

DOING BUSINESS IN CANADA?

UNDERSTAND ITS EMPLOYMENT LAWS

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Despite the international upheaval and the unusually aggressive rhetoric of late between our ordinarily close nations, the ongoing involvement that each country's businesses have in the other cannot be overlooked. It is and remains a result of this ongoing involvement that our offices are regularly contacted to provide assistance with ensuring the labor and employment practices of U.S. businesses in Canada are compliant with Canadian laws, or in more dire cases, to help minimize the repercussions associated with non-compliant practices.

To this end, this article provides an overview of the more critical considerations and risks that need to be kept in mind for U.S. businesses with Canadian operations and a locally based workforce.

SOURCES OF AUTHORITY

Canadian labor and employment laws (excepting those in Quebec) are principally derived from two sources of authority: (a) the employment legislation implemented by the provinces or the federal government and (b) the extensive body of case law (or

common law) developed by our court system and other non-court entities.

The legislation of labor and employment law is presumptively the responsibility of each Canadian province, with approximately 90% - 95% of employees in Canada falling within a province's sphere of authority. Although legislation is generally similar from province to province, it is not identical and it cannot be taken for granted that practices that are compliant in one province would be similarly compliant in another.

The remaining 5% - 10% of employees in Canada fall under the legislative auspices of the federal government, which has authority to regulate employees in a "federal work, undertaking, or business." This would typically include companies involved in the provision of interprovincial or international services (i.e. businesses physically crossing borders, such as railways, telephone and cable systems, pipelines, ferries, shipping, etc.), airline transportation, banks, fisheries, federal government employees, and Aboriginal activities.

Whether an employer and their respec-

tive employees are federally or provincially regulated will ultimately be a fact-specific, legal analysis. However, unless the employer is involved in one of the aforementioned federal industries, the default is that its workforce will be governed by the laws of the province in which its operations are based. Governance in this context includes the minimum standards for employment, labor or union-related activities, human rights protections, and occupational health and safety requirements.

The second source of labor and employment law in Canada is the common law developed by our court system and other non-court entities, such as human rights tribunals and labor relations arbitrators. By way of background, each provincial jurisdiction has its own superior level court, as well as an appeal level court. Appeals beyond each jurisdiction's designated appeals court all flow to the Supreme Court of Canada. Decisions from a province's courts or from the Supreme Court of Canada are considered authoritative and binding on subsequent decisions in that jurisdiction, while

extra-provincial court decisions can be considered persuasive if the action deals with a similar matter.

THE EMPLOYMENT AGREEMENT AND NO AT-WILL EMPLOYMENT

With this legal framework in mind, one of the more significant differences between U.S. and Canadian employment laws is the creation, content, and impact of the employment agreement between an employee and their employer. In Canada, as soon as a valid offer of employment is advanced by an employer and unambiguously accepted by the employee, a contract of employment is created.

Once formed, an employment agreement will include, in addition to those terms agreed to between the employee and their employer, certain implied terms and obligations that are imposed by operation of legislation and common law. Among these implied terms will be the minimum standards of employment established in that respective jurisdiction (e.g. hours of work, vacation and holiday entitlements, overtime entitlements, leaves of absence, etc.), as well as the obligation to provide the employee termination notice for a without cause dismissal.

At this point, it needs to be unequivocally stated that there is no “at-will” employment in Canada, nor is there an unqualified right to terminate an employee’s employment at any time for any reason. Rather, where the high bar of “just cause” for termination cannot be established, to dismiss employees, employers are obligated to provide them with termination notice or pay in lieu of notice.

The only real exception to this notice requirement relates to probationary employees; although the duration of employee probationary periods is capped at three months in most Canadian jurisdictions, such that the availability of this exception is limited. In addition, for an employer to be able to rely upon a probationary period to dismiss an employee without cause and without providing notice, this option will also need to be expressly incorporated into the employee’s written contract of employment.

It also bears mentioning that an employee and their employer cannot contractually opt out of the minimum standards of employment prescribed by the legislation in their respective jurisdiction. Language attempting to do this will be found void for non-compliance, which can become a significant issue where an employer has attempted to contractually limit an employee’s termination entitlements, as discussed below.

TERMINATION ENTITLEMENTS

Looking closer at the requirement for “notice or pay in lieu of notice,” the employment standards legislation in each jurisdiction specifies the *minimum* amount of advance notice or pay in lieu of notice that must be provided to employees to terminate their employment without cause. This statutory termination entitlement is based on an employee’s tenure with the employer prior to the date of dismissal, and typically ranges from one to eight weeks of notice.

Nevertheless, unless an employee’s employment agreement contains a very specific and enforceable without cause termination clause that explicitly limits their termination entitlements to the jurisdiction’s statutory minimums (but not less than the minimums), an employee dismissed without cause will be entitled to “common law reasonable notice.” This is regularly overlooked or misunderstood by many employers.

To be clear, common law reasonable notice subserves, and is not in addition to, the statutory minimum notice, and is calculated based on an employee’s age, length of service, position, and the availability of similar employment. These factors serve to reflect the length of time it will take the dismissed employee to find new, comparable employment.

The old rule of thumb for calculating common law reasonable notice was that an employee would be entitled to one month of notice or pay in lieu of notice per year of service with that employer, up to a notional ceiling of twenty-four months. While this approach has been judicially condemned and is no longer followed, it still provides a rough idea of the potential termination entitlements that can be associated with a without cause dismissal should there be no, or no effective, employment agreement in place.

Lastly, and speaking of entitlements, where advance notice of an employee’s termination is not provided, the employee will instead be entitled to receive “pay in lieu of notice.” This includes their regular salary or wages, as well as compensation for their employment benefits, bonus or other incentive-based payments, certain allowances, and the other forms of remuneration the employee was entitled to by virtue of their employment.

OTHER FORMS OF JOB PROTECTION

Adding a further layer of complexity to Canadian employment law, employees are also entitled to protection from a without cause termination in relation to certain statutorily imposed leaves of absence and in circumstances where the termination re-

lates to a protected ground of discrimination under the human rights legislation of the respective jurisdiction.

Starting with the job-protected leaves, although these vary across Canadian jurisdictions, those that are most consistently in place include maternity/paternity leaves, compassionate care leaves, bereavement leaves, reservist leaves, and long-term injury or illness leaves. Recent trends have seen the number of leaves available in many jurisdictions increase, and just this past December, amendments to the *Canada Labour Code* (the federal employment standards legislation) were passed to introduce a new family responsibility leave, a family violence leave, and an Aboriginal practices leave.

Canadian jurisdictions also prohibit discriminatory employment practices in relation to certain protected grounds, which typically include an individual’s age, gender, color, ancestry, religion, physical and mental disability, marital status, and sexual orientation. Protection in this context relates to both current employment and new employment, such as a refusal to hire based on a protected ground. Although there can be exceptions to this protection, these exceptions principally require that the employer either demonstrate that there is a *bona fide* occupational requirement for the specific position (e.g. firefighters must possess a certain level of fitness) or where accommodation of the protected ground extends past the point of undue hardship (i.e. where business operations would be materially impaired).

APPROPRIATE REVIEW

Bringing the preceding commentary together, the takeaway from this article should be that there are a whole host of employment-related risks and other nuances associated with each jurisdiction, whether federal or provincial. Accordingly, U.S. companies with Canadian workforces should ensure that their employment practices are regularly reviewed for compliance with the laws of the specific jurisdiction(s) in which they operate.



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