Global Employer Handbook Chapter
Manitoba

Introduction

Canada has 10 provinces and three territories. Manitoba is one of the three prairie provinces (Manitoba, Saskatchewan and Alberta). Manitoba shares a border with Saskatchewan to the west, Ontario to the East, the Territory of Nunavut to the North and the United States of America to the south (specifically, the states of North Dakota and Minnesota).

Manitoba's land mass comprises 649,950 square kilometres, making it the eighth largest province or territory in Canada. Manitoba has over 100,000 freshwater lakes, with 101,593 square kilometers of water. It has a port on Hudson's Bay in the city of Churchill.

Federally, Manitoba has 14 federal parliamentary seats and is represented in the Senate by six senators. There are 57 seats in the provincial government which is called the Legislative Assembly of Manitoba. The Lieutenant Governor, appointed to represent the King, is at the head of the provincial government. There are also municipal governments and town councils which govern local life in Manitoba's cities and rural areas. Manitoba's provincial capital is Winnipeg and its second largest city is Brandon. Smaller cities include Steinbach, Thompson, Portage la Prairie, Winkler and Selkirk.

There are approximately 1,474,439 people who live in Manitoba with approximately 841,000 in metropolitan Winnipeg.

Manitoba has a vibrant tourism industry. Churchill is known worldwide for the beauty of its coastline, its arctic climate and polar bears. Winnipeg is well known for the "Forks", the meeting place of the Red and Assiniboine rivers and the birthplace of the city. It is the home of the Royal Winnipeg Ballet, the Winnipeg Symphony Orchestra, the Royal Manitoba Theatre Centre, Prairie Theatre Exchange and a thriving arts community. Winnipeg hosts many popular cultural events such as the Folk Festival, the Fringe Festival, Festival du Voyageur and Folklorama (a celebration of different cultures from around the world). It is the home of the Canadian Museum of Human Rights, the only national museum in Canada outside of the national capital region. The Winnipeg Jets play in the National Hockey League, the Blue Bombers play in the Canadian Football League, the Goldeyes play in the American Association of Professional Baseball and the Sea Bears play in the Canadian Elite Basketball League.

Manitoba is predominantly English speaking, but with a number of vibrant French communities. There are 63 First Nations in Manitoba, making up approximately 164,289

registered First Nation persons. Manitoba is also part of the Historic Métis Nation Homeland and is home to approximately 96,730 self-identified Métis peoples. Manitoba has 8 universities and a number of community college campuses.

Manitoba has a robust economy largely based on natural resources, agriculture, tourism, energy, oil, mining and forestry. About 12% of Canadian farmland is located in Manitoba, with cattle, grain and oilseed being the most common agricultural activities.

Canada has a universal health-care system which is paid for through taxes. Canadian citizens and permanent residents may apply for public health insurance. Each province has its own health insurance plan. Most provinces have a waiting period before becoming eligible for government health insurance coverage. Each province will provide a health insurance card to those inhabitants that it insures, and this card must be shown when accessing medical services. The federal government provides temporary health insurance to certain refugees, protected persons and refugee claimants until they are eligible for provincial health insurance.

I. Hiring

A. Basics of Entering an Employment Relationship

i. At-Will v. Just Cause

Canadian common law and legislation presume that employers and employees intend the employment contract to remain in force indefinitely, until brought to an end upon appropriate notice. The presumption that employment contracts are indefinite can be rebutted with evidence that the contract was intended to be a term contract, though if the employee is allowed to keep working after the purported-term expires, courts will typically infer that the contract has become indefinite. Where there is "just cause" to terminate the employment of an employee, the employee is not entitled to notice of termination or pay in lieu of notice. Otherwise, the amount of notice (or pay in lieu) required is dictated both by statute and by common law principles.

ii. Common Law Claims

Absent just cause for termination, non-unionized employees are entitled to notice of termination (or pay in lieu) under the common law. "Common law" refers to the principles developed by courts which determine the appropriate or "reasonable" notice period an employer is required to provide to dismiss an employee without just cause. Common law notice is distinct from statutory notice and is generally far greater, in extreme cases being up to two years.

Unlike the statutes in some other Canadian jurisdictions (e.g. Ontario and the federal jurisdiction) Manitoba's *Employment Standards Code,* C.C.S.M. c. E110 ("*ESC*") does not contain a right to severance pay.

The length of common law notice required (absent a valid term in the employment contract defining its length) depends on various circumstances including the employee's age, length of service, position, availability of similar employment and any other factors that might impact finding new employment, having regard to the experience, training and qualifications of the employee, as well as bad faith conduct in the manner of dismissal or any inducements or representations made in recruitment. The onus is on the employee to establish a "dismissal."

Although every case is heavily dependent on the particular facts at hand, Manitoba courts have tended to award greater damages to former employees who were older, in senior level or unique positions, or had greater seniority with the employer.

The following is a rough summary of "reasonable notice" periods Manitoba courts have awarded in recent years. Every case is unique however and turns on its own specific facts. Accordingly, this should not be treated as an absolute statement as to entitlements or obligations.

- For senior management, the period ranges from 6 to 12 months for employees with fewer than 5 years of service to 12-24 months for employees with 11 or more years of service.
- For middle management, the period ranges from 4 to 6 months for employees with fewer than 5 years of service to 10-24 months for employees with 11 or more years of service.
- For lower management, the notice period ranges from 3 to 6 months for employees with fewer than 5 years of service to 8-24 months for employees with 11 or more years of service.
- For non-management, the notice period ranges from 1 to 6 months for fewer than 5 years of service to 8-24 months for employees with 11 or more years of service.

In the January 2024 decision of *Kozar v. The Canadian National Railway Company*, 2024 MBKB 12, the court awarded a 62 year old employee 24 months' as reasonable notice. The employee had worked in a middle management position for some 34 years at the time of dismissal. He had never graduated high school, had no trade certifications or credentials, received all of his training on the job, and had been terminated from the only job he had held in his adult life. The employer argued for a range of 21-24 months, but the court preferred the employee's argument for 24 months.

A common-law reasonable notice period includes the "statutory" notice required under the *ESC*.

Disputes and litigation related to the terms of employment (including the appropriate notice to be provided upon termination) may be avoided where the employer and employee(s) have entered into a detailed and unambiguous employment contract setting out terms that are no less favourable than those contained in the *ESC*. For employers to limit their liability to the statutory minimum notice provisions of the *ESC*, the employment contract must expressly adopt those minimums and make it clear that no further notice or

pay in lieu will be owing upon termination without cause. The contract of employment must also be otherwise legally enforceable and broadly speaking, courts will scrutinize carefully any employment contract which reduces an employee's implied common law rights.

Notice may be provided as working notice (where the employee continues working through the notice period) if there are no significant changes to the terms of employment and it is reasonable for the employee to stay at work, or as pay in lieu of notice. If an employee resigns during the notice period, they will not be entitled to compensation for the balance of the period of notice.

Under the *ESC* an employer who can prove just cause is entitled to dismiss an employee summarily without notice. A 2013 decision of the Manitoba Labour Board confirmed that the Legislature's intent was for the common law standard of just cause to apply. The employer has the onus to prove it had just cause for termination and just cause is a heavy standard to meet.

As affirmed in the 2021 case *McCallum v Saputo,* 2021 MBCA 62, Manitoba follows the doctrine of after-acquired cause, meaning that when dismissing an employee for just cause, an employer is not required to state all the grounds for that at the time of dismissal. So long as the cause existed in fact, it is immaterial whether it was known to the employer at the time of dismissal.

An employer’s allegation of just cause may be significantly undermined where the employer condoned the conduct or behaviour relied on by it to allege just cause, or where the employer failed to warn the employee of the consequences of their conduct, or failed to afford the employee a fair opportunity to address the employer’s concern. Condonation occurs where an employer ignores, tolerates or forgives inappropriate conduct on the part of an employee, or otherwise demonstrates a pattern of acceptance of the conduct.

Where there is no just cause, the employee has the same entitlement as if they had received "reasonable notice" of termination, including salary, lost bonuses and the pecuniary value of lost benefits (including diminution in value of a pension). Damages may also be awarded for consequential costs, such as expenses incurred in a job search. As confirmed in *Matthews v Ocean Nutrition Canada Ltd.,* 2020 SCC 26, in the absence of very clear language to the contrary, employees are entitled to any benefits payable during their reasonable notice periods.

An employee has a duty to mitigate their losses by looking for and accepting reasonable alternative employment. Any amounts earned (or that could have been earned had the employee acted reasonably) during the notice period for such work will be deducted from the damages payable by the employer. Where an employee receives amounts pursuant to a separate contract (e.g. short-term disability insurance paid for by the employee) the court would most likely decline to deduct the amounts from the award.

In the June 2024 decision of in *Brown v. General Electric Canada et al*, 2024 MBKB, the court determined that even though the employee had been constructively dismissed by the employer, the employee was not entitled to pay in lieu of reasonable notice because the employee did not act reasonably to mitigate his damages by declining the job offer from the new employer, Wabtec. The employee, who was an electrical engineer and held a senior business manager position at the time of dismissal, had the opportunity to work for Wabtec, who offered a job with very similar terms and conditions as the employee had before the sale. The court found that the employee's rejection of the new job offer constituted a complete failure to mitigate his damages.

iii. Statutory Claims

In Manitoba, the *ESC* governs many of the terms of the employment relationship and although the *ESC* covers provincially regulated Manitoba employers, many categories of workers are exempt from various provisions of the *ESC*. For example, the hours of work provisions do not apply to construction employees, landscaping workers, some agricultural workers, employees employed in the fishing industry, some managerial employees or professionals.

The employment standards prescribed by the *ESC* constitute minimum requirements only; any condition of employment under a contract of employment that provides greater benefits prevails over the *ESC* requirements. Parties cannot contract out of the *ESC*, and any contract that purports to do so is void at least to the extent it undercuts the *ESC*. There is also the chance such provision could invalidate the entire contract of employment.

The *ESC* provides for a comprehensive, relatively speedy and free administrative scheme through which employees can seek wages they are owed but which have not been paid. Under this process, an employee can file a claim with the Employment Standards Branch of the Department of Labour. The Branch investigates the claim, and if it finds there are unpaid wages, can order the employer to pay the wages. Such orders can be appealed to the Manitoba Labour Board, and potentially court as well.

Presently, there is some uncertainty in Manitoba law as to whether employees can pursue rights provided for under the *ESC* in civil actions. On one hand, in *Rivard v Assiniboine Credit Union Ltd.*, 2014 MBQB 30, the court ruled that as the *ESC* discloses no civil cause of action for a breach of its provisions, an action in court to recover unpaid wages based on a breach of the statute cannot succeed.

However, in *Hutlet v 4093887 Canada Ltd. and 4093879 Canada Ltd.*, 2014 MBQB 223, that same court ruled that a cause of action does potentially lie in a breach of the ESC and, therefore, an employee can pursue a civil remedy to recover unpaid wages, as opposed to being strictly limited to the administrative process under the *ESC*. The *Hutlet* decision was appealed to the Manitoba Court of Appeal, but that court declined to rule on the cause of action issue on the basis there was not a full factual record, as the lower court's decision arose out of a motion to strike. The Court of Appeal noted that it was

neither endorsing nor disagreeing with the interpretation of the *ESC* undertaken by the motion court judge (*Hutlet v 4093887 Canada Ltd et al*, 2015 MBCA 82). As of July 2024 there are no further reported decisions arising from the *Hutlet* matter, or new decisions considering the issue, and the question of whether an employee can enforce *ESC* rights in civil proceedings in Manitoba remains unclear.

Since the entitlement to reasonable notice is a common law entitlement and an implied term of the employment contract, there can be no doubt there is a cause of action for such a breach of the employment contract. However, insofar as an employee has the option to pursue the statutory minimum pay in lieu of notice of termination under the *ESC*, the employee may be required to elect whether to proceed under the *ESC* or by way of other action.

By section 92(2) of the *ESC*, an employee who is covered by a collective agreement may not file a complaint under the *ESC*. Further, a complaint may be refused if the employee is proceeding with other action in respect of the subject matter of the complaint or has obtained recourse before a court, tribunal or arbitrator or by some other form of adjudication.

Pursuant to section 61 of the *ESC*, with some exceptions, employees terminated not for cause must be provided notice of termination (or pay in lieu). Where 50 or more employees are terminated within a 4 week period, a longer notice period applies.

In most circumstances, when an employee has a complaint regarding an employer's alleged violation of the *ESC*, the employee must first contact the employer about the employment standard right(s) they believe has/have been violated and about the amount of money the employee claims is owed. The employee may then file a claim directly with Employment Standards. After investigating a claim (note, not holding a hearing) the Employment Standards Officer will make a decision about whether the employer has or has not breached the *ESC* and issue an appropriate order. This can be appealed by right to the Manitoba Labour Board where a hearing will be held.

Individuals other than employees who contravene the *ESC* commit an offence punishable by a maximum fine of $5,000; a subsequent offence may be punishable with a fine and/or up to 3 months' imprisonment. Individual employees may be fined a maximum of $2,500 for a first offence and $2,500 and/or be subject to up to 3 months' imprisonment for subsequent offences. Corporations may be fined up to $25,000. Upon conviction, an employer may also be ordered to take action, including reinstating an improperly dismissed employee. Failure to comply renders the person guilty of an offence and liable to further fines and/or imprisonment for each day of non-compliance.

Where an employer is convicted of an offence, in addition to any other penalty, it will also be ordered to pay any unpaid wages owing to employees.

An employer who dismisses or otherwise takes some reprisal against an employee for enforcing their rights under the *ESC* is guilty of an offence. Further, any officer, director

or agent of a corporation who authorizes, permits or acquiesces in the contravention of the *ESC* is a party to the offence and is personally liable whether or not the corporation is prosecuted or convicted. The burden of proof is on the officer, director or agent to prove they did not authorize, permit or acquiesce in the contravention.

A proceeding or prosecution for violation of the *ESC* cannot be commenced more than 1 year after the date the offence was committed or alleged to have been committed.

Manitoba's Employment Standards website provides many resources, and can be accessed as follows:

https://www.gov.mb.ca/labour/standards/index.html

B. Discrimination in Employment, Including the Hiring Process

The *Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, Schedule B to the Canada Act, 1982 (U.K.), 1982, c. 11* prohibits government actors (at the municipal, provincial and federal levels) from discriminating against individuals. The *Canadian Human Rights Act, R.S.C. 1985, c. H-6* applies to federally regulated employers, and in Manitoba *The Human Rights Code* C.C.S.M. c. H175 (the "*HRC*"), applies to provincially regulated employers.

The *HRC* provides that every person has a right to equal treatment with respect to employment without unlawful discrimination based on certain protected grounds, being:

- ancestry, including colour and perceived race;
- nationality or national origin;
- ethnic background or origin;
- religion or creed, or religious belief, religious association or religious activity;
- age;
- sex, including sex-determined characteristics or circumstances, such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
- gender identity;
- sexual orientation;
- marital or family status;
- source of income;
- political belief, political association or political activity;
- physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device; or
- social disadvantage.

"Disability" includes mental disorders and drug, alcohol or other addiction, as well as physical disabilities.

The protected grounds of social disadvantage and gender identity are newer additions to the *HRC*. Social disadvantage is defined as diminished social standing or social regard due to homelessness or inadequate housing, low levels of education, chronic low income or chronic unemployment or underemployment. Gender Identity is defined as a person's internal, individual experience of gender.

Special programs designed to aid disadvantaged groups and approved by the Manitoba Human Rights Commission (the "MHRC") do not infringe the *HRC*.

The Mandatory Training for Provincial Employees Act, which came into force May 30, 2023, requires provincial employees (persons defined by the government or a government agency) complete an annual training program aimed at eliminating systemic racism and to advance understandings of human rights.

The *HRC* definition of "discrimination" includes differential treatment on the basis of actual or presumed membership in or association with some class or group of persons, rather than on the basis of personal merit. This is sometimes known as discrimination on the basis of an "analogous" ground and there is case law confirming that a criminal record is a protected characteristic under the *HRC* by virtue of being an analogous ground. In other words, it could be illegal to discriminate against someone because of their actual or presumed criminal record (*A.B. and University of Manitoba,* 2020 MBHR 1).

The right to equal treatment with respect to employment is not infringed where a required qualification is reasonable and bona fide in the circumstances**.** To be reasonable and bona fide, the qualification must be adopted in an honest and good faith belief that the standard is necessary for the adequate performance of the work. In addition, the employer must show that it adopted the qualification or standard for a purpose rationally connected to the performance of the job. Finally, the standard or measure must be reasonably necessary to the accomplishment of legitimate work-related purposes.

Practically, an employer cannot establish a bona fide occupational requirement unless it shows that it made attempts to accommodate the employee(s) in question to the point of "undue hardship." In assessing whether an accommodation would cause an employer an undue hardship, Manitoba human rights adjudicators may consider a variety of factors including cost, available outside sources of funding and any existing health and safety requirements.

It is not necessary that alleged discrimination be aimed at the protected individual or group. In many cases, a rule that appears neutral on its face may have a disproportionate impact on individuals in identified groups which may amount to unlawful ("systemic") discrimination and invoke the duty to accommodate to the point of "undue hardship".

An employer may also face liability for failing to maintain a safe workplace for its employees. Along with workplace safety and health requirements, as discussed below in Section XII, an employer has a duty to take reasonable steps to prevent and terminate harassment and discriminatory actions being taken against its employees. Should an

employer knowingly permit, or fail to take reasonable steps to end, the harassment of an employee, it will have breached s. 19(1)(b) of the *HRC*.

As an example, in *T.M. v Government of Manitoba (Manitoba Justice),* 2019 MBHR 13*,* an employee faced continuous and severe discrimination and harassment by his co-workers regarding his sexual orientation. This was in the form of vulgar and denigrating comments, gestures and physical assaults, that occurred over some years. Despite ongoing complaints by the employee to the employer, and the employer taking some modest action, the misconduct continued. Eventually the employee resigned and brought forward the human rights complaint.

The Adjudicator found the actions taken by the employer were not reasonable. She ordered comprehensive remedial action be taken at a broad institutional level to address the workplace culture as a whole, and provide protections for employees moving forward. She ordered compensation for lost wages from the time employee resigned until his anticipated retirement date, and in addition, $75,000 as damages for the injury to the employee's dignity, feelings and self-respect.

Shortly following this case, in *Pruden v. Manitoba,* 2020 MBHR 6, a different adjudicator disagreed with the high level of general damages awarded in *T.M*. The adjudicator considered the respondent as the provincial government and took into account the range of Manitoba awards for injury to dignity, feelings or self-respect. The adjudicator ultimately awarded $30,000 to the complainant and $12,500 to his mother.

As of January 1 2022, a $25,000 maximum cap has been set on damages for injury to dignity, feelings, or self-respect awarded by an adjudicator under the *HRC*, and any such award must be proportionate to the seriousness of the contravention and its effects on the party.

The MHRC's website publishes policies guidelines, past decisions and other resources, and can be accessed as follows:

https://manitobahumanrights.ca/index.html

C. Employment Applications

i. Permissible Inquiries

A written or oral application for employment, or an advertisement in connection with employment, cannot directly or indirectly express a limitation, specification or preference based on any of the protected grounds set out above, unless the limitation, specification or preference is based on a bona fide occupational requirement (*HRC* section.14(3)).

D. Use of Employment Contracts

At common law, the relationship between an employer and its employees is governed by contract. Absent a written contract of employment, the agreement between the parties is deemed to comply with statutory minimums (such as those contained in the *ESC*) and to import common law principles (such as reasonable notice of termination (discussed above) and the employee's duty of loyalty to their employer).

With respect to the contents of an employment agreement, parties are free to negotiate whatever terms they choose, provided the agreement is consistent with applicable minimum statutory requirements. Because an employer may limit an employee's entitlement to common law notice upon termination, a properly drafted and implemented employment agreement can be one of the best investments an employer can make.

In most circumstances, an employment contract is signed prior to the individual commencing their employment (or, for existing employees, prior to the commencement of a new position). This is ideal, as it ensures that both parties are clear on the terms that will govern their relationship. Where an employer wishes to introduce employment contracts with existing employees it must ensure that it offers fresh or new "consideration" or something of value to the employee in exchange for signing the contract, failing which the employer may be precluded from relying on its contents (including any provision that limits notice of termination).

i. Mandatory Arbitration Clauses

Manitoba's Labour Relations Act (the "*LRA*") indicates that all collective agreements shall contain a provision for final settlement without stoppage of work. If a collective agreement fails to include an arbitration clause, section 78(2) of the *LRA* sets out an arbitration clause that shall be deemed to be included in the collective agreement.

ii. Non-Disclosure Agreements/Non-Competes

These are discussed in detail in Section VII below.

E. Advertising/Recruitment

As mentioned above, the *HRC* prohibits an advertisement in connection with employment from indicating, directly or indirectly, an employer's preference for qualifications according to a prohibited ground of discrimination.

F. Employment References/Background Investigations

There are various statutes requiring an employer to obtain personal information from employees and potential employees as a condition of commencing and continuing employment. Personal information can and usually does include a person's full name and address, date of birth and Social Insurance Number. Privacy issues relating to the gathering of personal information are discussed below.

The collection of certain other information, however, may raise a presumption of illegality. By way of example, the *LRA* makes it illegal to refuse to employ, or refuse to continue to employ, or to discriminate against any person in regard to any term or condition of employment because of their trade union status. Similarly, the *HRC* prohibits discrimination in employment on a number of protected grounds, as set out in section I. B. above. Where inquiries touching on any of these areas are made of or about potential or current employees, employers may find themselves faced with an allegation that the information was sought for an illegal purpose.

If such questions are reasonable and appropriate to the job, employers can ask on an application form whether the applicant has been convicted of a criminal offence for which a pardon has not been granted or whether they are bondable. Prior to the interview stage, employers may not ask about the applicant's record of offences, including criminal offences for which a pardon has been granted and offences with respect to provincial enactments. However, if, for example, driving is an essential duty, employers may ask at the interview stage whether the applicant has any convictions under *The Highway Traffic Act,* SM 1985-86, c 3*.*

Past criminal activity may be checked and/or verified by contacting local police or law enforcement agencies, but employers are required by law to have a release form signed by the candidate in order to obtain this information.

A decision whether or not to hire someone cannot be made on the basis of their record of offences. This means that an applicant cannot be denied a position simply because of a conviction for an offence under federal law, such as the *Criminal Code, R.S. 1985, c. C-46*, for which a pardon has been granted, or because of a conviction for a provincial offence. However, an applicant may be lawfully denied employment if it can be shown that the conviction will impact their ability to perform the job or if the nature of the position so dictates. An employer can refuse to hire someone based on criminal convictions if no pardon has been granted.

Employers can avoid many headaches by conducting a thorough background check on prospective employees. Employers should verify educational background and job histories in detail. It is recommended that every step of the process be documented to create a verifiable paper trail.

Employers who choose to ask for references should be aware of the obligations under *The Personal Investigations Act*, C.C.S.M. c. P34 (the "*PIA*").

For instance, under the *PIA*, an employer should refrain from seeking information regarding an applicant's race, religion, ethnic origin or political affiliation, among other things; and that an applicant about whom an investigation is conducted and a denial has resulted has certain rights to be provided the information that is the basis of that denial and the right to protest certain incorrect information.

II. Compensation

Many categories of workers are exempt from some or all provisions of the *ESC*, and therefore some or all of the aspects of compensation for those workers can therefore be determined by the parties without reference to the *ESC*. That said, even in the absence of the *ESC* the law of contract applies and employers are advised to set out accurately and fully the applicable terms and conditions of employment so as to avoid disputes down the road.

Where the *ESC* does apply in whole or in part, it is vital its minimums be maintained. Parties cannot legally contract out of the *ESC* and an employee whose rights have been compromised, even with their express agreement, can still advance a claim after-the-fact.

A. Minimum Wage

Employees must be paid at least the minimum wage. Manitoba's minimum wage is $15.30 per hour as of October 1, 2023 and will be $15.80 per hour as of October 1, 2024.

The *Employment Standards Regulation* ("*ESR*") under the *ESC* provides for a premium on the minimum wage to be paid to employees working as security guards.

B. Wage Payments and Deductions

Payment of wages is regulated by Part 3 of the *ESC*. Wages must be paid in cash, by cheque, or by direct deposit on a regular pay day. When wages are paid, an employer must furnish an employee with a statement, in writing or electronically, setting out the period of time or the work for which the wages are paid, the wage rate, the amount, and deductions. Where an employer has not kept accurate records, an Employment Standards Officer may determine the regular rate of pay and the number of hours worked by an employee in each day and week and make payment of wage orders.

Although employers are primarily responsible for payments under the *ESC*, by section 91, corporate directors are jointly and severally liable with the corporation to an employee or former employee of the corporation for the following unpaid wages of the employee:

- wages, other than vacation allowance, that were earned or became due and payable within the last six months in which the person was a director;
- vacation allowance that accrued or became due and payable within the last 22 months in which the person was a director.

Wages do not include (in this context):

- a wage in lieu of notice that becomes payable in case of termination of employment; and
- wages earned by an employee while the corporation's business is under the control of a receiver-manager.

No provision in a contract, articles of incorporation, or by-laws may relieve a director from liability under the *ESC*, but a corporate employer can indemnify a director if the director or former director had acted honestly and in good faith with a view to the best interests of the employer, and if the director had reason to believe that their conduct was lawful.

Permitted deductions from wages are outlined in section 19 of the *ESR.* An employer must not deduct any amount from the wages payable to an employee except as required by federal or provincial law, as permitted by a court order, or as permitted by subsection 19(2) of the *ESR*. Under subsection (2), certain rules apply regarding permitted wage deductions. Circumstances in which an employer *may* deduct an amount from an employee's wages under subsection (2) include:

- If the employer has provided the employee with a direct benefit which they were not required to obtain and has received the employee's consent for the deduction (s. 19(2)(1));
- If an employer provides meals or lodging to an employee who has no other reasonable options of obtaining them, but only to the point where what they are owed does not drop below the minimum wage to which they are entitled more than: $1 per meal, and for lodging, $7 per week (s. 19(2)(2));
- If an employer has provided tools or supplies to the employee, unless the employee was required to purchase them, the employee would not be permitted to keep them upon termination, or the employer is legally required to provide them (s. 19(2)(4));
- If the employer has made a payroll error in the employee's favour, or has made a cash advance to the employee, the greater of the following amounts can be deducted: (1) the amount of the payroll error or cash advance (with the employee's consent) or (2) the amount that could be seized or attached by a garnishment order if the employer had one under *The Garnishment Act* (s. 19(2)(7));
- If an employer is prosecuted under s. 13(1.1) of *The Summary Convictions Act* for an offence (e.g. a traffic offence) that was committed by the employee, so long as the employee consents to the deduction in writing (s. 19(2)(8)).

Circumstances in which an employer *may not* deduct from an employee's wages under subsection (2) include:

- If the employer requires the employee to have a uniform that is unique to the employer, such as bearing a logo or being of no use anywhere outside that specific workplace (s. 19(2)(3));
- If the employer seeks to cover the costs of faulty work of, or damage caused by, the employee (s. 19(2)(5));
- If the employer seeks to cover a cash shortage arising from a failure to collect all or part of the purchase price from a purchaser (s. 19(2)(6));
- If the employer seeks interest, a service charge, or a fee in regards to a payroll error, cash advance, or cashing of a cheque (s. 19(2)(7)).

C. Minimum Age/Child Labour

The *ESC* sets minimum age requirements for employment in certain industries. Children under 13 are not able to be employed. For children between the ages of 13 and 15 work requires the completion of the Young Worker Readiness Certificate Course. Employees under the age of 18 are not allowed to work alone between the hours of 11:00 p.m. and 6:00 a.m. They are also not allowed to work at all in the following industries:

- forestry;
- saw or pulp mills;
- confined spaces;
- underground in mines or on the face of open pit quarries; or
- asbestos abatement and removal.

Employees under 16 years old are not allowed to work between the hours of 11:00 p.m. and 6:00 a.m., more than 20 hours during a week of school, or work:

- on a construction site;
- in the industrial or manufacturing processes;
- drilling or servicing rigs;
- on scaffolds or swing stages; or
- pruning, repairing, maintaining, or removing or trees.

D. Overtime Requirements

Issues related to overtime are regulated by Division 3 of the *ESC*. Overtime means an employee's hours of work in excess of the employee's standard hours of work. Subject to certain exceptions (including employees subject to *The Construction Industry Wages Act,* RSM 1987, c. C190), the *ESC* mandates that standard hours of work are 40 hours per week and 8 hours per day.

An employee who works overtime must be paid at least 1 ½ times their regular wage rate for the additional hours. In some cases the employer and employee may agree to average the employee's hours of work over a number of weeks for the purpose of determining entitlements to overtime pay, and document this in a formal written agreement as per section 11.1 of the *ESC*, The agreement has various requirements, including:

- being signed by the employer and by the employee or, in the case of a group of employees, by at least 75% of the employees affected by the agreement;
- specify the start date and end date of the agreement, which may be no more than three years in duration; and
- specify the period over which the hours will be worked, which may not exceed 12 weeks.

Where both parties agree, overtime may be compensated by time off in lieu of payment. The time in lieu must be taken within 3 months of the week in which the overtime was earned. Lieu time must be accrued at the same rate as overtime compensation; that is, 1 ½ hours must be credited to the employee for each overtime hour worked.

The standard hours of work and overtime provisions of the *ESC* do not apply to employees who perform management functions primarily, or to employees who have substantial control over their own hours of work and whose annual regular wage is at least two time the Manitoba industrial average wage, as defined by the *ESR*. For the period of June 1, 2024 to May 31, 2025, the Manitoba industrial average wage is $57,429.32. This of course changes annually.

E. Workday/Workweek/Work Hours

Subject to certain exceptions, the maximum number of non-overtime hours are 8 hours per day or 40 hours per week. Unlike some other jurisdictions, there is no prescribed maximum hours of work per day or week.

Generally, employees, except those "on call," must have 24 consecutive hours free from work each week.

In Manitoba, subject to the *ESR,* employees in retail business establishments as defined in *The Remembrance Day Act,* CCSM c. R80, may refuse to work on Sundays so long as they provide their employer with at least 14 days' notice prior to the Sunday, or, if the employee is scheduled to work a Sunday less than 14 days away, as much notice as is reasonable and practicable in the circumstances. An employee cannot be terminated or laid off, nor can their working conditions or wage rate be changed, as a result of refusing to work on a Sunday.

The Remembrance Day Act ensures the right of employees to wear a poppy while working during the seven day period from November 5 ending on November 11 of each year.

F. Benefits/Health Insurance

Manitoba residents are eligible for provincially funded health care. As a result, employers are not required to provide their employees with health insurance coverage. To be eligible for Manitoba health care coverage, a person must be a Canadian citizen or have immigration status, make their permanent and principal home in Manitoba, and physically reside in Manitoba for at least 6 months out of the year. For certain refugees, protected persons, or refugee claimants, the federal government can provide temporary health insurance until they are eligible for provincial health insurance.

III. Time Off/Leaves of Absence

A. Paid Time Off

i. Vacation Pay

Annual vacation and vacation allowances are governed by Division 5 of the *ESC*. Every employee is entitled to vacation time, with accrued vacation pay, after the employee has worked 1 year for the employer. An employer must give an employee an annual vacation

of at least 2 weeks' vacation per year until the employee has worked for the employer for 5 consecutive years, at which point the employee must receive at least 3 weeks' vacation per year (*ESC* s.34(1)). An employer may determine when the vacation is taken, but vacations are to be taken within 10 months after the end of the year for which the vacation is earned.

For each week of vacation, employees earn 2 per cent of their gross wages (excluding overtime) as vacation pay. For example, employees who earn 2 weeks of vacation receive 4 per cent of their gross wages as vacation pay and employees with 3 weeks of vacation receive 6 per cent of their gross wages as vacation pay.

ii. Sick Leave Pay

The *ESC* does not require Manitoba employers to provide their employees with paid sick leave. However, employees may apply for compensation from Employment Insurance for sick time where the sick time was unpaid.

iii. Holiday Pay

The *ESC* recognizes certain general holidays, specifically New Year's Day, Louis Riel Day (the third Monday in February), Good Friday, Victoria Day, July 1, Labour Day, Orange Shirt Day (National Day for the Truth and Reconciliation), Thanksgiving Day and Christmas Day.

General holidays are regulated under Division 4 of the *ESC* and employees are entitled to be paid for a holiday unless the employee was absent on the day before or after the general holiday without the employer's consent.

An employee who works on a general holiday must be paid for that day at the rate of 1 ½ times the employee's regular wages for the time worked and holiday pay for that day (*ESC* s. 25(1)). If a general holiday falls on a day on which an employee is not scheduled to work that employee will receive a day off with holiday pay before the employee's next annual vacation or, if the holiday falls on a weekend, on the next scheduled shift for that employee (*ESC* s. 26(2)).

An employee who works in a continuously operating business, seasonal business, seasonal business, place of amusement, gasoline service station, hospital, hotel or restaurant, or in domestic service, the employer may pay the employee for the hours worked on the general holiday as if it were not a general holiday; and give the employee a day off, with holiday pay, on another day that would normally have been a workday for the employee, within 30 days after the general holiday, with at least 2 days' notice of the day to be taken off, or if the employee agrees, within any longer period but before the employee's next annual vacation.

B. Family and Other Medical Leaves

The *ESC* provides that an employee who has worked for an employer for at least 30 days is entitled to up to 5 days of unpaid leave on the death of a "family member" of the employee (*ESC* s. 59.4(1)). "Family member" is defined very broadly in the *ESR* and includes any person whom the employee "considers to be like a close relative" (s. 22(f)). Unpaid leave under s. 59.4(1.1) is also available to an employee impacted by the loss of a pregnancy.

An employee who has worked for an employer for at least 30 days is entitled to up to 3 days of unpaid leave during each employment year to meet responsibilities related to family responsibilities or the health of a "family member" (again defined as including anyone whom the employee considers to be like a close family member) (*ESC*, s. 59.3, *ESR* s. 22).

An employee who has worked for an employer for at least 90 days is entitled to up to 28 weeks of unpaid leave to provide care or support to a "family member" (again this includes someone the employee "considers to be like a close relative" (s. 22(f) of the *ESR*)) and for whom there is a serious medical condition with significant risk of death within 26 weeks (*ESC* s. 59.2(2)-(3)). The employee must provide a physician's certificate stating the risk of death within 26 weeks from the start of the leave or from the date the certificate was signed (ESC s. 59.2(3)).

An employee may also be entitled to periods of unpaid leave to care for critically ill family members (s. 59.8 of the *ESC*). An employee who has been employed by the same employer for at least 30 days may take up to 37 weeks of unpaid leave to care for or support a critically ill child who is a family member, and an employee who has been employed by the same employer for at least 90 days may take up to 17 weeks of unpaid leave to care for or support a critically ill adult who is a family member. An employee generally must give their employer a copy of the physician's certificate as well as notice of, generally, at least 1 pay period. Leave can be taken continuously or in periods, so long as a period is not less than 1 week in duration. If taken in periods, leave must end no later than 52 weeks after the day the first period began, unless the family member remains critically ill at that point, in which a new leave can be taken.

The Federal Government amended the *Employment Insurance Act S.C. 1996, c. 23* (the "*EIA*") in 2004, to include "compassionate care" benefits. Employees who are temporarily absent from work due to a family member's health emergency may be entitled to employment insurance benefits. An employee will be eligible for up to 26 weeks of benefits upon providing a medical certificate affirming that a family member faces a serious risk of death within 26 weeks, and is in need of care or support.

The *ESC* contains a leave of absence for an employee who is a victim of interpersonal violence. Interpersonal violence includes both domestic violence and stalking as defined in *The Domestic Violence and Stalking Act,* SM 1998, c.41, and sexual violence, as defined in s. 59.11(1) of the *ESC.* Such an employee (who has been employed with the

employer for at least 90 days) is entitled to both a leave of up to 10 days, which the employee may choose to take intermittently or in a continuous period; and leave of up to 17 weeks to be taken in a continuous period; in each 52 week period. The legislation provides for a closed list of reasons for which an employee may take the leave at s. 59.11(3) of the *ESC*. Up to 5 days of the leave may be taken as paid leave, provided that when an employee gives notice of the leave as required, they indicate which days are to be paid days, otherwise, the leave is an unpaid leave of absence. The employee must provide the employer with "reasonable verification of the necessity of the leave". As of July 2023, the *ESR* does not define that verification (see s. 59.11 of the *ESC*). An employee may also take this leave if their child or dependent is a victim of interpersonal violence, as defined by ss. 59.11(1) and 59.11(3.1) of the *ESC*.

An employee employed by the same employer for at least 30 days may also be entitled to unpaid leave of up to 104 weeks if the employee is the parent of a child who died, and it is probable the death was the result of a crime, or to unpaid leave of up to 52 weeks if the employee is the parent of a child who has disappeared, and it is probable that the disappearance resulted from a crime (s. 59.9 of the *ESC*). The employee must, generally, give their employer notice of at least 1 pay period, as well as reasonable verification of the necessity of the leave. There is no entitlement to this leave if the employee seeking the leave has been charged with a crime.

C. Disability Leave

Manitoba employers are not required to provide their employees with paid disability leave. However, disabled employees may be eligible for Employment Insurance benefits during an unpaid leave. When faced with a leave request from a disabled employee, employers must remain sensitive to their duty not to discriminate on the ground of disability under the *HRC*. It is unlawful for an employer to refuse a leave request or dismiss an employee who suffers from a disability unless the employer can show that it cannot accommodate the employee without undue hardship. Although not specifically required by statute, employers must be cautious when determining how to address a disability-related leave and must remain mindful of their *HRC* obligations. Generally, human rights adjudicators find that tolerating (sometimes significant) periods of absence due to disability fall within the employer’s accommodation obligations.

The *ESC* also sets out an unpaid leave of absence of up to 17 weeks in any 52-week period for an employee who is seriously injured or ill. Note that Bill 9 was introduced and passed during the 1st Session of the Legislative Assembly of Manitoba to extend the length of the leave for serious injury or illness from 17 weeks to 27 weeks. As of July 26, 2024, there have been no further updates on this Bill. The entitlement arises after the employee has been employed with the employer for 90 days. For an employee to be eligible for leave, a physician must issue a certificate providing evidence reasonable in the circumstances that the employee is expected to be incapable of working for a period of at least two weeks because of a serious injury or illness. The employee must take the leave in a continuous period, unless the employee and the employer otherwise agree or a collective agreement otherwise provides. Before the employee returns to work, the

employer may require the employee to provide a certificate issued by a physician stating that the employee is fit to return to work (*ESC*, s. 59.10).

D. Maternity Leave/Parental Leave

There are two kinds of unpaid leave related to the arrival of a child, maternity leave and parental leave. Those who qualify are entitled to receive federal employment insurance benefits for a specified time.

A pregnant employee who has worked for the employer for at least 7 consecutive months and who requests maternity leave is entitled to up to 17 consecutive weeks of unpaid leave (*ESC* s. 54(1)). This can however, be extended by the number of days the date of delivery is after the estimated date.

An employee who becomes a parent, who has worked for the employer for at least 7 consecutive months, and who requests parental leave, is entitled to up to 63 consecutive weeks of unpaid leave (*ESC* s. 58(1)).The employer should be given at least 4 weeks' notice of the impending leave; if proper notice is not given then the leave will be shortened by the number of days by which the notice was insufficient (e.g. the employee's leave could be reduced by 3 days if notice was given 3 days late) (*ESC* s. 58(2)).

If an employee takes maternity leave and parental leave, the leave must be taken within a continuous period unless the employee and employer otherwise agree or a collective agreement provides otherwise (*ESC* s. 59).

A birth parent is entitled to up to 63 consecutive weeks of unpaid leave, provided the leave commences not less than 18 months from the date the child was born (*ESC* s. 58(3)).

An adopting parent is entitled to up to 63 consecutive weeks of unpaid leave, provided the leave commences not less than 18 months from the date the child was adopted (*ESC* s. 58(3)).

When maternity or parental leave ends, the employer must attempt to reinstate the employee to the position held prior to the leave. If the position no longer exists, the employee must then be placed in a comparable position unless this would cause undue hardship to the employer.

An employer cannot penalize an employee for taking maternity or parental leave. If the employer fails to comply, an employment standards officer may make an order for compensation or other action (such as reinstatement).

E. Leave for Reservists

An employee who is a member of the Reserves, as defined by s. 59.5(1) of the *ESC,* is entitled to a period of unpaid leave for service, if they have been employed by the same

employer in civilian employment for at least 3 months and are required to be absent from work for the purpose of either active duty, military skills training, or treatment, recovery or rehabilitation in respect of a physical or mental health problem that results from active duty or military skills training.

Subject to the *ESR,* the length of the leave is whatever period is necessary to accommodate the employee's period of service. An employee wishing to taking this leave must give to their employer, in writing, as much notice as is reasonable and practicable in the circumstances. An employer may require the employee provide reasonable verification of the necessity of the leave, including a certificate from a Reserve official as outlined in subsection 59.5(4) of the *ESC*. An employee on this leave must also give their employer written notice of their expected return to work, at which point the employer may defer the employee's return by up to 2 weeks or 1 pay period, whichever is longer.

F. Other Leaves

i. Organ Donation

An employee who has been employed by the same employer for at least 30 days is entitled to unpaid leave of up to 13 weeks for the purpose of donating an organ. The employee wishing to take this leave must give their employer, in writing, as much notice as is reasonable and practicable in the circumstances, and a medical certificate stating the start and end date of the period necessary for the surgery and recovery (s. 59.6 of the *ESC*).

ii. Citizenship Ceremony

An employee who has been employed for at least 30 days is entitled to take up to 4 hours of unpaid leave to attend a Canadian citizenship ceremony, as provided for under the *Citizenship Act,* RSC, 1985, c. C-29 and regulations. An employee must give their employer at ;east 14 days' notice, or if not possible, as much notice as is reasonable and practicable in the circumstances. An employer may request the employee provide evidence of their entitlement to this leave (s 59.7 of the *ESC*).

iii. Temporary COVID-19-Related Leaves

As a result of the COVID-19 pandemic, various temporary leaves have been introduced to assist employees and employers.

In April, 2020 (with additional subsequent amendments) the *ESC* was amended to introduce a new unpaid, job protected public health emergency leave for employees whose ability to work is affected by the pandemic. This leave is available if, in relation to the COVID-19 pandemic, an employee cannot work because:

(a) the employee is under medical investigation, supervision or treatment;

(b) the employee, as a result of information or directions issued or provided by a health officer, health professional, Health Links-Info Santé, the Government of Manitoba or the Government of Canada:

(i) is required to quarantine or isolate themselves, within the meaning of *The Public Health Act*, or

(ii) is subject to self-isolation or any other measure that results in their inability to work;

(b.1) the employee is, in the opinion of a health officer or health professional, or according to information or directions issued or provided by the Government of Manitoba or the Government of Canada, more susceptible to COVID-19 because the employee

(i) has an underlying medical condition,

(ii) is undergoing medical treatment, or

(iii) has contracted another illness;

(b.2) the employee is absent from work as a result of the side effects from being vaccinated against COVID-19;

(c)the employer, due to the employer's concern about the employee's exposure to others, has directed the employee not to work;

(d) the employee is providing care or support to a family member (as defined in the *ESR*), as defined in section 59.2 of the *ESC*, including care or support needed to be provided as a result of the closure of a school or premises where child care is provided;

(e) the employee is directly affected by travel restrictions and cannot reasonably be expected to travel to their workplace;

(f) the employee is subject to an order made under *The Public Health Act*;

(g) the employee is acting in accordance with an order made under *The Emergency Measures Act*; or

(h) any other circumstances prescribed by regulation.

An employee taking a leave under this section may be required to provide their employer with reasonable verification of the necessity of the leave as soon as practicable. This public health emergency leave may continue as long as the employee is entitled to it, and can continue even after the leave is repealed from the *ESC*, as long as certain conditions are met. An employee seeking leave under this section may be required to provide the employer with reasonable verification of the necessity of the leave as soon as practicable.

In May, 2021, the *ESC* was again amended to provide for paid leave for the purposes of employees being vaccinated against COVID-19. The employee is entitled to pay at their regular wage rate for the amount of time the employee is required to be absent from work, up to a maximum of 3 hours, for each time the employee is vaccinated. An employee who wishes to take leave under this section is required to give their employer as much notice as is reasonable and practicable in the circumstances. The employer may also request that the employee provide evidence of the employee's entitlement to the leave, such as confirmation of an appointment to get a vaccine. As of July 2023, this leave is still part of the *ESC*.

IV. Discrimination and Harassment

A. Discrimination

i. Protected Classes

Protected classes of discrimination are set out in I. B. above.

ii. Protected Activities

Under s. 82(1) of the *ESC*, an employer cannot discriminate by paying one sex on a different scale of wages than applies to the other sex if the kind and quality of work and amount of work required is the same or substantially the same. A different rate of pay is permitted where the difference is based on a seniority or merit system, or one that measures earnings by quantity or quality of production, or any factor other than sex. Compensation may not be reduced in order to achieve pay equity.

When an employee has a complaint regarding an employer's alleged violation of the *HRC,* they may file an application with the MHRC. The limitation period for filling a complaint is one year from the date of the alleged contravention of the *HRC*, unless the complainant alleges a continuing contravention of the *HRC,* in which case the limitation period is one year from the last alleged instance of the contravention. The MHRC attempts to resolve the matter through mediation, and may do so at any stage of the proceeding, failing which an adjudicator may hold a hearing to decide whether discrimination took place. If an adjudicator finds that the employee experienced discrimination, they may make an order to address the discrimination, to provide financial compensation to the employee, and/or

make orders to prevent further human rights violations. If an adjudicator finds that discrimination did not occur, they will dismiss the application.

A respondent to a complaint may request a determination of whether an offer of settlement made by the respondent to the complainant is reasonable before a complaint proceeds to a hearing on its merits. The adjudicator hearing the application is to assume that the allegations contained in the complaint have been proven, and then must determine whether offer made by the respondent is "reasonable", and approximates the amount which an adjudicator might be expected to award after a hearing on the merits. If the offer is determined to be reasonable, the proceedings are terminated even if the complainant rejects the settlement offer.

In 2016, in *Northern Regional Health Authority v Manitoba (Human Rights Commission)*, the Manitoba Court of Queen's Bench heard an employer-respondent's application for judicial review respecting a complaint filed by a unionized employee. On review, the Court held that the Manitoba Human Rights Commission had no jurisdiction with respect to the complaint because the essential character of the dispute arose out of the complainant's employment, which was governed by a collective bargaining agreement. As a result, the dispute ought to have been subject to grievance arbitration as provided for in the collective agreement and the *LRA.* The full text of the Court's decision is reported at 2016 MBQB 89 (available on CanLII). The decision came as a surprise to the Manitoba legal community as the Manitoba Human Rights Commission had been dealing with human rights complaints arising out the employment of unionized employees for years. In October of 2017 the decision was overturned by the Manitoba Court of Appeal in 2017 MBCA 98 (available on CanLII). The Court of Appeal relied on the applicant having severed her claim for employment remedies (discipline and discharge) from her discrimination claim, finding that there was an individual right under the *HRC* that was separate and apart from her rights under the collective agreement. The decision was overturned once more by the Supreme Court of Canada in a decision reported at 2021 SCC 42. The purpose of s. 78 of the *LRA* is to channel all disputes arising from collective agreement into a single forum, and so a labour arbitrator (and not the Manitoba Human Rights Commission) has jurisdiction.

The *HRC* protects Manitoba employees from discrimination in the workplace. The *HRC* is enforced through a "complaint-driven mechanism". An employee can file a complaint with the Manitoba Human Rights Commission, which investigates the complaint, and may then appoint an adjudicator to decide questions of law, fact and remedy. Infringement of a right, obstruction of an investigation, or contravention of an order of a human rights adjudicator constitutes an offence punishable by a fine of up to $5,000 for individuals and $25,000 for corporations. Human rights adjudicators' orders may be enforced as court orders.

As of January 1 2022, a complaint made under the *HRC* may be dismissed prior to an investigation occurring if:

(a) it is frivolous or vexatious;
(b) the acts or omissions alleged do not contravene the *HRC;*
(c) it is outside of the jurisdiction of the *HRC*;

(d) the subject matter is being or has been dealt with according to procedure under another Act; or
(e) additional proceedings in respect to the complaint would not benefit the party allegedly contravened (*ESC,* s. 26(2)).

A complaint made under the *HRC* must be dismissed following an investigation if:

(a) it is frivolous or vexatious;
(b) the acts or omissions alleged do not contravene the *HRC;*
(c) it is outside of the jurisdiction if the *HRC*;
(d) the subject matter is being or has been dealt with according to procedure under another Act;
(e) additional proceedings in respect to the complaint would not benefit the party allegedly contravened; or
(f) the evidence in support of the complaint is insufficient to substantiate the alleged contravention (*HRC,* s. 29(1)).

A human rights adjudicator can order a party to do whatever it believes is necessary to comply with the *HRC*. The adjudicator can direct restitution, including monetary compensation for losses arising out of the infringement, or issue other non-monetary orders that are required in the opinion of the adjudicator to promote compliance with the *HRC*.

Non-monetary remedies include reinstatement of employment, orders to offer a job to the complainant, consider the complainant for the next suitable job, implement an affirmative action program, attend seminars on discrimination, review all employer policies and documents to ensure compliance, provide a reference, apologize to the complainant, or post a written declaration of intention to abide by the *HRC.*

B. Harassment and Bullying

Under Manitoba's *HRC*, every employee has the right to freedom from harassment in the workplace based on:

- ancestry, including colour and perceived race;
- nationality or national origin;
- ethnic background or origin;
- religion or creed, or religious belief, religious association or religious activity;
- age;
- sex, sex-determined characteristics or circumstances such as pregnancy, the possibility of pregnancy, or circumstances related to pregnancy;
- gender identity;
- sexual orientation;
- marital or family status;
- source of income;
- political belief, political association or political activity;

- physical or mental disability or related characteristics or circumstances, including reliance on a service animal, a wheelchair, or any other remedial appliance or device, and social disadvantage (*HRC,* s. 9(2));
- social disadvantage (*HRC*, s. 9(2))..

"Harassment" in the workplace occurs when an employee is subject to a course of objectionable conduct that creates a risk to the health of the worker or which adversely affects the worker's physical or psychological health or well-being (*Workplace Safety and Health Regulation,* ("*WSHR*")).

Workplace sexual harassment is also prohibited. This includes sexual solicitation made by a person in a position to confer, grant, or deny a benefit or advancement, where the person making the solicitation knows (or ought reasonably to know) that the sexual advance is unwelcome.

Employers are vicariously liable for the acts of their employees. Thus, any conduct or act done, or omitted to be done, in the course of employment by an officer, official, employee, or agent of a corporation is deemed to be conduct or an act done, or omitted to be done, by the corporation, except with respect to workplace sexual harassment. However, employers nonetheless will be held liable for sexually harassing conduct carried out by their employees where the harassment is carried on by a "directing mind" of the employer, or the employer knows or ought to know of the harassing conduct, but does nothing to address or stop it. This would include bullying type conduct.

Pursuant to *The Workplace Safety and Health Act,* RSM 1987, c. W210 *(*"*WSHA*") and the *WSHR*, employers must develop and communicate workplace violence and harassment prevention policies and programs and provide employees with training on such policies. In addition, employers must assess risks of workplace violence, take reasonable precaution to protect workers from possible domestic violence in the workplace and provide information to employees about individuals with a history of violence which they may encounter in the workplace.

V. Termination/Dismissal Issues

A. Overview

An overview of termination and dismissal issues is provided in Section I.

B. Justification for Dismissal

While no justification is required for a "without cause" dismissal, to terminate an employee without providing the notice as set out in the *ESC* or any further common law or statutory entitlements, an employer has the obligation to provide for "just cause".

A court will find that a dismissal is "wrongful" where an employer failed to provide the appropriate notice (including situations where either the employer did not assert just

cause but failed to provide sufficient notice, or where an employer asserted just cause but did not convince the court of its position).

C. Mandatory Severance Pay

Severance pay is distinct from pay in lieu of notice. There is no right to severance pay under Manitoba's *ESC* or the common law, though parties are free to negotiate a right to severance pay in employment contracts.

D. Use of Severance Agreements and Releases

i. Releases/Waivers

Since severance pay is not a statutory right under the *ESC*, parties are free to negotiate this right or to waive it as they see fit when negotiating an employment agreement.

E. Legal Challenges to Dismissal

i. Constructive Dismissal

"Constructive dismissal" is a form of wrongful dismissal that occurs where an employer unilaterally alters a fundamental condition of the employment agreement (whether or not the agreement is in written form). If the employer imposes such a change without requisite advance notice or without the employee’s agreement, the employee may be entitled to obtain damages on the same basis as if they had been dismissed. This is because, in making the unilateral change(s) it did, the employer has indicated it is no longer prepared to continue to employ the employee on the terms of their employment contract and has terminated the employee’s employment on those terms.

The nature of the change(s) that will amount to a constructive dismissal depend on all the facts surrounding the employment relationship. A written employment contract or personnel policy (that is brought to the attention of the employee) may define what types of changes management may make unilaterally. The parties' past practice and reasonable expectations in the industry may also be used to define the scope of permissible employer-initiated changes.

ii. Dispute Resolution Process/Forums

Wrongful dismissal claims in Manitoba are dealt with through the court system in non-unionized environments.
In unionized workplaces, dispute resolution is done pursuant to the terms of the collective agreement, specifically grievance and arbitration provisions.

F. Employment References

The issue of giving references presents an employer with potential liability on a number of fronts. The means to avoid this liability is not to refuse to give references, since an absolute refusal may, in some cases, be grounds for additional liability. There are, however, a number of simple steps employers can take to reduce the chances of liability resulting from a reference.

The person charged with composing a reference should investigate the former employee's conduct and ability as an employee to ensure that the contents of the reference are accurate. This investigation might include conferring with the former employee's co-workers and supervisors. In all cases, previous performance reviews should be reviewed to ensure that statements made in a reference can be supported. Conferring with an employee's co-workers may be problematic where an employee has been dismissed and a reference is negotiated as part of a termination settlement, since such settlements are usually confidential, and dissemination of information regarding the settlement should be limited. Therefore, in such circumstances, discussions should be restricted to other managerial personnel and conducted with discretion.

Responsibility for responding to oral inquiries should be delegated to a specific person, and all subsequent inquiries should also be directed to this person. This precaution will help ensure consistency among the responses. A comprehensive written reference, however, may lessen the likelihood of oral inquiries.

In some cases, it may be appropriate to consult the employee about their reference. The risk of liability (or of being sued at all by the former employee) will likely be reduced if consensus as to the contents of the reference is reached with the employee.

In the context of a wrongful dismissal action, it may also be possible to negotiate with the former employee's counsel, without prejudice, the contents of a reference. The employer should be careful not to agree to provide a reference unless the employee agrees that the reference will not be used against the employer in the lawsuit to rebut cause. Providing a reference in this manner would prevent the former employee from claiming an extended notice period on the basis that the employer did not provide them with a reference.

Finally, some employers are in the practice of providing minimal letters that merely give the date of hire, the date employment ended and the positions held by a former employee. The inference that arises from such letters is that the employer had nothing good to say about the employee. As a result, it is likely that such a letter would be considered a negative reference, and could lead to a claim for additional damages.

As references are a potential minefield for employers, they must always act with integrity in providing them, and should never agree to a reference they cannot honestly support.

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

A. Overview

The *ESC* and *ESR* govern many of the terms of the employment relationship. In certain circumstances, the *ESC* imposes on employers certain obligations relating to notice or pay in lieu of notice. "Termination" for purposes of the notice of termination provisions includes terminations, "constructive dismissals" (discussed above) and temporary lay-offs equal to or exceeding 8 weeks in any 16-week period.

B. Procedure

i. Mandatory Notice Periods

Employees employed for at least 30 days are entitled to notice (or pay in lieu) under the *ESC*, unless an exception applies. Employees will not be entitled to notice if they were employed for fewer than 30 days, if the employment was for a fixed term and the term comes to an end, if the employee was employed for completion of a particular task and the task is completed in less than 12 months, if the employee was employed in construction, if the employee is on strike or has been locked out in a lawful manner, if there was just cause for dismissal, if the employee gave notice of intention to resign or retire and then ceased work on the date specified, or if the employer's business is sold or transferred and the employee is immediately re-employed by in the same business on terms that are the same or better, or in other circumstances as prescribed by regulation.

Different notice provisions apply, depending on whether or not the situation involves a "group termination." A group termination occurs when an employer terminates 50 or more employees at an "establishment" in any period of 4 weeks or less.

The following periods are prescribed in relation to mass terminations:

- Where 50-100 employees are terminated in the same 4 week period, 10 weeks' notice is required;
- Where 100-300 employees are terminated, 14 weeks' notice is required; and
- Where 300 or more employees are terminated, 18 weeks' notice is required.

An employer must give the employees written notice of termination in person or by mail using a method of delivery that permits the delivery to be verified. In addition, the employer must provide written notice to the Director of Employment Standards. The notice must set out the economic circumstances surrounding the termination, consultations that have occurred, the statistical profile of the affected employees, proposed adjustment measures and the number of employees expected to benefit from each. This notice must be conspicuously posted at the employer's workplace or establishment.

Once the notice of termination is given, all wages and working conditions are frozen. If notice is not given, the employer must pay the employee "termination pay" equal to the amount of wages the employee would have earned during the requisite notice period. This amount is often referred to as "pay in lieu of" notice. After 30 days of employment, an individual employee is entitled to notice of termination based on length of employment. Employees are entitled to a minimum of:

- 1 weeks' notice if they have worked less than 1 year
- 2 weeks' notice if they have worked at least 1 year and less than 3 years
- 4 weeks' notice if they have worked at least 3 years and less than 5 years
- 6 weeks' notice if they have worked at least 5 years and less than 10 years
- 8 weeks' notice if they have worked more than 10 years (*ESC* s. 61(2)).

ii. Severance Pay

There is no statutory requirement to pay severance pay for Manitoba employers in provincially regulated industries.

iii. Benefits

Employees on notice are entitled to full benefit coverage, and employers are therefore required to make benefits contributions for the duration of a notice period. If notice is not given, the employer must continue to make benefit plan contributions so the employee will continue to receive the benefits to which they would have been entitled had they worked for the duration of the notice period.

iv. Severance Packages/Separation Agreements

Employers and departing employees may enter into separation agreements detailing the terms of separation or the termination of employment and so address common law obligations and entitlements in exchange for providing a release extinguishing claims against the employer. These agreements are generally signed and enforceable, subject to statutory limitations or issues of duress or unconscionability. Employees should be advised to obtain independent legal advice before entering such agreements and signing releases.

VII. Unfair Competition/Covenants Not to Compete

A. Trade Secrets

The common law binds employees to keep secret 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 its disclosure could negatively impact the employer's business. Confidential information may include marketing strategy, personnel information, or

standard business practices, as well as trade secrets (such as manufacturing processes), sales information, commercial contracts, computerized data, and supplier and customer lists. Confidential information does not include trivial or self-evident matters, or information in the public domain.

B. Covenants Not to Compete

The obligations of departing employees with respect to competing with their former employer will be 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.

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 because the law favours free competition and courts are reluctant to impede a dismissed employee from securing alternate employment. On the other hand, there is a larger, more exacting duty imposed on employees with a fiduciary duty that is similar to that owed to a corporate employer by its directors.

Where an employer includes a non-compete covenant in the terms of an employment agreement that covenant will receive strict scrutiny by courts. A non-competition agreement is presumptively unenforceable unless the employer demonstrates that: (i) the employer has a proprietary interest that warrants protection; (ii) the spatial and temporal restrictions go no further than necessary to protect the proprietary interest; and (iii) the covenant does not offend public interest. The general approach of courts is to refuse to uphold a non-compete clause where a non-solicit clause would adequately protect the employer's interests.

C. Solicitation of Customers and Employees

Non-solicitation clauses are less restrictive than non-competition clauses and, therefore, are more likely enforced by the courts, subject to their reasonableness in terms of geographic scope of application, types of restrictions and length of restrictions.

A non-solicitation clause protects against direct and sometimes indirect solicitation, but does not prevent a client from making a switch purely on their own initiative.

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

Even if an employee does not have a non-competition agreement or non-solicitation agreement, they can be found to have owed a fiduciary duty or duty of loyalty to the employer such that a restrictive covenant not to compete or solicit can be deemed to be in effect.

VIII. Personnel Administration

A. Payroll Requirements

i. Method of Payment

Section 88 of the *ESC* sets out that wages are to be paid in Canadian currency by cheque, bill of exchange or directly deposited into the employee's account.

ii. Payment Frequency

Section 86(1) sets out that wages must be paid within 10 working days after the expiration of each pay period and at least semi-monthly.

There are exceptions where there is an established custom or practice that has been followed since at least 1976 or there is a special permit issued by the director of the *ESC*.

iii. Special Record Keeping Requirements

The *ESC* requires employers to keep accurate employee records for 3 years after the work has been performed. The pertinent information includes:

(a) name, address, date of birth and occupation;

(b) the date on which the employment commenced;

(c) the regular wage rate and overtime wage rate when employment starts, the particulars of any change to the regular wage rate or overtime wage rate, including the date of the change;

(d) subject to subsection (2), the regular hours of work and overtime, recorded separately and daily;

(e) the dates on which wages are paid, and the amount of wages paid on each date;

(f) the deductions from wages and the reason for each deduction;

(g) details of any banked time under section 18, and time off that is provided and taken in respect of banked time;

(h) the date on which each general holiday is taken;

(i) the employee's hours of work on a general holiday, the wage rate paid for those hours, and any time off provided in respect of those hours of work;

(j) each annual vacation, showing the date it begins and the date that work resumes, the period of employment in which it is earned, and the date and amount of vacation allowance paid;

(k) the amount of vacation allowance paid to the employee in lieu of an annual vacation upon termination of the employment and the date of the payment;

(l) copies of documents relating to any leave taken by an employee, including records of the type of leave and the dates and number of days taken as leave;

(m) the date of termination of the employment; and

(n) any other record prescribed by regulation (see *ESC*, s. 135(1)).

An employer should be prepared to produce these records for inspection by an employment standards officer.

B. Required Postings

Manitoba employers are not required to post material prepared by the Ministry of Labour describing the rights of employees and the obligations of employers.

Manitoba employers have an obligation to post certain information pursuant to Manitoba's *WSHA* (discussed further below). Examples of such postings include the employer's health and safety policy, harassment policy and violence in the workplace policy; and the names and work locations of the health and safety committee members.

C. Required Training

Certain employment-related training is mandated under the *WSHA*, including training on violence and harassment in the workplace and prescribed training for certain safety-sensitive industries.

D. Meal and Rest Periods

An employer must ensure that no employee works more than 5 consecutive hours without a break and that each break lasts at least 30 minutes (*ESC* s. 50(1), *ESR* s. 20).

E. Payment Upon Discharge or Resignation

The *ESC* requires employers to pay outstanding wages to terminated employees no later than ten working days after their employment ends.

F. Personnel Records

i. Right of Access

Under the *ESC*, personnel records must be readily available for inspection as required by an Employment Standards Officer. Employees do not have an express statutory right to access their records. However, employees are entitled to receive employment related information such as detailed wage statements.

ii. Retention Requirements

The *ESC* sets out that subject to any longer or shorter periods of time prescribed by regulation, an employer shall retain the employment records for not less than three years after the record is made.

IX. Privacy

Under the federal *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5 ("*PIPEDA*") the personal information of employees of federally regulated organizations is protected (*see* the Canadian Federal Labour and Employment Law chapter for a more detailed discussion of the legislation). Personal information generally does not include the name, business title, business address, or business telephone number of any employee, e.g., information that is otherwise found on a business card.

Effective January 1, 2004 all provinces that had not enacted legislation substantially similar to *PIPEDA* are subject to the federal statute. Manitoba has not yet enacted privacy legislation substantially similar to *PIPEDA*, and therefore Manitoba organizations are subject to *PIPEDA*. However, as applied provincially, the legislation governs commercial uses of personal information and does not apply *per se* to the employer-employee relationship.

Manitoba has, however, enacted provincial privacy legislation that applies to any employee who performs services for a public body, either under a contract or through an agency relationship. The *Freedom of Information and Protection of Privacy Act,* CCSM c. F175 protects the personal information of employees in publicly governed workplaces, and the *Personal Health Information Act,* CCSM c. P33.5 ("*PHIA*") protects the personal health information of employees in publicly governed workplaces.

A. Drug and Alcohol Testing

Manitoba courts have yet to release a decision on drug testing in the non-unionized context. The Ontario Court of Appeal decision in *Entrop et al. v. Imperial Oil Ltd. (2000),* 50 O.R. (3d) 18 is now older but still persuasive authority. The decision established general criteria for determining whether or not an employer's drug testing policy is legitimate. Manitoba employers contemplating implementing a drug and alcohol policy should consider the following general guidelines:

- **Pre-employment**:
  - Pre-employment testing is illegal.
- **Safety-Sensitive Positions**:

    - 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 Ontario, and may be permissible in other 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, again, if this is part of a larger assessment of the employee.
- **Non-Safety-Sensitive Positions**:
    - Random alcohol and drug testing for employees in non-safety-sensitive positions is illegal.
- **All Positions**:
    - Alcohol testing post-incident and for cause is permissible where there is reason to suspect that alcohol use was part of the problem.
    - Alcohol and drug dependency can constitute a disability pursuant to the *HRC*. There, as is the case for all disabilities, employers have a duty to accommodate disabled employees up to the point of undue hardship.
    - Drug testing post-incident and for cause is permissible only if it is necessary as one part of a larger assessment of abuse, recognizing that a positive test does not indicate impairment and should only be used as part of a larger investigation.
    - The response to a positive alcohol or drug test cannot be automatic termination. Rather, an employer's response must be tailored to the individual's circumstances, with due regards to the employer's duty to accommodate an employee's disability, if any.
    - 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.

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 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 them. Discipline, including termination, may therefore be justified when an employee's off-duty conduct is prejudicial to the employer's interests.

Generally, off-duty conduct will warrant dismissal only where the conduct is prejudicial to the employer's business or reputation or negatively impacts the duties of the employee in

question; there is a causal connection or *nexus* between the impugned conduct and the employer's business; and the conduct is "wholly incompatible" with the continuation of the employment relationship.

It is increasingly common for Manitoba employers to introduce policies regulating the use of technology and social media in the workplace, as well as setting out expectations and limitations for how employees will conduct themselves in their personal use of social media.

C. Medical Information

See Section VIII above for a discussion concerning an employer's obligation regarding personal employee information.

The collection, use and disclosure of medical information by employers generally would be governed by *PIPEDA* for private sector employees, and by *PHIA* for public sector employees and health care providers, as described above.

D. Searches

In Manitoba, *The Privacy Act,* RSM 1987, c. P125 creates a general tort of breach of privacy, the test being "a person who substantially, unreasonably, and without claim of right, violates the privacy of another person, commits a tort against that other person" (s. 2(1)). Actions for breaches of privacy under *The Privacy Act* are actionable without proof of damage.

Any searches must also be in compliance with the *HRC* and consistent with the relevant case law. If a certain class of employee is searched, but others are not, there may be an infringement under the *HRC.* Employers should ensure that employees are advised, in advance, that they are liable to have their property searched so that they can make an informed decision concerning what materials they bring to the workplace. A search may not include bodily contact, as this may be construed as an assault. Further, where an employer wishes to take action against an employee based on what is discovered in a search, it must be mindful not to inadvertently create human rights liability. For instance, where an employer finds drugs in an employee’s knapsack it must ensure it does not act in the assumption that the employee is a drug addict, but rather deal with the presence of drugs on the premises. In such circumstances, a clear written policy prohibiting unwanted materials on the employer’s premises can assist in curbing potential liability.

E. Lie Detector Tests

Manitoba legislation does not include specific provisions addressing the issue of lie detectors; however, under the common law it is unlikely that an employee could be forced to take a lie detector test.

F. Fingerprints

Manitoba legislation does not include specific provisions addressing the issue of fingerprinting but again, under the common law it is unlikely an employee could be forced to provide fingerprints.

G. Social Security Numbers

There is no statutory requirement in Manitoba for an employee to provide their social insurance number to an employer, however, under the federal *Employment Insurance Act,* SC 1996, c. 23, if an employee is employed in insurable employment, their employer is required to keep records containing the social insurance number of each insured person under their employment (s. 87(1)). This is necessary because such employers are required to provide the Federal government with information about employees' income tax deductions, and amounts withheld for government benefit programs and service.

H. Surveillance and Monitoring

Employees have a diminished expectation of privacy in the workplace. This means that while they may not have the same extent of privacy expectations they would in situations outside of work, in the workplace they still have a reasonable expectation of some privacy. In determining the extent of privacy an employee to which an employee is entitled, the totality of the circumstances and the particular situation at hand must be considered.

The Privacy Act protects employees from surveillance and monitoring that is "unreasonable" and "without claim of right".

In the unionized context, Manitoba arbitrators have used a two-part test: Firstly, was it reasonable, in all of the circumstances, to undertake surveillance of the employee's off-duty activity? Secondly, was the surveillance conducted in a reasonable way, which is not unduly intrusive and which corresponds fairly with acquiring information pertinent to the employer's legitimate interests?

In a non-unionized context, an employer must establish the surveillance is reasonable in all the circumstances, as balanced against an employer's legitimate interests. Relevant considerations in determining reasonableness include but are not limited to:

- The reason for surveillance (e.g. the basis for suspicion that supports the decision to surveil);
- Any efforts made to address the problem in other ways;
- The availability (or unavailability) of other sources of information;
- The employee(s)' expectation of privacy at the time and place of surveillance;
- The scope of personal information collected (e.g. all employees, or only employees about whom the employer has suspicion?);
- The extent of intrusion into privacy (eg.. constant or transitory); and
- The seriousness of the loss of privacy as captured by the surveillance.

Employers should always proceed with caution when undertaking surveillance measures, and should have clear and objectively reasonable policies in place regarding work and personal devices, confidentiality, and other privacy issues.

I. Cannabis (medical and recreational use)

Medically prescribed cannabis is legal in Canada, as is recreational cannabis. If medically required, the employer must reasonably accommodate the employee to the point of undue hardship. This would require an investigation into what the employee's needs are, an assessment of the employer's requirements and a bona fide effort made to accommodate (perhaps by moving the employee away from any safety sensitive position). While recreational cannabis use is legal, short of addiction the employee has no right to accommodation and the employer may prohibit its use at work just like any other intoxicant.

J. Social Media

Social media usage of employees falls into the realm of off duty conduct and as such in order to take action regarding an employee's social media presence, an employer must be able to show some impact on the employer's operations or the ability of the employee to perform their work. Public sector employees have constitutionally protected rights such as of freedom of expression, but private sector employees do not have such protections and so through the use of appropriate policies may more easily be constrained in terms of their social media presence.

K. Weapons/Workplace Violence Policy

Employers have an interest and legal requirement in ensuring the safety of their employees. Employers should have policies in place for weapons or violence. There is no constitutional or legal right to bear arms.

X. Employee Injuries/Workers' Compensation

The purpose of Manitoba's *Workers' Compensation Act,* RSM 1987, c. W200 *(*"*WCA*") is to promote healthy workplaces and to facilitate the recovery and return to work of injured workers. The legislation applies to all employers unless they are explicitly excluded by the *Excluded Industries, Employers and Workers Regulation*, Man Reg 196/2005*.*

Employers must contribute to the accident fund maintained by the Workers' Compensation Board.

A. Work Related Injuries

Workers' compensation removes most employees' common law actions against their employers for injuries sustained in connection with their employment, and instead imposes a system of collective liability on employers. It is a "no-fault" system. The

employer's premiums are generally based on the accident record of the industry as a whole and on the last 3 years of the employer's individual "experience rating."

The *WCA* imposes an obligation on most employers to re-employ injured employees when the employee had been continuously employed for one year prior to the accident. The employer's obligation to re-employ continues for two years after the injury, six months after the employee is able to perform the essential duties of their job, or until the employee would have retired (whichever comes first).

Employers also have a duty to reasonably accommodate an injured employee to the extent that the accommodation does not cause undue hardship. The employer and employee must attempt to identify employment at the workplace consistent with the employee's functional abilities that will restore the employee's pre-injury earnings to the extent possible.

B. Non-work Related Injuries

If an employee is injured outside of the scope of their employment, they are not entitled to receive benefits under the *WCA.* There may or may not be other private insurance coverage for them, but that is not required by law.

XI. Unemployment Compensation

A. Eligibility

Employment Insurance benefits are provided by the Federal Government under the *EIA*. An individual is qualified to receive employment insurance benefits if, prior to becoming unemployed, they accumulated a certain amount of employment hours, based on regional rates of unemployment.

B. Procedure

Applications for benefits can be done online at:

https://www.canada.ca/en/services/benefits/ei.html

XII. Health & Safety

A. Overview

The purpose of Manitoba's *WSHA* is to protect the health and safety of Manitoba workers. The *WSHA* applies to most Manitoba employers, including Crown corporations.

Employers have a general obligation to maintain a safe workplace and to ensure that the measures and procedures prescribed in the *WSHA* and *WSHR* are followed. Employers are also required to:

- Ensure that appropriate protective equipment is provided to and worn by workers;
- Instruct and supervise employees with respect to health and safety issues;
- Establish and maintain a joint health and safety committee, comprised of management and of non-managerial workers if they employee 20 or more employees;
- Assist and cooperate with the committee and the health and safety representative in carrying out their functions;
- Ensure that hazardous materials in the workplace are properly labeled, stored, and disposed of, and instruct employees about hazards in accordance with the Workplace Hazardous Materials Information System;
- Maintain accurate records of the handling, storage, use, and disposal of biological, chemical, or physical agents;
- Prepare and review, no less than every three years, a written occupational health and safety policy, and develop and maintain a program to implement that policy;
- Prepare and communicate to employees a policy and program to address workplace harassment and violence;
- Establish a medical surveillance program for employees and provide for safety-related medical exams and tests for employees, as prescribed; and
- Ensure that the owner of a workplace provides a washroom on request to a person making a delivery to the workplace, or collecting things from the workplace for delivery elsewhere. This is subject to some exceptions such as if there are safety or health concerns with providing access, if the owner in taking steps to providing access would suffer undue hardship, if the layout of the workplace prohibits this access, or if the washroom is only accessible through a dwelling.

Consistent with their role in the workplace, supervisors have similar responsibilities.

Employees are also under an obligation to comply with the provisions of the *WSHA* and *WSHR*. For example, they must use the protective devices or clothing supplied by the employer, and must report to their supervisors any defects in equipment or other hazards in the workplace. Furthermore, employees are prohibited from making ineffective any safety device, from using or operating any equipment or device in a manner that may endanger that employee or any other employee, and from engaging in any horseplay or boisterous conduct.

A number of Department of Labour inspectors are specifically trained to explain and enforce the *WSHA*. An inspector is authorized to enter any workplace at any time without warrant or notice and to issue orders in writing further to an inspection at the workplace. In the course of inspecting a worksite, the inspector may make inquiries of any person that may be relevant to the inspection, consult with a worker health and safety representative or committee member, and order that equipment at the workplace be tested.

Where an inspector finds that a contravention of the *WSHA* constitutes a danger or hazard to the health or safety of an employee, they may issue an improvement order, directing that a contravention be remedied, or issue a stop work order, dictating that the place or

equipment not be used until compliance is achieved; that the work at the workplace shall cease until the stop-work order is withdrawn or cancelled; and that the workplace or work area where the contravention exists be cleared of employees until the danger or hazard to the health or safety of an employee is removed. Copies of any order made by an inspector must be posted in the workplace and a copy must be given to the health and safety representative and committee. Workers are to be paid while a stop work order is in effect, however, it is permissible for an employer to re-assign workers to alternate work.

Any person, including a corporation, who contravenes or fails to comply with a provision of the *WSHA* or an order is guilty of an offence and, on conviction, is liable to a fine, for a first offence, of not more than $500,000, and in the case of a continuing offence, to a further fine not exceeding $50,000 for each day during which the offence continues, or, for a second or subsequent offence, to a fine of not more than $1,000,000, and in the case of a continuing offence, to a further fine not exceeding $100,000 for each day during which the offence continues. In addition to these monetary penalties, a person convicted of an offence may also be imprisoned for a term not exceeding six months. Where a person is convicted of certain offences relating to violation of supervisory obligations imposed by *WSHA*, they may be prohibited from working in a supervisory capacity for a six month period. There is a two year limitation period from the day the alleged act occurred for commencing a prosecution under the *WSHA*.

An employee covered by the *WSHA* has the legal right to refuse to perform unsafe work, as long as they believe on reasonable grounds that the work or workplace constitutes a danger to themselves or another employee (i.e. there is both a subjective and objective element to this). The refusal must be reported to the employee's employer or supervisor and the claim must be investigated immediately in the presence of the employee and the committee member who represents the employee, a health and safety representative, or a worker selected by the trade union or employees to represent the worker.

If the employee continues to refuse to work, an inspector must be notified to investigate the refusal to work. At this second stage refusal, the employee must have "reasonable grounds to believe" that their or another's health or safety is at risk. This is an objective standard.

The inspector may, in a written decision, support the worker's refusal to work, or may dismiss the refusal as frivolous and decide that there is no legitimate reason why the employee should not return to work. Employees who exercise their statutory right to refuse to do unsafe work may not be disciplined by their employer.

In the course of investigating a refusal, the employer may not assign another worker to do the refused work unless the other worker has been informed of the first worker's refusal and the reasons for it. A worker refusing unsafe work is to be paid the same wages and benefits that they would have received had they continued to work. The employer is permitted to re-assign the worker temporarily to alternate work.

An employee has a statutory right to appeal an order or decision of a safety and health officer under section 37 of the *WSHA*. Changes to the *WSHA* in 2021 provide that despite this right to appeal, the Director of the Workplace Safety and Health Branch may made an order confirming an order or decision of a safety and health officer at any point after receiving a notice of appeal if the Director is of the opinion that the matter under appeal is frivolous or vexatious, or in the case of a reprisal, the Director determines the reprisal was not referred to a safety and health officer within the prescribed 6 month limitation period under section 42.1(1.1).

Accident and injury notices are mandatory and strictly enforced. Where any person is killed or seriously injured at a workplace, the employer must notify the Workplace Safety and Health Branch (WSH) immediately and must internally investigate the incident and provide a written report of the accident. The report must be carried out jointly by a committee member or worker who represents the employer and a WSH committee co-chair (or their designates) who represents the employees. The purpose of this investigation is to assist in determining the cause(s) of the incident so that measures can be put in place to reduce the changes of similar incidents occurring. Different notice obligations apply to other accidents and to occurrences of occupational illness.

Except for federal works or undertakings, labour law in Canada is a matter of provincial jurisdiction. This is not the case, however, with criminal law that is within the domain of the federal Parliament. Federal Bill C-45, *An Act to Amend the Criminal Code of Canada*, S.C. 2003, c. 21 came into force effective March 31, 2004. It imposes criminal liability where an organization or individual fails to take reasonable steps to prevent workplace accidents. Section 3 of Bill C-45 provides that everyone who undertakes, or has the authority, to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task.

To prove that an individual or organization has been criminally negligent under Bill C-45, the Crown prosecutor is required to establish, beyond a reasonable doubt, that the individual or organization breached its duty to take reasonable steps to prevent workplace accidents. Once fault has been established, the accused can escape liability by establishing that it took all precautions reasonable in the circumstances to prevent the accident or injury in question.

Bill C-45 does not, in any way, oust the jurisdiction of federal or provincial labour ministries to bring quasi-criminal charges against an employer under health and safety legislation. Although it is possible that proceedings could be brought under both the *Criminal Code* and health and safety legislation in connection with the same triggering event, *Criminal Code* prosecutions will likely be reserved for the most egregious conduct.

B. Regulatory Requirements

i. Health and Safety Committee

Under s. 40 of the *WSHA,* all employers must establish a workplace safety and health committee if they have at least 20 employees or for any specific workplace or class of workplaces specified by the director. There are certain specific exceptions for some construction worksites. A workplace safety and health committee must be made up of between 4 and 12 persons and at least half must be non-management employees. A committee should have two chairpersons, one employer chairperson and an employee chairperson.

For any workplace where a committee is not required but at least 5 employees are regularly employed, a non-managerial employee must be designated as the worker safety and health representative (s. 41 of the *WSHA*). Such a representative is also required for any construction project (notwithstanding requirements for a committee) and at any other workplace designated by the director. The representative shall be appointed in accordance with the constitution of the union, or in the case of a non-unionized workplace, by a vote of the employees. The duties of the representative are the same as those for a committee.

ii. Advisory Council

Bill 17 re-establishes the Advisory Council on Workplace Safety and Health. The council is appointed by the Minister and advises the minister on matters relating to the *WSHA* and its administration.

The council will be made up of 6 to 12 members, 1/3 appointed by the minister after consulting organizations representing workers, 1/3 after consulting organizations representing employers, and 1/3 after consulting with technical and professional bodies. The council would meet at the call of the Minister, or at least once per year. They would advise and make recommendations to the Minister on workplace health and safety matters generally, recommend consultants and advisors to be appointed by the Minister, and advise on any matter relating to workplace health and safety that the Minister seeks council's opinion on. Every five years, the council will review this Act and its administration and provide a report and recommendations, if any, to the Minister.

As of July 26, 2024, Bill 17 passed the First Session and there are no further updates on it.

XIII. Trade Unions – Industrial Relations

A. Overview

i. Favoured/Disfavoured by Government

Manitoba's *LRA* (like similar legislation throughout Canada) provides protections for unions and employees attempting to unionize. The preamble to the *LRA* has for decades stated expressly "it is in the public interest of the Province of Manitoba to further harmonious relations between employers and employees by encouraging the practice

and procedure of collective bargaining between employers and unions as the freely designated representatives of employees". That said, the statute has undergone many changes impacting the extent by which it facilitates or supports unionization, based on the ideology of the political party in power at any given time.

ii. Prevalence of Trade Unions

Roughly 34.2% of employees are unionized in Manitoba.

iii. Special Requirements

There are no special requirements for employees to unionize, nor on unions in general, in Manitoba.

iv. Challenges for a Unionized Business

Any conduct on the part of an employer that interferes with the right of employees to join a trade union or participate in its affairs constitutes an "unfair labour practice." Further examples of unfair labour practices include illegal strikes and lockouts (or threats of that), employer participation in or interference with the formation or administration of a trade union, dismissals or other discriminatory action motivated even in part by anti-union animus, and employer infiltration of a trade union.

Where an unfair labour practice is found, the Board enjoys broad authority to impose various remedial orders.

Board and arbitral orders may be filed in the Manitoba Court of King's Bench and are enforceable as judgments of the Court.

B. Right to Organize/Process of Unionization

Manitoba's *LRA* protects an employee's right to join a union and a trade union's right to organize workers. The *LRA* 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.

To be eligible for membership in a union in the context of a certification application, an employee must be employed in a non-managerial capacity within the bargaining unit proposed by the union. A union cannot solicit membership at an employee's place of work during working hours, but may solicit membership during breaks.

Where there is no certified bargaining agent and no applicable collective agreement, a trade union may apply with written notice to the Board for certification as the bargaining agent. Similarly, a union may apply to displace another trade union during the final 3 months of operation of a collective agreement that has been in force for 3 years or less, and during the 3 months preceding the anniversary date of longer collective agreements.

All working conditions are frozen once the Board serves an application for certification upon the employer. During this period, an employer cannot alter wage rates, terms of employment or any other employment privilege, or otherwise not operate "business as usual". The freeze remains in effect until the union's application for certification is dismissed, the union is certified and gives notice of its desire to bargain collectively (at which point a second, virtually identical, "statutory freeze" commences) or when the right to strike or lockout crystallizes (*see* below).

An application for certification must include a written description of the proposed bargaining unit, an estimate of the number of individuals in the unit, a list of union members in the proposed unit, and evidence of their status as union members. An employer must receive a copy of an application (without the list or membership evidence) before it is filed. Any response from the employer must be made within the time limits set by the Board. Should an employer object to a proposed unit, it must include in its response an alternative bargaining unit. The appropriate unit, however, is determined by the Board.

If at least 40% of the employees in the unit wish to have the union represent them as their bargaining agent, the Board is required to conduct a vote by secret ballot of the employees, where a simple majority of those who vote determine whether or not the application is successful. In the case of a displacement application, at least 45% of the employees in the unit must wish to have the union represent them as their bargaining agent for a vote to be conducted. Again, a simple majority of those who vote determine whether or not the application is successful.

In May 6, 2024, Bill 37 – The Budget Implementation and Tax Statutes Amendment Act, 2024, was introduced. Schedule D of the Bill would prohibit the use of replacement workers during a legal strike or lockout. This Bill proposes automatic certification of a bargaining unit if a simple majority (50% plus one) signed membership cards with the Manitoba Labour Board. Currently, there is no ability under the *LRA* for a union to become automatically certified without a secret ballot vote being conducted. Representation votes by secret ballot on certification will be limited to "at least 40% but 50% or fewer" support levels.

The Bill also proposes to repeal current essential services legislation for healthcare, government, child and family services agencies. Furthermore, the Bill expands the definition of essential services to potentially cover any workplace to the extent necessary to:

(a) prevent a threat to the life, health or safety of any person;
(b) maintain the administration of justice, and
(c) prevent a threat of serious environmental damage.

Bargaining rights also may be acquired where the employer voluntarily recognizes the union as the exclusive bargaining agent. The agreement must be in writing signed by the parties and generally is incorporated into a collective agreement.

Once certified, a trade union gives notice to the employer of its desire to negotiate a collective agreement. The union has exclusive authority to bargain collectively on behalf of the employees in the unit. After notice to bargain is given, or the parties have met and bargained, a conciliation officer may be appointed, as outlined by the *LRA* (s. 67).

A strike or lock-out can legally occur after the freeze has expired, or after the collective agreement has expired.

Prior to striking, a trade union must conduct a vote by secret ballot of employees in the bargaining unit to obtain the mandate to authorize the strike. During a lawful strike or lockout, employers are free to hire replacement employees or to allow willing bargaining unit employees to do the work of the employees on strike or lockout. However, it is an unfair labour practice for an employer to retain the services of professional strikebreakers.

C. Managing a Unionized Workforce

i. Collective Bargaining

Where a first collective agreement has not been signed and the conciliation process has run its 120 days (or 90 days if the conciliation officer believes further conciliation would be futile), either party may apply for first collective agreement arbitration.

Once the Board decides the first collective agreement will be settled by arbitration, no strike or lockout can occur. If either is in progress, it must be terminated, and striking or locked-out employees must be reinstated.

A proposed collective agreement or memorandum of settlement has no effect until ratified. There are some exceptions, for example, where the collective agreement is imposed by the Board or is settled by arbitration. Ratification occurs if more than 50% of the bargaining unit members vote, by secret ballot, in favour of the agreement.

Every collective agreement is deemed to provide that there will be no strikes or lockouts as long as the agreement continues to operate. Additionally, every collective agreement must provide for final and binding settlement by arbitration of differences arising from the interpretation, application, administration, or alleged violation of collective agreement. A collective agreement cannot discriminate on prohibited grounds.

Every collective agreement must 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. Exceptions may be granted to employees on religious grounds, in which case their dues are diverted to a charity approved by the Board after consulting with the union.

Where a collective agreement does not specify a term, it is deemed to operate for 1 year. There is no maximum term.

During the term of operation, a collective agreement can be revised by mutual consent.

A union may apply to displace another trade union during the 3 months before the final 3 months of operation of a collective agreement, and during the 3 months preceding the anniversary date of collective agreements longer 18 months' duration. These timelines also apply to applications to cancel a union's status as bargaining agent. Subject to the restrictions in the *LRA*, termination applications may also be made by employees during such times.

Upon application of the employer or any employee in a bargaining unit, the Board may declare that a trade union no longer represents the employees in the bargaining unit if:

- One year has elapsed since certification and there is no collective agreement;
- The union failed to give notice of its desire to bargain within 60 days of its certification; or
- The union failed to bargain within 1 year of giving notice of its desire to do so.

Generally, when an employer sells, leases, or otherwise disposes of a business, the union's rights follow the business to the "successor" employer. An employer that purchases all or part of a business is bound by the collective agreement as if it was a party to it, and inherits any incumbent unions' bargaining rights. Upon application, the Board may terminate the bargaining rights of a trade union if the purchaser has substantially changed the character of the business.

ii. Dispute Resolution

All collective agreements in Manitoba must have an arbitration or final determination clause, failing which, one is deemed to be included in the collective agreement.

Board and arbitral orders may be filed in the Manitoba Court of King's Bench and are enforceable as judgments of the Court.

iii. Impact on Management Rights

The collective agreement puts limitations on the rights of the employer in the workplace. Previously, any management rights that were not expressly limited by the collective agreement were deemed to remain in the sole discretion of the employer. Recent arbitral decisions have pulled back on these residual rights and now a more holistic approach exists where the reasonable expectations of the parties and fairness must be considered.

XIV. Immigration/Labour Migration

A. Overview Business Immigration Policy

Business immigrants are chosen based on their ability to become economically established and support the development of the Canadian economy. There are two classes, start-up visa and self-employed. The start-up visa requires a commitment of support from a designated Canadian venture capital fund, business incubator or angel

investor group. Further, ability to communicate in either of Canada's official languages and adequate funds to settle and provide for the cost of living prior to earning an income. Self-employed requires either experience that will make significant contribution of cultural or athletic life in Canada OR experience in farm management with intention and ability to purchase and manage a farm in Canada.

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

Pursuant to s. 186(a) of the *Immigration and Refugee Protection Regulations* there is no requirement for business visitors to obtain a work permit as long as a business visitor to Canada meets the meaning of section 187.

To qualify as a business visitor you must show that:

- you plan to stay for less than 6 months;
- you don't plan to enter the Canadian labour market;
- your main place of business and source of income and profits is outside Canada;
- you have documents that support your application;
- you meet Canada's basic entry requirements, because you:
    - have a valid travel document, such as a passport;
    - have enough money for your stay and to return home;
    - plan to leave Canada at the end of your visit; and
    - are not a criminal, security or health risk to Canadians.

A business visitor requires either a visitor visa or an Electronic Travel Authorization to enter Canada.

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

A work permit is not required if you will only work for up to 15 consecutive days once every six months or up to 30 consecutive days once a year. In those situations, a temporary resident visa or electronic travel authorization would be required. In other situations, a work permit is required.

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

A Temporary Resident Visa or an Electronic Travel Authorization is required, depending on the individual situation. Please also note that a work permit is required.

i. Labour Market Impact Assessment (LMIA)

LMIA is a document that an employer in Canada may need to obtain before hiring a foreign worker. It evaluates the impact of hiring a foreign worker on the Canadian labour market. A positive LMIA indicates the need for a foreign worker for the job. Some jobs are

exempt from the LMIA requirement, such as intra-company transferees, individuals under international agreements, and those under federal programs such as the International Mobility Program. While some provinces do not mandate an LMIA, in Manitoba, employers must obtain a positive LMIA to hire temporary or foreign workers, unless the job falls under one of the specified exceptions.

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

The Start-Up Visa or Self-Employed Persons programs set out above can be an option if the requirements are met.

Manitoba also has a Provincial Nominee Program ("PNP") For the PNP, a minimum net worth of CAD $500,000 is required, and there is a minimum investment of CAD $250,000 in the Manitoba capital region, or CAD $150,000 outside of the Manitoba capital region. The business must also be eligible and create or maintain at least one job for a Canadian or permanent resident. Further, business ownership and management experience must be shown in at least 3 of the past 5 years.

F. Permanent residency based on employment

Permanent residency may be obtained through employment in Manitoba, where workers may be eligible to apply through various provincial programs. These programs are designed to attract workers who can contribute to the local economy and meet the labour market needs. A temporary foreign worker is not a permanent resident.

The PNP offers three streams, with their respective pathways, through which a worker can immigrate to Manitoba and become a permanent resident of Canada:

- Skilled worker
- Business Investor
- International Education

Additionally, through Immigration, Refugees and Citizenship Canada, the federal government offers a number of options for workers looking to immigrate to Manitoba.

All applications for permanent residency can be made online.

G. Citizenship for foreign nationals

To become a Canadian citizen a person must be a permanent resident, live in Canada for 3 of the last 5 years, file their taxes (if necessary), pass a test on rights, responsibilities and knowledge of Canada, prove their language skills in either official Canadian language, those being English and French, and take the oath of citizenship.

H. Compliance concerns for employers of foreign nationals

It is important to ensure employees maintain their visas and work permits, extending or renewing them when required. Failure to do so will result in an employee losing their status. Applications to extend a visa must be made in writing at least one month prior to status expiration. Applications to extend work permits must be made prior to the expiration of the work permit.

I. Regional, Federal, or State/Province Specific Immigration or Compliance Issues

Manitoba has its own PNP program as set out above.

XV. Additional Information

Contact Information

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