Global Employer Handbook Chapter
New Brunswick

INTRODUCTION

Canada has 10 provinces and three territories. New Brunswick is one of the four Atlantic provinces (New Brunswick, Nova Scotia, PEI, and Newfoundland and Labrador) New Brunswick is also part of an area known as the Maritimes (which comprises: Nova Scotia, PEI, and New Brunswick).

New Brunswick is approximately 72,000 square kilometres. New Brunswick shares a border with the province of Quebec to the west and the province Nova Scotia to the east. New Brunswick also has an international border with Maine, a state of the United States of America, and coastline to the south on the Bay of Fundy and to the northeast on the Gulf of Saint Lawrence. There are various islands off its coast, the largest of which is Grand Manan, which is in the Bay of Fundy and reachable by ferry from the city of Saint John.

New Brunswick has 10 federal parliamentary seats and is represented in the Senate by 10 senators. There are 49 seats and the provincial government is called the Legislative Assembly of New Brunswick (Assemblée Législative du Nouveau-Brunswick). The Lieutenant Governor, appointed to represent the Queen, is at the head of the provincial government. In practice however, the role of the Lieutenant Governor is primarily symbolic, and the government is headed by the Premier.There are also municipal governments and town councils which govern local life in New Brunswick's cities and rural areas.

New Brunswick has approximately 800,000 inhabitants. The provincial capital is Fredericton, which along with Saint John and Moncton, are the provinces three primary urban centres. Moncton serves as the provinces' economic hub and Saint John is also quite industrial and has the largest port in the Maritimes. Fredericton, Saint John and Moncton have populations of 58,000, 68,000 and 72,000 respectively. Other urban centres are Bathurst, Edmundston, and Campbellton. Several communities banded together to create the City of Miramichi in 1995, which has a population of just under 20,000. The province has been among the quickest growing in Canada since 2019 (per capita).

New Brunswick is Canada's only officially bilingual province. About one third of the population speaks French as a first language. Its historical French population were predominantly Acadians. The Courts operate in both French and English. New Brunswick has 15 First Nation communities, and is the traditional and unceded territory of the Maliseet, Mi'Kmaq and Passamaquoddy nations.

There are four universities and four public college in New Brunswick. The University of New Brunswick is the largest by far, and Mount Allison University is consistently ranked as the best undergraduate institution in the country by MacLean's Magazine.

New Brunswick's largest industries are mining, forestry and agriculture. Some of New Brunswick's largest industries are:

- Agriculture
- Aquaculture Fishing
- Retail and wholesale trade
- Manufacturing
- Forestry
- Construction
- Accommodation and food services

New Brunswick has also recently become a hub for start ups in the tech sector.

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 eligible residents, and this card must be shown when accessing medical services. The federal government provides temporary health insurance for certain refugees, protected persons, and refugee claimants until they are eligible for provincial health insurance.

NEW BRUNSWICK LABOUR AND EMPLOYMENT LAW

Employment relationships in New Brunswick are governed by legislation and common law. If the workplace is unionized, the employment relationship is also governed by a collective agreement.

Generally, Canadian provinces have jurisdiction over labour and employment law. Therefore, most employment-related cases are heard before provincial courts, boards, or tribunals (e.g., the Court of Queen's Bench of New Brunswick, The Court of Appeal of New Brunswick, and the New Brunswick Labour and Employment Board). The federal government retains jurisdiction in circumstances including specific works and undertakings within exclusive federal jurisdiction (e.g. shipping, air transportation, and banking, among others). Employers operating within federal jurisdiction are subject to federal legislation and will have matters heard before the Federal Court of Canada or the Canada Industrial Relations Board.

I. HIRING

A. Basics of Entering an Employment Relationship

The rules governing employment relationships arise from both the common law and from legislation (statutes and regulations). These sources of law guide how terms of the

employment contracts and, in unionized workplaces, provisions of the collective agreements, can be negotiated, applied and interpreted. The application of these rules depends on a variety of factors.

- At Will Vs. Just Cause

Employment relationships in Canada are not "at will". Except for fixed-term employment contracts, the presumption is that an employer and an employee intend the employment contract to remain in force indefinitely until it is ended either with reasonable notice or with just cause. 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. (Please see section V.B Justification for Dismissal for more information).

- Common Law Claims

The employment relationship is regulated by rules derived from case law, jurisprudence, and other precedents. That body of law is referred to as the "common law". The common law includes a range of rules and concepts that both predate the Canadian legal system, as well as more recent statements and iterations articulated or refined by the courts and administrative boards and tribunals.

Common law is constantly changing. As new cases and decisions are released, they become part of the common law. Those new cases and decisions can result in significant changes to existing legal rules, or they may serve to reaffirm existing rules. Trends in certain decisions, or decisions from higher courts such as the Supreme Court of Canada, play a significant role in articulating this body of law. It is important to note-up or research the law when applying common law rules. This ensures that the common law rules as applied are accurate and reflect current legal principles.

- Statutory Claims

A significant number of rules regarding employment in New Brunswick are outlined in the *Employment Standards Act*, SNB 1982, c E-7.2 (the "*Employment Standards Act*"). The *Employment Standards Act* generally applies to all employees, however certain types of employees are excluded. Those exclusions are listed in the *General Regulation - Employment Standards Act,* NB Reg 85-179 (the "*General Regulation*"). Because of those exclusions, some groups of employees are removed from specific provisions in the *Employment Standards Act* regarding, for example, public holidays.

The *Employment Standards Act* establishes the minimum standards for employment in New Brunswick, such as the rules relating to hours of work, vacation, public holidays, wages, and leaves of absence. While an employer can provide an employee with rights that are greater than the minimums articulated in the *Employment Standards Act*, they are not entitled to impose anything that falls below those minimums. If an employment contract purports to give an employee rights that are less than those articulated in the *Employment Standards Act*, then those provisions of the contract will be declared void as against public policy.

Depending on the circumstances, there is common law to suggest that attempting to provide less than those articulated minimums could result in the entire contract being declared void.

In addition to the *Employment Standards Act*, there are other provincial laws that are relevant to the employment relationship, including: the *Industrial Relations Act,* RSNB 1973 c I-4 (the "*Industrial Relations Act*"), the *Pension Benefits Act,* SNB 1987, c P-5.1, the *Human Rights Act,* RSNB 2011, c 171 (the "*Human Rights Act*"), the *Occupational Health and Safety Act,* SNB 1983, c O-0.2 (the "*Occupational Health and Safety Act*"), the *Workers' Compensation Act,* RSNB 1973, c W-13 (the "*Workers' Compensation Act*") and the *Workplace Health, Safety and Compensation Commission Act,* SNB 1994, c W-14 (the "*Workplace Health, Safety and Compensation Commission Act*"). Employers are also subject to the regulations accompanying these Acts. The relevance of these laws will be addressed in more detail below.

Depending on the industry in which the employer operates, there may be additional legislation that the employer is subject to which is specific to that industry.

B. Discrimination (in the Hiring Process)

The *Human Rights Act* prohibits discrimination in the employment context, including the hiring process. Allegations of discrimination can arise because of the hiring process in several ways. One common source of such allegations relates to the language used in employment applications. Unsuccessful candidates for employment may, for example, argue that they were discriminated against because certain requirements were listed in an employment application or questions were asked in an application or interview regarding a protected ground.

Employers should be wary of including requirements or questions regarding any of the enumerated protected grounds of discrimination in employment advertisements, applications, or interviews. Such requirements or questions should only be included if they relate to a bona fide occupational requirement ("BFOR"). An employer bears the onus of establishing the BFOR on a balance of probabilities by demonstrating that the standard, factor, requirement, or rule:

- was adopted for a purpose or goal that is rationally connected to performing the job;
- was adopted in good faith, in the belief that it is necessary to fulfill a legitimate work-related purpose; and
- is reasonably necessary to accomplish the work-related purpose.

To show that the standard, factor, requirement, or rule is reasonably necessary, the employer must show that is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing *undue hardship* upon the employer.

Discrimination will be discussed in more detail in Section IV. Discrimination & Harassment below.

C. Employment Applications

- Permissible Inquiries

The *Human Rights Act* prohibits an employer from using or circulating an application for employment or making a written or oral inquiry in connection with employment that expresses either directly or indirectly a limitation, specification, or preference or an intention to dismiss from employment, refuse to employ, or discriminate against a potential employee based on a protected ground. The *Act* also prohibits an employer from using an employment agency that discriminates against persons seeking employment based on protected grounds in the hiring or recruitment process.

Employers should take special care in the interview and throughout the hiring process that they are not asking questions of the candidates meant to discover information about a candidate that is related to a prohibited ground of discrimination. For example, making conversation about how many children the candidate has, their age, or if they attend religious ceremonies may seem like small talk. However, if the candidate is not selected, they may claim that your reason for asking was discriminatory based on sex, family status, age or religion.

Beyond the prohibitions listed above, there are no statutory or common law rules regarding how an employer is required to hire an employee in a non-unionized workplace. In unionized workplaces, collective agreements may contain provisions that are relevant to the hiring process. For example, a collective agreement could state that an employer is required to fill new positions within a bargaining unit based on seniority. Employers should therefore review any applicable collective agreements and take the appropriate steps before hiring an employee.

D. Use of Employment Contracts

The hiring process and creation of the employment relationship are governed generally by common law contract principles. As with any contract, the fundamental requirements for creating the employment relationship are offer, acceptance, and consideration. An employment contract is not concluded until there is an offer of employment made by an employer, a corresponding acceptance of that offer made by the employee, and a mutual exchange of consideration, which is typically payment of a salary by the employer in exchange for the employee performing work.

Parties to all employment relationships have an employment contract with one another whether written or not. Employment contracts can be oral or implied, and do not need to be in writing to exist. However, if there is a dispute, it may be nearly impossible to ascertain the terms of the contract unless they are reduced to writing, and so employers should not be rely on oral contracts alone.

To avoid uncertainty and minimize the employer's exposure to risk, it is recommended that employers prepare written employment agreements that are specific to the employment relationship to be created. A written agreement is an opportunity to clearly establish the terms and conditions of employment, such as the employee's position, job duties, hours of work, remuneration, and performance expectations. A written employment agreement also

provides the employer with an opportunity to protect its interests and minimize its liability if the employment relationship comes to an end. Depending on the nature of the employment position, the agreement can include restrictive covenants that limit an employee's ability to compete with the employer or solicit the employer's clients or employees away from the employer's business. Confidentiality clauses serve to protect the unauthorized use or distribution of the employer's proprietary information following termination of the employee. Perhaps the greatest value to an employer from having a properly drafted employment contract in writing is the ability to limit an employee's entitlement to notice or pay in lieu of notice upon termination without cause. Without this, termination can have uncertain and expensive implications for an employer, as it is up to the common law and a court to determine the appropriate notice entitlement for a without cause termination.

When preparing a written employment agreement, employers must remember that the agreement will be subject to both the common law and any applicable legislation. Any employment agreement must at the very least comply with any minimum standards articulated in legislation, such as the *Employment Standards Act*. Written employment agreements will be interpreted strictly by the courts, and any uncertainty will be interpreted against the party who drafted the agreement. Written agreements are generally upheld as enforceable unless it is established that, for example, an agreement does not comply with legislated minimum standards, that it was signed under duress or without adequate consideration, or that it is unconscionable.

- Mandatory arbitration clauses

Every collective agreement shall provide for the final and binding settlement by arbitration or otherwise, without stoppage of work, of all differences between the parties to, or persons bound by, the agreement or on whose behalf it was entered into, concerning its interpretation, application, administration or an alleged violation of the agreement, including any question as to whether a matter is arbitrable. If a collective agreement does not contain such a provision, there is wording in the *Industrial Relations Act* that is deemed to be contained in the agreement.

- Non-Disclosure Agreements/Non-Competes

A written employment agreement provides the employer with an opportunity to protect its interests and minimize its liability if the employment relationship comes to an end. Depending on the nature of the employment position, the agreement can include restrictive covenants that limit an employee's ability to compete with the employer or solicit the employer's clients or employees away from the employer's business. Public policy discourages restraint of trade generally, so courts generally refuse to enforce these clauses unless they protect a legitimate interest of the employer. The Employer should use clear language and only include what is necessary.

Confidentiality clauses serve to protect the unauthorized use or distribution of the employer's proprietary information following termination of the employee and are generally upheld.

E. Advertising/Recruitment

The *Human Rights Act* prohibits an employer from publishing any advertisement in connection with an employment opportunity or prospective employment that is based on a discriminatory ground. Increasingly, there have been challenges to whether the method of advertising is discriminatory in that it would target certain groups but not other groups who can be differentiated on prohibited grounds.
There are no other legislative requirements that govern how employers must advertise for positions.

In unionized workplaces, there are sometimes provisions in the collective agreement that govern how employment positions must be advertised.

F. Background Checks/ Employment References

Employers often perform background checks as part of the hiring process. There are no legislative or common law prohibitions on background checks in New Brunswick, however, employers should be aware that not all employers may be willing to provide references for former employees.

There is case law and jurisprudence from other jurisdictions in Canada which establishes that background checks, particularly financial and/or criminal background checks, should only be used when they are "reasonably" required for establishing an employment relationship. What is "reasonable" depends on the circumstances of the employment position. Employers should exercise caution in the collection and use of personal information, and ensure appropriate measures are in place to maintain confidentiality and respect employees' privacy. Breaches of an employee or applicant's privacy may result in that person bringing an action against an employer, including commencing a claim for damages.

II. COMPENSATION

The following provides an overview of the various rights conferred upon employees in New Brunswick concerning their entitlement to compensation, periods of rest, and other benefits.

A. Minimum Wage

Minimum wage rates are established by regulation under the *Employment Standards Act* and *Minimum Wage Regulation*. These rates are subject to change from time to time and vary according to specific regulated occupations. As of April 1, 2024, the minimum wage is $15.30 per hour. Any new increases in the minimum wage will be evaluated April 1st of each succeeding year.

Employers must pay their employees at least one and one-half times the minimum wage for each hour they work in excess of 44 hours during a work week.

There is a minimum number of hours that an employer must pay an employee who has been asked by the employer to report for work. This is known as the minimum reporting wage. The employer must pay the eligible employee the greater of three hours pay at the minimum wage or the minimum overtime rate for those hours, or the hours worked by the employee at their regular wage rate.

Where an employment situation is covered by a collective agreement, the provisions of the *Employment Standards Act* relating to the minimum reporting wage do not apply. In this case, employers must follow the salary/wage schedule in the Collective Agreement.

B. Wage Payments & Deductions

The *Employment Standards Act* requires employers to pay their employees at intervals that are not more than 16 days apart, unless such payments are otherwise made in accordance with the terms of a practice existing at the time this section of the *Employment Standards Act* came into force, under the terms of a collective agreement, or in accordance with the provisions of an order of the Director with respect thereto granted on application.

On each payday, the employer must pay employees all wages earned in the preceding pay period and provide each employee with a written wage statement showing the dates of the pay period, the gross pay of the employee for the pay period, the particulars of each deduction and the amount thereof, and the net pay after deductions have been made.

Most employers establish pay periods of one week or two weeks. Employers must arrange for payment either by cash, cheque, money order, or direct deposit to an account of the employee's choice.

Typical deductions made by employers from an employee's earnings include: (a) deductions required by provincial or federal legislation; (b) amounts ordered to be deducted or withheld by an order of a court; (c) an overpayment of wages; (d) deductions related to a group benefit plan that the employee participates in; or (e) savings plan deductions requested by the employee.

C. Minimum Age/Child Labour

The *Employment Standards Act* has rules about when children may be employed in New Brunswick. These rules do not apply to people who are 16 years and older. The law generally divides children into two groups: those under 14 and those under 16.

The *Employment Standards Act* establishes that it is against the law to pay wages to a child under the age of 16 to do work that is:

- Likely to be unwholesome or harmful to the child's health, welfare, or moral or physical development;
- For more than six hours in any day;

- For more than three hours on any school day;
- On any day for a period which, when added to the time required for attendance at school on that day, would require the child to spend more than a total of eight hours attending school and working; or
- Between the hours of 10pm of any day and 6am of the following day.

Due to safety concerns, it is against the law to employ a child under the age of 14 to do work in:

- Any industrial undertaking;
- The forest industry;
- The construction industry;
- A garage or automotive service station;
- A hotel or restaurant;
- A theatre, dance hall, or shooting gallery; or
- The position of an elevator operator.

The *Employment Standards Act* provides that the Director of Employment Standards may, on application, issue a permit allowing the employment of a child where the Director is satisfied on reasonable grounds that the employment of the child will not:

- Be unwholesome, harmful to the child's health, welfare, moral or physical development;
- Be in violation of the *Occupational Health and Safety Act*;
- Negatively affect the child's attendance at school or capacity to benefit from instruction at school; or
- Be permitted without the written consent of the parent or guardian.

D. Overtime Requirements

The *Employment Standards Act* and *Minimum Wage Regulation* provides that, after 44 hours of work, an employee is entitled to overtime compensation.

Employers have the right to require their employees to work overtime hours. However, employers must compensate employees for all overtime hours worked by at least the minimum wage overtime rate or their regular hourly rate, whichever is greater. Banking of hours is not permitted. Where an employee works on a public holiday, the hours worked on

the public holiday are not taken into consideration in calculating any overtime pay to which the employee is entitled for the week in which the public holiday occurred.

E. Workday/Workweek/Work hours

There is no limit on the number of hours an employee may work during any daily, weekly, or monthly period in New Brunswick. However, under the *Employment Standards Act* employers are required to provide each employee with a rest period of at least 24 consecutive hours in every seven-day period and, wherever possible, to provide that rest period on a Sunday.

Exceptions include situations where, in the opinion of the Director of Employment Standards, the employee is required to work in an emergency, or the employee usually is not employed for more than three hours in one day. If the Director approves, the rest period can be accumulated and taken later, either in smaller parts at different times or all at once.

Under the *Days of Rest Act*, SNB 1985, c D-4.2, employees who work in certain retail businesses may be able to refuse to work on a Sunday. If the retail business is exempt from the Days of Rest Act, an employee may still be able to refuse to work on a Sunday under a by-law made, or permit issued, under the *Municipalities Act*, RSNB 1973, c M-22. If an employee qualifies and wishes to refuse to work on a Sunday, he or she must give the employer verbal or written notice of the refusal at least 14 days before any Sunday for which the employee refuses to work. An employee may, at one time, give at least 14 days' notice in relation to one Sunday, more than one Sunday, all Sundays, or any combination of Sundays. An employer cannot dismiss, suspend, lay off, penalize, discipline, or discriminate against an employee for refusing or attempting to refuse to work on a Sunday if the employee is permitted to do so.
An employer has a general duty to provide a safe workplace for its employees, and requiring hours of work that may create an unsafe workplace may attract scrutiny under the New Brunswick *Occupational Health and Safety Act*.

Employers operating in unionized environments should consult the applicable collective agreement to determine any restrictions in place regarding the scheduling of hours of work.

F. Benefits/Health Insurance

There is no statutory requirement for an employer in New Brunswick to provide health insurance to their employees. Employers may opt to provide health, dental, and/or vision insurance benefits to their employees, but there is no legal obligation to do so.

Employers in New Brunswick, subject to a few exceptions, are generally required to participate in the workers' compensation statutory insurance scheme set out in the *Workers' Compensation Act*. See Section X Employee Injuries and Workers Compensation for further information on Workers' Compensation.

III. TIME OFF/LEAVES OF ABSENCE

A. Paid Time Off

The *Employment Standards Act* provides for several leaves of absence. Some are paid and some are unpaid.

Employees must give their employers written notice of their intention to take a leave as soon as possible. If possible, the information to be provided to the employer includes the anticipated commencement date and duration of the leave. The employer may require the employee to provide evidence that is reasonable in the circumstances of the employee's entitlement to the leave.

For all leaves of absence protected under the *Employment Standards Act*, an employee may not be dismissed from their job while on a leave of absence for any reason arising from, or due to, the leave. An employee continues to accumulate seniority during a leave of absence therefore, the employee's employment status is not affected. When an employee completes a leave of absence, the employee must be allowed to return to the job he held immediately before taking the leave or to a comparable job with no decrease in benefits or pay.

- *Vacation Pay*

Employers are required to give all their employees an annual vacation leave with vacation pay dependent on each individual employee's years of service.

An employee who has less than eight years of employment with the employer is entitled to a vacation leave of the lesser of the following two options: (a) at least one day for each month worked; or (b) at least two weeks of vacation per vacation year. An employee who has more than eight years of employment with the employer is entitled to a vacation leave for the lesser of the following two options: (a) at least one and one-quarter day for each month worked, or (b) at least three weeks of vacation per vacation year. The vacation must be provided not later than four months after the vacation pay year ends. The *Employment Standards Act* defines vacation pay year as the period from the first day of July to the last date of June in the following year.

An employee who has less than eight years of employment with employer is entitled to receive a vacation pay equal to four percent of his gross wages (before deductions). An employee who has eight or more years of employment with the employer is entitled to receive a vacation pay equal to six percent of his gross wages (before deductions). In both cases, the employee must receive all his or her accumulated vacation pay at least one day before his or her vacation begins.

An employee is entitled to take vacation after completing one year of service with the same employer. Employers and their employees can agree on when vacation should be taken. If an agreement cannot be reached, the employer can decide when the employee's vacation will begin as long as the employer provides the employee at least one week notice prior to the vacation start date.

An employee who is terminated or quits before taking vacation time is entitled to receive all outstanding vacation pay when the employment ends. Payment must be made when the employee receives his or her final pay cheque.

An employee in New Brunswick is not entitled to a vacation or public holiday with pay under the *Employment Standards Act* if he or she receives these benefits under a collective agreement or contract of employment and, together, they equal or exceed the combined vacation and public holiday benefits provided by the *Act*. Payment of four percent of wages is considered equivalent to the public holiday benefits under the *Act*.

- *Sick Leave Pay*

In New Brunswick, employers are not required to provide employees with paid sick leave. However, employees who have worked for an employer for more than 90 days are entitled to a leave of absence without pay of up to five days during a 12-month period.

If an employee requests a leave of absence that is four or more consecutive calendar days in length, the employer may require the employee to provide a certificate from a medical practitioner, nurse practitioner, or midwife certifying that the employee is incapable of working due to illness or injury.

It is also important to ensure compliance with the *Human Rights Act* in addressing sick leave.

- *Holiday Pay*

The *Employment Standards Act* provides that employees in New Brunswick are entitled to time off with pay for each of the following public holidays:

- New Year's Day,
- Family Day,
- Good Friday,
- Canada Day,
- New Brunswick Day (First Monday in August),
- Labour Day,
- Remembrance Day,
- and Christmas Day.

An employee is not entitled to paid public holidays where he or she has been employed for fewer than 90 days during the previous 12 calendar months immediately preceding the public holiday, or if he or she has failed to work the regularly scheduled day of work preceding or following a public holiday. Employees in certain occupations, such as regulated professionals, house and car salespersons, do not qualify to receive pay for a public holiday.

Where a public holiday falls on an employee's working day, the employee and the employer may agree to substitute another working day for the public holiday. This day must be taken not later than the next vacation of the employee, and the day substituted shall be deemed the public holiday.

Where a public holiday falls on a non-working day for an employee, or during his or her vacation period, an employer is required to pay the employee his or her regular wages for

the public holiday, or, with his or her agreement, designate a working day that is not later than the next vacation of the employee, that can be deemed the public holiday. When the employee's wages vary from day to day, the employee shall be paid based on an average day's pay. This calculation takes into account all hours worked before the holiday.

Rather than paying the employee a regular day's pay when the employee qualifies for a paid public holiday, the employer has the option of paying the employee an additional four percent of all the employee's gross wages. In addition to paying the four percent of the employee's wages, when the employee works on a paid public holiday, the employer must also pay the employee one and one-half times his regular rate of pay for the hours worked on each holiday.

Employees employed in any "continuous operation", such as a hotel, motel, tourist resort, restaurant, or tavern, who are required to work on a public holiday, must be paid: (a) not less than one and one-half of their regular rate of wages for the time worked and, where the employee is entitled to the holiday with pay, their regular wages in addition thereto; or (b) their regular wages for each hour worked on the public holiday, in addition to being given a paid holiday at their regular rate of pay on the first working day immediately following their next vacation or on a mutually agreed upon future working day.

All employees are entitled to receive one and one-half time their regular wage rate for each hour worked on a paid public holiday. An employee who qualifies and works on the public holiday must receive his or her regular day's pay plus one and one-half times his or her regular wage rate for the hours worked on that day. An employee who qualifies and does not work on the public holiday must receive his or her regular day's pay for that day.

B. Leaves of Absence

Court Leave

Where an employee is summoned or selected to serve on a jury or to act as a witness in a court proceeding, the employer must give the employee a leave of absence without pay for the period of time the employee is absent from work for this purpose.

Leave for Reservists:

In New Brunswick, employees are entitled to a leave of absence without pay for Reservists' military service. Members in all classes of the Canadian Forces reserve force are eligible for a leave of absence without pay in order to perform military service.

Eligible types of military service include deployment to a Canadian Forces operation either inside or outside Canada, required pre-deployment or post-deployment activities, including training and travel time, within and outside of Canada, a period of treatment, recovery, or rehabilitation from a physical and/or mental health problem resulting from these activities, and annual training.

A leave of absence for military service can be up to 30 continuous calendar days for the purpose of annual training, or up to 18 months for purposes other than the annual training.

In the case of a first leave, the employee must have been employed for at least six months. In the case of a second or subsequent leave, at least 12 months must have elapsed since the date the employee returned to work from his or her most recent leave. An employee must give the employer at least four weeks notice in writing before the beginning of the leave.

Domestic Violence Leave/Intimate Partner Violence Leave or Sexual Violence Leave

In New Brunswick employees are entitled to these leaves of absence in accordance with the *Domestic Violence, Intimate Partner Violence or Sexual Violence Leave Regulation* and on the request of the employee if the employee has been in the employ of the employer for more than 90 days. The total of these leaves of absences an employee is entitled to take, in each calendar year, shall not exceed 10 days, which the employee may take intermittently or in one continuous period, and up to 16 weeks in one continuous period.

The purposes for which the leave may be taken are to seek medical attention for the employee or the child of the employee for a physical or psychological injury or disability caused by the domestic violence, intimate partner violence or sexual violence; to obtain victim services for the employee or the child of the employee from a qualified person or organization; to obtain psychological or other counselling from a qualified person for the employee or the child of the employee; to relocate temporarily or permanently; to seek legal or law enforcement assistance, including preparing for or participating in any civil or criminal legal proceeding related to or resulting from the domestic violence, intimate partner violence or sexual violence; and for any other purpose related to or resulting from the domestic violence, intimate partner violence or sexual violence.

The employee is entitled to take the first five days as paid leave and the balance of the employee's entitlement as unpaid leave.

Family Responsibility Leave

In New Brunswick employees are entitled to a leave of absence without pay of up to three days during a 12-calendar-month period for responsibilities related to the health, care, or education of a person in a close family relationship with the employee. An employee intending to take such a leave must advise his or her employer in advance of its anticipated commencement date and its anticipated duration.

A "close family relationship" is defined in the *Employment Standards Act* to mean the relationship between: people who are married to one another; parents and their children; siblings; grandparents and their grandchildren; and Unmarried persons who demonstrate an intention to extend to one another the mutual affection and support normally associated with a married relationship or with those who have a blood relationship.

Compassionate Care Leave:

This provides employees a leave of absence without pay for up to twenty-eight weeks to care for a person in a close family relationship who is critically ill and has a significant risk of dying in twenty-eight weeks.

In order for an employee to qualify for compassionate care leave, the employee must have a written note from a certified medical practitioner stating that a person in a close family relationship has a serious medical condition that carries a significant risk of death within the next twenty-eight weeks and requires care and support.

In addition to these requirements, other conditions apply:

- Should the person in a close family relationship die, the compassionate care leave expires, and bereavement leave may be taken by the employee;
- the leave of absence may be broken up over the twenty-eight-week period, and may only be taken in periods of at least one-week duration;
- the twenty-eight weeks of leave may be shared by two or more employees, but the total leave period taken by the employees may not exceed twenty-eight weeks; and
- there is no length of service requirement for employees to access compassionate care leave.

Bereavement leave

In the event of the death of a person in a close family relationship, an employer must give an employee a leave of absence without pay of up to five consecutive days. Bereavement leave is to begin no later than the day of the funeral.

Critically Ill Child Leave

The *Employment Standards Act* provides critical illness leave for employees who must provide care and support for a critically ill child who is under 18 years old. Employees are entitled to an unpaid leave of up to 37 weeks. To be eligible for the leave, the employee must be a parent or family member of the child. If both parents or family members are employees of the same employer, the leave of absence may be taken wholly by one of the employees or be shared by the employees. The aggregate amount of leave that may be taken by the two employees shall not exceed 37 weeks.

Employees must give their employers written notice of their intention to take critically ill child leave as soon as possible. If possible, the information to be provided to the employer should include the anticipated commencement date of the leave, the anticipated duration of the leave, and a doctor's certificate. If circumstances beyond the employee's control require a change in the duration of the leave, the employee must advise the employer of the change. The leave ends the last day of the week in which either the child dies or at the expiration of the 37 weeks.

Critically Ill Adult Leave

The *Employment Standards Act* provides critical illness leave for employees who are the parent or other family member of a critically ill adult. Employees are entitled to an unpaid leave of up to 16 weeks. To be eligible for the leave, a qualified medical practitioner must issue a certificate that states the adult is critically ill and requires the care and support of one or more of his or her parents or other family members and sets out the period during which the adult requires that care or support. If both parents are employees of the same employer, the leave of absence may be taken wholly by one of the employees or be shared by the employees. The aggregate amount of leave that may be taken by the two employees shall not exceed 37 weeks. The leave ends the last day of the week in which either the adult dies or at the expiration of the 16 weeks.

Death or Disappearance Leave (Child):

The *Employment Standards Act* provides for leave for the death or disappearance of a child. An employee who is the parent of a child under 18 years old who has died as the probable result of a crime is entitled to an unpaid leave of up to 37 weeks.

An employee is not entitled to the leave if they are charged with the crime. If both parents are employees of the same employer, they are both entitled to the leave. Employees may end the leave early by giving the employer written notice before they wish to return to work. The period during which the employee may take the leave begins on the day that the death or disappearance occurs and ends 37 weeks after that day.

In the child is found alive within the leave period, the employee is entitled to continue taking leave for 14 days after the child is found. If the child is found dead or dies as a result of the circumstances of a disappearance, the employee is entitled to take up to 37 weeks of unpaid leave from the day the child is found dead. Where it is no longer probable that a child's death or disappearance is the result of a crime, a leave ends 14 days after that date, unless the employer and employee agree to an earlier return to work.

Emergency Leave

Under the Employment Standards Act, and employer shall grant an employee a leave of absence in any of the following circumstances:

- a state of emergency declared on the Emergency measures Act;
- a public welfare emergency, public order emergency, and international or a war emergency under the Emergencies Act (Canada);
- an order under s. 58 of the Quarantine Act (Canada);
- in any circumstance relation toa notifiable disease prescribed by regulation under the Public Health Act, a notifiable event prescribed by regulation under the Public Health Act, or;
- any other threat to public health.

Disability Leave

Disability leave is not regulated by statute in New Brunswick except in the case of workplace injuries, which are generally covered by the *Workers' Compensation Act*. It is important to ensure compliance with the *Human Rights Act* in addressing disability leave, including accommodating a disability up to the point of undue hardship. In cases of disability, it is also prudent for employers to consider the availability of other leaves discussed in this Section.

Pregnancy Leave/Parental Leave

Any pregnant employee in New Brunswick becomes entitled to maternity leave upon hiring. Maternity leave is up to 17 weeks of unpaid leave and must begin no earlier than 13 weeks before the probable delivery date.

Pregnant employees who wish to take maternity leave must:

a) Advise their employer four months prior to their expected delivery date or as soon as their pregnancy is confirmed, whichever is later; and
b) Provide their employer with a medical doctor's certificate confirming pregnancy and the probable delivery date; or
c) In the absence of an emergency, give their employer two weeks' notice prior to commencing their maternity leave

In turn, employers are required to allow an employee to take a leave of absence without pay for maternity. Employers cannot dismiss, suspend, lay-off or refuse to employ a person because they are pregnant per the *Employment Standards Act.* However, an employer may require a pregnant employee to begin a leave of absence without pay when they can no longer reasonably perform their duties, or the performance of their work is materially affected by their pregnancy. Any employer-imposed leave of absence is in addition to any maternity leave the employee is entitled to per the *Employment Standards Act,* and therefore the maternity leave is not affected by the employer-imposed leave. Of note, an employee's employment status shall not affect an employee's employment status and they shall continue to accumulate seniority.

Childcare Leave:

All parents, natural or adoptive, are entitled to childcare leave. Childcare leave is up to 62 consecutive weeks of unpaid leave. Childcare leave may be shared by parents; however, it must not exceed a total of 62 weeks. Employees seeking to combine maternity leave and childcare leave are entitled to a combined maximum duration of 78 weeks leave. In addition, unless otherwise agreed to by an employer, where maternity leave and childcare leave are taken by the same employee, the leave must be taken consecutively.

Employees seeking to take a childcare leave must:

a) Provide the employer with a medical doctor's certificate specifying the probable date of delivery or the date upon which the birth has occurred; and

b) In the absence of an emergency, give four weeks written notice to the employer of the commencement date and duration of the leave

Adoptive parents seeking childcare leave must:

a) Provide the employer with proof that a child has been or will be placed with the employee for the purpose of adopting
b) Notify the employer of the commencement date and duration of the leave on being made aware of the date of placement with the employee for adoption; and
c) In the absence of an emergency, give four months' notice to the employer before the anticipated date on which a child will come into the employee's care and custody

In turn, employers are required to allow an employee to take a leave of absence without pay. No employee may be dismissed from their position while on a leave of absence for any reason related to the leave. As above, childcare leave shall not affect an employee's employment status and the employee shall continue to accumulate seniority. Further, upon completion of a childcare leave, the employee must be able to return to the job they held immediately before taking the leave or to a comparable job with no decrease in benefits or pay per the *Employment Standards Act.*

IV. DISCRIMINATION & HARASSMENT

A. Discrimination

For more information on the process of investigating and conciliating complaints of discrimination, see Appendix A.

- Protected Classes

Employers may not discriminate based on the protected grounds enumerated in section 2.1 of the *Human Rights Act*. Section 4(1) of the Act states that no person (which includes an employer) shall, based on a prohibited ground of discrimination,

(a) refuse to employ or continue to employ any person, or
(b) discriminate against any person in respect of employment or any term or condition of employment.

The prohibited grounds of discrimination are race, colour, national origin, ancestry, place of origin, creed or religion, age, physical disability, mental disability, marital status, family status, sex, sexual orientation, gender identity or expression, social condition (including source of income, level of education, and occupation), and political belief or activity. Discrimination may be direct, or indirect which means it imposes an adverse effect by excluding, restricting, or preferring some persons because of a protected ground set out in the *Human Rights Act*.

The *Human Rights Act* itself does not define discrimination. The New Brunswick Human Rights Commission (the Commission), the government agency responsible for the

administration of the *Human Rights Act*, defines discrimination as a practice or standard that is not reasonably necessary, that has the effect, intended or not, of putting certain persons or groups at a disadvantage because of shared personal characteristics, and that is based on stereotypes about them or perpetuates the view that they are less capable or less worthy of recognition or value.

The *Human Rights Act* only expressly prohibits sexual harassment, but harassment (including bullying) on all the protected characteristics is implicitly prohibited based on the common law's recognition that harassment is a form of discrimination.

- Protected Activities

Employees in New Brunswick are protected from retaliation by their Employer for making a complaint or for participating in any process under the *Human Rights Act*, the *Employment Standards Act*, the the *Industrial Relations Act*, or the "*Occupational Health and Safety Act*". No employer shall dismiss, suspend, lay off, penalize, discipline or discriminate against a worker because the worker suffered a personal injury by accident in respect of which the worker is, entitled to make application for compensation under the *Workers' Compensation Act* until such time that the Commission has made a decision or the Employer is no longer bound by the requirements of the *Act*.

B. Harassment and Bullying

The New Brunswick *Human Rights Act* protects employees against certain kinds of harassment in and away from the workplace. Harassment occurs when someone is subjected to unwelcome verbal or physical conduct. Harassment is prohibited under the *Human Rights Act* if it is based on a protected ground enumerated in the *Human Rights Act* as discussed in Section IV - Discrimination. It is a violation of the *Human Rights Act* to harass another person in an establishment, such as a workplace, based on a prohibited ground of discrimination.

Workplace sexual harassment is expressly prohibited under the *Human Rights Act*. Sexual harassment means to engage in vexatious comment or conduct of a sexual nature that is known, or ought reasonably to be known, to be unwelcome. An employer may be vicariously liable for the acts of its employees in cases of sexual harassment, unless the employer can demonstrate that it exercised the appropriate diligence under the circumstances to prevent the harassment.

An employer has a general duty to provide a safe workplace for its employees under the New Brunswick *Occupational Health and Safety Act*. A healthy and safe workplace must be free of violence and harassment. Harassment under the *General Regulation - Occupational Health and Safety Act* has a broader scope than harassment under the *Human Rights Act*, and is defined as any objectionable or offensive behaviour that is known or ought reasonably to be known to be unwelcome, including bullying or any other conduct, comment or display made on either a one-time or repeated basis that threatens the health or safety of an employee, and includes sexual harassment, but does not include reasonable conduct of an employer in respect of the management and direction of employees at the place of employment.

Employers are legally responsible for actively discouraging and prohibiting harassment and discrimination in the workplace. New Brunswick has recently introduced regulations on developing Workplace Violence and Harassment Codes of Practice in the *General Regulation - Occupational Health and Safety Act*. Employers are required to develop a written Code of Practice to address harassment in the workplace. Such a Code must include, among other things, a reporting and investigation mechanism, any training requirements and a harassment-free workplace statement. An employer's liability for discrimination and harassment is not strictly limited to conduct which takes place in the workplace or during normal working hours. It can include conduct that takes place offsite or after hours, but which can be shown to be related to or associated with employment in some way.

V. TERMINATION/DISMISSAL ISSUES

A. Overview

An employee's relationship with an employer can end in several ways. In many instances, the end of this relationship will be without incident or protest from either party. For example, where the relationship ends because of the expiry of a fixed term contract, as a result of a retirement, or by agreement.

In contrast, there are certain situations which are more likely to generate dispute between an employer and an employee. Situations where an employer unilaterally chooses to terminate the relationship may, for example, generate a significant amount of controversy. The friction in these situations will typically surround (a) the employer's cause for terminating the employee, and (b) the employee's entitlement to severance or notice. The following section will provide an overview of some of the issues that arise in these more contentious situations.

B. Justification for Dismissal

The distinction between termination with or without cause is of major significance. Notably, it dictates whether an employee is entitled to any termination pay or notice from an employer. An employer may allege termination with "just cause" when the employee has engaged in conduct which effectively amounts to a repudiation of the employment contract. Employers are not required to provide any notice of termination, or pay in lieu of notice, if termination is with "just cause".

The *Employment Standards Act* does not contain an express definition of termination with cause or without cause. Established precedent in common law gives rise to the definition. The assessment of just cause requires a contextual analysis of the circumstances surrounding the conduct. The decision to terminate must be shown to be proportional to the employee's conduct. Just cause generally arises where an employee's conduct is sufficiently harmful or deficient such that there is just cause to terminate the employment relationship. For example, just cause is often established in cases where an employee has engaged in serious misconduct such as theft, assault, or sexual harassment. The employer has the onus of showing that it dismissed an employee for just cause. If there is no repudiation of the

contract by the employee and the employer merely chooses to end the relationship, then the termination will be found to have been without cause.

Employees may be terminated because of performance issues, although it bears noting that performance issues on their own may not be sufficient to establish just cause. Employers are typically required to advise the employee of the performance issue and warn the employee that failure to remedy the performance issue could result in termination. Employers may also implement progressive discipline regimes where the level of sanction imposed on an employee increases because of repeated performance issues.

The *Employment Standards Act* requires the employer who dismisses an employee for cause to set out the reasons for such action in writing. If the employer fails to do this, the dismissal without notice is not valid, even if the cause for such action exists and the employer is liable to pay the employee what he or she would have earned for the statutory notice period.
If an employer condones an employee's inappropriate behavior or fails to discipline the employee, then the employer may be unable to justify a termination for just cause.

A termination will be "wrongful" when an employer has terminated employment "without cause" and has not provided the requisite reasonable notice or alternatively, when an employer has asserted "just cause" but has consequently failed to prove that there was "just cause" on a balance of probabilities.

C. Mandatory Severance Pay

Employers are not required to provide any notice of termination, or pay in lieu of notice, if termination is with "just cause". If an employee is terminated without cause, or if an employer does not believe they could establish that the employee was dismissed for just cause if challenged in court, then the employee is entitled to written notice of termination or pay in lieu of notice. There is no severance payment required by statute in addition to notice (or pay in lieu of notice). However, notice encompasses all regular benefits of employment during that period. Please see Section VI.B. – Mandatory Notice Periods, for more information on minimum notice requirements for "with cause" terminations.

D. Use of Severance Agreements and Releases

- Releases/Waivers

An employer and a departing employee may enter into a separation agreement outlining the terms of the employee's departure. This typically includes a release of all claims, which is generally agreed to when the parties have resolved outstanding issues. These agreements, like any other contract, must include an offer, acceptance, and consideration.

Separation agreements are generally enforceable in New Brunswick provided that the agreement is not signed under duress and is not so unfair as to be considered unconscionable. To be enforceable, employers must ensure that there is consideration given for having the employee sign the agreement and release the employer from future liability.

The consideration must be something in addition to the statutory notice entitlement to which the employee is already entitled to either through statute or his or her employment agreement. Employers should encourage an employee to obtain independent legal advice before signing the agreement to avoid claims that the agreement was signed under duress.

E. Legal Challenges to Dismissal

Employees may challenge that a termination of employment was a wrongful dismissal. This can be a claim that there were insufficient reasons for a with cause termination, that there was insufficient notice provided under the *Employment Standards Act* (see section V.C. – Mandatory Severance Pay), at common-law (see section VI.B – Mandatory Notice Periods) or in the employment contract, that they were owed other damages for breach of contract, or that they were constructively dismissed.

If an employee is entitled to a notice period, the value of the claim is typically the salary that the employee would have received for this period, but for his or her termination. Depending on the nature of the position and the provisions of the employment agreement, a court may find that the damages award should include pay raises, bonuses, overtime pay, benefits (such as medical or disability benefits), stock options, and other compensation that the employee would have been entitled to during the notice period.

The common law also recognizes that employees may claim damages for several other dismissal-related matters. One common claim for damages relates to concerns about the employer's conduct towards the employee. Employers are required to deal fairly and in "good faith" with their employees. If an employer breaches this duty of good faith, the employee may be entitled to damages. An example of a breach of the employer's duty of good faith may include acting in a high-handed manner that is untruthful, misleading or unduly insensitive. Allegations of bad faith typically arise because of the way an employee is terminated. Quantifying damages for breaching the duty of good faith such a claim will depend on several relevant factors, including the nature and severity of the employer's conduct and the impact that conduct had on the employee.

Another claim often advanced by employees involve allegations of discrimination based on a protected ground under the *Human Rights Act*. An employee may argue that he or she was terminated because of a characteristic protected under the *Human Rights Act*. If an employee establishes that the employer engaged in discriminatory conduct, the employee may be entitled to damages. Quantifying damages based on discrimination again depends on the nature and severity of the proven conduct. Employers should be aware that Human Rights Tribunals and Commissions across the country have substantially increased the quantum of damages in recent years to set the tone that discrimination in the workplace will not be tolerated.

Important to determining if an employee is entitled to damages and what the quantum of damages should be is an assessment of the employee's efforts to mitigate his or her damages during the relevant notice period. An employee who is wrongfully terminated has a duty to mitigate any damages resulting from a termination. This includes taking reasonable

efforts to search for and accept reasonable alternative employment. A court may reduce a damage award where the employer brings evidence showing that the employee failed to take sufficient steps to mitigate his or her damages. The employer bears the onus of proving a failure to mitigate.

- Constructive Discharge

Another form of “wrongful termination” arises if an employer changes a fundamental term or condition of an employee's contract without the employee's consent, or without adequate notice. The employee may be deemed to have been “constructively dismissed.” Determining whether an employee was constructively dismissed requires an analysis of the terms of the employment relationship, and several other relevant contextual factors. Certain conduct will often lead to findings of constructive dismissal, including reductions in salary or changes in employment duties such as removal of responsibilities or decision-making authority. Abusive behaviour of the employer that makes working conditions intolerable, or allows for a toxic workplace, can constitute grounds for constructive dismissal, as a fundamental implied term of any employment relationship is that the employee will be treated with civility, decency, respect, and dignity.

If an employee does not object to the "fundamental change" or "constructive dismissal" within a reasonable period, then the employee may be deemed to have acquiesced to the change and could lose the opportunity to claim damages for the alleged constructive dismissal.

- Dispute Resolution Process /Forums

If an employee disagrees with the termination of the employment relationship, there are several avenues of recourse available to the employee which the employer should be aware of. The most common recourse sought by employees is to commence a civil claim in court. Both the New Brunswick Small Claims Court and the Court of Queen’s Bench of New Brunswick have jurisdiction to adjudicate wrongful dismissal claims. The Small Claims Court has the power to hear civil actions where the monetary claim does not exceed $20,000. The Court of Queen’s Bench has jurisdiction over all matters, including those where the damage claim exceeds $20,000, or where other relief, such as an injunction, is sought.

In addition to court proceedings, an employee may bring an application or file a complaint with the Labour and Employment Board of the Department of Post Secondary Education, Trainings and Labour, which is the administrative body responsible for the administration of the *Employment Standards Act* and its regulations. An employee may file a complaint alleging that an employer failed to comply with the *Employment Standards Act*. The Board has the authority to investigate and can issue an order to comply with the *Employment Standards Act*. Complaints regarding discrimination or harassment can be made to the New Brunswick Human Rights’ Commission as described above in Section I.B - Discrimination.

In unionized workplaces governed by a collective agreement, an employee’s options for recourse are based in the grievance process. The grievance process involves a forum where termination-related issues are grieved and if not resolved between the parties, decided before an arbitrator. As the grievance process may vary from one collective agreement to

another, employers operating in unionized workplaces should be familiar with the relevant provisions and requirements of any collective agreement before taking action.

As discussed in Section IV - Discrimination, the *Human Rights Act* protects New Brunswick employees from discrimination in the workplace. Employees may not be discriminated against in the workplace, including during the termination of their employment. If an employee is discriminated against in his or her termination, he or she may advance a complaint under the *Human Rights Act*.

F. Employment References

There is no statutory or common law obligation for an employer to prepare a confirmation of employment letter or to provide an employment reference for a terminated employee. However, refusing to do so may increase the notice period. Courts have recognized that an employer's refusal to provide a reference makes it more difficult for an employee to find alternate employment.

If the employer chooses to provide references, at a minimum, the references should confirm employment and length of service. Further comments should only be provided where the employer conducts a thorough investigation to ensure the accuracy of the contents. Employers should never provide a reference that they are unable to support.

VI. LAYOFFS/WORK FORCE REDUCTIONS/REDUNDANCIES/COLLECTIVE DISMISSALS

G. Overview

This section reviews situations where the employer chooses to end the employment relationship for reasons other than employee misconduct or performance issues. For example, due to lack of work or a sale of the business.

H. Procedure

- Mandatory Notice Periods

The *Employment Standards Act* outlines minimum notice periods for employees based on their years of service with an employer. It requires that employees who are not otherwise covered by a collective agreement or those who fall under an outlined exception, to be given notice of termination, or pay in lieu of notice, as follows:

Length of Service	Amount of Notice
• Six months up to five years	Two weeks
• Five years or more:	Four weeks

An employer is prohibited in a four-week period from terminating or laying off more than 10 employees who represent 25% or more of the total workforce without first giving the Minister of Training & Employment Development, the affected employees, and, where the employees

are covered by a collective agreement, the employees' bargaining agent, at least six weeks' notice of termination or lay off.

If an employee refuses an offer of reasonable alternate employment by the employer as an alternative to being terminated or laid off, the employer may terminate or lay off without notice.

Under the *Employment Standards Act*, employees are not entitled to notice where:

- there is a lack of work, due to any reason unforeseen by the employer at the time notice would otherwise have been given, for such period as the lack of work continues due to that reason;
- the termination is a result of the employee completing a definite assignment that he or she was hired to perform over a period not exceeding 12 months, whether or not the exact period was stated in the employment contract;
- the employee has completed a fixed-term employment contract, unless the employment continues for a period of three months beyond that period;
- the employee retires under a *bona fide* retirement plan;
- the employee is doing construction work in the construction industry;
- the termination or layoff results from the normal seasonal reduction, closure, or suspension of an operation; or
- the termination arises under such circumstances as are prescribed by regulation.

Employers are not required to provide employees with notice where there is just cause for termination. Please see section V – Termination/Dismissal Issues for more information on terminations for cause.

Employees who are terminated without cause may also have common law rights that are separate and distinct from the statutory requirements provided for in the *Employment Standards Act*. An employee will often be entitled to more notice or pay in lieu of notice at common law. Reasonable notice is based on several factors, including: the employee's age, length of service, professional status and experience, seniority and responsibility, salary, and the availability of comparable alternative employment. These factors are not exhaustive, and a Court may also consider other matters which may extend the notice period, such as whether the employee was induced to leave his or her employment, or the current economic climate, which may extend the notice period on that basis.

Some employers elect to include contractual clauses that limit the amount of severance or notice to which an employee is entitled. Any provision that purports to provide an employee with less than the amount of notice required by the *Employment Standards Act* will be invalid and struck down by the Courts. There is case law in some Canadian jurisdictions that

has found the entire agreement, not just the clause or provision in question, will be invalid. Provisions that state that an employee is only entitled to the minimum amount under the *Employment Standards Act* have been subject to a significant amount of scrutiny. In many cases, Canadian courts have found termination clauses of this nature to be invalid or unenforceable on a number of bases and therefore have awarded employees damages representing reasonable notice at common law. Central to many of these cases was the element of uncertainty regarding the notice entitlements and whether the agreements were drafted in such a way that it was clear that the employee was waiving his or her right to common law notice. This concept is evolving. Employers should therefore be cautious and obtain legal advice when including such provisions in employment agreements.

The case law is clear that the common law rules regarding notice apply to situations where an employee has an indefinite term contract. Matters become more complicated where an employment agreement is for a fixed term. In most cases, termination of a fixed term contract before the end of the term will result in the employee being entitled to damages equal to the remaining value of the contract. In some cases, an employee may be able to argue that he or she is entitled to common law reasonable notice at the end of a fixed-term contract. For example, if an employee has worked successive fixed-term contracts, or in the absence of a provision that is explicitly clear that the employee has waived his or her right to common law notice, the employee may successfully argue that severance should be calculated in accordance with the common law, and not based on the term of the contract. Again, it is important for employers to exercise caution when entering employment agreements and to obtain appropriate legal advice.

- Transfer of Undertakings/TUPE

New Brunswick does not have specific Transfer of Undertakings legislation in place, however, employees who work for an organization being sold or transferred to another organization are protected by a combination of statutory and common-law principles.

The courts recognize the realities of modern business life require a recognition of complex intercorporate relationships between companies. There is considerable caselaw around determining what happens to the employment relationship when ownership of an operation changes. Several legal doctrines and principles have evolved to ensure "*that permissible complexity in corporate arrangements does not work an injustice in the realm of employment law…*"

The principal that *personal services cannot be assigned to a new employer without the consent of the parties* (the employee and the new employer), has been applied by the courts in order to prevent solvent parent or related companies from avoiding liability by attempting to transfer it to hollow subsidiaries. Accordingly, the transfer of a business, where it results in the change of the legal identity of the employer, constitutes an effective termination of employment in the form of a constructive dismissal (see section V.E. – Constructive Discharge), and the employee must be given notice and any other rights they are owed under the contract for an early dismissal.

Employers may negotiate that the provision of particular benefits for their employees (substantially similar to those to which they were previously entitled) be included in the contract of sale. This may limit the amount of damages an employee can claim for the constructive dismissal as it limits the actual loss suffered.

If the employee chooses to continue in service of the business the common law will recognize their past service with the seller and be given credit for the purposes of incidents of employment such as salaries, bonuses and notice of termination. This is considered an implied term in the contract of employment with the new employer and it may be negated by an express term to the contrary.

However, the *Employment Standards Act* ensures that where an activity, business, trade or undertaking is disposed of, transferred or sold in any manner or amalgamated, whether by agreement, will, instrument, transfer, including transfer of shares, or by operation of law, the period of employment of an employee of the activity, business, trade or undertaking at the time of such disposition, transfer, sale or amalgamation, shall be deemed to have been a period of employment with the disposee, transferee, purchaser or amalgamation and the continuity of employment shall be deemed to be unbroken. The purpose of this section is to prevent a corporate restructuring with the aim of denying employees the minimum benefits available to them under the Act. These can not be contracted out of.

Other principles that protect employees after transfers tend to broaden the available defendants liable for damages related to employment claims. Among them are the "common employer" doctrine (when more than one organization are found jointly responsible for the same employee) and "piercing the corporate veil" (when the court looks beyond what is written in a contract to the actual reality of the employment relationship). Establishing the identity of the employer is key to determining liability to employees that arises both before and after the transfer. To decide this, the courts are entitled to ask, "In substance, who is his employer?"

- Severance Pay

There are no separate statutory requirements in New Brunswick for severance pay other than the termination notice, or pay in lieu of notice, provisions in the *Employment Standards Act* as noted above.

- Benefits

Employees who work through their notice period are entitled to their full benefit coverage, and employers must make the contributions "as usual" for the duration of the notice period. Employers are not required by statute to maintain benefits for employees who are laid off.
The employer is required to pay all outstanding pay and benefits no later than the time the employee would have been paid if the employee was still employed, and in no case later than twenty-one days after the last day the employee was employed.

- Severance Packages/Separation Agreements

Please see section V.D – Use of Severance Agreements and Releases for more information.

VII. UNFAIR COMPETITION/COVENANTS NOT TO COMPETE

A. Trade Secrets

There are no statutes governing trade secrets as they relate to employment in New Brunswick.
Under the common law, employees must not divulge confidential information or trade secrets that they acquire during their employment. Confidential information has value to the employer by it being generally unknown outside of the employer's business. It is information that if disclosed, would result in negative impact or damages to the employer's business. It is not common knowledge within the industry and is treated as confidential, with reasonable steps taken to protect it from disclosure. Confidential information may include marketing strategies; business plans; personnel information; customer history and preferences; trade secrets such as manufacturing processes or formulas; sales data; commercial contracts; computer records; and supplier or customer lists.

Confidential information is distinguished from general business skills and knowledge of the industry which a former employee acquired through employment. Employees are not prevented from taking with them the general knowledge and skills they acquire when the employment relationship ends. Trivial or self-evident matters, and information otherwise available in the public domain, are generally not considered confidential information.

B. Covenants Not to Compete

There are no statutes governing non-compete agreements as they relate to employment in New Brunswick.

Employers may include non-competition covenants in their employment agreements. As a starting point, these restrictive covenants are presumed to be unenforceable as they impose a restraint on trade. They will only be enforced if a court determines that it is "reasonable" and no more restrictive than necessary to protect the employer's legitimate interests. This analysis considers the scope of the specific activities sought to be restricted, the duration for which the activities will be restricted, and the geographic area covered by the restriction. If the non-compete is overly broad, it will be unenforceable.

There are three types of contractual provisions designed to restrict employee rights during and after their employment. Known as restrictive covenants, these provisions include: (1) confidentiality or non-disclosure clauses designed to protect against the disclosure of confidential information; (2) non-solicitation clauses, which limit a former employee's ability to solicit the customers, employees, and/or suppliers of the employer for a specified period of time; and (3) non-competition clauses, which attempt to prevent certain competitive activities within a defined geographic area and for a specific length of time following termination. Non-competition clauses are the most restrictive, and generally are the most difficult to enforce.

Restrictive covenants are covenants in restraint of trade and, on their face, are void as being against public policy. A court will only enforce a restrictive covenant if it meets the following criteria:

- It is reasonable considering the relationship between the parties. There must be a valid reason why the restrictive covenant is required;
- The covenant must be for a reasonable period of time;
- The geographic scope must be reasonable; and
- The scope of prohibited activities must be reasonable in relation to the employee's duties.

C. Solicitation of Customers & Employees

There are no statutes governing non-solicitation agreements or employees and customers as they relate to employment in New Brunswick.
Non-solicitation agreements are more likely to be enforced by a court than non-compete clauses, as they are less restrictive and are more closely aligned with the employer's legitimate proprietary interests. This is subject to the reasonableness requirements.

D. Wage-Fixing and No-Poaching Agreements

In June of 2022, the federal government passed Bill C-19, amending the *Canada Competition Act.* The amendment makes it a criminal offense for unaffiliated employers to agree to fix employees' wages, or to establish that they (the employers) will not solicit or hire one another's employees. The law came into force on June 23rd, 2023, and will carry a hefty penalty of up to 14 years in prison and/or a fine deemed appropriate by the court. The Competition Act applies to all employers, whether they are subject to federal or provincial jurisdiction.

The Competition Bureau has found that the Competition Act does not apply to agreements formed by way of collective bargaining. As such, employers should not be concerned about any provision that was lawfully negotiated with a trade union.

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

The common law prescribes certain obligations on employees and former employees regarding how they may interact with their former employer and its customers, suppliers and other related parties. All employees have an implied "duty of fidelity" to their employer which includes an obligation not to compete (either directly or indirectly) with their employer while still employed. The obligations imposed at common law after an employee leaves employment vary depending on the nature of the employment relationship. If the former employee is considered to owe a fiduciary duty to his or her former employer, then the former employee may have greater post-termination restrictions than other employees.

Conduct that serves to undermine or seriously impair the essential trust and confidence the employer is entitled to place in the employee in the circumstances of their particular relationship could provide grounds for summary dismissal. Directors, senior employees, and other "key employees" who have the authority to make decisions affecting the fundamentals of their employer's organization are generally considered fiduciaries. A fiduciary employee has more onerous obligations of loyalty, good faith, honesty, and avoidance of conflict and self-interest than an ordinary employee, both during and after the employment relationship. Therefore, a fiduciary does not have the same right as an ordinary employee to compete with his or her former employer after the employment relationship ends.

VIII. PERSONNEL ADMINISTRATION

A. Payroll Requirements

Questions about payroll requirements in New Brunswick can be directed to the Employment Standards Office at 1-888-452-2687.

- Method of Payment

Employers must pay each of their employees in Canadian dollars, by cheque or deposit to the employee's personal bank account.

Employers are required to give each of their employees a pay statement on each pay day showing the dates of the pay period and the gross wages for that period, the amount and description of each deduction, and the net pay. Furthermore, should the employer choose to provide electronic pay statements at the place of employment, he must provide the employee with confidential access to the electronic pay statement and a means of making a paper copy of his statement.

- Payment Frequency

Employers are required to pay their employees at least every 16 calendar days. On each pay day, employees should receive all wages and commissions owed to them up to seven days prior to pay day.

- Special Record-Keeping Requirements

Employers are required to keep payroll records for each employee showing:

  - name, address, date of birth and social insurance number;
  - date the employment began;
  - number of hours worked each day and each week;
  - wage rate and gross earnings for each pay period;
  - amount and reason for each deduction from gross earnings;
  - vacation dates, vacation pay due or paid, and the dates of payment;
  - public holiday pay due or paid, and the dates of payment;

- net amount of money paid;
- dates and reason the employee was on a leave of absence and any document or certificate relating to a leave of absence;
- date of any dismissal or layoff, and the dates of the notices thereof,
- date of cessation of employment;
- any other relevant information about the employer/employee relationship.

Employers are required to keep payroll records for at least 36 months. This includes any period after the employee ceases to work for the employer. These records must be maintained in the province of New Brunswick.

B. Required Postings

The *Employment Standards Act* requires an employer to whom the minimum wage regulations apply to post and keep posted a copy of the regulations in a conspicuous place where employees are engaged in their duties.

Under the *Occupational Health and Safety Act*, the employer must post the names of the occupational health and safety committee members or health and safety representative, a code of practice, and a copy of the *Occupational Health and Safety Act* and its regulations in a prominent place or places at the place of employment where they are most likely to come to the attention of the employees. There are several posting requirements in the *General Regulation - Occupational Health and Safety Act* that are applicable only in certain circumstances. If you are not certain which obligations are applicable to you, please reach out to us for more information at +1 902 377 2233.

Collective agreements may also contain certain provisions regarding when an employer must post information. The Labour and Employment Board also has the power to require notices be posted in connection with proceedings before the Board.

C. Required Training

Employment-related training is mandated for certain safety-sensitive industries and related to codes of practice for workplace violence and harassment pursuant to the regulations under the New Brunswick *Occupational Health and Safety Act*.

D. Meal and Rest Periods

Under the *Employment Standards Act*, employees must be provided with a weekly rest period of at least 24 consecutive hours, unless the employee is required to cope with an emergency or he or she usually works fewer than three hours per day. Where possible, the rest period is to be taken on Sundays. There are further restrictions on the hours a person under the age of sixteen is permitted to work. Please see Section II.C – Minimum Age/Child Labour, for more information.

Under the General Regulations to the *Occupational Health and Safety Act*, employees in New Brunswick are also entitled to a break of at least 30 minutes for food and rest after each five consecutive hours of work.

E. Payment Upon Discharge or Resignation

Under the *Employment Standards Act*, an employer is required to pay an employee who is dismissed or who resigns all outstanding wages at the time the employee would have normally been paid if he or she had continued to work, and in no case later than 21 days after the last day the employee was employed.

F. Personnel Records

The *Employment Standards Act* requires every employer to make and keep personnel records containing certain information (see Section VIII.A – Special Record Keeping Requirements).

- Right of Access

The Labour and Employment Board, the Director and an Employment Standards Officer may at any time request from any employer, or from any person, firm, company or partnership maintaining an employee's records, information required to be kept by the *Employment Standards Act* with respect to any employee.

PIPEDA and the *Privacy Act* (applies to federal government institutions) gives people the right to access their personal information held by an organization subject to these laws, and to challenge its accuracy.

It is common for collective agreements to provide employees a right of access to the contents of their personnel file.

Please see Section IX - Privacy for more information on privacy requirements for personnel information.

- Retention Requirements

The *Employment Standards Act* requires every employer to make and keep personnel records for at least 36 months after the last date work is performed or service is rendered by an employee.

IX. PRIVACY

Employees are entitled to a reasonable expectation of privacy in the workplace. The degree of privacy to which a person is entitled in any given situation will vary depending on all the circumstances and the nature of the employer's worksite and industry.

Employers are privy to a significant amount of personal information regarding employees. The personal information of employees working in federally regulated organizations within

the private sector is protected under the *Personal Information Protection and Electronic Documents Act*, SC 2000, c 5("*PIPEDA*"). *PIPEDA* falls under the authority of the Office of the Privacy Commissioner of Canada. Organizations covered by *PIPEDA* must obtain an individual's consent when they collect, use, or disclose that individual's personal information. Personal information can only be used for the purposes for which it was collected. If an employer is going to use it for another purpose, they must obtain consent again. Individuals should be assured that their information will be protected by appropriate safeguards. Notably, business contact information such as an employee's name, title, business address, telephone number, or email addresses that is collected, used, or disclosed solely for communicating with that person in relation to his or her employment or profession is not covered by *PIPEDA*.
The collection and use of employee information by private sector employers not covered by *PIPEDA* is not governed by legislation in New Brunswick. The common law right to privacy is still developing, and there has been considerably more consideration of the issue of employee privacy in arbitral jurisprudence involving unionized workplaces.

Employers should exercise caution in the collection and use of employee personnel information as the common law continues to evolve in this area. While Canadian courts have commented that there is no free-standing right to dignity or privacy under the Charter or at common law, in other cases the courts have found that the unauthorized use of employee personal information, for example, to conduct a credit check on an employee without the employee's permission, warranted a remedy consistent with Charter values.

A. Drug and Alcohol Testing

There is no statute in New Brunswick that specifically regulates drug and alcohol testing. The *Human Rights Act* protects individuals against discrimination based on mental or physical disability. Drug and alcohol dependencies are disabilities protected under the legislation. As such, testing programs that negatively affect persons who suffer from substance dependency may be considered discriminatory. However, a testing program can be upheld if it is a *bona fide* occupational requirement (BFOR). The case law has established that an employee may be asked to submit to an alcohol or drug test if the employer has reasonable grounds to believe, based on observation of the employee's conduct or other indicators, that the employee is or may be unable to work in a safe manner because of alcohol or drug use.

The current state of the law on this issue across Canada remains in flux. In 2013, the Supreme Court of Canada released a landmark decision, *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("*Irving Pulp & Paper*"), where the majority of the Court found that in order for a drug and alcohol testing policy to be upheld, an employer must establish that such policy properly balances employer safety concerns with the privacy interests of employees. While that balancing will typically favour pre-access testing, pre-employment testing, and for cause testing in safety sensitive positions, other testing policies have been subject to high levels of scrutiny and are more likely to be found unreasonable.

Regarding random testing, the Court in *Irving Pulp & Paper* found that it is only acceptable in narrow circumstances, where an employer could provide evidence of enhanced safety risks in the workplace due to alcohol and drug use. Canadian courts are currently grappling with the issue of random testing in safety sensitive workplaces, but a definitive decision has yet to be reached.

Employers looking to implement alcohol and drug testing policies must approach that decision with caution. For more information, please reach out to us at +1 902 377 2233.

B. Off-Duty Conduct

There is no statute in New Brunswick that specifically regulates off-duty conduct. Generally, an employer has no right to direct 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.

The issue of off-duty conduct typically arises in the context of whether an employee can be disciplined for conduct that occurred outside of his or her normal work duties and hours. Employers are entitled to be concerned about their reputations and profits. When an employee, outside the normal course of his or her employment, does something that puts these interests in jeopardy, the employer has a right to take steps to protect its interests, which may include discipline.

Determining whether off-duty conduct is grounds for discipline is done on a case-by-case basis and depends on several factors. Off-duty conduct will generally warrant discipline when it is prejudicial to the employer's business or reputation, negatively impacts the duties of the employee in question, or where there is a causal connection between the impugned conduct and the employer's business, and the conduct is "wholly incompatible" with the employment relationship. Certain egregious conduct, such as serious criminal conduct while off-duty, may be grounds for termination. Please see Section V.B – Justification for Dismissal, for more information.

C. Medical Information

Employers should take steps to maintain privacy and confidentiality in the collection, use, and disclosure of medical information. Employers must limit their request, use, and disclosure to only that which is necessary.

Typically, medical information comes into the employer's possession in situations where an employee requires an accommodation in the workplace. An employer is only entitled to sufficient medical information to allow it to fulfill the objective in seeking the information, for example to confirm an employee's absence, accommodation needs, or ability to perform his or her job duties and responsibilities. Rarely is it appropriate for an employer to need a diagnosis of an employee's medical condition. Employers should take steps to ensure that employee medical information is only shared on a need-to-know basis with identifiable employer representatives, to fulfill the purpose for which it was obtained, or as required by law.

D. Searches

There is no statute in New Brunswick that specifically regulates searching employees or the possessions of employees. However, employees are entitled to a reasonable expectation of privacy in the workplace. There must be a balance between the employee's privacy interests against the employer's concerns with security and safety in the workplace. The degree of privacy to which a person is entitled in any given situation will vary depending on all the circumstances and the nature of the employer's worksite and industry.

In unionized workplaces, the collective agreement may restrict or prohibit employee searches.

E. Lie Detector Tests

The *Employment Standards Act* provides that employees have a right not to take or be asked or required to take or submit to a lie detector test. No person shall communicate or disclose to an employer that an employee has taken a lie detector test or communicate or disclose to an employer the results of a lie detector test taken in another jurisdiction.

F. Fingerprints

There is no statute in New Brunswick that contains specific provisions related to employers' collection of employee fingerprints. However, information about an individual's blood type, fingerprints or other hereditary characteristics is considered personal information and should be treated as such, including compliance with privacy legislation such as *PIPEDA*. Fingerprints are also biological characteristics, the collection of which has given rise to issues of alleged discrimination in some jurisdictions in Canada. Any requests for fingerprints should be reasonable and consider the balance between an employee's privacy interests and the employer's legitimate needs to justify such an intrusion of privacy.

G. Social Security Numbers

Employers are required to ask for and record an employee's Social Insurance Number ("SIN") upon hiring the employee in accordance with federal legislation related to verifying an employee's legal status to work in Canada and the withholding and remittance of statutory deductions and income tax. Employers are prohibited from distributing SINs to non-government third parties without consent from their employees.

H. Surveillance and Monitoring

There are no statutes in New Brunswick that prohibit the use of video surveillance and monitoring in the workplace.

Much like other kinds of workplace policies described in this Section, the enforceability of workplace surveillance is assessed based on a balancing of employer and employee interests. That requires considering the employer's rationale for surveillance and the interest it seeks to protect, as well as the modalities of surveillance to be used. It also requires

consideration of whether less invasive steps other than surveillance could be implemented to achieve the same goal.

In unionized workplaces, arbitral jurisprudence has established that video surveillance is generally only permitted when there is a pressing need, such as evidence of a real and substantial problem of workplace theft, and where the parameters of the surveillance are not overly intrusive. For example, surveillance monitoring should not occur in locker rooms or other areas where employees have a heightened expectation of privacy.

Before employers implement surveillance monitoring in the workplace, they should be confident that they can justify such action as necessary to resolve a reals and substantial problem, and that the scope of the surveillance is no broader than necessary. For more information, please reach out to us at +1 902 377 2233.

I. Cannabis (medical and recreational use)

On October 17, 2018, the Cannabis Act made Canada the second country in the world to legalize recreational cannabis and create a national cannabis market. The *Cannabis Control Act,* SNB 2018, c 2 states that generally, cannabis cannot be used in an indoor workplace. The Duty to Accommodate under the Human Rights Act may be triggered through "disability." This could be the case if an employee has a disabling dependency, or if they are using cannabis as a treatment for a medical condition. Employees should be made to understand that they may not self-medicate with marijuana during work hours and they may be obligated to notify their employer about their use of prescription marijuana if it is impairing.

Employers should address cannabis usage as they would other unacceptable substances in the workplace (i.e. alcohol). They should maintain up to date internal workplace drug and alcohol and occupational health and safety policies that clearly reflect what is and is not acceptable in the workplace.

Canadian employers operating in both Canada and the U.S. should take particular care to ensure that employees crossing the border as part of their job responsibilities are aware of the US federal prohibition on cannabis and the heightened awareness of legal cannabis at the border and strict enforcement of federal law by US Customs and Border Protection. For more information, please reach out to us at +1 902 377 2233.

J. Social Media

New Brunswick does not have any laws or statutes that address social media.

Employees can be disciplined for the inappropriate use of social media. Please see Section IX.B – Off Duty Conduct for more information on how an employee's off-duty conduct, including social media posts can affect the employment relationship.

Employers should develop a social media policy that addresses acceptable use of social media on and off duty, expectation of privacy issues, and consequences for failing to follow the policy.

For more information, please reach out to us at +1 902 377 2233.

K. Weapons/Workplace Violence Policy

Weapons possession and use is strictly regulated in Canada and failing to comply can amount to a criminal offence. Employers who intend to utilize weapons in the course of business should consult the *Criminal Code of Canada* and the *Firearms Act*. Such a business will need to be licensed to possess firearms and must ensure that every employee of the business who, in the course of duties of employment would handle firearms is a holder of the applicable firearms license. In almost all circumstances, it is illegal for individuals to carry concealed weapons in Canada.

Violence in a place of employment, as defined in the *General Regulation - Occupational Health and Safety Act*, means the attempted or actual use of physical force against an employee, or any threatening statement or behaviour that gives an employee reasonable cause to believe that physical force will be used against the employee, and includes sexual violence, intimate partner violence and domestic violence.

New Brunswick employers are required to assess the risk of violence at the place of employment and consult with any applicable health and safety committees or representatives on their assessment. The *General Regulation - Occupational Health and Safety Act* provides guidelines on the risk factors to consider and on what types of employers must establish and keep up to date a code of practice for violence. All employers with 20 or more employees must establish such a code. Details of what to include in the code of practice and on training requirements can be found in the same regulation.

Employers are prohibited from collecting personal information or disclosing the identity of a person who is involved in an incident of violence or harassment or the circumstances related to the incident, other than the minimum amount necessary to investigate the incident, take corrective measures in response to the incident or to act as otherwise required by law.

Under the *Domestic Violence, Intimate Partner Violence or Sexual Violence Leave Regulation – Employment Standards Act*, employees who are victim of or parent to a victim of domestic violence, intimate partner violence or sexual violence are entitled to a leave of absence to seek medical attention, obtain victim services, psychological or legal counselling, or to relocate. Please see Section III – Time Off/Leaves of Absence for more information.

X. Employee Injuries and Workers Compensation

A. Work Related Injuries

New Brunswick employees who are injured on the job may be entitled to receive compensation under the New Brunswick *Workers' Compensation Act*. The New Brunswick *Workers' Compensation Act* provides a scheme for compensating workers in the event of accidents that occur on the worksite or occupational illness. The legislation applies to most employers, although there are some limited exceptions provided in the scope of the *Act* and in the *Exclusion of Workers Regulation - Workers' Compensation Act*.

This insurance scheme provides certain benefits to employees who are injured in workplace injuries. Coverage for injuries may extend beyond the four walls of an employer's facility and may (depending on the circumstances) include injuries sustained while travelling to or from the workplace. Specifically, under the *Workers' Compensation Act*, employees are entitled to some wage replacement for lost income while they are disabled by a work injury or illness and unable to work. Compensation is also provided to the dependents of qualified workers who die because of such an injury, unless the injury is attributable solely to the serious and wilful misconduct of the worker.

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 the part of employers. It is referred to as a "no-fault" system.

The workers' compensation system is funded through the payment of premiums by employers with coverage. Employers receive the benefit of removing the possibility that employees could commence proceedings in relation to any covered workplace injuries or illnesses.

The insurance scheme and its related elements are operated by the Workplace Health, Safety, and Compensation Commission, also known as "WorkSafeNB". If the employee is deemed by the Commission to be fully capable of working, then the employee is no longer eligible for wage replacement. The Commission also covers the costs of medical aid as required because of a workplace injury or illness, including hospital care, medical attention, medication and surgery, in addition to other required benefits and treatments such as physio or occupational therapy. The Commission continues to have authority to pay compensation to a worker who is seriously and permanently disabled or impaired because of an injury arising out of and during employment even if that injury is attributable solely to the serious and wilful misconduct of the worker.

In the instance of a workplace injury or illness, the employee, the employee's medical care providers, and the employer are required to provide reporting forms to the Commission in accordance with the *Occupational Health and Safety Act*. The Commission then confirms if the employee is covered. (Certain injuries sustained in an employer's physical workplace may not be insured.) Where there is proper workers' compensation coverage for the employee, and the injury or illness arose out of or during the employment, the claim is processed to determine the appropriate compensation benefits for the employee.

In the event of an accident, injury, or industrial disease at the employer's worksite, the employer must provide or pay the cost of immediate transportation from the injury site to a medical treatment facility.

Employers must notify WorkSafeNB immediately to report the following incidents:

- a loss of consciousness;
- amputations;
- fractures (other than fingers or toes);
- burns requiring medical attention beyond first aid treatment;
- loss of vision in one or both eyes;
- deep lacerations requiring medical attention beyond first aid treatment;
- worker admission to a hospital as an in-patient;
- fatalities;
- any accidental explosion or exposure to a biological, chemical or physical agent, whether or not a person is injured; or
- any catastrophic event or equipment failure that results or could have resulted in an injury.

Employers have other responsibilities under the *Workers' Compensation Act*, such as ensuring that employees comply with the *Workers' Compensation Act* and its regulations, and any order made in accordance with them. Employers must also ensure that at the place of employment, the necessary systems of work, tools, equipment, machines, devices, and materials are maintained in good condition and are of minimum risk to health and safety when used as directed. Employers must acquaint employees with any hazard to be found at the place of employment in connection with the use, handing, storage, disposal and transport of any tool, equipment, machine, device o biological, chemical or physical agent. They must also provide such information, instruction, training, and supervision as are necessary to ensure employee's health and safety and provide protective equipment as required by regulation.

Employers must cooperate with a health and safety committee or representative, and with any person responsible for the enforcement of the *Workers' Compensation Act* and its regulations. A copy of the *Workers' Compensation Act* and its regulations must be posted in a prominent place where workers can see them. If the employer has 20 or more employees regularly employed in New Brunswick, it must establish a safety policy and a health and safety program. If the employer has 20 or more employees regularly employed in a workplace, a joint health and safety committee must be formed.

Pursuant to this legislation, an employer is prohibited from engaging in discriminatory or disciplinary action against an employee who has been injured at the workplace and who, in the opinion of the Workplace Health, Safety, and Compensation Commission, is entitled to workers' compensation.

Depending on the size of the workplace, employers have the following statutory obligations to re-employ an employee who has been injured in an accident or who suffers from an occupational disease:

- Generally, employers with fewer than 20 workers must hold the position the worker held immediately before the accident for a period of one year; and permit the injured worker to resume work in that position.

- Generally, employers with more than 20 workers must hold the position the worker held immediately before the accident for two years and permit the injured worker to resume work in that position.

Employers also have a duty to accommodate an injured employee to the extent that the accommodation does not cause the employer undue hardship, in accordance with human rights principles. The employer and employee must attempt to identify employment at the workplace that is consistent with the employee's functional abilities, and that will restore the employee's pre-injury earnings to the extent possible. Please see Section IV.A – Discrimination for more information.

For more information on workers' compensation in New Brunswick, *see* Section II and XI.

B. Non-work-related injuries

In accordance with human rights principles, employers have a duty to accommodate an injured employee to the extent that the accommodation does not cause the employer undue hardship. This includes employees who were injured while off-duty. The employer and employee must attempt to identify employment at the workplace that is consistent with the employee's functional abilities, and that will restore the employee's pre-injury earnings to the extent possible. Please see Section IV.A – Discrimination for more information.

XI. UNEMPLOYMENT COMPENSATION

A. Eligibility

Employment insurance benefits for employees in New Brunswick are governed by federal legislation, under the *Employment Insurance Act,* RSC 1996, c 23. The *Act* is administered by Employment and Social Development Canada. The Employment Insurance (EI) program provides financial support to eligible workers by replacing part of their income while they:

- look for new employment
- upgrade their skills or
- are absent from work due to:
- sickness
- childbirth or adoption
- caring for a child or adult who is critically ill or injured, or needs end-of-life care

EI regular benefits are available to individuals who:

- lose their jobs due to shortage of work or seasonal or mass lay-offs
- are looking for, available for and able to work, but can't find a job

EI special benefits provide support to employees or self-employed individuals who:

- are unable to work due to sickness
- are pregnant or recently gave birth
- are caring for a newborn or a newly adopted child
- are caring for a child or adult who is critically ill, injured or needs end-of-life care

EI fishing benefits provide support to qualifying self-employed fishers who are actively seeking work. EI work-sharing benefits help employers and employees avoid layoffs when there is a temporary reduction in the level of business activity. While the employer recovers, the measure provides support to employees who work a temporarily reduced work week.

If the employee meets certain eligibility criteria, including having paid into the Employment Insurance scheme and accumulating a requisite number of employment hours during the qualifying period, the individual may receive payment of benefits as a form of wage replacement while the individual is unemployed or not working.

B. Procedure

Employers are responsible for:

- advising employees to register for EI benefits as soon as possible after they stop working;
- accurately recording the reason for separation, hours worked, gross earnings and any money paid or payable on separation;
- ensuring the information on the Record of Employment (ROE) is accurate (knowingly making false or misleading statements may cause you to be subject to penalties);
- issuing ROEs when employees stop working;
- promptly responding to all Service Canada requests for information;
- storing blank paper ROEs in a safe place for your business use only;
- contacting Service Canada if:
  - you offer work to an EI claimant who does not accept it;
  - you must pay an employee an arbitration award or similar settlement.

For more information, Employers can contact the Employer Contact Centre at 1-800-367-5693.

XII. HEALTH AND SAFETY

A. Overview

In New Brunswick, the health and safety of workers is governed by the *Occupational Health and Safety Act* and its regulations, and overseen by Crown corporation, WorkSafeNB. The *Act* promotes a shared responsibility between the employer and employees for the health and safety of workers in the workplace. Every employer, as far as is reasonably practicable, must ensure the health and safety of all its employees and any other person present at a

workplace where the employer's work is carried out. An employer must remedy any workplace conditions that are hazardous to the health and safety of its workers. Employees also must conduct themselves in such a way as to ensure their own health and safety, as well as that of other persons at, in, or near their place of employment. They must report to their employer the existence of any hazard of which they are aware and wear or use such protective equipment as is required by regulation.

B. Regulatory Requirements

An employer in New Brunswick has a general duty to maintain a safe workplace and to ensure that measures and procedures prescribed in the *Occupational Health and Safety Act* are followed. Pursuant to the *Act* and regulations thereunder, all employers are required to:

- Take every reasonable precaution to ensure the health and safety of employees.
- Comply with the OHS Act and regulations, and any order made in accordance with them.
- Ensure that employees comply with the Act and regulations, and any order made in accordance with them.
- Ensure that at the place of employment the necessary systems of work, tools, equipment, machines, devices and materials are maintained in good condition and are of minimum risk to health and safety when used as directed by the supplier or in accordance with the directions supplied by the supplier.
- Acquaint an employee with any hazard to be found at the place of employment in connection with the use, handling, storage, disposal and transport of any tool, equipment, machine, device or biological, chemical or physical agent.
- Provide such information, instruction, training and supervision as are necessary to ensure an employee's health and safety.
- Provide and maintain in good condition such protective equipment as is required by regulation and ensure that such equipment is used by an employee in the course of work.
- Co-operate with a committee, where such a committee has been established, a health and safety representative, where such a representative has been elected, and with any person responsible for the enforcement of this Act and the regulations.
- Post a copy of the OHS Act and regulations in a prominent place where workers can see them.
- Draft and implement policies and procedures which become the safety program in the workplace.
- If the employer has 20 or more employees regularly employed in New Brunswick, the companies must establish a safety policy and a health and safety program.
- If the employer has 20 or more employees regularly employed in a workplace, a Joint Health and Safety Committee must be formed.

The *Occupational Health and Safety Act* requires employers to immediately notify WorkSafeNB when there has been a serious injury or death of a person, an accidental explosion or exposure to biological, chemical or physical agent, or any catastrophic event or equipment failure that results or could have resulted in injury.

Comprehensive information on employer obligations under the act is available at Worksafenb.ca.

In 2024, New Brunswick passed its first accessibility legislation – the *Accessibility Act*. The Act introduces a requirement for the government to create accessibility standards respecting employment by 2040.

It also creates a scheme to report contraventions of the Act which has a prohibition against reprisals including between employers and employees.

It likely will be a long time before specific accessibility standards are announced and implemented in New Brunswick.

- Social Elections

New Brunswick does not have any laws or statutes that address this issue. For more information, please reach out to us at +1 902 377 2233.

- Works Councils

New Brunswick does not have any laws or statutes that address this issue. For more information, please reach out to us at +1 902 377 2233.

- Health and Safety Committee

Joint Health and Safety Committee (or JHSC) are advisory committees of employees and employers who work together toward a common goal: establishing and maintaining healthy and safe workplaces. Its members are dedicated to strengthening the health and safety culture to prevent workplace injuries and occupational illness. Through regular monthly meetings, the JHSC seeks ways to improve health and safety awareness and provides guidance and recommendations on health and safety issues arising in the workplace. Every Employer with 20 or more employees is required by law to establish a joint health and safety committee.

JHSCs may make recommendations for the establishment and enforcement of policies involving health and safety practices; participate in the identification and control of health and safety hazards at the place of employment; inform employees and the employer of existing or potential hazards at the place of employment and of the nature of the risks to their health and safety; and establish and promote health and safety programs for the education and information of the employer and employees. They receive, consider, investigate and make recommendations to the employer regarding complaints respecting the health and safety of the employees at the place of employment; carry out monitoring and

measuring procedures where the Commission has determined there is a need for regular monitoring and measuring at the place of employment and participate in all inspections, inquiries and investigations concerning the health and safety of employees.

When an Employer has five to nineteen employees, they must establish a safety policy which may include a provision for a health and safety representative, particularly if the nature of employment presents a high risk to the health and safety of employees, or where the accident record is high. The health and safety representative has the same authority as a JHSC.

XIII. TRADE UNIONS – INDUSTRIAL RELATIONS

A. Overview

If a workplace is unionized and employees are members of a bargaining unit, the collective agreement will govern the terms and conditions of employment. Collective agreements in New Brunswick for most private businesses are governed by the *Industrial Relations Act* if the employer is subject to provincial jurisdiction, or by the *Canada Labour Code*, if the employer is subject to federal jurisdiction.

New Brunswick's *Industrial Relations Act* regulates provincial trade union activities and labour relations. This statute is administered by the Labour and Employment Board (the "Board") which is the independent and impartial tribunal responsible for the day-to-day administration of New Brunswick's labour laws. The *Industrial Relations Act* governs both the process by which a trade union acquires bargaining rights and the collective bargaining procedures between trade unions and employers.

The *Industrial Relations Act* provides the mechanism for union and employer (or management) relations in provincially regulated workplaces. It governs the relationship between unionized employees, unions, and employers, sets a framework for proper conduct in the union-management relationship, and sets out timelines relating to bargaining rights in order to enhance stability. The *Industrial Relations Act* does not apply to employees who are working in federally regulated unionized workplaces where federal legislation, namely the *Canada Labour Code*, would apply.

- Favored/Disfavored by Government

Under the *Industrial Relations Act* every employee has the right to be a member of a trade union and to participate in the lawful activities thereof, and Employers are not permitted to participate in or interfere with the formation, selection or administration of a trade union, nor may they contribute financial support.

- Prevalence of Trade Unions

In Canada, the unionization rate fell steadily from 38% through the 1980s and 1990s, then remained relatively stable through the 2000s, with data up to 2012 at around 30%. In

2015, the share of union dues-paying workers comprised 31.8% of all employees in Canada, an increase of 0.3 percentage points from 2014.

From 1981 to 2012, unionization declined in all provinces, but the largest declines took place in British Columbia, -13 percentage points, and New Brunswick, -11 percentage points.

In Canada, unions can be divided into four main types: (1) national; (2) international; (3) independent local organization; and (4) directly chartered local. A strong majority (69.7%) of unionized workers were affiliated with national unions in 2015. International unions accounted for almost 25% of unionized workers, followed by independent local organizations (3.9%) and directly chartered locals (1.5%). Compared to 2014, there was little change in representation by type of organization. In 2015, national and international unions represented almost 95% of unionized workers but accounted for 30.5% of the total number of unions in Canada. Directly chartered locals and independent local organizations made up the majority of unions (69.6%).

Information sourced from "Long term trends in unionization," Statistics Canada, by Diane Galarneau and Thao Sohn, and "Labour Organizations in Canada 2015," Employment and Social Development Canada.

- Special Requirements (e.g. US-Right to Work)

New Brunswick does not have right to work laws. Potential employees can be compelled, as a condition of employment, to join and pay dues to a labour union that represents that employment unit. Please see Section XII.C. Managing the Workplace Collective Bargaining for more information.

- Works Council

The European concept of Works Councils is not a practice that exists in New Brunswick. If you have questions on this topic, please reach out to us at +1 902 377 2233.

- Challenges for a Unionized Business

Implications of managing a unionized business include:

- A decreased ability to communicate directly with employees about all work-related matters or negotiate individually;
- higher labour costs;
- decreased flexibility as employers must adhere to concessions made in collective bargaining, often affecting the right to contract out work, require overtime, determine the size and mix of the workforce, leave temporary vacancies unfilled, discipline employees without significant challenges and terminate employees without cause;
- a risk of developing a "we/they" type atmosphere;
- additional expenses related to addressing grievances and arbitration costs;
- increased time commitment, particularly around collective bargaining;

- the risk of work stoppage.

B. Right to Organize/Process of Unionization

There are two methods of gaining bargaining rights. The first is certification and the second is voluntary recognition.

Certification is the process whereby the Labour and Employment Board designates a trade union as the sole and exclusive bargaining agent for a group of employees, referred to as a bargaining unit, following proof that the bargaining agent has majority support among the employees in the bargaining unit.

Voluntary recognition is where a trade union acquires the status of exclusive bargaining agent for a group of employees in a defined bargaining unit because an employer voluntarily agrees to recognize it as such.

Where no collective agreement is in force and no trade union is certified under the Act, an application for certification may be made by a union at any time before the Labour and Employment Board.

All working conditions are frozen once the Board is served with an application for certification. During this period, an employer cannot alter wage rates, terms of employment, or any other employment privilege. The freeze remains in effect until the union's application is either dismissed or a certification order is issued, and the union gives notice to bargain. If a certification order is issued and the union gives notice to bargain, a second, virtually identical, statutory freeze commences.

Where a trade union applies for certification, the Board will determine whether the unit for which the application is being made is appropriate for collective bargaining. The Board has discretion to include additional employees or exclude any current employees in order to make the unit appropriate for collective bargaining. When the Board is satisfied that not less than 40% and not more than 60% of the employees in the bargaining unit are members in good standing of the trade union, it may direct that a representation vote be taken. If more than 50% of the ballots of eligible voters are in favour of the union, or if the Board is satisfied that more than 60% of the employees in the unit are members in good standing of the trade union, the Board will certify the trade union. Employees absent from work during voting hours and who do not cast votes are not eligible to vote.

If, on any application to which this section refers, the Board is satisfied that more than fifty per cent of the employees in the bargaining unit are members in good standing of the trade union, the Board may certify the trade union as bargaining agent without taking a representation vote.

Employers cannot attempt to prevent an employee from becoming a union member or from exercising other rights under the *Industrial Relations Act*; nor may an employer discriminate against an employee based on membership in a union. Such actions are considered unfair labour practices.

A certification order may be revoked (also known as “decertification”) following an investigation by the Board where it is determined that a bargaining agent no longer represents a majority of the employees in the unit for which it was certified or for which it is serving as the bargaining agent. Following the revocation, the employer is no longer required to bargain collectively with the bargaining agent.

For more information, please contact us at +1 902 377 2233.

C. Managing a Unionized Workforce

- Collective Bargaining

Collective Bargaining means negotiating in good faith with a view to the conclusion of a collective agreement or the renewal or revision thereof. The *Industrial Relations Act* imposes strict timelines in bargaining and should be referred to carefully to ensure compliance.

When appropriate notice to bargain has been given under the terms of the *Industrial Relations Act*, the parties must meet without delay and commence bargaining collectively and make every reasonable effort to conclude a renewal, revision or new agreement.

If the parties are unable to bring about a first collective agreement, either party may request that the matter be referred to the Board for first contract arbitration. The *Industrial Relations Act* provides that when a notice to commence collective bargaining has been given and the parties are unable to bring about a first collective agreement, either party may request that the Minister refer the matter to the Board for first contract arbitration. The Board will inquire into the negotiations and either refer to a mediation officer or submit the mater to an arbitrator or arbitration board that shall render an award. If mediation is unsuccessful, the parties will also be referred to an arbitrator or arbitration board. If at the end of the process the parties are still unable to come to an agreement, the Arbitration Board renders an award that is binding on both parties.

Typically, collective agreements contain provisions concerning union recognition and the scope of the collective agreement. Additionally, a collective agreement often includes language regarding the deduction and remittance of union dues, and the applicable arbitration and grievance procedures. Other provisions typically found in collective agreements include those relating to progressive discipline and termination; union membership eligibility; seniority; layoff and recall; contracting out; hours of work and scheduling; pay and benefits; management rights; discrimination; and other rules specific to the workplace. Collective agreements usually address issues such as hours of work, work schedules, management rights, wages, hiring, discipline, layoffs, and termination.

There are a few provisions that must be included in a collective agreement by law. These are found in the *Industrial Relations Act* and include a mandatory Arbitration Clause, an Exclusive Bargaining Agent clause, provisions that prohibits strikes or lock-outs during the operation of the agreement, provisions regarding technological change, and provisions regarding the term of operation of the agreement.

Not all collective agreements will contain the same provisions. The employer may be subject to several collective agreements depending on the makeup of the workforce. Consequently, it is important for an employer to review any applicable collective agreements before taking steps in relation to a position or an employee that is within the scope of a collective agreement. Failing to comply with the terms of a collective agreement could result in a union initiating grievance proceedings which, in turn, could lead to an award being issued against the employer.

Once concluded, the *Industrial Relations Act* provides that the collective agreement is binding on the parties to it or affected by it. This includes the bargaining agent and the employees in the unit of employees that the bargaining agent represents, and an employers' organization and employer who has entered into the agreement or on whose behalf the agreement has been entered.

A collective agreement, certification, application, notice, or entitlement to give notice continues in force, and is binding on the purchaser, lessee, trustee, or the person otherwise acquiring an employer's business. This is true whether the employer sells, leases, or transfers, or otherwise disposes of, or agrees to sell, lease, transfer, or otherwise dispose of his or her business or the operations of the business, or a part of either, unless the Board directs otherwise.

- Dispute Resolution

Strike action or lockouts are prohibited during the period in which a collective agreement is in place. Strikes and lockouts are permissible during collective bargaining. All employees defined in a bargaining unit represented by a trade union may legally strike or be locked out by an employer, except those employed as firefighters and police officers who do not have the right to strike.

A strike or lockout vote taken by secret ballot must precede any strike or lockout action. All employees in the bargaining unit are entitled to vote, and a majority must vote in favour in order for the declaration of a strike or lockout to be made. A lockout vote is only necessary where an employers' organization is involved. A vote to ratify the employer's offer under the proposed collective agreement and a strike vote may be combined on a single ballot.
No strike or lockout vote may be held until 9 days have elapsed (7 day waiting period plus 2-day mailing period) after the Minister of Labour, Employment and Population Growth has decided not to appoint a conciliation officer or a conciliation board for the purposes of concluding a collective agreement. Written notice, at least 24 hours in advance, must be given by a trade union or an employer before a lawful strike or lockout can take place.

During the operation of the collective agreement, employees have access to a grievance and arbitration procedure to enforce their rights. The details of these procedures differ based on the terms of the particular agreement. The *Industrial Relations Act*, provides arbitrators the authority

- Impact on Management Rights

Where the Board has certified a trade union as a bargaining agent of employees, the bargaining agent may, on behalf of the employees in the unit, by notice in writing, require the employer to commence collective bargaining.

Certain actions under the *Industrial Relations Act*, such as an application to certify or notice to bargain, trigger restrictions on the Employer's management rights such as a prohibition on altering the terms and conditions of employment without the consent of the trade union. Once a collective agreement is in place, it is binding on both parties. Failure to comply with the provisions of the agreement can lead to awards against the Employer.

When interpreting collective agreements, arbitrators and courts read in a requirement of "reasonableness" to the exercise of management rights. In other words, management decisions are subject to external scrutiny to determine that they were not discriminatory, arbitrary or in bad faith. Decisions that do not meet that standard can be found to be a breach of the collective agreement.

For more information, see Section XIII.A. Challenges for a Unionized Business.

XIV. IMMIGRATION / LABOUR MIGRATION

Temporary and permanent immigration to Canada is governed by federal legislation--the *Immigration and Refugees Protection Act*, S.C. 2001, c. 27 ("IRPA") and the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRPR"). In recent years, many Canadian provinces, including New Brunswick, have enacted specific foreign worker protection legislation to supplement the general employment standards that apply to everyone. These measures recognize that foreign workers can be particularly vulnerable, especially when their status in Canada is tied to a single employer by virtue of the terms and conditions of their work permit.

New Brunswick's *Labour Standards Code* now includes a regime under which employers must register with the Province to employ foreign workers, subject to some exceptions.

A. Overview Business Immigration Policy

International business travel to Canada and the temporary employment of international talent (foreign workers) in Canada is governed by IRPA, IRPR and Canadian immigration policy. Foreign nationals must hold a work permit that properly authorizes the activities they will perform in Canada, or be eligible for one of the work permit exemptions that permit certain foreign nationals to work in Canada without a work permit in certain situations.

- *Work Permits and Exemptions*

The standard process to obtain a work permit involves two steps. First, an employer must obtain a Labour Market Impact Assessment ("LMIA") to confirm, among other things, that employing a foreign national in a particular role will likely have a positive or neutral impact on the Canadian labour market. In most cases, employers seeking LMIA confirmation must

test the domestic labour market by conducting a robust recruitment campaign to demonstrate there are no qualified and available Canadians or permanent residents for the role.

Once LMIA confirmation is in place, the foreign national is then able to apply for an employer-specific work permit to authorize their employment in Canada. Foreign nationals who do not require a temporary resident visa ("TRV") to enter Canada, can apply for an LMIA-based work permit at the port of entry, upon arrival in Canada. Foreign nationals who require a TRV to enter Canada must apply for their work permit online (and their application must be approved) before travelling to Canada. Work permit processing times vary throughout the year and from one Canadian visa office to another, but generally speaking applying for a work permit from overseas adds anywhere from two weeks to several months to the process.

Since it can also be cumbersome and time consuming to obtain an LMIA, employers who wish to hire a foreign national in Canada are advised to consider whether any of the facilitative work permit categories exempt from the LMIA requirement (or a work permit exemption) apply given the candidate and position in question before engaging the LMIA process. Various LMIA-exempt work permit categories are available pursuant to public policies, international agreements to which Canada is a signatory and IRPR. As an example, LMIA-exempt work permits are available for eligible intra-company transferees, certain professionals under the *Canada-United States-Mexico Agreement* (and other free trade agreements), and highly specialized international resources whose work in Canada will create or maintain significant benefits or opportunities for Canadians and permanent residents of Canada. These LMIA exemptions are only a few of the many facilitative work permit options available.

The eligibility requirements for various LMIA-exempt work permit categories are informed by Canadian immigration policy and are flushed out by Immigration, Refugees and Citizenship Canada ("IRCC") in their program delivery instructions published online for Temporary Workers.

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

Pursuant to subsection 186(a) and section 187 of IRPR, international business travelers coming to Canada to perform activities that do not constitute direct entry into the Canadian labour market are eligible to work in Canada without a work permit as business visitors. Those seeking admission to Canada as a business visitor must be prepared to demonstrate their eligibility for this work permit exemption with documentary evidence.

Depending on their nationality, a foreign national may require a TRV to authorize their admission to Canada. Except for American citizens, foreign nationals from visa-exempt countries must obtain an electronic Travel Authorization ("eTA") to enter Canada by air.

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

Unless eligible for a specific work permit exemption, a foreign national requires a work permit to authorize their employment in Canada in professional and managerial positions. An applicant's eligibility for an LMIA-exempt work permit is fact-specific and must be assessed on an individual basis.

There is a short-duration work permit exemption available for foreign nationals coming to Canada to perform managerial or professional activities for a maximum of 15 consecutive days (available once every 6 months), or for a maximum of 30 consecutive days (available once per year).

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

With some limited exceptions, most notably for after-sales service providers coming to Canada to provide proprietary or product-specific assistance and support for the installation, configuration, start-up and commissioning or repair of specialized commercial or industrial equipment or software purchased or leased outside of Canada, foreign nationals coming to Canada to perform work that is not professional or managerial will require a work permit to properly authorize their activities. Moreover, some highly specialized high- and semi-skilled foreign nationals qualify for LMIA-exempt work permits, but generally temporary foreign workers contracted to work in Canada in non-professional and non-managerial roles will require an LMIA-based work permit to authorize their employment.

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

- *Start-up Visa Program*

Canada offers a start-up visa program for entrepreneurs who possess the necessary skills and potential to build innovative businesses in Canada that will create jobs for Canadians and permanent residents of Canada and compete on a global scale. To apply to the start-up visa program, an applicant's business idea or venture must first be supported by one or more designated organization.

The start-up visa program is a permanent immigration pathway which eventually leads to permanent residence status in Canada. However, while a start-up visa application for permanent residence is processed by IRCC, the applicant can apply for a work permit that will allow them to come to Canada and start their business in the meantime.

- *Self-employed/entrepreneur work permit*

This LMIA-exempt work permit category is designed for self-employed foreign nationals seeking to come to Canada temporarily, usually on a seasonal basis, to operate a business that will create significant social, cultural, or economic benefits or opportunities for

Canadians and permanent residents. Because of high volumes of applications under this program, this work permit category was temporarily paused on April 30, 2024 and will re-open on January 2027. There is also a facilitative work permit category available to foreign nationals whose immigration to Canada has been nominated by a province under a provincial nominee program entrepreneurial stream.

F. Permanent residency based on employment

There are many pathways through which a foreign national can apply for permanent resident status in Canada. The permanent residence programs available in Canada can be classified under the three main categories or classes: (1) Economic Classes, (2) Family Class and (3) Refugee Class. It is much easier to immigrate to Canada under an Economic Class program with the support of a Canadian employer with whom the applicant has accepted an offer of employment or is currently employed. Having one or more years of Canadian work experience also enhances a foreign national's eligibility for permanent residence and/or the likelihood they will be invited to apply for permanent residence status in Canada.

Eligibility for permanent residence in Canada must be assessed on a case-by-case basis. For more information or assistance developing a strategy for an employee to become a permanent resident of Canada, please reach out to the Immigration Law Team at Barteaux Labour and Employment Lawyers Inc. by contacting Andrea Baldwin at (902) 536-3109 or abaldwin@barteauxlawyers.com.

G. Citizenship for foreign nationals

To become a naturalized citizen of Canada, it is necessary to first become a permanent resident. To be eligible for Canadian citizenship, a permanent resident must accumulate at least 1,095 days of physical presence in Canada within five-years. Another important requirement for Canadian citizenship is to file Canadian income tax returns (if required) for three out of five years, matching the physical presence requirement.

Subject to some exemptions, citizenship applicants must pass a test to demonstrate knowledge of Canada's history and heritage and the rights and responsibilities of being a Canadian citizen. Most citizenship applicants are also required to demonstrate adequate language skills in English or French.

H. Compliance concerns for employers of foreign nationals

- *Consequences of Unauthorized Employment (and Work) in Canada*

It is an offence contrary to section 124 of IRPA to employ a foreign national in Canada without proper authorization. This offence is punishable by a fine of up to $50,000 and/or imprisonment for up to two years. Employers must exercise due diligence to determine whether a foreign national is properly authorized to work in Canada. An employer who fails

to exercise due diligence to confirm that a foreign national is properly authorized to work for them in Canada is deemed to have known the employment was not authorized.

Foreign nationals who work in Canada without proper authorization open themselves to many risks including potential removal from Canada, a six-month ban against working in Canada and being found inadmissible to Canada for non-compliance. The risks faced by foreign nationals who work in Canada without proper authorization can also impact employers whose operations depend on key international resources to fill labour shortages and skills gaps in Canada.

- *Conditions Imposed on Employers of Foreign Nationals*

Various conditions are imposed on employers of foreign nationals in Canada pursuant to sections 209,2 to 209.4 of IRPR including but not limited to providing a foreign worker with the same occupation and substantially the same (but not less favourable) wages and working conditions as those set out in their offer of employment; complying with the applicable federal and provincial laws that regulate employment and the recruitment of employees; and making reasonable efforts to provide an abuse-free workplace.

An employer's compliance with the regulatory conditions imposed on their employment of foreign nationals is monitored by the Government of Canada through employer compliance inspections. Non-compliance discovered during an inspection that cannot be justified constitutes a violation that is subject to one or more of the following sanctions:

- a warning;
- a period of ineligibility from hiring foreign workers;
- inclusion of the employer's information on a public website of ineligible employers; and
- an administrative monetary penalty.

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

New Brunswick Provincial Nominee Program

Through the New Brunswick Provincial Nominee Program ("NBPNP"), prospective immigrants with the skills and experience targeted by New Brunswick can be nominated for immigration to Canada. Provincial nomination is a preferred pathway for obtaining permanent residency in Canada for many foreign nationals because of the flexibility built into many of nomination streams.

Currently, the following nomination streams are available under the NBPNP:

- The **Skilled Worker Stream** is an employer-driven stream through which employers can hire foreign workers and recently graduated international students with skills and experience needed in New Brunswick. This program was paused on August 29, 2024, as the province's full allocation for 2024 was reached. It will re-open in January 2025.

- The **Express Entry Stream** selects individuals who wish to live permanently in New Brunswick ("NB") and have one of three connections to NB which includes a job offer in a highly skilled role, have recently graduated from an NB educational institution or is a graduate student who has submitted their thesis for evaluation, or has received a letter of invitation from NB based on their labour market demands. This program was paused on August 29, 2024, as the province's full allocation for 2024 was reached. It will re-open in January 2025.

- The **Strategic Initiative for French Speaking Immigrants Stream** selects individuals with French-language skills who have one of three connections to NB which includes a job over at any skill level from an NB employer, have completed an exploratory visit to NB and wishes to immigrant there permanently, or receives a direct invitation from NB based on economic priorities.

- The **Business Immigration Stream** is for experienced business owners or senior business managers who want to live in NB. Applicants are required to start a new business or buy an existing business in which they actively participate in the day-to-day management. The business must create at least one full-time jobs for someone in NB and personal worth verification of at least $500,000 is required.

- The **Critical Worker Pilot Stream** is a pilot program and accessible only to employees of six employers who were selected based on a demonstrated experience and history using federal and provincial immigration programs, as well as their ability to provide settlement supports. This stream does not accept applicants from interested candidates; applications are submitted through the six identified employers.

- The **New Private Career College Graduate Pilot Program** is a pilot program accessible to graduates from two identified private career colleagues that are not eligible for post-graduate open work permits. Applicants must have a job offer in a list of eligible occupations within 90 days of graduation.

XV. ADDITIONAL INFORMATION

APPENDIX A - *Complaints under the Human Rights Act*

The New Brunswick Human Rights Commission ("the Commission") investigates and conciliates formal complaints of discrimination filed under the *Human Rights Act*. An individual claiming to be aggrieved by discrimination contrary to the *Human Rights Act* may file a complaint with the Commission. The compliant must be filed within one year after the alleged violation of the *Human Rights Act* occurs, unless the Commission grants an extension of time. It is illegal for an employer to retaliate against an individual for making a

complaint, giving evidence, or assisting in any way in respect of the initiation, inquiry, or prosecution of a complaint or any other proceeding under the *Human Rights Act*.

The Commission uses various approaches to resolve complaints. In some cases, the Commission's staff offers mediation services, known as pre-complaint intervention, to negotiate a settlement of a dispute prior to the filing of a formal human rights complaint. If a complaint is filed, the Commission has an early mediation service in which a staff person acting as a neutral third party assists the parties to resolve the complaint as early as possible.

If early mediation is unsuccessful or is refused by the parties, a Human Rights Officer may investigate the complaint. There are opportunities for the parties to settle the complaint throughout the investigation.

Depending on the information gathered, the Officer may recommend that the file be closed by the Director as being clearly without merit. In that case, the parties receive a letter and a summary dismissal report indicating why the file was closed and advising them that they can appeal the dismissal to the Commission within 15 calendar days. The time limit for appeals cannot be extended. If an appeal is filed, the members will review the Director's decision during a Commission meeting and either uphold it or direct that the file be re-opened for further action.

Unless the case is closed by the Director, the investigating Officer will prepare a Case Analysis Report (CAR). It contains an analysis of the information gathered through the investigation and a recommendation from the staff to the Commission members (for example, to dismiss the complaint). The CAR is shared with the parties and they can respond to it in writing.

The CAR and any responses received from the parties are considered by the Commission members at a meeting. The Commission members may dismiss the complaint as being without merit. On the other hand, if the members are satisfied that an inquiry is warranted under the circumstances, and the Commission is unable to settle the complaint, the Commission members will refer the complaint to the Labour and Employment Board.

If the complaint is referred to the Labour and Employment Board, the Board will hold a pre-hearing conference to deal with preliminary issues and to mediate the dispute if possible. If a settlement cannot be negotiated, the Board will hold a public hearing later to hear evidence and argument of all the parties to the complaint. The Commission is a party and had carriage of the complaint.

If the Board finds that the *Human Rights Act* was not violated, it dismisses the complaint. If it concludes that there was a violation, it may order, for example, that the discrimination stop, that a dismissed employee be reinstated with back pay, or that the victim be compensated financially for expenses and emotional suffering. The decisions of the Board are published unless the Board orders otherwise.

It is the Board, not the Commission, which holds a hearing and issues an order. The Board is separate and independent from the Commission.

CONTACT INFORMATION

For more information about labour and employment law in Nova Scotia please contact **Nancy Barteaux, K.C.** or **Michelle Lahey**.

For more information about Canadian immigration law, please contact **Andrea Baldwin** or **Lana Roberts**.

Law Firm: Barteaux Labour & Employment Lawyers Inc.

Address: 1701 Hollis Street, Suite L106, Halifax Nova Scotia, Canada B3J 3M8

Email: nbarteaux@barteauxlawyers.com; mlahey@barteauxlawyers.com;

abaldwin@barteauxlawyers.com; lroberts@barteauxlawyers.com

Phone: +1 (902) 377-2233