



Critical Distinctions between U.S. and Canadian Labour and Employment Law

What Every U.S. Labour and Employment Counsel Should Know to Assist Clients with Operations in Canada

As the Canadian members of the Employment Law Alliance, we are frequently asked by our U.S. colleagues to assist their clients in setting up operations in Canada.

There are certain issues that arise time and time again in terms of assisting clients to understand their Canadian (vs. American) obligations, as well as helping U.S. counsel prepare their American clients for the move to Canada. As such, we thought it would be helpful to set out some of the key issues.

KEY ISSUES

1. provincial governance
2. employment at will
3. employees with disabilities
4. drug and alcohol testing
5. union certification
6. restrictive covenants
7. overtime payments

1. Labour and employment issues for most Canadian companies are governed province by province, rather than federally.

Under the Canadian Constitution, labour and employment issues are addressed at the provincial level, except where they are “integral to a federal work or undertaking.” Federal works and undertakings include industries of national importance, such as railways, interprovincial transport, banks, airlines and communications. Workers Compensation is done exclusively at the provincial level, and Employment Insurance is only federal.

The result is that labour and employment issues for the vast majority of businesses are regulated at the provincial or territorial level.

Each jurisdiction has its own employment standards legislation and enforcement mechanism. Employment standards legislation generally addresses issues such as:

- minimum wage
- hours of work and overtime
- vacation entitlement and general holidays
- job-protected leaves of absence
- minimum notice entitlements upon termination of employment.

While there are some commonalities, not all employment standards are the same throughout the provinces. It is critical, therefore, to ensure that an employer is compliant with the employment standards in each Canadian jurisdiction in which it operates.

2. There is no “employment at will” in Canada.

OR: Why employment agreements are a good thing in Canada.

It bears repeating: there is no “employment at will” in Canada.

This means that, unless there is just cause for terminating an employee’s employment, he or she is entitled to notice, or pay in lieu of notice, upon termination of his/her employment. There are, however, certain exceptions. For example, in Nova Scotia employees with over 10 years of service may be terminated only for just cause. The same is true in Quebec for employees with two or more years of service. The employee will be entitled to notice, or pay in lieu of notice, unless just cause for termination also amounts to a serious reason, which is a higher threshold.

An employer and employee may enter into an employment agreement that, among other things, limits the employee’s notice entitlements upon termination. There is a great deal of flexibility with respect to the type of notice provision an employment agreement may contain as long as it provides not less than the employee’s minimum entitlements under the applicable employment standards legislation. The employer (the party most likely to be relying on the terms of an employment agreement) must also be able to prove that the employee received consideration for entering into the employment agreement, most commonly (but not exclusively) demonstrated by showing the agreement was executed prior to the employee commencing employment (or employment in a new position).

Unless an employer has properly drafted and implemented an employment agreement limiting an employee’s entitlement to notice of termination, a court will determine the amount of notice to which the terminated employee is entitled, referred to as “common law” or “reasonable” notice.

When determining an employee’s common law notice entitlement, courts have assessed what is a “reasonable” period of notice by taking into account the person’s age, length of service, position, remuneration, the current employment market, and any inducement issues (*i.e.*, was the employee induced to leave secure employment elsewhere to join the company). All this information is reviewed with an eye toward determining how long it will take the person to find comparable employment.

The employee’s common law notice entitlement includes (and is not in addition to) his/her minimum employment standards entitlements.

Although there are exceptions in some jurisdictions, an employer is generally required to continue all employment-related entitlements during the notice period, including salary, benefits, bonuses, etc. (in other words, all the same entitlements as the employee would have had if he/she had worked through the period of reasonable notice).

This will also generally include stock option entitlements or bonuses that would have flowed to the employee during the reasonable notice period. However, there are ways to draft bonus and stock option programs that can limit entitlements to these benefits during the notice period.

If an employer is found not to have provided “reasonable” working notice or pay in *lieu* (including continuation of employment-related entitlements and benefits), courts will award damages for wrongful dismissal, which include not only salary, but all of the other employment-related entitlements referenced above.

On the other hand, terminated employees have an obligation to mitigate their common law losses by actively seeking comparable employment; once such employment is found, their losses are deemed to be mitigated. The duty to mitigate is generally not applied to statutory notice periods, but rather is the delta between statutory notice periods and common law notice periods.

Even when the courts purport to apply the same principles, they often come up with varying time periods; thus, there are no hard-and-fast calculations that provide common law notice periods. There are, however, databases that index court decisions that can provide significant guidance.

The analysis often starts with a very general guideline of “one month per year of service” when looking at common law notice (subject to increasing or decreasing, based on the factors listed above). The benchmark in some provinces varies slightly (for example, in Manitoba the formula is more generally 2/3 month per one year of service). However, that baseline amount is most frequently driven upward by two factors: the employee’s age and job position. Further, a senior employee who has been in his/her current position for just a short time also tends to drive the notice period dramatically upward.

For example, for a 45-year-old middle manager who has been with a company for six years, one month per year may be an appropriate benchmark. If that manager is 62, the benchmark may be five weeks per year.

Furthermore, if instead of a middle manager, the employee is a Senior Vice President, that number could be two or more months per year, and if the person is a Senior Vice President who has been with the organization for only two years, the number could conceivably be up to four months per year (or eight months total).

This is why Canadian employment counsel strongly encourage clients to put in place properly drafted and implemented employment agreements (including for hourly employees) that can limit these amounts (in most Canadian jurisdictions) to as little as one week per year of service.

As with many employment-related entitlements, it is critical to understand the specific requirements in each Canadian jurisdiction in which the client operates. In Newfoundland and Labrador, for example, a provision in an employment agreement setting out the duration of notice to be provided to the employee is effective only if the same period of notice is required by both the employer and the employee.

In Quebec, there is less flexibility with respect to the notice provisions an employment agreement may contain. Contractual notice entitlements upon termination must be reasonable, taking into account the factors listed above: age, length of service, position, remuneration, the current employment market, and any inducement issues. These must be assessed at the time termination of employment takes place. If the terms should be construed as unreasonable they will not be enforceable, and the employee will be entitled to claim more by way of termination pay and other damages, as the case may be.

3. There is a high onus on employers to accommodate employees with disabilities.

Under Canadian human rights legislation an employer must accommodate an employee with a disability to the point of undue hardship. While each jurisdiction has its own definition of what constitutes a “disability,” all include both physical and mental disabilities, including drug or alcohol addiction. While all ailments that qualify for workers’ compensation are generally considered disabilities, an employee’s disability does not have to be work related to invoke the employer’s duty to accommodate.

Where an employee’s job-related shortcomings are due to a disability, an employer will be found to have unlawfully dismissed the employee unless it can show that it would suffer undue hardship if it was required to continue to employ the individual.

What “undue hardship” looks like varies, depending on the nature of the workplace and the disability. Some human rights legislation limits the factors upon which the employer can rely in arguing that it has met the undue hardship threshold to include health and safety and financial cost. Furthermore, adjudicators have clearly stated that, when considering financial cost, the actual cost of accommodation must be such that it impacts on the viability of the organization itself. As a result, cost is not often a deciding factor in accommodation cases. Undue hardship arguments may also be available where genuine attempts to accommodate have proven futile or the employee refuses to participate in the accommodation process.

Workplace accommodation most often involves either a physical assistive device (such as a stool, a modification to a machine, or devices that aid accessibility) or the reorganization of work tasks. Canadian adjudicators require an employer to look not only at the employee's own "pre-accommodation" job to determine whether it can be modified to permit the employee to continue to perform the core tasks of the job, but also to consider whether there are sets of tasks that may be "bundled together" that are within the employee's restrictions.

When assessing the duty to accommodate in a unionized setting, most labour arbitrators also take into account the impact of any accommodation on the rights of other employees under the collective agreement (*i.e.*, whether accommodation may include "bumping" another employee out of his or her position). In addition, the union has an independent duty to participate in accommodation efforts (including, where necessary, waiving some types of collective agreement requirements such as job posting). The employee requiring accommodation also has a duty to participate in accommodation efforts, including attempting the assigned accommodated job tasks unless doing so would jeopardize his/her (or a co-worker's) health and safety.

4. Unilateral random drug and alcohol testing is not permitted in Canada.

As recently as June 2013 our Supreme Court has ruled that, even in safety-sensitive positions, random drug and alcohol testing is generally not permissible.

Canadian adjudicators (be they courts or arbitrators) have applied an approach that seeks to balance the obligation of employers to protect the health and safety of employees (and their right to protect their own property and means of production) against the inherent privacy interests of employees.

Applying this balancing test, adjudicators have found that alcohol and drug testing of individual employees in safety-sensitive positions is permitted if the employer has reasonable cause to believe an employee is impaired while working, has been directly involved in a workplace accident or significant incident/near miss, or is returning to work after a treatment for alcohol or substance abuse. Failing such circumstances, purely random testing is not permitted.

Even in the limited situations where an employer is permitted to test, a failed test does not necessarily lead to the termination of employment. Drug or alcohol addiction (including the perception that an employee is addicted) is considered a disability in Canada.

As noted above, where an employee suffers from a disability, the employer is required to accommodate that disability to the point of undue hardship. In the case of drug or alcohol addiction, accommodation usually involves job-protected leave for the employee to secure addiction treatment. Although an employer is not required to provide paid leave in these circumstances, some benefit plans will provide disability payments to employees. Adjudicators have noted that, since relapse is a common element of addiction-based diseases, it may be necessary for an employer to provide more than one period of leave to meet its duty to accommodate.

5. The union certification process may, well, shock you.

The Conference Board of Canada pegged the unionization rate among private sector Canadian employers at about 16% in 2012. When including the public sector, that number rises to just under 30%.

Because union certification is a provincially regulated matter for the vast majority of employers, it is critical to understand the union certification process in each Canadian jurisdiction in which an employer operates. Some jurisdictions (including New Brunswick, Prince Edward Island, Newfoundland and Labrador, Manitoba and Quebec, as well as Ontario and Nova Scotia (in the construction industry only)) provide for card-based certification, where there is no election, provided that a union can demonstrate a certain percentage level of support. In the other jurisdictions, an election is mandatory, provided a union can show support of between 35% and 45% (depending on the jurisdiction).

Where votes are conducted, most jurisdictions hold votes within *five to 10 business days* of filing the Application.

Except for Manitoba (which requires an employer to remain neutral), most Canadian jurisdictions permit an employer to engage in reasonable electioneering, but provide for remedial certification in the event the employer engages in threats, intimidation, or undue influence in connection with the application.

6. Restrictive covenants must be highly tailored to be enforceable; there is no “blue penciling” in Canada.

Canadian courts have severely limited the circumstances in which a restrictive covenant, such as a non-compete or non-solicit agreement, are considered enforceable.

More generally, a court will only enforce an agreement that represents the minimal degree of restriction required to protect the corporation’s legitimate business interests. This means that a court will not enforce a non-compete where it finds that a company’s business interests could have been reasonably protected through a non-solicit agreement.

An enforceable restrictive covenant must clearly define the activity that is restricted (with a significant degree of specificity) and it must contain reasonable and relevant geographic limitations and time limits.

Where a court finds that a restrictive covenant is overbroad (temporally, geographically, or in the activity it purports to limit); ambiguous (such as identifying a geographic area that does not in fact exist, such as “Greater Vancouver”); or is overly restrictive (*i.e.*, using a non-compete where a non-solicit would have sufficed), the court will strike the restrictive covenant rather than read down its scope or amend/remove the offending provision.

It is therefore critical that any Canadian employer contemplating using restrictive covenants works closely with counsel to structure them in a manner that creates the best opportunity that they will be found enforceable.

7. Just because an employee is salaried doesn’t mean he or she is exempt from overtime payments.

The employment standards legislation in each Canadian jurisdiction defines which employees are, and are not, eligible for overtime payments. Generally, these distinctions are independent of the manner in which employees are paid. In other words, simply being paid on a salary basis does not mean that an employee is overtime exempt.

While each jurisdiction’s legislation contains its own specific exemptions and nuances, most jurisdictions do exempt someone who is truly a “manager” from overtime eligibility. Being a “manager” typically means employees who truly “manage” other employees (and who only occasionally perform front line work themselves), or who manage significant projects or programs, or who operate at a high level with a significant degree of independence. Simply having the title of “manager” will not exempt an employee from overtime eligibility. In some jurisdictions there are additional exclusions, such as where an individual is practising as a professional or where the individual has substantial control over his/her hours of work and earns more than a prescribed wage.

The information provided above is for reference purposes only. Please contact any of your Canadian ELA colleagues listed on the next page if we can be of further assistance to you and your clients in Canada.

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