike or lockout can occur. For example, Alberta has adopted: 1) mandatory mediation; and 2) cooling-off periods; followed by 3) a requisite strike vote. All three steps must occur before a labor dispute can commence.

Most jurisdictions, with the exception of federal jurisdiction, permit labor relations boards to regulate picketing activity. This may include the labor

relations board determining the location of picketing, the number of picketers and the manner of picketing.

The Supreme Court of Canada has differentiated between picketing and leafleting. Leafleting is the dissemination of printed materials. This has been recognized as a form of free speech and is less regulated, even though the outcome is similar to picketing.

Administering the Collective Agreement

Canadian jurisdictions require all disputes during the life of a collective agreement (i.e., grievances) to be resolved without strike action. Most parties have adopted binding arbitration to resolve grievances. Court based lawsuits are prohibited.

Labor arbitrators have wide discretion to address grievances and grant remedies. Most arbitrators have the authority to substitute employer decisions to discipline a discharge, and to evaluate lesser forms of discipline.

Most Canadian employers have adopted formalized progressive discipline policies with respect to unionized workplaces. Typically, the unionized

employee will receive a written warning, one-day suspension, three-day suspension, five-day suspension, and then termination if the prior remedial suspensions did not correct the problem.

Unique Aspects in Québec

This section addresses unique aspects associated with employment in the province of Québec.

Although Québec is a civil law jurisdiction rather than a common law jurisdiction, from a practical perspective, legal principles applicable to employment in the province of Québec are largely similar to legal principles in the rest of Canada. Where differences are significant, they have been noted and discussed throughout this manual.

An aspect of employment in Québec that is unique in Canada, however, is the issue of language. The majority of the population of Québec is French-speaking, and Québec law regulates certain aspects of the use of French in the workplace.

Québec's *Charter of the French Language* affirms French as the province's official language, and grants French-language rights to everyone in Québec, both as workers and as consumers. Anyone who does business in Québec – anyone with an address in Québec, and anyone who distributes, retails or otherwise makes a product available in Québec – is therefore subject to rules about how they interact with the public and how they operate internally inside the province.

In Québec, written communications with staff must be in French, including offers of employment and promotion and collective agreements. No one may be dismissed, laid off, demoted or transferred for not knowing a language other than French – but knowledge of English or another language may be made a condition of hiring if the nature of the position requires it.

Businesses that employ at least 50 people within Québec for at least six months, must obtain a francization certificate by demonstrating the generalized use of French at all levels of the business. Businesses where the use of French is not generalized at all levels may be subject to a francization program in order to achieve this goal. Businesses with at least 100 employees must establish an internal francization committee to report on progress.

For further information, read our article *"Fragile Transplants: Adapting Employment Agreements to Québec"* available on our website.

Executive Employment North of the Border

This section highlights some unique aspects associated with executive employment in Canada.

Executive Contract Terms

The terms of employment for an executive are typically more complex than that of the average employee. For that reason, it is imperative to have the terms of employment reduced to writing. By agreeing to a written contract of employment, in advance of the executive starting in the position, the employer is better able to control important terms such as the obligations on severance of the relationship, including any restrictive covenants that may be required.

Due to the status, remuneration and relative lack of available opportunities, executive employment positions typically attract a longer period of notice in the event of termination of employment, in very rare cases even exceeding 24 months.

Controlling the Terms Upon Cessation of the Employment Relationship

Many employers insert provisions regarding the protection of confidential information, as well as, non-solicitation and non-competition clauses into executive contracts.

Some executives may be in a position where they owe fiduciary obligations to the company. This would be the case of a key employee with a substantial amount of responsibility and trust, such that they could significantly damage the company by placing their personal interests above those of the company. Employers should be careful to note that when they reduce obligations and requirements to writing, they are effectively tailoring terms that might otherwise be implied by the court under the common law.

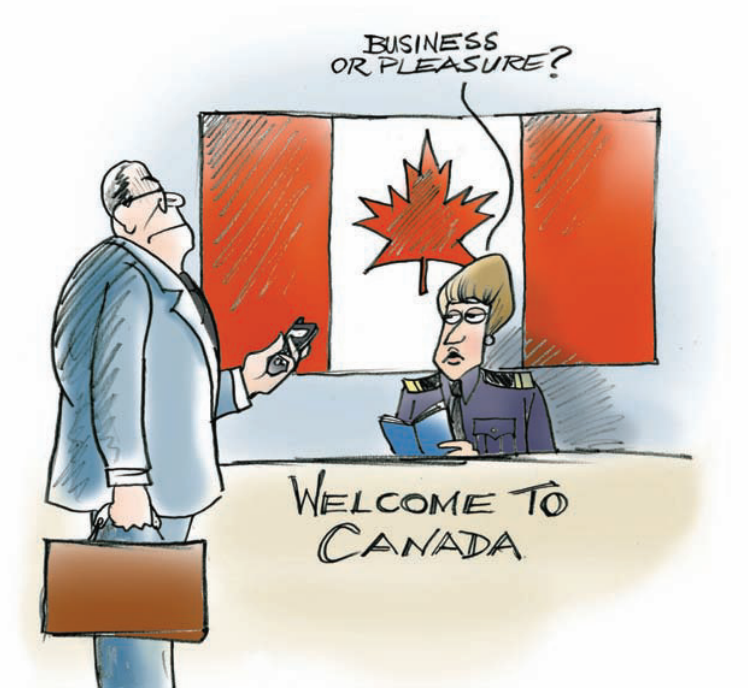
An employer should also consider what period they require by way of notice of resignation from the executive. Absent a specific provision, the required notice period for resignation that a court would imply might be less than what the employer expects.

Due to the fact that executives can have fairly robust remuneration packages, including many different types of benefits, it is certainly advisable to agree to arrangements upon severance where possible. An employer will want to ensure that they have provided for the possibility of working notice in the arrangement and any compensation amounts for notice of termination or pay in lieu thereof, are inclusive of the minimum requirements imposed by employment standards legislation.

As with other employees, the common law and CCQ will place the executive in the shoes that he or she would have been had they been working during the notice period. This can have particularly onerous implications when applied to the various types of remuneration and benefits that an executive receives. If an employer wishes to tailor the applicable remuneration during the notice period then they should do so specifically in the contract. Items such as car allowance, expenses, stock options, incentive based pay formulas, health, dental and insurance benefits, should all be specifically addressed.

It is advisable that the company pay particular attention to the stock option plan, any grants of options, as well as, the executive's employment agreement itself, in order to address the vesting of options during the reasonable notice period. Companies frequently wish to prevent the vesting of options during the notice period, and if they wish to do so they must deal with this explicitly in the language of the various agreements. Because employers are obligated to provide reasonable notice of dismissal to their employees, general language, indicating that options will not vest following the termination of employment, likely will not suffice. That language may not be sufficient because the court will deem that the immediate termination without notice is not lawful and that the effective termination date is at the end of the notice period. As such, the language in the stock option plan, grants or employment contract must attach the cancellation or expiry of the options to a specifically desired date, such as the time when the executive is informed that their employment is being terminated, or their last day of actual active employment, not including any period of reasonable notice.

The specific terms that will apply on termination of employment range, depending upon whether the executive was terminated for cause, without cause, whether the contract was frustrated, or whether the executive resigned with or without good reason (for example, in the face of a change of control). It is also fairly common to have a notice period or severance package that increases with the length of service of the executive.



U.S. Executives Working in Canada

An U.S. executive who is transferred or seconded to Canada will be subject to Canadian immigration laws that apply to temporary foreign workers, and in most instances they will require a work permit, unless the person concerned is a Canadian citizen or a Canadian permanent resident.

United States and Mexican citizens may be able to take advantage of the *North American Free Trade Agreement* (NAFTA), and can apply at the border for a work permit based on a work permit category such as, the NAFTA intra-company transfer. These executives may transfer from their employers in the United States or Mexico to a legally related company (e.g. subsidiary; sister/affiliate; parent; branch) in Canada, provided that they meet a number of criteria. In the previous three-year period, the employee must also have been employed by the legally related company outside Canada for at least

12 consecutive months in a senior executive or senior managerial capacity. Generally, middle managers do not qualify for this senior category. This work permit category is available for executives and managers, whether they are coming to occupy a full time role in Canada, or are travelling to Canada on a frequent basis to engage in the provision of services to their legally related company and its clients.

Once the appropriate determination has been made by the employer as to whether a work permit is required and the proper route to take to apply for the document, there are still a few factors to watch out for with respect to compliance with Canadian immigration legislation. The employee who is travelling to Canada or being transferred may require a special entry document called a temporary resident visa if they are a citizen of a prescribed country such as, South Africa or Brazil. This visa must be obtained through a Canadian consulate in advance and cannot be applied for at the border. Similarly, if the employee has a previous criminal record, or serious health problems, they may also be denied entry to the country.

HR Issues When Buying and Selling Your Canadian Business

This section highlights employment law considerations when buying and selling a Canadian business.

Jurisdiction

As noted in Chapter 2, most employees are covered by the law of the province in which they work. But, some employees in Canada are governed by federal law which will apply no matter where in Canada they work.

If the transaction involves organizations from different jurisdictions, there can be very different treatment of employment issues. That could be an issue for businesses operating under different provincial jurisdictions. Even more complicated is a transaction involving organizations whose employees are variously federally and provincially regulated.

Privacy

In some Canadian jurisdictions there is privacy legislation which regulates the collection, use and disclosure of personal information of employees involved in a business transaction in the private sector. When a business is bought or sold in Canada, it is necessary to deal with personal information of employees, so the legislation must be considered.

Employees under federal jurisdiction, as well as, employees in British Columbia, Alberta and Québec, are all covered by privacy statutes in those jurisdictions.

Basic Employment Law

The basics of Canadian employment law outlined in Chapter 3 provide the context for most of the issues you will face in buying or selling a Canadian business. It is especially important to understand the difference between at-will employment in the U.S., and the requirement for reasonable notice, coupled with statutory minimum standards, in Canada.

Typical Labor and Employment Issues

Terms of Employment

To understand your potential liability to employees of the business being bought or sold, you need full information about all terms and conditions of employment: the statutory and common law requirements; written terms in employment contracts; collective agreements; and policies.

Look out for fixed term contracts, specific termination provisions, and change of control agreements. Carefully review the terms of bonus, stock option and other variable compensation plans.

Collective Bargaining Obligations

Review all collective agreements for provisions relevant to the transaction. Some collective agreements even have obligations that are triggered by a sale of shares.

Certifications granted by labor relations boards, and scope clauses of collective agreements, have to be reviewed to understand the full scope of collective bargaining obligations that may be involved in the transaction.

Review the expiry date of collective agreements and consider if the bargaining cycle could affect, or may be affected by, the proposed transaction.

Depending on the jurisdiction involved, advance notice to unions of a proposed transaction, and negotiation of an adjustment plan, may be required by statute or a collective agreement. This can affect the timing of a transaction and other disclosure obligations a party may have. Even without such an obligation, the parties should consider how and when to inform the union of the proposed transaction.

Union and Non-union Successorship

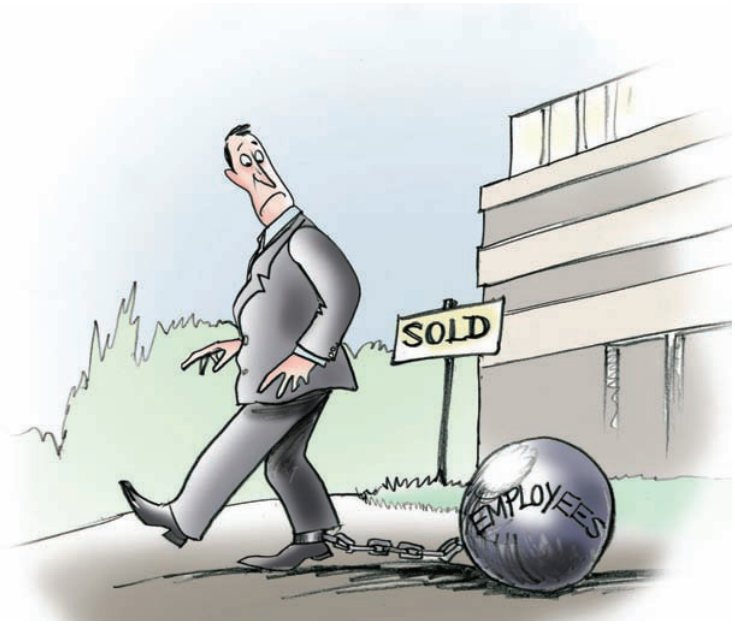
Most asset purchase transactions will trigger successorship under labor law, i.e., the buyer of the business will be bound by the certifications, collective agreements and ongoing labor disputes of the seller. Successorship happens as a matter of law; the union does not have to re-organize or win a vote. The potential for successorship means a full review of the current state of labor relations, collective bargaining, and grievances is required.

Less well known, is the concept of non-union successorship. Employment standards legislation generally deems employment to be continuous when a business is sold and the employees continue in employment with the buyer.

In such cases, the seller will not have termination obligations, but the buyer takes the employees with accrued seniority and other rights. Each jurisdiction is different, so the applicable statute must be considered.

The common law also has a form of successorship by presuming the buyer hires employees from the seller with the employees' accrued length of service for things like, benefits, vacation and future termination.

Under Québec civil law, a contract of employment is not terminated by a sale of the employer's business and is binding on the purchaser.



Offers of Employment

When and how offers of employment are made by a buyer will depend on many factors, including applicable legislation, the state of the transaction negotiations, restrictions on disclosure, getting set up to take over the employees, and the desired human resources outcome. To whom offers are to be made, and on what terms, is governed by the terms of the deal. A purchaser has to be sure it can meet an obligation to offer employment on "the same" or "substantially similar terms" if required by the agreement.

Terminations

If the transaction will result in some loss of employment, the full cost of terminations, and who will bear that cost, must be considered. The liability will flow from specific employment contract provisions, common law and CCQ requirements for reasonable notice, and statute.

There are several factors that influence the length of reasonable notice and statutory severance that may be required. To estimate your potential liability, you need full information about the age, hire date, position and compensation for all employees affected.

All employment standards statutes in Canada provide for a minimum amount of notice or compensation in lieu of notice to be provided. Some statutes also require severance pay.

Employment standards statutes also have provisions for the termination of large numbers of employees in a short period of time. The numerical and timing triggers for group termination provisions, and how they might apply to a group of related entities, have to be reviewed in each jurisdiction.

Employees Not Actively at Work

There may be a large number of employees who are not actively at work when the transaction is closed. Employees may be away from work for any number of reasons – statutory leaves such as, maternity or parental leave, disability, leaves of absence – and with varying degrees of certainty about their return to work.

This can be a problem for both the buyer and seller: the seller wants all employees of the business to be hired by the buyer; the buyer does not want liability for employees who may not return to work any time soon. Meanwhile, both buyer and seller have to recognize the rights and interests of the employees. An employee on leave from work may be protected by human rights legislation, and benefits could be adversely affected by the transaction.

Employment/Labor Litigation

A comprehensive review of all current, pending and threatened employment and labor claims is important. It will help to identify prospective liability and can help to guide negotiations on price and price adjustments, holdbacks, indemnities, and the handling of claims after closing. It will also help to provide a general sense of the human resource and labor relations climate in the organization, and identify corrective actions that are necessary.

Pensions and Benefits

An early understanding of the pension and benefits plans that each party has will assist negotiations on issues such as, the buyer's obligation to offer comparable employment to the seller's employees. Before committing to offering employment on the "same" or "substantially similar" terms of employment, it is necessary to understand the details of the pension and benefits plans and determine what can be offered and how soon.

Pension statutes and related income tax laws, at the very least, may impose registration requirements with strict time limits.

Some time, effort and expense will be required to ensure a defined benefit pension plan is fully and properly funded.

Workers' Compensation

Provincial and territorial statutes governing compensation for workplace injury and illness will apply to almost all employees in Canada. These mandatory insurance schemes use different methodologies, but generally assess employers based on the nature of the industry and the employer's safety record.

A transaction may involve combining or separating businesses with different assessment rates in the same province or territory. An early review of the assessment rates and safety records of the employers involved is required to see if there is an opportunity for a lower assessment rate, or a risk of a higher assessment rate.

Employment Insurance, Canada Pension Plan

An often overlooked but sometimes significant issue is the effect of a transaction on an employer's EI and Canada Pension Plan contributions (and Québec Pension Plan and QPIP). Such contributions are subject to a yearly maximum and many employers reach that maximum long before the end of the year. However, depending on the nature of the transaction, a new employer may have to restart contributions. Early identification of the issue may allow for changes to the timing or structure of the transaction to minimize or eliminate the extra liability.

Immigration

Employees of a party who need to come to Canada to negotiate the transaction or conduct due diligence, may be able to enter as business visitors, but on certain conditions. Others may not qualify for business visitor status and may need to obtain a special visa before arriving.

If the transaction will involve hiring an employee on a work permit, application must be made to vary the work permit to show the name of the new employer. In some cases, a labor market opinion will be required. Any offer of employment should be conditional on obtaining the new work permit.

Three Key Issues to Consider in Your Canadian Workplaces

Based on our unique vantage point of working with many Canadian employers in the key business centers of Vancouver, Calgary, Toronto and Montréal and our frequent interaction with U.S.-based businesses with Canadian workplaces, our labor and employment attorneys have identified three key issues meriting particular attention.

Privacy

Workplace privacy issues are emerging as key issues for employers with Canadian based workplaces.

The Federal Government of Canada and the provinces of British Columbia, Alberta and Québec have adopted privacy legislation based on 10 key privacy principles. They are:

- accountability
- identifying purposes for collecting confidential information
- consent
- limiting collection
- limiting use, disclosure and retention
- accuracy
- security safeguards
- openness
- individual access
- challenging compliance

While privacy legislation applies to all business operations, many employers have found the application of privacy laws to human resources matters to be particularity challenging, because of the extensive collection of personal information required by human resources departments.

Generally speaking, employers in British Columbia, Alberta, and Québec in the federal jurisdiction must:

- conduct a privacy impact assessment;
- establish a privacy policy; and
- appoint a privacy officer.

An employer must only collect, use and disclose personal information about an employee (or prospective employee) if it is reasonable to do so. Information about an employee that is unnecessary or not relevant to the employment relationship is likely unreasonable.

In most cases, personal information must be collected, used or disclosed only with the consent of the employee. In some jurisdictions, consent may be implied, depending on the nature of the information and how it is collected.

Employers collect information in a number of ways: resumes; reference checks; job applications; benefit enrolment forms; discipline notes; evaluations; payroll data; sick notes; and insurance forms, to name only a few!

An employee, for the most part, is entitled to review information collected by the employer and challenge its accuracy.

The employer must safeguard all personal information. Privacy laws require that adequate security measures be in place. In Alberta, there is a mandatory obligation to report if personal information has been inadvertently disclosed and there is a reason there may be harm to the employee (for example, a laptop containing human resources information being lost or stolen which would lead to identity theft of employees).

Many jurisdictions, Ontario being the major exception, have privacy commissions. Employees who cannot access their personal information with the employer may lodge formal complaints. Also, if an employee believes there has been an unreasonable collection, use, or disclosure of their personal information, they may lodge a complaint.

Other aspects of workplace privacy in Canada are emerging in technologies (such as video surveillance, voice mail recording and office computers), and the wide usage of social media.

Canadian courts have generally used the expectation of privacy doctrine to determine whether an employer may search an employee's personal files on a company computer. If there is no expectation of privacy, then it is less likely that an employee can complain.

For further information, read these articles *"Employers Computer-Use Policy Passes Test — Teacher Did Not Have a Reasonable Expectation of Privacy Information Stored on School Computer"*; *"Social Media Sites and Privacy at Work"*; *"I Always Feel Like… Somebody's Watching Me…"* and *"Bill 54 Proposes New Notification Requirements for Privacy Breaches and for Using Foreign Service Providers"* available on our website.

Alcohol and Drug Testing

Although alcohol and drug testing is common in the U.S., a fundamentally different approach has developed in Canada.

The regulation of alcohol and drug testing in Canada has been driven from a human rights perspective, rather than from an occupational health and safety perspective. Human rights commissions have treated alcohol or drug dependency as a form of physical disability, requiring Canadian employers to accommodate such employees to the point of undue hardship. On the other hand, an employee who works under the influence of alcohol or drugs, but who is not addicted, may be disciplined or terminated.

Canadian courts hearing appeals from various human rights commissions have accepted scientific evidence that disputes the reliability of drug testing, on the basis that such testing methodologies show past use, not current impairment. This means that testing for drugs, especially on a random basis, is problematic. Finally, labor arbitrators have followed similar approaches, interpreting collective agreements so as to prioritize an employee's rights to privacy and workplace dignity, over the employer's need to manage the worksite safely.

In summary:

- Testing is usually limited to employees in safety sensitive positions with minimal supervision or in remote work locations.
- Random testing is rarely used for alcohol and is not used for drugs.
- Testing is done as part of a larger effort to address substance abuse in the workplace.
- Employers need to use medical and substance abuse professionals to assess whether the employee has an addiction or is not addicted and therefore can be disciplined.
- An employee who has an addiction and abuses alcohol or drugs must be accommodated to the point of undue hardship. Examples of accommodation may include giving the employee an opportunity to obtain counselling and treatment, and then return to the workplace.
- Testing is most frequently used after an accident or near miss, and when there is reasonable cause to believe there is a substance use problem.
- Access-to-site and pre-employment testing may be used in limited circumstances.

Alcohol and drug testing is controversial in Canada and legal challenges continue. Employees argue the safety aspects while unions and human rights commissions and individual employees assert human rights and privacy laws.

Unlike some testing methodologies used in the U.S., many Canadian arbitrators have not accepted hair/nail sampling; on the basis that such testing will show drug consumption but do not prove current impairment.

For further information, read the article *"Up in Smoke: The Court of Appeal for Ontario Confirms Restrictions on Random Drug Tests in Unionized Workplaces"* available on our website.

Class Action Lawsuits

Although still not frequently used in Canada, the number of class action lawsuits is increasing. Mostly, large federally regulated employers have been served with class action lawsuits involving overtime claims. The class of plaintiffs (employees) must be court-certified as having a common issue. Some of these lawsuits have failed, on the basis that the facts are not sufficiently common between the employees or the matter related to employment standards, and ought to proceed through regulatory procedures and not the courts. In any event, the likelihood of more class action lawsuits in the area of employment law remains high. Some potential areas for class action lawsuits include:

- plant closures
- use of surpluses in pension plans
- group-based constructive dismissals
- retiree benefits

For further information, read the article *"Ontario Court Denies Certification of Employees' Class Action Lawsuit for Constructive Dismissal"* available on our website.

Resources for Our Clients

McCarthy Tétrault understands the complexity of conducting business cross-border. We help our U.S. clients address employment issues by providing timely information on the evolving Canadian landscape. Below is an overview of resources and programs for our U.S. clients:

- News bulletins on Canadian employment issues for U.S. employers
- *Doing Business in Canada* – our annual guide
- *Canadian Human Resources Law Manual for American Employers*
- Round table sessions for U.S. employers

Standard resources for our clients include:

- Annual client conferences
- Access to a wealth of industry information and original thoughtware on human resources, and the latest developments in the labor and employment sector

To subscribe to any of our publications, or for more information, please contact:

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