Global Employer Handbook Chapter Canadian Federal Labour and Employment Law

Introduction

Canada is the second largest country in the world, and the largest country in North America in terms of land mass. It occupies the northernmost section of the continent and is bordered by the United States to the south, the Pacific Ocean to the West, the Atlantic Ocean to the east and the Arctic Ocean to the north. The population of Canada is approximately 38.6 million. It is ranked 39th in the world in terms of population size.

Canada is officially a bilingual country. French and English are the official languages of Canada. All federal government institutions are required to serve the public in both official languages.

Canada had its origins in 1867 when three colonies in British North America united to form a "Federal Union" called Canada under the *British North America Act, 1867*. The *British North America Act, 1867* is now referred to as the *Constitution Act, 1867*.

Today, Canada is made up of ten provinces and three territories: British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Quebec, Newfoundland and Labrador, New Brunswick, Nova Scotia, Prince Edward Island, and Nunavut, Northwest Territories, and the Yukon Territory. The capital of Canada is Ottawa. It is located on the south bank of the Ottawa River in the eastern portion of southern Ontario bordering Quebec.

Under the *Constitution Act, 1867* legislative authority in Canada is divided between the federal and provincial branches of government. The federal Parliament governs banking, the postal service, and shipping as well as other entities whose core activities are cross-provincial. Airlines, railways, and telecommunication companies generally fall within the federal sphere.

Provinces have jurisdiction over education, municipal institutions, local works, etc., as well as "generally all matters of a merely local or private nature in the province." The majority of businesses in Canada are provincially regulated.

This chapter addresses employment and labour laws relevant to employers governed by Canadian federal law.

Federally regulated employers must abide by the common law and federal statutes. The common law is "judge-made"; it continuously evolves, based on past case law or "precedent". Legislation or statutes are laws that are written and enacted by government.

The principal statute governing employment in the federal sector is the *Canada Labour Code* (the Code). Part I of the Code governs "Industrial Relations" and sets out the procedure for acquisition and termination of bargaining rights, bargaining obligations, and strikes/lockouts. It also establishes the Canada Industrial Relations Board with the authority to enforce the provisions of the Code. Part II of the Code applies to both union and non-union workplaces. It covers Occupational Health and Safety. It sets out the duties of employers and employees with respect to

safety, obligations of safety committees and a process for enforcement. Part III of the Code applies to both union and non-union workplaces. It sets out minimum standards for hours, wages, vacations and holidays as well as various leaves of absence and rules for notice and severance on termination of employment.

Free copies of Canadian court decisions, statutes and regulations can be obtained here: https://www.canlii.org/ .

I. Hiring

A. Basics of Entering an Employment Relationship

- At Will vs. Just Cause (US & other appropriate jurisdictions)

The terminology "at-will," as it is used in Canada, usually refers to a right to dismiss an employee without notice and without cause. At-will or "at pleasure" employment relationships, as they are sometimes called, are now very rare in Canada but may still exist for certain types of public employees, especially those employed by the Crown. The right to terminate "at-will" is an unusual and specialized area of the law. It is not covered in this chapter.

The employment relationship is contractual whether the contract terms are written, oral or implied by common law. The parties may negotiate whatever terms they choose to govern their employment relationship provided their agreement is consistent with applicable minimum statutory requirements.

The basic principles of contract law, offer, acceptance, consideration, will govern the formation of the contract of employment. However, in practice very few employees sign detailed written contracts governing every aspect of the employment relationship. When called upon to issue rulings in these matters, the courts often imply terms into employment contracts. Some of these are standard and have arisen over the years through decided case law; others may arise from dealings between the parties and, therefore, form part of the unwritten agreement between employer and employee.

In unionized environments the collective agreement negotiated between the union and the employer is the employment contract that governs the terms and conditions of employment for all employees who are members of the union's bargaining unit.

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- Common Law Claims

Common law claims in respect of the hiring process are relatively rare. When they arise they are usually based on contractual torts such as fraudulent or negligent misrepresentation. In those cases the remedy may be rescission of the contract or damages where the plaintiff can establish that they suffered monetary loss as a result of the misrepresentation.

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- Statutory Claims

The terms and conditions of employment established at the time of hire must provide at least the minimum standards established in the Canada Labour Code. These minimum standards cover standard hours, wages, vacations and holidays, unpaid leaves, and termination of employment. They are discussed in more detail under Sections II., III., V., VI. and VIII. below.

Statutory claims at the time of entering an employment relationship may also arise under the Human Rights Code. Please See Section I. B. and Section V. C. below.

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B. Discrimination (in the Hiring Process)*

**Discrimination will be discussed in more detail in Heading IV below.*

The Canadian Human Rights Act prohibits discrimination in employment on the following grounds: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Employers must be careful to avoid asking discriminatory questions during the hiring process.

The prohibition against discrimination applies equally to the hiring process and the post-hiring relationship.. Please see Section IV. below for information about discrimination in employment.

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C. Employment Applications

- Permissible Inquiries

The Canadian Human Rights Act makes it a discriminatory practice to use or circulate a form of application for employment, publish an advertisement, or make a written or oral inquiry in connection with employment that expresses or implies any limitation, specification, or preference based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

The prohibition against discrimination applies equally to the hiring process, employment applications, and the post-hiring relationship. Please see Heading IV below for a discussion about discrimination in employment.

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D. Use of Employment Contracts

At common law, the relationship between an employer and its employees is governed by contract. The terms of the contract may be written or oral. Some essential terms, such as reasonable notice of termination, will be implied by the courts.

The parties may negotiate whatever terms they choose provided the agreement is consistent with applicable minimum statutory requirements established in the Canada Labour Code and discussed in more detail under Sections II., III., V., VI. and VIII. below.

In practice very few employees sign detailed written contracts governing every aspect of the employment relationship. When called upon to issue rulings in these matters, courts often imply terms into employment contracts. Some of these are standard and have arisen over the years through decided case law; others may arise from dealings between the parties.

In unionized environments, the collective agreement negotiated between the union and management is the employment contract that governs the terms and conditions of employment for employees covered by the union bargaining unit.

The Canada Labour Code and Canada Labour Standards Regulations require employers to provide every employee with a written statement outlining the terms of their employment. The statement must be provided within 30 days of the employee's first day of work.. If any changes occur to these terms during the course of employment a written statement of the change must be provided within 30 days. The statement must include:

- the names of the parties to the employment relationship;
- the job title and a brief description of the duties and responsibilities;
- the place of work and address;
- the date employment begins;
- the term of employment;
- the probationary period, if any;
- a description of the necessary qualifications for the position;
- a description of any required training for the position;
- the hours of work for the employee—including how it is calculated and overtime rules;
- the rate of wages or salary—including overtime rates;
- the frequency of payments;
- any mandatory deductions from wages; and
- information on the reimbursement process for reasonable work-related expenses.

See also Section VII. A., B., C., D. below.

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- Non-Disclosure Agreements/Non-Competes

The obligations of employees with respect to non-disclosure or competing with their former employer are determined by the type of relationship that was formed in the employment contract. The extent of the obligation could also depend on whether the employee owes a fiduciary duty to the employer.

A contractual duty not to compete imposed on a non-fiduciary employee will receive close scrutiny from a court to ensure that it minimally impairs the right of the employee to earn a living while protecting only the core business interest of the employer. Subject to contractual obligations, there are few restrictions on the right of an employee in a non-fiduciary position to compete with a former employer since the law favours free competition.

A more exacting duty will be imposed on a fiduciary employee. The scope of such duty is similar to that owed to a corporate employer by its directors.

Non-disclosure and non-solicitation clauses are generally less restrictive than non-competition clauses. For that reason they are more readily enforced by the courts.

See also Section VII. A., B., C., D. below.

Note that under the Competition Act it is a criminal offence for non-affiliated employers to agree:

- To fix, maintain, decrease or control wages or other terms of employment; or
- To refrain from hiring or trying to hire one another's employees

This applies only to agreements to not solicit or hire "each other's" employees. When a restraint contained in an agreement only applies to one employer it will be viewed as a one-way agreement and not applicable to "each other's" employees. However, if there are reciprocating promises enforcement action may be taken. Employers who violate the Competition Act may face possible imprisonment up to 14 years, or fines in amounts determined at the court's discretion. Prior to 2024 fines were capped at a maximum of $25 million.

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E. Advertising/Recruitment

The Canadian Human Rights Act makes it a discriminatory practice to use or circulate a form of application for employment, publish an advertisement, or make a written or oral inquiry in connection with employment that expresses or implies any limitation, specification, or preference based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered. Exceptions may be made if the limitation or preference is based on a *bona fide*

occupational requirement. The term "*bona fide* occupational requirement" is not defined in the legislation. It will depend on the facts of each individual case.

The prohibition against discrimination applies equally to the hiring process, employment applications, and the post-hiring relationship. Please see Section IV. below for a discussion about discrimination in employment.

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F. Background Checks/ Employment References

Canada does not have any laws or statutes that address this issue in the Federal Sector.

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II. Compensation

A. Minimum Wage

As of April 1, 2024 the federal minimum hourly wage is $17.30. If the minimum hourly wage of the province or territory where the federal employee works is higher than $17.30 they are entitled to receive the minimum wage established in that province or territory. If an employee is paid on a basis other than time, the employee's minimum hourly wage may be set by either their employer or the Minister of Labour.

The federal minimum wage is adjusted upwards annually on the basis of the Consumer Price Index for Canada.

Temporary help agency employers must pay their employees the same wage as the wage paid to the client's employees for performing substantially the same work in the same working establishment under similar conditions. There may be exceptions where wage rates are based on a system of seniority, merit or the quality of production. The client is prohibited from reducing their wage rates to comply with this provision.

Employers are required to reimburse an employee for the employee's reasonable work-related expenses within 30 days of a claim being made. Different rules may apply for employees covered by a collective agreement. The regulations to the Canada Labour Code set out the following factors for determining whether an expense is "reasonable" and "work-related". :

Work-related:

- whether the expense is connected to the employee's performance of work;

- whether the expense enables an employee to perform work;
- whether incurring the expense is required by the employer as a condition of employment or continued employment;
- whether the expense satisfies a requirement for the employee's work imposed by an occupational health or safety standard; and
- whether the expense is incurred for a legitimate business purpose and not for personal use or enjoyment.

Reasonable:

- whether the expense is connected to the employee's performance of work;
- whether the expense is incurred to enable an employee to perform work;
- whether it is incurred at the request of the employer;
- whether any amount of expense is incurred beyond the amount necessary to enable the performance of the work;
- whether the expense is one that is normally reimbursed by employers in similar industries;
- whether the employer authorized the expense in advance;
- whether the expense is incurred by the employee in good faith; and
- whether the claim includes documentation, such as a receipt or invoice, that indicates that the expense was incurred.

The factors may not all be applicable. They will be assessed as a whole.

See Interpretations, Policies and Guidelines IPG-120 for more information on reimbursement of reasonable work-related expenses: https://www.canada.ca/en/employment-social-development/programs/laws-regulations/labour/interpretations-policies/reimburse-work-expenses.html

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B. Wage Payments & Deductions

The Canada Labour Code requires employers to pay their employees their regular wages on an established pay day, and to pay any other amounts owing within 30 days of when they are due.

Only those deductions permitted by the Canada Labour Code may be made from wages. The permitted deductions are: those required by a federal or provincial Act or regulations made thereunder; those authorized by a court order or a collective agreement or other document signed

by a trade union on behalf of the employee; amounts authorized in writing by the employee; overpayments of wages by the employer; and other amounts prescribed by regulation.

Employers must not make any deduction from wages in respect of damage to property, or loss of money or property, if any person other than the employee had access to the property or money in question.

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C. Minimum Age/Child Labour

Persons under 18 years of age can only be employed in occupations that are specified in the Canada Labour Code's Labour Standards regulations and that meet certain prescribed conditions. Persons under the age of 18 years are prohibited from working during school hours and in environments that may pose a threat to their health and safety and during certain night shifts.

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D. Overtime Requirements

Under the Canada Labour Code, employees who work in excess of the standard hours of eight hours per day and 40 hours per week are entitled to be paid overtime at a rate of one and one-half times their regular wage, or be granted not less than one and one-half hours of time off with pay for each hour of overtime worked.

Employees may refuse overtime in order to carry out family responsibilities except where the overtime is necessary to address an unforeseen emergency that threatens the life or safety of persons or damage to property or serious interference with the employer's business. The right to refuse overtime is also subject to the employee first taking all reasonable steps to carry out their family responsibility by some other means that would enable them to work the overtime.

Some industries are exempt from overtime requirements and other industries are subject to specific overtime rules. Employees covered by a collective agreement may also be exempt if there is an established work practice allowing employees to exercise seniority rights to work in excess of standards hours. Managers and employees in certain professions are also exempt.

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E. Workday/Workweek/Work hours

Under the Canada Labour Code, the standard hours of work are 8 hours per day and 40 hours per week. For those industries that require employees to work irregular hours, the Canada Labour Code permits daily and weekly hours to be averaged over a period of two or more weeks. The standard number of weekly hours may be extended to 48 per week, or to such hours as are

prescribed in industry-specific regulation if a ministerial permit is obtained, or in the case of an emergency.

Work schedules must be provided to employees at least 96 hours in advance of the start of the first shift. If the schedule is not provided at least 96 hours in advance the employee may, subject to certain exceptions, refuse to work any shift that starts less than 96 hours from the time the schedule is provided.

Every employee is entitled to an unpaid break of at least 30 minutes during every period of five consecutive hours of work. The break period must be paid if the employer requires the employee to be available for work during the break. Breaks may be cancelled for emergencies.

Every employee is entitled to a rest period of at least 8 consecutive hours between work periods or shifts. Exceptions may be made for emergency situations.

Employees working in continuous operations or sectors that require flexibility in scheduling may be exempt from some or all of the Canada Labour Code rules related to meal breaks, rest periods between shifts, and written notice prior to changes to shift schedules. Exemptions may also apply to employees in the banking, telecommunications / broadcasting, and rail transportation sectors and in the airline sector. Employers in these sectors should inquire into the specific exemptions applicable to their industries. Here are a few examples:

- Commission sales people in banking and telecommunications / broadcasting are exempt from the meal break; rest period and advance notice of work schedule provisions;

- Telecom technicians may have their 30 minute meal break divided into two 15 minute periods;

- Live broadcast producers, technicians and journalists may have their 30 minute meal break divided into two 15 minute periods; and they are entitled to a 24 hour rest period after 8 hours work, subject to exceptions.

Under the Canada Labour Code employees who have completed at least six consecutive months of continuous employment may request a flexible work arrangement. The request may cover hours of work; work schedule; location of work; or any terms and conditions that apply to the employee and that are prescribed by regulation. The employer must consider the request. The request may be refused on one or more of the following grounds: the change would result in additional costs that would be a burden on the employer; the request would have a detrimental impact on the quality or quantity of work in the industrial establishment; the employer is unable to reorganize work among existing employees or recruit additional employees to manage the request; and there would be insufficient work available for the employee if the request was granted. If the employees are covered by a collective agreement the union and the employer must both agree to the change.

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F. Benefits/Health Insurance

Under the Canada Labour Code every employer must subscribe to a plan that provides an employee who is absent due to a work-related illness or injury with wage replacement, payable at the equivalent rate to that provided for under the applicable workers' compensation legislation in the employee's province of permanent residence.

Where an employer chooses to provide employees with a long-term disability plan as part of their employment benefits, the Canada Labour Code requires the plan to be insured with a licensed entity. Some exceptions may apply.

Otherwise, employers are not generally required to provide their employees with health insurance coverage beyond those required by provincially regulated medical services insurance plans. The medical services plan requirements will vary by province.

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III. Time Off/Leaves of Absence

A. Paid Time Off

- Vacation Pay

The Canada Labour Code requires at least two weeks of paid vacation be given to employees with one to five years of employment, with pay equal to 4% of wages; three weeks of paid vacation to those with five to 10 consecutive years of employment, with pay equal to 6% of wages; and at least four weeks if they have completed at least 10 consecutive years of employment with the same employer, with pay equal to 8% of wages.

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- Sick Leave Pay

Employees are entitled to medical leave of up to 27 weeks for personal illness or injury; organ or tissue donation; medical appointments during working hours; or quarantine. Part of this leave must be paid if the employee meets certain requirements. After completing 30 days of continuous employment with the employer the employee is entitled to three days of medical leave with pay. After the initial 30 day period, the employee is entitled to an additional paid day of absence after each month of continuous employment up to 10 days of paid medical leave per calendar year.

The Canada Labour Code requires every employer to subscribe to a plan that provides an employee who is absent due to a work-related illness or injury with wage replacement, payable at the equivalent rate to that provided for under the applicable workers' compensation legislation in the employee's province of permanent residence.

The Canada Labour Code requires employers to continue to provide pension, health, and disability benefits to the employee during an absence for work-related illness or injury, as long as the employee continues to make any contributions they would have made had they been at work.

If an employer chooses to provide a long-term disability plan for its employees, the Canada Labour Code requires the employer to insure that plan with an entity that is licensed to provide insurance. Some exceptions may apply.

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- Holiday Pay

The Canada Labour Code recognizes ten general holidays: New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, National Day for Truth and Reconciliation, which is observed on September 30, Thanksgiving Day, Remembrance Day, Christmas Day and Boxing Day. Every employee is entitled to and must be granted a holiday with pay on each of the general holidays. If a general holiday falls on a non-working day the employee is entitled to and shall be granted a holiday with pay at some other time convenient to both the employee and employer. If New Year's Day, Canada Day, National Day for Truth and Reconciliation, Remembrance Day, Christmas Day or Boxing Day falls on a Saturday or Sunday that is a non-working day the employee is entitled to and shall be granted a holiday with pay on the working day immediately preceding or following the general holiday.

For employees subject to a collective agreement, the employer may substitute any other day for a general holiday if the substitution is agreed to in writing by the trade union.

The employer may also substitute any other day for a general holiday for employees not covered by a collective agreement if at least 70% of affected employees agree to the substitution. If the substitution affects only one employee that employee must agree in writing.

An employee who is required to work on a day on which they are entitled to holiday pay shall be paid, in addition to the holiday pay for that day, wages at a rate equal to at least one and one-half times their regular rate of wages for the time that they work on that day. Different rules may apply to employees covered under a collective agreement and for those employed in "continuous operations". Continuous operations are defined as:

(a) any industrial establishment in which, in each seven- day period, operations once begun normally continue without cessation until the completion of the regularly scheduled operations for that period;

(b) any operations or services concerned with the running of trains, planes, ships, trucks or other vehicles, whether in scheduled or non-scheduled operations;

(c) any telephone, radio, television, telegraph or other communication or broadcasting operations or services; or

(d) any operation or service normally carried on without regard to Sundays or general holidays.

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- Personal Leave

Every employee is entitled to and shall be granted a leave of absence from employment of up to five days in every calendar year for: carrying out responsibilities related to the health or care of any of their family members; carrying out responsibilities related to the education of any of their family members who are under 18 years of age; addressing any urgent matter concerning themselves or their family members; and attending their citizenship ceremony under the Citizenship Act.

If the employee has completed three consecutive months of continuous employment with the employer, the employee is entitled to the first three days of the leave with pay at their regular rate of wages for their normal hours of work.

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- Leave for Victims of Family Violence

The Canada Labour Code provides that every employee who is a victim of family violence or who is the parent of a child who is a victim of family violence is entitled to and shall be granted a leave of absence from employment of up to 10 days in every calendar year, in order to enable the employee, in respect of such violence: to seek medical attention for themselves or their child in respect of a physical or psychological injury or disability; to obtain services from an organization which provides services to victims of family violence; to obtain psychological or other professional counselling; to relocate temporarily or permanently; or to seek legal or law enforcement assistance or to prepare for or participate in any civil or criminal legal proceeding.

If the employee has completed three consecutive months of continuous employment with the employer, the employee is entitled to the first five days of the leave with pay at their regular rate of wages for their normal hours of work.

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- Bereavement Leave

The Canada Labour Code provides that every employee is entitled to bereavement leave, in the event of the death of a family member in respect of whom the employee is, at the time of the death, on compassionate care leave or leave related to critical illness. The bereavement leave

entitlement is for up to 10 days. The leave may be taken within the period starting from the day on which the death occurs, and ending six weeks after the last memorial, burial or funeral service is held. An extension may be granted.

If the employee has completed three consecutive months of continuous employment with the employer, the employee is entitled to the first three days of the bereavement leave with pay at their regular rate of wages for their normal hours of work.

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B. Unpaid Time Off – Family and Other Medical Leaves

All employees are entitled to take up to 28 weeks of compassionate care leave under the Canada Labour Code (the Code) to provide care for a family member who is at significant risk of death. In addition the Code provides that all employees are entitled to take up to 37 weeks leave related to critical illness to care for a critically ill child, and up to 17 weeks for a critically ill adult or family member. To qualify the employee must provide a certificate from a health care practitioner certifying that the person is critically ill and requires the care or support of a family member.

The Code also provides that all employees are entitled to take leave of absence up to 104 weeks if the employee is the parent of a child, defined as under 25 years of age, who has died or disappeared as a result of crime.

The Code provides that every employee is entitled to and shall be granted any unpaid breaks that are necessary for medical reasons. Employees are required, if requested by the employer, to provide a doctor's certificate setting out the length and frequency of required medical breaks. Mothers who are nursing are entitled to unpaid breaks necessary for them to nurse their babies or to express breast milk.

The Code provides that every employee is entitled to up to 27 weeks medical leave for personal illness or injury; organ or tissue donation; or medical appointments during working hours, or quarantine. Part of this leave must be paid if the employee meets certain requirements. After completing 30 days of continuous employment with the employer the employee is entitled to three days of medical leave with pay. After the initial 30 day period, the employee is entitled to an additional paid day of absence for medical leave after each month of continuous employment up to 10 days of paid medical leave per calendar year.

The Code prohibits terminating, laying off, demoting or disciplining an employee because the employee intends to take or has taken a medical leave of absence. An exception may be made if it is necessary to assign the employee to a different position because they are unable to perform the work of their former position due to their medical condition.

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C. Disability Leave

Under the Canada Labour Code (the Code) every employer must subscribe to a plan that provides an employee who is absent due to a work-related illness or injury with wage replacement, payable at the equivalent rate to that provided for under the applicable workers' compensation legislation in the employee's province of permanent residence.

The Code provides that every employee is entitled to up to 27 weeks medical leave for personal illness or injury; organ or tissue donation; medical appointments during working hours; or quarantine The employer may require the employee to provide a medical certificate certifying absences of three days or longer. Employees are also entitled to up to 16 weeks unpaid leave if required for quarantine.

The Code prohibits terminating, laying off, demoting or disciplining an employee because the employee intends to take or has taken a medical leave of absence. An exception may be made if it is necessary to assign the employee to a different position because they are unable to perform the work of their former position due to their medical condition.

The Code requires the employer to continue to provide pension, health, and disability benefits to the employee during an absence for work-related illness or injury, as long as the employee continues to make any contributions they would have made had they been at work.

In addition, please note that it is a violation of the Canadian Human Rights Act (the CHRA) to discriminate against an employee on the basis of their physical or mental disability. The CHRA requires an employer to accommodate an employee's disability where possible unless to do so would amount to undue hardship. The determination of whether undue hardship exists will be determined on the factual circumstances of each case. The leading decision is *Central Okanagan School District No. 23 v. Renaud,* [1992] SCR 970 where the Supreme Court of Canada determined that:

> "More than mere negligible effort is required to accommodate. The use of the term "undue" infers that some hardship is acceptable; it is only "undue" hardship that satisfies this test. The extent to which the discriminator must go to accommodate is limited by the words "reasonable" and "short of undue hardship". These are not independent criteria, but are alternative ways of expressing the same concept."

In *Alberta Human Rights Commission v. Central Alberta Dairy Pool*, [1990] S.C.J. No, 80, Madame Justice Wilson set out a list of some of the factors that may be relevant in deciding the scope of undue hardship.

- financial costs of accommodation;
- disruption of the collective agreement;
- morale problems among other employees;
- interchangeability of work force and facilities;
- size of the employer's operation (this may influence other factors such as financial cost or the difficulty in adapting the workforce/facilities to accommodate individuals); and
- safety concerns (both the magnitude of risk and the identity of those who would bear it).

Free copies of Canadian case law, statutes and regulations can be obtained here: https://www.canlii.org/

For more information on the duty to accommodate, please reach out to us at Roper Greyell LLP, Attention: Gregory J. Heywood, 604-806-3841, gheywood@ropergreyell.com or James D. Kondopulos, 604-806-3865, jkondopulos@ropergreyell.com

D. Pregnancy Leave/Parental Leave

Under the Canada Labour Code (the Code) from the beginning of an employee's pregnancy to the end of the 24th week following the birth of her baby, a pregnant or nursing employee may request modification of her job functions or reassignment to another job if her current job may pose a risk to her health or to the health of her fetus or child. When making such a request, the Code requires that the employee's claim be supported by a certificate of a qualified health care practitioner, indicating the expected duration of the potential risk and the activities or conditions that should be avoided by the employee. Employers to whom such requests are made are required, where reasonably practicable, to modify the employee's job functions or reassign them.

The Code also provides that pregnant or nursing employees are entitled to a medical leave of absence from the beginning of the pregnancy to the end of the 24th week following the birth of the baby if the employee provides the employer with a medical certificate indicating that she is unable to work, and the duration of that inability.

Under the Code employees are entitled to 17 weeks maternity leave and/or 63 weeks parental leave. Parental leave is available to adoptive parents, fathers or natural mothers. The aggregate of maternity and parental leaves for one birth may not exceed 78 weeks. The leave may be extended if the child is hospitalized. The leave may be interrupted by the number of weeks during which the employee is on compassionate care leave, leave related to critical illness, leave related to death or disappearance of a child, leave for court or jury duty, or leave related to the death or disappearance of a child, or medical leave, work-related illness and injury leave or reservist leave.

The Code further provides that when both parents are employed by a single employer, the aggregate amount of maternity and parental leave the two can take is 86 weeks

Maternity and parental leave may coincide with the entitlement to employment insurance benefits under the Employment Insurance Act. As such, the Code provides that employees who take these leaves are entitled to continued coverage under pension, health, and disability benefits. Where an employee pays a portion of the premium cost for insurance or pension coverage, the employee must continue to make the payments during the period of absence within a reasonable time. The Code also provides that the employees' seniority continues to accumulate during their leave of absence.

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E. Leave for Traditional Aboriginal Practices

The Canada Labour Code provides that every employee who is an Aboriginal person and who has completed three consecutive months of continuous employment with an employer is entitled to and

shall be granted a leave of absence from employment of up to five days in every calendar year in order to engage in traditional Aboriginal practices which may include: hunting; fishing; and harvesting.

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F. Leave for Court or Jury Duty

The Canada Labour Code provides that every employee is entitled to and shall be granted a leave of absence from employment to attend court to: act as a witness; act as a juror; or participate in jury selection.

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G. Leave of Absence for Members of the Reserve Force

Under the Canada Labour Code, an employee who is a member of the reserve force and has completed at least three consecutive months of continuous employment with an employer – or a shorter period that is prescribed for a class of employees to which the employee belongs – is entitled to and shall be granted a leave of absence from employment to take part in National Defence activities or Canadian Armed Forces training.

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IV. Discrimination & Harassment

A. Discrimination

- Protected Classes

The Canadian Human Rights Act prohibits discrimination in employment on the following grounds: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

If the ground of discrimination is pregnancy or childbirth, the enunciated ground of discrimination is deemed to be on the basis of sex.

If the ground of discrimination is refusal of a request to undergo a genetic test or to disclose, or authorize the disclosure of, the results of a genetic test, the discrimination shall be deemed to be on the ground of genetic characteristics. The Canada Labour Code provides that every employee is entitled not to undergo or be required to undergo a genetic test. Employees are entitled not to disclose the results of a genetic test.

Exceptions may be made if the limitation or preference is based on a *bona fide* occupational requirement. The term "*bona fide* occupational requirement" is not defined in the legislation. It will depend on the facts of each individual case.

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- Protected Activities

The Canadian Human Rights Act (the CHRA) specifies that it is a discriminatory practice to refuse to employ, or refuse to continue to employ, or, in the course of employment, to differentiate adversely in relation to an employee on the basis of any of the protected grounds: race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered.

It is not, however, a discriminatory practice to refuse, exclude, suspend, specify, or express a preference in relation to employment if it is based on a *bona fide* occupational requirement. A discriminatory practice may be deemed justifiable where the employer can prove that it was adopted in an honest and good faith belief that it is necessary for the adequate performance of the work, or for a purpose rationally connected to the performance of the job; and that the standard or measure is reasonably necessary to the accomplishment of legitimate work-related purposes.

To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the complainant without imposing undue hardship on the employer.

The CHRA also prohibits wage discrimination. The CHRA establishes that it is a discriminatory practice to pay different wages to male and female employees for work of equal value.

The Equal Wages Guidelines, 1986 provide guidance for the application of the CHRA and prescribe the factors justifying different wages for work of equal value.

The equal wage requirements under the CHRA are separate and distinct from the employment equity requirements of the Employment Equity Act. The Employment Equity Act is intended to encourage the establishment of working conditions that are free of barriers; correct the conditions of disadvantage in employment and promote the principle that employment equity requires special measures and the accommodation of differences for the four designated groups: women, Aboriginal peoples, persons with disabilities, and members of visible minorities. The Employment Equity Act applies to parts of the federal public service, some Crown corporations, and federally regulated private sector employers with over 100 employees. Under the Employment Equity Act employers have a duty to implement policies that ensure persons in the designated groups are hired in proportion to their representation in the Canadian workforce except where to do so would cause undue hardship.

The Pay Equity Act and Regulations require federally regulated employers with 10 or more employees to develop and implement proactive pay equity plans. This legislation is intended to achieve pay equity through proactive means by redressing systemic gender-based discrimination.

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B. Harassment and Bullying

The Canadian Human Rights Act (the CHRA) prohibits harassment on any prohibited ground of discrimination. Sexual harassment is specifically deemed to be harassment on a prohibited ground of discrimination.

The Canada Labour Code (the "Code") defines "Harassment and Violence" to include "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment." This includes all types of harassment and violence, including sexual harassment, sexual violence and domestic violence. Employers are required to establish workplace committees to prevent harassment and violence.

The Code requires:

- Workplaces with 300+ employees must establish a policy health and safety committee "Policy Committee");
- Workplaces with 20 – 300 employees must establish a work place health and safety committee ("Workplace H&S Committee") and can establish a Policy Committee; and
- Workplaces with 1 – 20 employees, appoint a person as the health and safety representative for that workplace ("H&S Representative").

Pursuant to the Workplace Harassment and Violence Prevention Regulations to the Code (the "Regulations"), there are a number of obligations that require collaboration between an employer and the "Applicable Partner". Applicable Partner is defined in the Regulations as the Policy Committee or, if there is no Policy Committee, the Workplace H&S Committee or the H&S Representative.

The following are the key requirements imposed by the Regulations:

1. **Conduct a Workplace Assessment:** Employer + Applicable Partner jointly carry out a **workplace assessment** that consists of the identification of risk factors and the development & implementation of preventative measures (both development and implementation of preventative measures to be complete within 6 months after the risk factors are identified).
    a. In identifying risk factors, take into consideration:
        i. the culture, conditions, activities and organizational structure of the work place;
        ii. circumstances external to the work place, such as family violence, that could give rise to harassment and violence in the work place;

iii. any reports, records and data that are related to harassment and violence in the work place;

iv. the physical design of the work place; and

v. the measures that are in place to protect psychological health and safety in the work place.

b. The Workplace Assessment must be reviewed and updated every three years or when:

i. An occurrence is not resolved by Negotiated Resolution and the principle party ends the resolution/advises they do not want to continue; or

ii. The responding party is <u>not</u> an employee or an employer.

c. The Employer must ensure that each individual who is directed by the Employer to identify the risk factors above, or to develop and implement the preventive measures, is qualified to do so by virtue of their training, education or experience

2. **Develop a Workplace Harassment and Violence Prevention Policy:** Employer + Applicable Partner must jointly develop a work place harassment and violence prevention policy, compliant with the Regulations. The policy must be reviewed once every three years. The policy must contain:

a. a mission statement;

b. a description of the roles of the workplace parties;

c. a description of risk factors;

d. a summary of the training that will be provided;

e. a summary of the complaint resolution process;

f. a list of the reasons which would trigger the Employer + Applicable Partner to review or update the workplace assessment;

g. a summary of emergency response procedures that must be implemented when an occurrence poses an immediate danger to the health and safety of an employee or there is a threat of such an occurrence;

h. address privacy considerations (for example, the investigator's report must not reveal the identity of the parties involved in an occurrence, or the resolution process for an occurrence);

i. address any recourse, in addition to any under the Act or Regulation that may be available to persons involved in an occurrence;

j. set out resources/support measures available to employees respecting the medical, psychological or other support services available within their geographic area; and

k. name the person who is designated to receive a complaint under the Act.

3. **Inform and Train Employees**: Employer + Applicable Partner must jointly develop or identify training on workplace violence and harassment that is provided to employees. The training must be specific to the culture, conditions and activities of the workplace and include:

a. Elements of the policy;

b. A description of the relationship between workplace harassment and violence, and the prohibited grounds of discrimination under the *Canadian Human Rights Act*; and

c. A description of how to recognize, minimize, prevent and respond to workplace harassment and violence.

i. d. Training must be provided within three months of the day the employee begins employment and at least once every three years after that. The employer must also undergo the training .

4. **Support Measures:** the Employer must make available to employees information respecting the medical, psychological or other support services available within their geographical area.

5. **Select a "Designated Recipient"**: the Employer must designate the individual, or work unit, that will be the designated recipient of a notice of occurrence (i.e. report of workplace violence or harassment).

6. **Resolution Process**: When a notice of occurrence[1] is received by the Designated Recipient, the Employer or Designated Recipient must:

   a. **Respond**: contact the principal party within 7 days and inform them of each step in the resolution process and that they be represented during the resolution process. The Employer must contact the responding party and inform them of the notice, the resolution process and that they may be represented during the resolution process.

   b. **Investigate**:

      i. Negotiated Resolution: The parties must make every reasonable effort to resolve an occurrence by negotiated resolution. This must begin **within 45 days** after the day on which notice is provided. This can include:

         1. Mediation/conciliation; and/or
         2. A joint determination that the occurrence does not constitute harassment and violence;

      ii. Investigation: If a complaint is not resolved through negotiated resolution, the Employer must investigate the incident if the principal party requests it.

      iii. Timelines: There is no timeline provided in the Regulations for how long Negotiated Resolution can go on before a determination that it has "not been resolved" is made, and an Investigation commences; however, the entire resolution process must be completed within 1 year of receiving the notice of occurrence, including, *implementation* of any recommendations and *completion* of a Workplace Assessment, if required.

      iv. The Investigator: must have training in investigative techniques; knowledge, training and experience that are relevant to harassment and violence in the work place; and knowledge of the Code, the Canadian Human Rights Act and any other legislation relevant to harassment and violence in the work place. The investigator must be:

         1. a person agreed to by the Employer and the parties; or
         2. a person on a list jointly developed by Employer and Applicable Partner; or

[1] A notice of occurrence must contain (i) the name of the principal party and the responding party, if known; (ii) the date of the occurrence; and (iii) a detailed description of the occurrence.

3. if there is no agreement within 60 days, a person whom the Canadian Centre for Occupational Health and Safety identifies as having the knowledge, training and experience.

v. Note: The Applicable Partner does NOT participate in an Investigation. Amendments to sections 134.1, 135, and 136 of the Code specify that Policy Committees, Workplace H&S Committees and H&S Representatives shall not participate in an investigation relating to an occurrence of harassment and violence in the workplace.

vi. Note: the Employer must not provide information that is likely to reveal the identity of a person involved in an occurrence of harassment and violence to the Applicable Partner. Amendments to sections 135.11 and 136.1 specify that Policy Committees, Workplace H&S Committees and H&S Representatives must not be provided with such information, other than in some work refusal situations or if consent is provided.

c. **Implement Recommendations**: The Investigator will provide a report which must contain certain information, including recommendation to eliminate the risk of a similar occurrence. The Employer and Applicable Partner must jointly determine which recommendations to implement, which the Employer must then implement

d. **Monthly Updates**: For every occurrence, the Employer or designated recipient must provide monthly updates regarding the status of the resolution process to the principal party and responding party.

7. **Record Keeping:** the Employer must keep records related to a number of the requirements set out above for 10 years (see s. 35 of the Regulations for a full list).

8. **Annual Reporting**: On or before March 1 of each year, the Employer must provide the Labour Minister with an annual report which includes

(i) the total number of occurrences,

(ii) the number of occurrences that were related, respectively, to sexual harassment and violence and non-sexual harassment and violence,

(iii) the number of occurrences that resulted in the death of an employee,

(iv) if known, the number of occurrences that fell under each prohibited ground of discrimination set out in subsection 3(1) of the Canadian Human Rights Act,

(v) the locations where the occurrences took place, specifying the total number of occurrences that took place in each location,

(vi) the types of professional relationships that existed between the principal and responding parties, specifying the total number for each type,

(vii) the means set out in section 32 by which resolution processes were completed and, for each of those means, the number of occurrences involved, and

(viii) the average time, expressed in months, that it took to complete the resolution process for an occurrence.

This is a new addition to an existing reporting obligation. Pursuant to section 9 of the Policy Committees, Work Place Committees, and Health and Safety Representative Regulations, SOR/2015-164, employers already have an obligation to annually report on the Workplace Committee's activities during the 12-month period ending on December 31st of the preceding year.

9. **Reporting a Death**: if an occurrence results in the death of an employee, an Employer must report the occurrence to the Minister of Labour **within 24 hours** after becoming aware of the employee's death.

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V. Termination/Dismissal Issues

A. Overview

The law presumes that employers and employees intend the employment contract to remain in force indefinitely. Legislation requires employers to provide a minimum period of notice of termination to most workers. Employees also may have common law rights with respect to notice of termination of their employment which can be in excess of their statutory rights. The right to notice will be implied in most employment relationships with or without a written contract. Notice may be in the form of working notice or pay in lieu of working notice. In most cases, if an employer can prove that it had "just cause" to terminate the employment relationship, no notice will be necessary.

Unionized employees, unlike non-union workers, cannot be dismissed simply by providing notice of termination. Unionized workers are entitled to continued employment unless there is just cause for their dismissal.

The Canada Labour Code also establishes a fairly unique procedure for non-unionized, non-managerial employees whereby, in certain circumstances, such employees may file complaints of unjust dismissal with a Labour Canada inspector and ultimately seek reinstatement. These workers will be treated in a similar manner to unionized employees and cannot be dismissed simply by providing notice of termination. They will be entitled to continued employment unless the employer can prove that there was just cause for summary dismissal.

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B. Justification for Dismissal

In order to prove that it had just cause for termination the employer may have a duty to warn the employee that their performance problems may result in dismissal. However, even with a warning it can be very difficult to prove just cause for performance problems. For example, if the employer fails to act on an employee's inappropriate behaviour or has treated similar behaviour more leniently in the past, the employer may not be able to justify a termination for poor performance.

Despite these difficulties there are certain types of misconduct, such as assault on a supervisor or co-worker, theft of significant amounts of company property, or other significant acts of dishonesty, which are so serious that just cause to dismiss without notice may exist without a duty to warn the employee.

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C. Mandatory Severance Pay

- Common Law Claims

Termination of employment of unionized workers is governed by the applicable collective agreement and the Canada Labour Code. It is not governed by the common law.

The common law requirement of reasonable notice of termination is implied into every non-union employment relationship. Notice of termination is required except in cases where the employee has given “just cause” for summary termination.

The parties may agree on the appropriate length of notice in their written contract of employment. This agreement will be upheld by the courts unless it provides less than the statutory minimums, or if it is unreasonable in light of changes to the employment relationship.

Note that non-union, non-managerial employees, covered under the Canada Labour Code, Part III, Division XIV cannot be dismissed simply by the provision of notice. These employees may only be dismissed for “just cause”. These statutory claims are discussed in more detail under “Statutory Claims” in the next bulleted section.

There is no fixed rule or formula to determine the length of common law notice. In setting the notice period, courts look to the following factors: length of service; character of employment; age of the employee; possible difficulty in finding alternate employment; and the circumstances of hiring/termination.

If adequate working notice of termination is not given the employee may seek common law damages through the courts. If the employee is successful the court will award damages designed to put the employee in the same monetary position they would have been in if working notice had been given. In most cases, therefore, the employee is entitled to payment for the loss of salary and certain benefits over the notice period.

If an employee is successful in a court action for damages in lieu of notice the employee will be entitled to a monetary amount equal to what the employee would have received by way of salary during the notice period. In most cases this will also include any raises or bonuses that would have been paid to the employee if they had continued to work during the notice period. Depending on

the wording of the contract, stock options may be treated in the same manner and may give rise to significant damage issues. The court may also award damages for costs incidental to finding a new job.

Employees on fixed-term contracts are typically entitled to an amount representing salary in lieu of notice equal to the amount of time remaining in the contract and may not be subject to the duty to mitigate.

Although there is substantial variability in decisions on this issue, judges have tended to award greater damages to former employees who held senior level positions or who had seniority with the company.

The following is a rough summary of "reasonable notice" periods that courts have awarded in recent years.

Please note that there is no formula for accurately determining notice periods and each case depends upon its unique facts.

Position	Length of service	Estimated Common Law Notice period*
Senior management	0-5 years	6-12 months
	6-10 years	10-12 months
	11 years or more	13-30 months
Middle management	0-5 years	4-9 months
	6-10 years	6-12 months
	11 years or more	12-24 months
Lower management	0-5 years	3-6 months
	6-10 years	7-9 months
	11 years or more	10-21 months
Non-management	0-5 years	1-6 months
	5-10 years	5-12 months
	11 years or more	9-18 months

**** These notice periods include the minimum statutory notice required under the Code.***

The value of monies earned and benefits obtained from alternate employment during the notice period will be deducted from any monies paid in lieu of notice. The employee has a duty to mitigate their losses by engaging in an effective job search in the weeks and months following termination.

At the time of termination, it is often not possible to determine when the employee will obtain alternate work. Many employers, therefore, offer settlement amounts that take into account both the potential common law damages and the possibility of re-employment. If the employee accepts the severance package and finds alternate work quickly, they may well benefit financially as a result of the termination. However, settlement packages can be structured to reduce such a windfall.

If the employer does not offer an acceptable severance package, the employee may obtain damages through a court action.

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- Statutory Claims

The Canada Labour Code (the Code) requires that 16 weeks' notice be given if the employer intends to terminate the employment of 50 or more employees during any four week period. The notice must be given to the Head of Compliance and Enforcement designated by the Minister of Labour. The notice must be copied to the Minister of Employment and Social Development, and to the Canada Employment Insurance Commission, and to the trade union, if any, or individual employees impacted by the notice if no trade union is certified. The notice must be posted in a conspicuous place in the workplace.

As soon as possible after giving notice of group termination the employer must establish a joint planning committee for the purpose of developing an adjustment program to assist employees.

In addition the Code requires notice to be given for individual termination of employment. Individual notice is required in addition to the group termination notice or in cases where the group termination provisions do not apply. Under the individual notice provisions, employees with at least three months of service are entitled to two weeks' notice, or pay in lieu of notice, except where they are terminated for just cause.

As of February 1, 2024 the length of termination notice or pay in lieu that is owed to employees who are terminated without cause will increase as follows:

- two weeks after three consecutive months of continuous employment;
- three weeks after three consecutive years of continuous employment; and
- one additional week for each consecutive year of continuous employment up to a maximum of eight weeks.

In addition, terminated employees who have been employed for 12 months or more are entitled to severance pay. Severance is calculated as two days' wages for each completed year of service and five days' wages. Severance pay is not payable where termination was for just cause.

A lay-off of an employee shall not be deemed to be a termination where:

(a) the lay-off is a result of a strike or lockout;

(b) the term of the lay-off is 12 months or less and the lay-off is mandatory pursuant to a minimum work guarantee in a collective agreement;

(c) the term of the lay-off is three months or less;

(d) the term of the lay-off is more than three months and the employer

(i) notifies the employee in writing at or before the time of the lay-off that he will be recalled to work on a fixed date or within a fixed period neither of which shall be more than six months from the date of the lay-off, and

(ii) recalls the employee to his employment in accordance with subparagraph (i);

(e) the term of the lay-off is more than three months and

(i) the employee continues during the term of the lay-off to receive payments from his employer in an amount agreed on by the employee and his employer,

(ii) the employer continues to make payments for the benefit of the employee to a pension plan that is registered pursuant to the *Pension Benefits Standards Act* or under a group or employee insurance plan,

(iii) the employee receives supplementary unemployment benefits, or

(iv) the employee would be entitled to supplementary unemployment benefits but is disqualified from receiving them pursuant to the *Employment Insurance Act*; or

(f) the term of the lay-off is more than three months but not more than 12 months and the employee, throughout the term of the lay-off, maintains recall rights pursuant to a collective agreement.

Please note that non-union, non-managerial employees, covered under the Code, cannot be dismissed simply by the provision of notice. The Code contains a fairly unique procedure for non-unionized, non-managerial employees whereby, in certain circumstances, such employees may file complaints of unjust dismissal with a Labour Canada inspector and ultimately seek reinstatement. These provisions apply to most non-union, non-managerial employees who have 12 or more months of continuous service and who are not laid off due to lack of work.

Where an unjust dismissal complaint is made and not settled, the Minister of Labour typically appoints an adjudicator, who holds a hearing very similar to a hearing held by an arbitrator under a collective agreement. An adjudicator so appointed has the power to order reinstatement, with lost wages, in a manner analogous to an arbitrator sitting under a collective agreement.

The offer or payment of severance does not make a dismissal “just” and deprive the dismissed employee of the potential remedies for unjust dismissal. The intent of it is to provide non-union, non-managerial, federally-regulated employees with protection against dismissal without cause similar to that enjoyed by union employees. Managerial employees may still be subject to dismissal without cause on payment of the appropriate severance and/or common law notice.

Employers must provide terminated employees with materials made available by the Head of Compliance and Enforcement of the Ministry of Labour related to termination of employment no later than their last day of employment.

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Free copies of Canadian court decisions, statutes and regulations can be obtained here: https://www.canlii.org/

D. Use of Severance Agreements and Releases
- Releases/Waivers

Where the parties agree on the amount of notice or pay in lieu of notice that is appropriate it is standard practice to have the former employee execute a release of all claims arising from the termination of their employment. The language of the release is left to the agreement of the parties.

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E. Legal Challenges to Dismissal
- Constructive Discharge

If an employer changes a fundamental term or condition of an employee's contract of employment without the employee's consent, or without adequate notice, the employee may be deemed to have been "constructively dismissed". In that case, the employee is free to treat the matter as a dismissal, and sue the employer for damages in lieu of notice.

If an employee does not object to a fundamental change to their contract of employment within a reasonable period of time, they may be deemed to have condoned the change, and could lose the opportunity to claim damages.

If an employee is successful in a court action for damages in lieu of notice the employee will be entitled to a monetary amount equal to what the employee would have received by way of salary during the notice period. In most cases this will also include any raises or bonuses that would have been paid to the employee if they had continued to work during the notice period. Depending on the wording of the contract, stock options may be treated in the same manner and may give rise to significant damage issues. The court may also award damages for costs incidental to finding a new job.

Employees on fixed-term contracts are typically entitled to an amount representing salary in lieu of notice equal to the amount of time remaining in the contract and may not be subject to the duty to mitigate.

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- Dispute Resolution Process /Forums

The Canada Labour Code (the Code) contains a fairly unique procedure for non-unionized, non-managerial employees whereby, in certain circumstances, such employees may file complaints of unjust dismissal with a Labour Canada inspector and ultimately seek reinstatement. These provisions apply to most non-union, non-managerial employees who have 12 or more months of continuous service and who are not laid off due to lack of work.

Where an unjust dismissal complaint is made and not settled, the Minister of Labour typically appoints an adjudicator, who holds a hearing very similar to a hearing held by an arbitrator under a collective agreement. An adjudicator so appointed has the power to order reinstatement, with lost wages, in a manner analogous to an arbitrator appointed under a collective agreement.

The Supreme Court of Canada confirmed an adjudicator's decision holding that the offer or payment of severance did not make a dismissal "just" and deprive the dismissed employee of the potential remedies for unjust dismissal under the Code: *Wilson v Atomic Energy of Canada Ltd*., 2016 SCC 29. The Supreme Court confirmed that the intent of these provisions is to provide non-union federally-regulated employees with protection against dismissal without cause similar to that enjoyed by union employees. Managerial employees may still be subject to dismissal without cause on payment of the appropriate severance.

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Free copies of Canadian court decisions, statutes and regulations can be obtained here: https://www.canlii.org/

F. Employment References

There are no Federal any laws or statutes that address this issue. For more information, please reach out to us at Roper Greyell LLP, Attention: Gregory J. Heywood, 604-806-3841, gheywood@ropergreyell.com or James D. Kondopulos, 604-806-3865, jkondopulos@ropergreyell.com

VI. Layoffs/Work Force Reductions/Redundancies/Collective Dismissals

A. Overview

Under the Canada Labour Code (the Code) a lay-off of an employee shall not be deemed to be a termination where:

(a) the lay-off is a result of a strike or lockout;

(b) the term of the lay-off is 12 months or less and the lay-off is mandatory pursuant to a minimum work guarantee in a collective agreement;

(c) the term of the lay-off is three months or less;

(d) the term of the lay-off is more than three months and the employer

(i) notifies the employee in writing at or before the time of the lay-off that he will be recalled to work on a fixed date or within a fixed period neither of which shall be more than six months from the date of the lay-off, and

(ii) recalls the employee to his employment in accordance with subparagraph (i);

(e) the term of the lay-off is more than three months and

(i) the employee continues during the term of the lay-off to receive payments from his employer in an amount agreed on by the employee and his employer,

(ii) the employer continues to make payments for the benefit of the employee to a pension plan that is registered pursuant to the *Pension Benefits Standards Act* or under a group or employee insurance plan,

(iii) the employee receives supplementary unemployment benefits, or

(iv) the employee would be entitled to supplementary unemployment benefits but is disqualified from receiving them pursuant to the *Employment Insurance Act*; or

(f) the term of the lay-off is more than three months but not more than 12 months and the employee, throughout the term of the lay-off, maintains recall rights pursuant to a collective agreement.

The Code contains individual termination of employment provisions, which apply in all circumstances (including those that do not qualify as a group termination). Under these provisions, employees with at least three months of service are entitled to two weeks of notice or pay in lieu of notice, except where they are terminated for cause.

As of February 1, 2024 the length of termination notice or pay in lieu that is owed to employees who are terminated without cause will increase as follows:

- two weeks after three consecutive months of continuous employment;
- three weeks after three consecutive years of continuous employment; and
- one additional week for each consecutive year of continuous employment up to a maximum of eight weeks.

Terminated employees are also entitled to severance. Employees who have completed twelve consecutive months of continuous employment with the employer are entitled to severance calculated as two days wages for each completed year of employment and five days wages.

The Code also contains complex provisions governing the termination of employment that apply to group termination. A group termination is defined as any situation where an employer, within a period of four or fewer weeks, terminates the employment of 50 or more employees within a particular "industrial establishment." For the purpose of group terminations the employer will be deemed to have terminated the employment of an employee where the employer lays off that employee with no intention of recalling them to work, but some exemptions apply, e.g. seasonal employees. An "industrial establishment" is defined to include all branches, sections, and other divisions of a federally regulated employer that are located in a single region established under the Employment Insurance Act.

Where the group termination of employment provisions apply, an employer is required to provide notice to the Minister of Labour at least 16 weeks before the date of termination. The notice must be given to the Head of Compliance and Enforcement designated by the Minister of Labour. The notice must be copied to the Minister of Employment and Social Development, and to the Canada Employment Insurance Commission, and to the trade union, if any, or individual employees impacted by the notice if no trade union is certified. The notice must be posted in a conspicuous place in the workplace. The employer must also establish a joint planning committee whose charge is to develop an adjustment program to assist employees. The committee must include employee or trade union representatives. Where the committee has not completed an adjustment plan, or is not satisfied with the terms of the plan, the Code provides for application to the Minister to appoint an arbitrator who will help set the terms of the adjustment plan and resolve any disputes. An arbitrator, however, has no power to review the employer's decision to terminate the employment of redundant employees, nor to delay their termination.

Unionized employees may be entitled to greater benefits under the terms of the collective agreement negotiated between the union and the employer.

Employers must provide terminated employees with materials made available by the Head of Compliance and Enforcement of the Ministry of Labour related to termination of employment no later than their last day of employment.

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Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

B. Procedure
- Mandatory Notice Periods

Please see Sections V.A. and V.C. (above).

Please see discussion under Section I. (above).

The procedure for giving notice of layoff to unionized employees will be governed by the process that the parties have agreed to in their collective agreement.

The Canada Labour Standards Regulations require that notice of group termination must include the name of the employer; the location at which the termination is to take place; the nature of the industry; the name of any trade union representing the employees; and the reason for termination.

Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

- Transfer of Undertakings/TUPE

The Canada Labour Code provides that employment will be deemed continuous despite the transfer of a business by any means from one employer to another employer as long as the business continues to be, or becomes, a federal work, undertaking or business. Employment is also deemed continuous where a contract is awarded through a retendering process. In certain

industries such as airport services, the new contractor may be obliged to pay the same wages to employees who provide the services as the wages paid by the previous contractor.

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Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

- Severance Pay

Please see Section V. A. and V. C. and discussion under Section I. and Section VI. B. Bullet Point Mandatory Notice Periods above.

- Benefits

The Canada Labour Code requires the employer to maintain medical, dental and other benefits during the period of a legal strike.

Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

- Severance Packages/Separation Agreements

Employers and employees may choose to enter into agreements governing the termination of the employment relationship, subject to statutory minimum notice/severance requirements, see Sections V.C. and V.D. above, and any union representation issues. In addition, employers should be aware that agreements deemed unconscionable or overly restrictive may be void at common law.

Employers must provide terminated employees with materials made available by the Head of Compliance and Enforcement of the Ministry of Labour related to termination of employment no later than their last day of employment.

As of February 1, 2024 employers will be required to give employees a statement showing their vacation benefits, wages, severance pay, and any other benefits arising from their employment as of the date of termination. The statement must be given to the employee on the day of termination if they are receiving pay in lieu of notice, or at least two weeks before termination if they are given working notice.

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VII. Unfair Competition/Covenants Not to Compete

A. Trade Secrets

The common law obliges employees not to disclose confidential information or trade secrets imparted by their previous employer. Although employees are entitled to bring to their next jobs the

general knowledge and skills learned from their previous employer, they are prohibited from divulging confidential information. Generally, information is deemed "confidential" where a reasonable outside observer, such as a court, would conclude that the employee knew or ought reasonably to have known that the information was confidential. Items marked clearly as confidential are treated as such and trade secrets would fall into this category. Other items, less clearly or obviously confidential may be identified and specifically protected by contract.

Confidential information may include marketing strategies, personnel information, or standard business practices. Confidential information also includes trade secrets, such as manufacturing processes, sales information, commercial contracts, computerized data, and supplier and customer lists. However, confidential information generally does not include trivial or self-evident matters, or information in the public domain.

See also Section I. D. above.

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B. Covenants Not to Compete

The obligations of departing employees with respect to competing with their former employer are determined by the type of relationship that was formed in the employment contract, and could depend on whether the employee owes a fiduciary duty to the employer. A contractual duty not to compete imposed on a non-fiduciary employee will receive close scrutiny from a court to ensure that it minimally impairs the right of the employee to earn a living while protecting only the core business interest of the employer. Subject to contractual obligations, there are few restrictions on the right of an employee in a non-fiduciary position to compete with a former employer since the law favours free competition. By contrast, there is a larger, more exacting duty imposed on an employee with a fiduciary duty. The scope of the duty imposed on a fiduciary is similar to that owed to a corporate employer by its directors.

See also Section I. D. above.

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C. Solicitation of Customers & Employees

Typical employment contracts contain a description of the duties expected of the employee, remuneration and other benefits. They may also contain confidentiality clauses, non-solicitation clauses and non-compete provisions.

Written employment contracts will be interpreted strictly by the courts, but will generally be upheld unless it can be shown that they were signed under duress or where they are so unfair as to be unconscionable. A contractual duty not to compete imposed on a non-fiduciary employee will receive close scrutiny from a court to ensure that it minimally impairs the right of the employee to earn a living while protecting only the core business interest of the employer.

Non-solicitation clauses are generally less onerous than non-compete clauses and will often be upheld by the courts.

Note that under the Competition Act it is a criminal offence for non-affiliated employers to agree:

- To fix, maintain, decrease or control wages or other terms of employment; or
- To refrain from hiring or trying to hire one another's employees

This applies only to agreements to not solicit or hire "each other's" employees. When a restraint contained in an agreement only applies to one employer it will be viewed as a one-way agreement and not applicable to "each other's" employees. However, if there are reciprocating promises enforcement action may be taken. Employers who violate the Competition Act may face possible imprisonment up to 14 years, or fines in amounts determined at the court's discretion. Prior to 2024 fines were capped at a maximum of $25 million.

See also Section I. D. above.

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D. Breach of Duty of Loyalty/Breach of Fiduciary Responsibility

Fiduciary employees are subject to the general, common law, standards of loyalty, good faith and avoidance of a conflict of duty and self-interest. An employee may be a fiduciary if they are considered a key employer or if they hold a unique position with the employer, even if the employee does not hold a directorial or senior management position. The scope of the duty of loyalty imposed on a fiduciary is similar to that owed to a corporate employer by its directors.

See also Section I. D. above.

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VIII. Personnel Administration

A. Payroll Requirements
- Method of Payment

The Canada Labour Code requires all employers to pay all wages on the regular pay-day of the employee as established by the practice of the employer.

Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/.

- Payment Frequency

The Canada Labour Code requires employers to pay their employees their regular wages on an established pay day, and to pay any other amounts owing within 30 days of when they are due.

Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

- Special Record-Keeping Requirements

The Canada Labour Standards Regulations require federally regulated employers to keep a record showing the date of commencement of employment and date of termination of employment for each employee for a period of at least 36 months after the date of termination. The employer is also required to keep, for at least 36 months after work is performed by an employee, information that includes, but is not limited to:

- The full name, address, Social Insurance Number, occupational classification and sex of the employee and age of the employee (if under 17 years of age);
- The employee's rate of pay;
- Details of deductions;
- The actual earnings showing any overtime, vacation, general holiday pay or other pay;
- The hours worked each day;
- Annual vacations;
- Dates of any sick leave;
- Any holidays granted and holiday pay;
- Any averaging agreements;
- Any medical certificates for sick leave;
- The dates of any leave granted;
- Any modified work schedule;
- Any work refusal; and
- Conditions of employment.

The employer must also keep records related to an employee's absence due to work-related illness or injury for a period of three years after the period of leave.

Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

B. Required Postings

Under the Canada Labour Code (the Code) employers are required to post provisions of the Code relating to occupational health and safety, along with any accompanying explanatory material; the employer's health and safety policy; and the names and work locations of the health and safety committee members. An employer will also be required to post any direction issued by a health and safety officer under the Code. Additional posting obligations may arise where an employer adjusts or cancels a work schedule that permits employees to work in excess of the statutory maximums.

Employers are required to provide employees with any material made available by the Head of Compliance and Enforcement, Ministry of Labour regarding employer and employee rights related to Part III, Standard Hours, Wages, Vacations and Holidays. New employees must be provided with this material within 30 days of their first day of work. Terminated employees must be provided with materials related to termination of employment no later than their last day of employment.

Employers must provide every employee with a written statement outlining the terms of their employment. The statement must be provided within 30 days of the employee's first day of work. If any changes occur to these terms during the course of employment a written statement of the change must be provided within 30 days. The statement must include:

- the names of the parties to the employment relationship;
- the job title and a brief description of the duties and responsibilities;
- the place of work and address;
- the date employment begins;
- the term of employment;
- the probationary period, if any;
- a description of the necessary qualifications for the position;
- a description of any required training for the position;
- the hours of work for the employee—including how it is calculated and overtime rules;
- the rate of wages or salary—including overtime rates;
- the frequency of payments;
- any mandatory deductions from wages; and
- information on the reimbursement process for reasonable work-related expenses.

As of February 1, 2024 employers will be required to give employees a statement showing their vacation benefits, wages, severance pay, and any other benefits arising from their employment as of the date of termination. The statement must be given to the employee on the day of termination if they are receiving pay in lieu of notice, or at least two weeks before termination if they are given working notice.

Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

C. Required Training

To fulfill their occupational health and safety obligations under the Canada Labour Code, employers may be required to offer various types of safety training to employees specific to their particular industry as well as training related to the Workplace Harassment and Violence Prevention Policy.

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D. Meal and Rest Periods

See Section II. E. above.

Under the Canada Labour Code every employee is entitled to an unpaid break of at least 30 minutes during every period of five consecutive hours of work. The break period must be paid if the employer requires the employee to be available for work during the break. Breaks may be cancelled for emergencies.

Every employee is entitled to a rest period of at least 8 consecutive hours between work periods or shifts. Exceptions may be made for emergency situations.

Employees working in continuous operations or sectors that require flexibility in scheduling may be exempt from some or all of the Canada Labour Code rules related to meal breaks, rest periods between shifts, and written notice prior to changes to shift schedules. Exemptions may also apply to employees in the banking, telecommunications / broadcasting, and rail transportation sectors and in the airline sector. Employers in these sectors should inquire into the specific exemptions applicable to their industries. Here are a few examples:

- Commission sales people in banking and telecommunications / broadcasting are exempt from the meal break; rest period and advance notice of work schedule provisions;

- Telecom technicians may have their 30 minute meal break divided into two 15 minute periods;

- Live broadcast producers, technicians and journalists may have their 30 minute meal break divided into two 15 minute periods; and they are entitled to a 24 hour rest period after 8 hours work, subject to exceptions.

Employees who have completed at least six consecutive months of continuous employment may request a flexible work arrangement. The request may cover hours of work; work schedule; location of work; or any terms and conditions that apply to the employee and that are prescribed by regulation. The employer must consider the request. The request may be refused on one or more of the following grounds: the change would result in additional costs that would be a burden on the employer; the request would have a detrimental impact on the quality or quantity of work in the industrial establishment; the employer is unable to reorganize work among existing employees or recruit additional employees to manage the request; and there would be insufficient work available for the employee if the request was granted.

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Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

E. Payment Upon Discharge or Resignation

The Canada Labour Code requires employers to pay their employees any amounts to which they are entitled within 30 days of when those amounts are due.

As of February 1, 2024 employers will be required to give employees a statement showing their vacation benefits, wages, severance pay, and any other benefits arising from their employment as of the date of termination. The statement must be given to the employee on the day of termination if they are receiving pay in lieu of notice, or at least two weeks before termination if they are given working notice.

Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

F. Personnel Records

- Right of Access

The Personal Information Protection and Electronic Documents Act (PIPEDA) establishes a protectionist privacy regime governing the collection, use, and disclosure of personal information.

Individuals, generally, have the right to access the personal information that an organization holds about them. They also have the right to challenge the accuracy and completeness of the information, and have that information amended where necessary.

An employer will be required, on request, to advise the individual about the personal information that it has retained about them, explain where the information was obtained, explain how the information has been used or disclosed, grant access to the information at minimal or no cost, and correct any inaccuracies.

PIPEDA defines "personal information" as any information about an identifiable individual. It applies to a broad range of employee and client information, age, name, ID numbers, income, ethnic origin, or blood type; opinions, evaluations, comments, social status, or disciplinary actions; and employee files, credit records, loan records, medical records, existence of a dispute between a consumer and a merchant, intentions (for example, to acquire goods or services, or change jobs).

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- Retention Requirements

The Personal Information Protection and Electronic Documents Act (PIPEDA) requires that personal information is to be retained only as long as is necessary to fulfill the purpose for which it was collected, or as long as is necessary to permit an individual to access their information pursuant to a request for access; once a request has been made, the employer is mandated to retain the information for as long as is necessary to allow the individual to exhaust any recourse they may have to compel access.

An employer is required to protect information from unauthorized use or disclosure.
Among other obligations, an employer must: designate individuals who will be responsible and accountable for compliance with PIPEDA, and make their identities known upon request; implement policies and procedures to protect personal information, respond to inquiries and complaints, and train employees to comply with PIPEDA; identify the purposes for which information is being collected at the time of or prior to its collection.

The employer must maintain safeguards to protect personal information. The appropriate safeguards will depend on the degree of sensitivity of the information. Employers must implement rules governing both internal and external access.

Under PIPEDA it is mandatory for all organizations to report to the Privacy Commissioner of Canada any breaches of security safeguards involving personal information that pose a real risk of significant harm to individuals. The affected individuals must also be notified about those breaches. The organization must keep a record of all breaches.

The Canada Labour Standards Regulations require federally regulated employers to keep a record showing the date of commencement of employment and date of termination of employment for each employee for a period of at least 36 months after the date of termination. The employer is also required to keep, for at least 36 months after work is performed by an employee, information that includes, but is not limited to:

- The full name, address, Social Insurance Number, occupational classification and sex of the employee and age of the employee (if under 17 years of age);
- The employee's rate of pay;
- Details of deductions;
- The actual earnings showing any overtime, vacation, general holiday pay or other pay;
- The hours worked each day;
- Annual vacations;
- Dates of any sick leave;
- Any holidays granted and holiday pay;
- Any averaging agreements;
- Any medical certificates for sick leave;
- The dates of any leave granted;
- Any modified work schedule;
- Any work refusal; and
- Conditions of employment.

The employer must also keep records related to an employee's absence due to work-related illness or injury for a period of three years after the period of leave.

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IX. Privacy

A. Drug and Alcohol Testing

Employers contemplating implementation of a drug and alcohol policy should be aware of the following:

- Pre-employment drug testing is illegal except for some safety-sensitive worksites.
- Employees must be notified during the hiring process that they may be subjected to alcohol and/or drug testing. If a policy is to be implemented with existing employees, they must be provided with reasonable notice of implementation.
- Alcohol testing post-incident and for cause is permissible where there is reason to suspect that alcohol use was part of the problem.

- Drug testing post-incident and for cause is permissible only if it is necessary as one part of a larger assessment of abuse. A positive test does not necessarily indicate impairment and, therefore, should only be used as part of a larger investigation.
- The response to a positive alcohol or drug test cannot result in automatic termination. The employer's response must be tailored to the individual employee's circumstances.
- A positive test result may oblige the employer to accommodate if the prospective employee suffers from an addiction
- Random alcohol and drug testing for employees in non-safety-sensitive positions is illegal.
- Random drug testing for employees in safety-sensitive positions is illegal.
- Random alcohol testing for employees in safety-sensitive positions, where supervision is limited or non-existent, is permissible in some jurisdictions, as long as the method of testing will show impairment.
- Employers may conduct drug and alcohol testing for certification of employees for safety-sensitive positions, as long as it is a part of a larger method of assessment to determine whether the employee is abusing drugs or alcohol.
- Employers may also conduct drug and alcohol testing as part of a post-reinstatement plan after an employee has been suspended due to drug and alcohol abuse if it is part of a larger assessment of the employee.

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B. Off-Duty Conduct

Generally, an employer has no right to scrutinize an employee's off-duty behaviour or activities. However, to some extent, an employee's duty to act in the employer's best interests extends into off-work hours. Businesses are entitled to be concerned about their reputations and their profits. When an employee, outside the course of their employment, does something that puts these interests in jeopardy, the employer has a right to take steps to protect itself. Discipline, including termination, may be justified when an employee's off-duty conduct is prejudicial to the employer's interests or negatively impacts the duties of the employee in question, or if a causal connection or nexus exists between the impugned conduct and the employer's business, and the conduct is "wholly incompatible" with continuing the employment relationship.

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C. Medical Information

Employers do not have a right to disclosure of employees' medical information. Under certain circumstances there may be an onus on an employee to provide medical evidence in support of a claim: that they are fit to return to work; or eligible for medical benefits; or entitled to a certain form of accommodation, for example. However, even in those circumstances the employee is not obliged to disclose their private medical information. There may be negative employment

consequences that flow naturally to the employee as a result of their failure to adequately prove their claim.

See also Section VIII. F. above, for information on the employer's obligations with respect to the collection, use, retention and disclosure of employee information, including medical information.

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D. Searches

Section 8 of the Canadian Charter of Rights and Freedoms protects Canadians from unreasonable search and seizure by the state. This does not apply to work place searches unless the search is performed by an agent of the state.

Employees are, however, protected by privacy rights at common law. The individual employee's privacy rights will be balanced against the employer's legitimate right to protect its property or business. These issues generally arise where the employer is seeking to introduce evidence obtained by a search in support of its decision to discipline or dismiss the employee. If the adjudicator decides that the search was unreasonable the evidence will not be admitted.

If the search results in a very serious violation of the individual's privacy rights, damages may be awarded.

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E. Lie Detector Tests

See Section VIII. F. above, for information on the employer's obligations under the Personal Information Protection and Electronic Documents Act with respect to the collection, use, retention and disclosure of employee personal information.

Polygraph test results are generally not admitted into evidence if they are intended solely to determine the credibility of witnesses. The admissibility of such evidence is up to the trier of fact in each case. There are no laws that require it to be accepted or rejected in all cases.

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F. Fingerprints

See Section VIII. F. above, for information on the employer's obligations under the Personal Information Protection and Electronic Documents Act with respect to the collection, use, retention and disclosure of employee personal information.

Other than privacy legislation there are no Federal laws or statutes that address this issue in an employment context. For more information, please reach out to us at Roper Greyell LLP, Attention: Gregory J. Heywood, 604-806-3841, gheywood@ropergreyell.com or James D. Kondopulos, 604-806-3865, jkondopulos@ropergreyell.com

G. Social Security Numbers

The Employment Insurance Act requires every person employed in insurable employment, or who is self-employed, to have a Social Insurance Number that has been assigned to that person. The employer must keep a record of every employee's Social Insurance Number.

Under the Canada Labour Standards Regulations employers must maintain a record of each employee's Social Insurance Number for at least three years after work is performed by the employee.

Free copies of Canadian statutes and regulations can be obtained here: https://www.canlii.org/

H. Surveillance and Monitoring

Under the Canada Labour Code (the Code) every employee is entitled to refuse a genetic test and entitled to refuse to disclose the results of a genetic test. The Code prohibits disciplinary action for refusal to undergo or disclose the results of a genetic test. The Code prohibits disciplinary action based on the results of a genetic test.

Video surveillance in the workplace is not prohibited by legislation. However, the capturing of images of identifiable individuals through video surveillance is considered to be a collection of personal information. Employers must comply with the Personal Information Protection and Electronic Documents Act with respect to the collection, use and disclosure of video surveillance images. See Section VIII. F. above for information on the employer's obligations with respect to the collection, use, retention and disclosure of employee personal information.

Employees are protected by privacy rights at common law. The individual employee's privacy rights will be balanced against the employer's legitimate right to protect its property or business. These issues generally arise where the employer is seeking to introduce evidence obtained by a surveillance or monitoring in support of its decision to discipline or dismiss the employee. If the adjudicator decides that the surveillance or monitoring was unreasonable the evidence will not be admitted.

If the surveillance / monitoring is found to be serious violation of the individual's privacy rights, damages may be awarded.

For more information, please reach out to us at Roper Greyell LLP, Attention: Gregory J. Heywood, 604-806-3841, gheywood@ropergreyell.com or James D. Kondopulos, 604-806-3865, jkondopulos@ropergreyell.com

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I. Cannabis (medical and recreational use)

Under the Cannabis Act recreational marijuana use is now legal in Canada.

Legalization does not permit marijuana use at work or allow impairment at work. Marijuana in the workplace is now treated in the same manner as alcohol use. Recreational users can be disciplined for consuming, possessing or being impaired by marijuana at work. It must be noted, however, that employees who are considered disabled by an addiction to marijuana (or alcohol or other legal or illegal drugs) must be accommodated where possible.

The employer has no right to prohibit or monitor off-duty use of marijuana unless it has a negative impact on the workplace.

Under the Canadian Human Rights Act, employers have a duty to accommodate employees who have been prescribed medical marijuana as long as it is used to treat a disability and only if it is a necessary treatment. Accommodation will not be required if the marijuana use, just like any other prescription medication, would pose a threat to workplace safety.

A prescription for medical marijuana does not entitle an employee to be impaired at work, to compromise safety, to smoke in the workplace or to automatically be entitled to unexcused absences or late arrivals.

The employee's medical information is personal information. See Section VIII. F. above, for information on the employer's obligations under the Personal Information Protection and Electronic Documents Act with respect to the collection, use, retention and disclosure of employee personal information.

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J. Social Media

Employees are protected by privacy rights at common law. The individual employee's privacy rights will be balanced against the employer's legitimate right to protect its property or business interests. These issues generally arise where the employer is seeking to introduce evidence obtained by a accessing an employee's social media account in support of its decision to discipline or dismiss the employee. If the adjudicator decides that the access of the social media was unreasonable the evidence will not be admitted.

If the access of the social media account is determined to be a serious violation of the individual's privacy rights, damages may be awarded.

Any information viewed or collected through an employee's social media account is governed by the Personal Information Protection and Electronic Documents Act. Viewing personal information is considered to be collection of personal information. See section VIII. F. for information on the collection, use, retention and disclosure of employee personal information.

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K. Weapons/Workplace Violence Policy

Private citizens are generally prohibited from carrying weapons for personal protection in Canada.

Some employees may be authorized to carry firearms or handguns where required for their occupation. Under the Firearms Act only those individuals who have successfully completed training in firearms proficiency and the appropriate use of force are authorized to carry firearms.

The Canada Labour Code defines "Harassment and Violence" to include "any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment." This includes all types of harassment and violence, including sexual harassment, sexual violence and domestic violence. Employers are required to establish workplace committees to prevent harassment and violence.

Pursuant to the Code, for the purposes of addressing health and safety matters that apply to individual work places:

- Workplaces with 300+ employees must establish a policy health and safety committee ("Policy Committee");
- Workplaces with 20 – 300 employees must establish a work place health and safety committee ("Workplace H&S Committee") and can establish a Policy Committee (); and
- Workplaces with 1 – 20 employees, appoint a person as the health and safety representative for that workplace ("H&S Representative").

Under the Workplace Harassment and Violence Prevention Regulations there are a number of obligations that require collaboration between an employer and the "Applicable Partner". Applicable Partner is defined in the Regulations as the Policy Committee or, if there is no Policy Committee, the Workplace H&S Committee or the H&S Representative.

The following are the key requirements imposed by the Regulations:

1. **Conduct a Workplace Assessment:** Employer + Applicable Partner jointly carry out a **workplace assessment** that consists of the identification of risk factors and the development & implementation of preventative measures (both development and implementation of preventative measures to be complete within 6 months after the risk factors are identified).
    a. In identifying risk factors, take into consideration:
        i. the culture, conditions, activities and organizational structure of the work place;
        ii. circumstances external to the work place, such as family violence, that could give rise to harassment and violence in the work place;

iii. any reports, records and data that are related to harassment and violence in the work place;

iv. the physical design of the work place; and

v. the measures that are in place to protect psychological health and safety in the work place.

b. The Workplace Assessment must be reviewed and updated every three years or when:

i. An occurrence is not resolved by Negotiated Resolution and the principle party ends the resolution/advises they do not want to continue; or

ii. The responding party is <u>not</u> an employee or an employer.

c. The Employer must ensure that each individual who is directed by the Employer to identify the risk factors above, or to develop and implement the preventive measures, is qualified to do so by virtue of their training, education or experience

2. **Develop a Workplace Harassment and Violence Prevention Policy:** Employer + Applicable Partner must jointly develop a work place harassment and violence prevention policy, compliant with the Regulations. The policy must be reviewed once every three years. The policy must contain:

a. a mission statement;

b. a description of the roles of the workplace parties;

c. a description of risk factors;

d. a summary of the training that will be provided;

e. a summary of the complaint resolution process;

f. a list of the reasons which would trigger the Employer + Applicable Partner to review or update the workplace assessment;

g. a summary of emergency response procedures that must be implemented when an occurrence poses an immediate danger to the health and safety of an employee or there is a threat of such an occurrence;

h. address privacy considerations (for example, the investigator's report must not reveal the identity of the parties involved in an occurrence, or the resolution process for an occurrence);

i. address any recourse, in addition to any under the Act or Regulation that may be available to persons involved in an occurrence;

j. set out resources/support measures available to employees respecting the medical, psychological or other support services available within their geographic area; and

k. name the person who is designated to receive a complaint under the Act.

3. **Inform and Train Employees**: Employer + Applicable Partner must jointly develop or identify training on workplace violence and harassment that is provided to employees. The training must be specific to the culture, conditions and activities of the workplace and include:

a. Elements of the policy;

b. A description of the relationship between workplace harassment and violence, and the prohibited grounds of discrimination under the *Canadian Human Rights Act*; and

c. A description of how to recognize, minimize, prevent and respond to workplace harassment and violence.

d. Training must be provided within three months of the day the employee begins employment and at least once every three years after that. The employer must also undergo the training.

4. **Support Measures:** the Employer must make available to employees information respecting the medical, psychological or other support services available within their geographical area.

5. **Select a "Designated Recipient"**: the Employer must designate the individual, or work unit, that will be the designated recipient of a notice of occurrence (i.e. report of workplace violence or harassment).

6. **Resolution Process**: When a notice of occurrence[2] is received by the Designated Recipient, the Employer or Designated Recipient must:

    a. **Respond**: contact the principal party within 7 days and inform them of each step in the resolution process and that they be represented during the resolution process. The Employer must contact the responding party and inform them of the notice, the resolution process and that they may be represented during the resolution process.

    b. **Investigate**:

        i. Negotiated Resolution: The parties must make every reasonable effort to resolve an occurrence by negotiated resolution. This must begin **within 45 days** after the day on which notice is provided. This can include:

            1. Mediation/conciliation; and/or

            2. A joint determination that the occurrence does not constitute harassment and violence;

        ii. Investigation: If a complaint is not resolved through negotiated resolution, the Employer must investigate the incident if the principal party requests it.

        iii. Timelines: There is no timeline provided in the *Regulations* for how long Negotiated Resolution can go on before a determination that it has "not been resolved" is made, and an Investigation commences; however, the entire resolution process must be completed within 1 year of receiving the notice of occurrence, including, *implementation* of any recommendations and *completion* of a Workplace Assessment, if required.

        iv. The Investigator: must have training in investigative techniques; knowledge, training and experience that are relevant to harassment and violence in the work place; and knowledge of the Code, the Canadian Human Rights Act and any other legislation relevant to harassment and violence in the work place. The investigator must be:

            1. a person agreed to by the Employer and the parties;

            2. a person on a list jointly developed by Employer and Applicable Partner; or

[2] A notice of occurrence must contain (i) the name of the principal party and the responding party, if known; (ii) the date of the occurrence; and (iii) a detailed description of the occurrence.

3. if there is no agreement within 60 days, a person whom the Canadian Centre for Occupational Health and Safety identifies as having the knowledge, training and experience.

v. Note: The Applicable Partner does NOT participate in an Investigation. Amendments to sections 134.1, 135, and 136 of the *Code* specify that Policy Committees, Workplace H&S Committees and H&S Representatives shall not participate in an investigation relating to an occurrence of harassment and violence in the workplace.

vi. Note: the Employer must not provide information that is likely to reveal the identity of a person involved in an occurrence of harassment and violence to the Applicable Partner. Amendments to sections 135.11 and 136.1 specify that Policy Committees, Workplace H&S Committees and H&S Representatives must not be provided with such information, other than in some work refusal situations or if consent is provided.

c. **Implement Recommendations**: The Investigator will provide a report which must contain certain information, including recommendation to eliminate the risk of a similar occurrence. The Employer and Applicable Partner must jointly determine which recommendations to implement, which the Employer must then implement

d. **Monthly Updates**: For every occurrence, the Employer or designated recipient must provide monthly updates regarding the status of the resolution process to the principal party and responding party.

7. **Record Keeping:** the Employer must keep records related to a number of the requirements set out above for 10 years (see s. 35 of the Regulations for a full list).

8. **Annual Reporting**: On or before March 1 of each year, the Employer must provide the Labour Minister with an annual report which includes

(i) the total number of occurrences,

(ii) the number of occurrences that were related, respectively, to sexual harassment and violence and non-sexual harassment and violence,

(iii) the number of occurrences that resulted in the death of an employee,

(iv) if known, the number of occurrences that fell under each prohibited ground of discrimination set out in subsection 3(1) of the Canadian Human Rights Act,

(v) the locations where the occurrences took place, specifying the total number of occurrences that took place in each location,

(vi) the types of professional relationships that existed between the principal and responding parties, specifying the total number for each type,

(vii) the means set out in section 32 by which resolution processes were completed and, for each of those means, the number of occurrences involved, and

(viii) the average time, expressed in months, that it took to complete the resolution process for an occurrence.

. This is a new addition to an existing reporting obligation. Pursuant to section 9 of the *Policy Committees, Work Place Committees, and Health and Safety Representative Regulations*, SOR/2015-164, employers already have an obligation to annually report on the Workplace Committee's activities during the 12-month period ending on December 31st of the preceding year.

9. **Reporting a Death**: if an occurrence results in the death of an employee, an Employer must report the occurrence to the Minister of Labour **within 24 hours** after becoming aware of the employee's death.

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X. Employee Injuries and Workers Compensation

A. Work Related Injuries

The Canada Labour Code, Part II addresses occupational health and safety. It sets out the general duties of employers to ensure safety. It provides for the establishment of health and safety committees. The Canada Occupational Health and Safety Regulations establish safety standards for specific industries and general safety standards for all work places.

Compensation to employees for injuries sustained at work is enforced through the workers' compensation legislation of each province. Employers and workers will be subject to the workers' compensation legislation of the province in which they work.

The purpose of each of the provincial workers' compensation statutes is to promote healthy workplaces and to facilitate the recovery and return to work of workers who have been injured. Workers' compensation or workplace insurance is funded by employers' contributions to an accident fund. These contributions are mandatory. The amount an employer must pay depends on its classification. In most provinces, the amount an employer must pay depends on the collective accident history of the industry in which the employer is classified, as well as its individual accident record.

Workers' compensation is primarily a "no-fault" system. It removes most employees' right to bring common law actions against their employers for injuries sustained in connection with their employment and instead imposes a system of collective liability on employers. Under this system, an employee is entitled to compensation for personal injury caused by accident (or for occupational illness), arising in the course of the worker's employment. General categories of compensation include income replacement benefits; permanent impairment benefits; survivor benefits; and rehabilitation benefits.

Subject to certain circumstances, employees are generally entitled to return to work following recovery from injuries. Employers must participate in a return-to-work plan. Employers, employees, and unions, where appropriate, must cooperate to ensure the employee's early and safe return to work. If an employee is unable to return to work with their employer, the provincial body regulating

workers' compensation will develop a labour market re-entry plan with the employee. Any party not satisfied with a decision made in a particular case has recourse to an adjudicative process.

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B. Non-work related injuries

Under the Canada Labour Code (the Code) every employer must subscribe to a plan that provides an employee who is absent due to a work-related illness or injury with wage replacement, payable at the equivalent rate to that provided for under the applicable workers' compensation legislation in the employee's province of permanent residence.

The Code requires the employer to continue providing pension, health, and disability benefits to the employee during an absence for work-related illness or injury, as long as the employee continues to make any contributions they would have made had they been at work.

If an employer chooses to provide a long-term disability plan for its employees, the Code requires the employer to insure that plan with an entity that is licensed to provide insurance. Some exceptions may apply.

Under the Canadian Human Rights Act employers must not discriminate on the basis of physical or mental disability. This imposes a duty to accommodate disabilities in the workplace where possible without incurring undue hardship. See Section IV. Above.

For more information on the duty to accommodate, please reach out to us at Roper Greyell LLP, Attention: Gregory J. Heywood, 604-806-3841, gheywood@ropergreyell.com or James D. Kondopulos, 604-806-3865, jkondopulos@ropergreyell.com

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XI. Unemployment Compensation

A. Eligibility

Employment Insurance (EI) in Canada is governed by the Employment Insurance Act (EIA). The EIA is intended to assist individuals who are unable to find employment through no fault of their own and who are able and ready to work.

To be entitled to receive regular EI benefits the individual must have lost their employment through no fault of their own. The individual must also have accumulated a certain number of hours of insurable employment during the 52 week period immediately preceding the date of their claim. The threshold number of hours to qualify for EI varies between 420 and 700 hours of insurable employment during the qualifying period. The number of hours depends on the individual's place of residence and the unemployment rate for their region.

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B. Procedure

Applications for Employment Insurance must be made online from home, a public internet access site, or from any Service Canada Centre. Service Canada is a department of Employment and Social Development Canada.

XII. Health and Safety

A. Overview

Occupational health and safety is governed by Part II of the Canada Labour Code (the Code). The purpose of Part II of the Code is to prevent accidents and injuries to health arising out of, or occurring in, the course of employment. Part II has prioritized preventative measures by focusing first on the elimination of hazards, then on the reduction of hazards, and finally, if hazards cannot be eliminated or reduced, providing personal protective equipment, clothing, devices, or materials. All preventative measures are to be designed with the goal of ensuring the health and safety of employees.

Every employer is responsible for ensuring the health and safety of all employees at the workplace. Employers are prohibited from taking disciplinary action against an employee because the employee exercises a right or participates in a proceeding under the Code.

Under the Canadian Human Rights Act employers must not discriminate on the basis of physical or mental disability. This imposes a duty to accommodate disabilities in the workplace where possible without incurring undue hardship. See Section IV. above.

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B. Regulatory Requirements

- Health and Safety Committee

The Canada Labour Code, Part II, requires the establishment of Policy Health and Safety Committees and/or Work Place Health and Safety Committees and/or a Health and Safety Representative. Establishment is mandatory in certain circumstances.

Policy Health and Safety Committee: If the employer normally employees 300 or more employees it must establish a policy health and safety committee. The policy committee is required to participate in the development of health and safety policies and programs; deal with matters concerning safety raised by committee members or by a work place committee; participate in

investigations pertaining to safety; and monitor data on work accidents. Policy committees must meet at least quarterly.

Work Place Health and Safety Committee: For every workplace where twenty or more employees normally work, the employer must establish a work place health and safety committee. Some exceptions may apply especially if the work place is considered low risk. The work place committee must consider and deal with complaints relating to safety; must participate in implementation of health and safety policies and programs; must participate in investigations pertaining to health and safety; must ensure that adequate records of work accidents are maintained; and must inspect all parts of the work place at least once each year. The work place committee must beet at least nine times a year at regular intervals.

Health and Safety Representative: For every work place where fewer than twenty employees are normally employed a person must be appointed as the health and safety representative for that work place. The health and safety representative must consider and deal with complaints relating to safety; must participate in implementation of health and safety policies and programs; must participate in investigations pertaining to health and safety; must ensure that adequate records of work accidents are maintained; and must inspect all parts of the work place at least once each year.

Separate regulations apply to an employer's responsibility to prevent incidents of harassment and violence in the workplace. The employer must develop a Workplace Harassment and Violence Prevention Policy that is compliant with the regulations. The employer must inform and train employees about workplace violence and harassment. The employer must designate an individual who will receive all reports of workplace violence or harassment. The employer must respond and attempt to resolve all reports. If no resolution can be negotiated then the employer must investigate. For more information see IV. B. Harassment and Bullying, above.

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- Work Refusals

The Canada Labour Code, Part II (the Code) allows an employee to refuse to use or operate a machine or otherwise perform work that the employee has reasonable cause to believe would constitute a danger.

Danger is defined in the Code as:

> "danger" means any hazard, condition or activity that could reasonably be expected to be an imminent or serious threat to the life or health of a person exposed to it before the hazard or condition can be corrected or the activity altered;

The employer must investigate all work refusals. If a danger exists, the employer must take immediate action. The work place committee, and the health and safety representative(s) must also investigate. If the employer ultimately decides that a danger does not exist, and the employee continues to refuse to work, the employer must immediately inform the Minister and the work place committee and/or the health and safety representative(s). The Minister may investigate or may

require the employee to return to work. Where the employees are covered by a collective agreement the Minister may decide to defer to the provisions of the collective agreement to resolve the dispute.

The Code allows a pregnant or nursing employee to stop performing her job if she believes that her current job functions may pose a risk to her health or to that of the foetus or child. The employee must consult with a health care practitioner of her choice to establish whether there is an actual risk. The employee may be reassigned to another job but will be deemed to continue to hold her previous job and maintain the same wages and benefits.

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- Menstrual Products

The Occupational Health and Safety Regulations require all federally regulated employers to provide menstrual products, including clean and hygienic tampons and menstrual pads in each toilet room in the same way they are required to provide other sanitation supplies such as toilet paper, soap, warm water and a means to dry hands. If it is not feasible to provide menstrual products in a toilet room the products must be provided in another location at the workplace that is reasonably private and accessible by employees at all times. A covered container for the disposal of menstrual products must also be provided.

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XIII. Trade Unions – Industrial Relations

A. Overview

Trade unions are favoured by government.

The right to form a trade union is guaranteed by the Charter of Rights and Freedoms. The Charter is enshrined in the Constitution Act, 1982. It is the highest law of the country. The Charter establishes the basic rights and freedoms guaranteed to every person in Canada. Freedom of association is a fundamental freedom guaranteed to every person in Canada in accordance with the Charter.

The Supreme Court of Canada (the highest level of court in Canada), in *Ontario (Attorney General) v. Fraser*, 2011 SCC 20, has interpreted the freedom of association to include protection of a process of engagement that permits employee associations to make representations to employers, which employers must consider and discuss in good faith. Laws or state actions that substantially interfere with the ability to achieve workplace goals through collective actions have the effect of

negating the right of free association and therefore constitute a limit on the Charter right of free association. Such a law will be unconstitutional unless the infringement of the Charter right can be demonstrably justified under s. 1 of the Charter. Section 1 provides that the Charter guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Every Canadian jurisdiction has some form of labour legislation that establishes the process for the formation of trade unions, protects the rights of individuals who form those trade unions and obliges employers to bargain collectively with trade unions to reach agreement on terms and conditions of employment for employees who are covered by the union's certification.

The rights and obligations of federal employers and employees with respect to the formation of trade unions and the right to bargain collectively are enforced through Part I of the Canada Labour Code.

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- Prevalence of Trade Unions

Approximately 30% of employees in all industries, provincial and federal, were covered by a collective agreement according to the most recently available statistics. Most employers in Canada are provincially regulated.

- Special Requirements

The Canada Labour Code, Part I (the Code) requires the employer to reinstate bargaining unit employees at the end of a legal strike or lockout in preference to any person who was not an employee in the bargaining unit on the date on which notice to bargain was given.

The Code prohibits employers from using the services of a recently hired employee, to perform bargaining unit work during a strike or lockout, for the purpose of undermining a trade union's representational rights. Bill C-58 was passed by the House of Commons on May 27, 2024. If it is passed by the Senate and receives Royal Assent it will amend the Code by removing the requirement to demonstrate a purpose of undermining the union's representational capacity. In other words, it will place a complete ban on the use of replacement workers during strikes and lockouts. Bill C-58 will also require employers and trade unions to agree upon essential services in the event of a strike/lockout. As of the date of writing, July 3, 2024, Senate approval and Royal Assent have not been given for these amendments and they are not currently in force.

The Code prohibits employers generally from interfering with the formation or administration of a trade union, or the employees' right to join or participate in the activities of the union.

The Code provides for the compulsory deduction of union dues from the wages of employees and remittance of those dues to the union.

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- Challenges for a Unionized Business

Under the Canada Labour Code, Part I (the Code) any conduct on the part of an employer that interferes with the right of employees to join a trade union or participate in its lawful affairs constitutes an "unfair labour practice." An employer's financial or other support of a trade union may also be an unfair labour practice.

The Code explicitly recognizes an employer's right to express its views, provided it does not use coercion, intimidation, threats, promises, or undue influence. For example, an employer is entitled to provide factual information to its employees, but it must be cautious in its communications to employees during an organizing campaign.

Where an employer is bound by a collective agreement the Code requires that it must give 120 days of notice to the union if it intends to implement a technological change that is likely to affect the terms and conditions or security of employment of a significant number of the employees. The union may then apply to the Canada Industrial Relations Board for an order requiring the employer to bargain for the purpose of revising provisions of the collective agreement related to terms and conditions or security of employment in respect of the technological change

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B. Right to Organize/Process of Unionization

The Canada Labour Code, Part I (the Code) protects an employee's right to join a union and a trade union's right to organize workers. It governs both the process by which a trade union acquires bargaining rights and the procedures by which trade unions and employers engage in collective bargaining.

The Canada Industrial Relations Board (the CIRB or the Board) administers Part I of the Code.

A trade union becomes the exclusive bargaining agent for member employees through the process of certification. Where there is no certified bargaining agent and no applicable collective agreement, a trade union may apply to the CIRB for certification as the bargaining agent. Similarly, a union may apply to displace another trade union during the final three months of operation of a collective agreement in force for three or fewer years. The three months are the "raiding period." If an agreement is in force for more than three years, the raiding period occurs during the three months prior to the anniversary date. No application for certification may be made during a lawful strike or lockout absent consent from the Board.

Once an application for certification is served on the employer by the CIRB, all working conditions are frozen until the application is withdrawn or dismissed, or until 30 days after certification. During this period, an employer cannot alter wage rates, terms of employment, or any other employment privilege, except pursuant to a collective agreement or with the consent of the Board.

Upon receiving an application, the Board must certify the applicant union as the bargaining agent if it receives an application for certification from a trade union, and determines that the unit applied for constitutes an appropriate unit, and a majority of employees in the bargaining unit wish to have the union represent them.

If the union can prove that it has support from less than 50% but more than 35% of the employees the Board will order a secret ballot representation vote to determine if a majority wish to be represented by the union. If a majority of employees vote in favour of the union the union will be certified for that bargaining unit.

A certification may be revoked on application of an employee claiming to represent a majority of employees in the bargaining unit. The application can only be made during the "raiding period" if a collective agreement is in force, or if no agreement is in force at any time after one year from the date of certification. An application for revocation must not be made during a lawful strike or lockout. Where the Board is satisfied that a majority of the employees in the bargaining unit no longer wish to be represented by the bargaining agent the Board shall grant a revocation order.

Bargaining rights may also be terminated in other circumstances. For example, a union will lose its bargaining rights if another union is certified for the same bargaining unit, or where it is determined that certification was obtained by fraud.

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C. Managing a Unionized Workforce

- Collective Bargaining

Under the Canada Labour Code (the Code) a trade union, after certification, gives notice to the employer of its desire to negotiate a collective agreement. The parties must then meet "without delay," usually within 20 days of the notice, although it can be at another agreed upon time. Once the notice to bargain is given, a statutory freeze of working conditions is triggered in first contract situations. In subsequent contract situations, the freeze is triggered once the notice is given and the collective agreement has expired.

If the parties are unsuccessful in negotiating a first collective agreement, the Minister may direct the Canada Industrial Relations Board (CIRB) to settle the terms and conditions of the collective agreement. An agreement imposed by the Board is effective for two years.

During the period between certification and the date on which a first collective agreement is entered into, an employer cannot dismiss or discipline an employee in the affected bargaining unit without just cause.

Where the union representatives at the bargaining table decline to put an employer's offer to bargaining unit employees, and the Minister deems it in the public interest that employees be afforded the opportunity to accept or reject the offer, the Minister may direct that a vote of the employees be taken.

After notice to bargain is given or the parties have met and bargained but have been unable to reach agreement, either party may request the appointment of a conciliation officer to assist in entering into or revising a collective agreement. Within 14 days of the conciliation officer's appointment, the officer must submit a report to the federal Minister of Labour advising of their success in the matter.

Where the conciliation officer has been unsuccessful, the Minister may appoint a conciliation board to further assist the parties in reaching a settlement. However, in practice, this step is rarely taken. Instead, the Minister issues a "no board report," which triggers a 21-day countdown to possible strike or lockout action.

After the collective agreement terms are settled, either by the parties or with the assistance of the CIRB, a copy of the agreement must be filed with the Minister before it will come into force. Once the collective agreement is filed its effective date will be the date specified in the collective agreement regardless of the date that it is filed with the Minister. Any subsequent renewal or revision of the collective agreement must also be filed with the Minister before it will come into force.

Other than first collective agreements imposed by the CIRB, where a collective agreement does not specify its term, it is deemed to operate for one year. There is no maximum term for a collective agreement.

For more information please reach out to us at Roper Greyell LLP, Attention: Gregory J. Heywood, 604-806-3841, gheywood@ropergreyell.com or James D. Kondopulos, 604-806-3865, jkondopulos@ropergreyell.com

Free copies of Canadian statutes and regulations and Canadian case law can be obtained here: https://www.canlii.org/

- Dispute Resolution

Under the Canada Labour Code (the Code) every collective agreement must provide for final and binding settlement without work stoppage, by arbitration or otherwise, of differences arising from the interpretation, application, administration, or alleged violation of the collective agreement.

During the term of a collective agreement either party may apply to the CIRB to review the structure of the bargaining units.

If the parties are engaged in bargaining a first collective agreement or renewal of a collective agreement they may resort to economic sanctions when bargaining breaks down. A trade union must give the employer at least 72 hours' notice of an impending strike. Unless a legal strike has occurred, an employer must give the trade union the same notice of a lockout. A trade union cannot declare a strike unless, by secret ballot within the 60 days prior to such declaration, a strike vote has been approved by a majority of the employees who voted.

Employees governed by the Code must continue to supply services and to produce goods "to the extent necessary to prevent immediate and serious danger to the safety or health of the public."

An employer may not, during a strike or lockout, use the services of a non-bargaining unit employee hired after the date on which notice to bargain was given to perform all or part of the duties of any bargaining unit employee on strike or locked out for the demonstrated purpose of

undermining the union's representational capacity rather than the pursuit of legitimate bargaining objectives. Bill C-58 was passed by the House of Commons on May 27, 2024. If it is passed by the Senate and recieves Royal Assent it will amend the Code by removing the requirement to demonstrate a purpose of undermining the union's representational capacity. In other words, it will place a complete ban on the use of replacement workers during strikes and lockouts. Bill C-58 will also require employers and trade unions to agree upon essential services in the event of a strike/lockout. As of the date of writing, July 3, 2024, Senate approval and Royal Assent have not been given for these amendments and they are not currently in force.

The statutory freeze on working conditions expires when the right to strike or lock-out accrues; at that point, therefore, subject to minimum standards set by Part III of the Code, and subject to any applicable provision in the collective agreement, employers are free to unilaterally set wages and working conditions.

At the conclusion of a strike or lockout the employer must reinstate bargaining unit employees in preference to any person who was not an employee in the bargaining unit on the date on which notice to bargain was given.

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- Impact on Management Rights

Under the Canada Labour Code (the Code) a trade union can require that a collective agreement provide for the deduction of union dues from the wages of each employee in the unit, whether or not the employee is a member of the union.

A collective agreement may provide that membership in the trade union is a condition of employment, may permit union members to conduct business during working hours without wage consequences, and may permit the union to use the employer's premises without payment. A collective agreement cannot discriminate on prohibited grounds.

Any conduct on the part of an employer that interferes with the right of employees to join a trade union or participate in its lawful affairs constitutes an "unfair labour practice." Pursuant to the Code, an employer's financial or other support of a trade union may also be an unfair labour practice.

At the conclusion of a strike or lockout the employer must reinstate bargaining unit employees in preference to any person who was not an employee in the bargaining unit on the date on which notice to bargain was given.

The Code explicitly recognizes an employer's right to express its views, provided it does not use coercion, intimidation, threats, promises, or undue influence. For example, an employer is entitled to provide factual information to its employees, but it must be cautious in its communications to employees during an organizing campaign.

Other than the duties and obligations of employers under the Code, management rights are considered to be inherent to the employment relationship. Any terms or conditions of employment

that derogate from those inherent rights must be negotiated and clearly described in the collective agreement. The collective agreement will govern the terms and conditions of employment for all employees covered by its scope. Issues related to the administration of the employment relationship that are not covered expressly or implicitly by the collective agreement remain at the discretion of management. Management must exercise their discretion reasonably and in a non-discriminatory manner.

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XIV. Immigration / Labour Migration

A. Overview Business Immigration Policy

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

B. Protocol for business visitors to obtain temporary entry for non-employment purposes

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

C. Visa options fSor the temporary employment of professional/management foreign nationals

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

D. Visa options for the temporary employment of non-professional employees

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

E. Visa options for foreign entrepreneurs and/or business investors

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

F. Permanent residency based on employment

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

G. Citizenship for foreign nationals

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

H. Compliance concerns for employers of foreign nationals

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

I. Regional, Federal, or state/province specific immigration or compliance issues

Immigration law in Canada is a specialized area of law and beyond the scope of this overview of labour and employment law.

XV. Additional Information

COVID-19 Update:

For the most up-to-date information on COVID-19 and how it may impact your workplace please refer to the Roper Greyell LLP website: https://ropergreyell.com/covid-19-updates/ or reach out directly to Roper Greyell LLP, Attention: Gregory J. Heywood, 604-806-3841, gheywood@ropergreyell.com and James D. Kondopulos, 604-806-3865, jkondopulos@ropergreyell.com

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