Global Employer Handbook Chapter
Newfoundland and Labrador

INTRODUCTION

Newfoundland and Labrador joined Canada in 1949 as Canada's tenth and final province. Prior to joining Canada, Newfoundland and Labrador was under British rule. Newfoundland and Labrador is the most easterly province in Canada, and is one of the four Atlantic provinces (Newfoundland and Labrador, Nova Scotia, Prince Edward Island and New Brunswick). Newfoundland and Labrador comprises the island of Newfoundland and a part of the mainland of Canada known as Labrador, which borders with the province of Quebec to the south and the west and has a coastline with the Labrador Sea to the north and east.

Newfoundland and Labrador comprises approximately 405,000 square kilometres, with Newfoundland accounting for approximately 110,000 square kilometers and Labrador covering approximately 295,000 square kilometers.

Newfoundland and Labrador has 7 federal parliamentary seats and is represented in the Senate by 6 senators. There are 40 seats in the provincial government, which called the Newfoundland and Labrador House of Assembly. The Lieutenant Governor, appointed to represent the Queen, is at the head of the provincial government. There are also municipal governments and town councils which govern local life in Newfoundland and Labrador's cities and rural areas.

There are approximately 530,000 inhabitants of Newfoundland and Labrador. St. John's is the provincial capital and is located on the island. St. John's (and its surrounding communities) have approximately 200,000 inhabitants. Other major centres in Newfoundland are Cornerbrook, Gander, and Grand Falls. In Labrador the main centres are Happy Valley Goosebay and Labrador City (each with a population of 7000 – 8500).

Newfoundland and Labrador has a distinct culture which is grounded in its independence until 1949, as well as a dramatic landscape. Its people have a connection to the land and the sea. They are known for their hospitality, sense of humour and storytelling. The Newfoundland accent is distinct as are the words and phrases used in Newfoundland not found elsewhere.

Newfoundland and Labrador is predominantly English speaking and there is a French community. There are two distinct First Nations, the Innu and the Mi'kmaq. The Innu are in Labrador and the Mi'kmaq are in Newfoundland. Labrador is also home to the people of Nunatsiavut, who are Inuit. Newfoundland and Labrador has one university and numerous colleges and community college campuses.

The fisheries were traditionally an important industry in Newfoundland and Labrador and are central to the province's identity.

Some of the largest industries in Newfoundland are:

- Construction
- Manufacturing (including Fish products)
- Wholesale & Retail
- Finance Insurance, Real Estate & Business Support Services
- Oil Extraction
- Mining
- Health Care & Social Assistance
- Public Administration

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.

NEWFOUNDLAND AND LABRADOR LABOUR AND EMPLOYMENT LAW

Employment relationships in Newfoundland and Labrador are governed by legislation and the 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 Supreme Court of Newfoundland and Labrador, The Court of Appeal of Newfoundland and Labrador, and the Newfoundland and Labrador Labour Relations 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

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

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.

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.

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 is nearly impossible to ascertain the terms of the contract unless they are reduced to writing, and so employers should not rely on oral contracts alone.

- *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 predate the Canadian legal system as well as more recent statements and iterations articulated or refined by the courts and administrative boards and tribunals.

The 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 Newfoundland and Labrador are outlined in the *Labour Standards Act, RSNL 1990, c L-2* (the "*Labour Standards Act*"). The *Labour Standards Act* generally applies to all employees, however certain types of employees are excluded from certain provisions of the *Labour Standards Act,* such as periods of rest, overtime, and notice of termination. Those exclusions are listed in the *Labour Standards Regulations,* CNLR 781/96 (the "*Labour Standards Regulations*").

The *Labour Standards Act* establishes the minimum standards for employment in Newfoundland and Labrador, 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 *Labour 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 *Labour 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 *Labour Standards Act*, there are other provincial laws that are relevant to the employment relationship, including: the *Employers' Liability Act,* RSNL 1990 c E-10, the *Human Rights Act, 2010,* SNL 2010, c H-13.1 (the "*Human Rights Act*"), the *Labour Relations Act*, RSNL 1990, c L-1 (the "*Labour Relations Act*"), the *Occupational Health and Safety Act,* RSNL 1990, c O-3 (the "*Occupational Health and Safety Act*"), and the *Workplace Health, Safety and Compensation Act,* RSNL 1990, c W-11 (the "*Workplace Health, Safety and Compensation 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 legislation that the employer is subject to which is specific to that industry.

The Collective Agreement

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 Newfoundland and Labrador are governed by the *Labour Relations Act* if the employer is subject to provincial jurisdiction, or by the *Canada Labour Code,* RSC 1985, c L-2 ("*Canada Labour Code*") if the employer is subject to federal jurisdiction.

Typically, collective agreements will address issues such as hours of work, work schedules, management rights, wages, hiring, discipline, layoffs, and termination. 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.

B. Discrimination (in the Hiring Process)

Section 14 of the *Human Rights Act* states that an employer is not allowed to:

- refuse to employ or to continue to employ any person; or
- otherwise discriminate against a person regarding employment or a term or condition of employment,

because of the race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, gender identity, gender expression, marital status, family status, source of income, or political opinion of the person, or for the conviction for an offence that is unrelated to the employment. Discrimination may be direct, or indirect because it imposes an adverse effect by excluding, restricting, or preferring some persons because of a protected ground set out in the *Human Rights Act*.

One common source of human rights complaints against employers 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 such requirements or questions regarding any of the enumerated 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 ("BFORQ"). An employer bears the onus of establishing the BFORQ 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.

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 *Human Rights 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.

Beyond those prohibitions, 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.

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.

D. Use of Employment Contracts

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, for the terms of a contract to be enforceable, and relied upon if there is a dispute, the terms of the contract should be reduced to writing.

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. 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 the termination of the employee's employment.

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 *Labour 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*

In a unionized workplace, the *Labour Relations Act* states that every collective agreement shall contain a provision for the final and binding settlement by arbitration of all differences between the parties arising from the application, administration, operation, or alleged violation of the collective agreement. Unlike in a non-unionized setting, courts have held that employees subject to a collective agreement do not have recourse to the courts if the subject matter of a dispute falls either explicitly or implicitly under the ambit of the collective agreement.

- *Non-Disclosure Agreements/Non-Competes*

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. For more on non-competes, please see Section VII.B.—Covenants Not to Compete, below.

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. 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 Newfoundland and Labrador, however, employers should be aware that not all employers may be willing to provide references for former employees.

There is 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 employee's 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 Newfoundland and Labrador concerning their entitlement to compensation, periods of rest, and other benefits.

A. Minimum Wage

The minimum wage rate for Newfoundland and Labrador is articulated in sections 8 and 9 of the *Labour Standards Regulations*. The minimum wage as of April 1, 2024, is $15.60 per hour.

There are several categories of employees who are exempt from the overtime pay

requirements, including some categories of agricultural workers and live-in housekeepers or baby-sitters.

B. Wage Payments & Deductions

The *Labour Standards Act* requires employees to be paid at least bi-monthly, and within seven days after the end of the pay period. An employer must provide a written statement with each pay that includes the gross amount of wages, relevant pay period, rate of wages for that pay period, amount and purpose of each deduction, and the net amount of wages.

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

The employer is entitled to make certain deductions from an employee's earnings, specifically: (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; (e) savings plan deductions requested by the employee; (f) overpayment of or unused portion of required travel advances; and (g) deductions for rental payments or charges for occupying living premises under the control of the employer.

Where an employee is required to incur expenses in connection with work, the employer must advance to the employee the amount that the employee may reasonably anticipate will be incurred. However, the parties can agree not to be bound by this requirement. Where expenses incurred exceed the amount advanced to the employee, the employer must reimburse the employee for the amount spent within two weeks of the employee submitting a claim for reimbursement.

C. Minimum Age/Child Labour

The *Labour Standards Act* specifies the following in respect of children and employment:

- a "child" means a person under 16 years of age;
- an employer cannot employ a child to do work that is or is likely to be unwholesome or harmful to the child's health or normal development, or is prejudicial to the child's attendance at school or the child's capacity to benefit from instruction given at school;
- an employer shall not employ a child who is under the age of 14 unless the work is prescribed work within prescribed undertakings; and
- an employer shall not employ a child while a strike by employees or a lockout of employees is in progress.

Children between the ages of 14 and 16 years are allowed to work, but subject to very strict

limitations regarding their hours of work and required periods of rest, particularly on days where the child is in school.

D. Overtime Requirements

The *Labour Standards Act* provides that, after 40 hours of work, an employee is entitled to compensation equal to time and one-half of the minimum wage rate. The employer and the employee may instead agree to compensate the employee for overtime hours by giving one and a half hours of paid time off work for each hour of overtime worked instead of overtime pay. Under such an arrangement, the paid time off must be taken within 3 months of the work week in which the overtime was earned, or with the employee's agreement, within 12 months of that work week.

The current minimum overtime wage rate is $23.40, as of April 1, 2024. All future adjustments to the minimum overtime wage rate will be based on the annual Consumer Price Index for Canada and will be announced annually by the government on April 1.st.

Where an employee agrees with one or more other employees to a change in their work schedule and the employer grants the employee, after receiving his or her written request to do so, a change in the employee's work schedule that results in the employee working more than 40 hours for the week, the employer is not required to pay the employee overtime wages for those hours.

E. Workday/Workweek/Work hours

The *Labour Standards Regulations* establish that the standard workweek in Newfoundland and Labrador is 40 hours.

The *Labour Standards Act* requires an employer to provide each employee with a rest period of at least 24 consecutive hours in every seven-day week and, wherever possible, to provide that rest period on a Sunday.

Except in the case of an emergency or an imminent hazard to life or property, an employer is required to give an employee not fewer than eight consecutive hours off from work in each unbroken 24-hour period of employment.

An employer must also provide an unbroken rest period of one hour immediately following each five consecutive hours of work.

Under the *Labour Standards Regulations*, there are exemptions to the statutory requirements for rest periods. Notably, employees who are crew members of a ferry boat, who are subject to a collective agreement, or who work alone and, in circumstances where it is impractical for that employee to take a rest period are exempt.

F. Benefits/Health Insurance

There is no statutory requirement for an employer in Newfoundland and Labrador 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 Newfoundland and Labrador, subject to a few exceptions, are generally required to participate in the workers' compensation statutory insurance scheme set out in the *Workplace Health, Safety and Compensation Act*.

III. TIME OFF/LEAVES OF ABSENCE

A. Paid Time Off

- *Vacation Pay*

After one year of continuous employment, an employee is entitled to two weeks of vacation within the ten months following the end of the one-year work period. The employer must pay 4% of the total wages earned by the employee during the 12-month period as vacation pay. Where an employee has completed 15 years of continuous service, his or her vacation entitlement increases to three weeks of vacation leave and 6% of total wages as vacation pay.

The entitlement to vacation leave is exclusive of any vacations for statutory holidays. Where a statutory holiday or bereavement leave falls during the vacation period, an extra day will be added to the vacation period.

Unless the employer and the employee agree upon shorter periods, an employer is required to give an employee his or her annual vacation in one unbroken period of two weeks or in two unbroken periods of one week. For employees entitled to three weeks of leave, the employee is permitted to take the leave in one unbroken period of three weeks, two unbroken periods of two weeks and one week respectively, or three unbroken periods of one week each.

The employer has the authority to decide when an employee must take his or her vacation leave. However, many employers allow their employees to choose when they will take their vacation leave. Unless the employer and employee otherwise agree in writing, the employer must give the employee not less than two weeks' written notice of the dates of the annual vacation. Where the employer cancels or changes the dates of the employee's annual vacation after having given such notice, the employer must reimburse the employee for reasonable expenses incurred by the employee with respect to the cancelled or changed vacation that are not otherwise recoverable by the employee.

- *Sick Leave Pay*

Paid sick leave is not required of Newfoundland and Labrador employers. However, the *Labour Standards Act* provides for a period of seven days unpaid sick leave or family responsibility leave per year after 30 days of continuous employment with the same employer. If the leave of absence is for three or more consecutive days, an employee is required to provide the employer with a certificate from a qualified medical practitioner or a statement in writing detailing the nature of the family responsibility. Any unused portion of

sick leave or family responsibility leave expires at the end of each year.

- *Holiday Pay*

The *Labour Standards Act* provides that employees in Newfoundland and Labrador are entitled to time off with pay for each of the following public holidays: New Year's Day, Good Friday, Memorial Day, Labour Day, Remembrance Day, and Christmas Day. Where a public holiday falls on a day which an employee is normally off, the employee is entitled to the next day immediately following the holiday, or another mutually agreed day. A collective agreement may make provisions for holidays that differ from these holidays, but it cannot reduce the total number of public holidays in a given year.

Employees are not entitled to paid holidays if they have been employed for fewer than 30 days or they fail to comply with the contract of service on the days immediately preceding or succeeding the holiday.

Where an employee is required to work on a paid holiday, the employer must pay the employee twice his or her regular rate of pay, give the employee one paid day off in lieu thereof within 30 days following the holiday, or add one full paid day to the employee's annual vacation entitlement.

- *Other*

B. Workers' Compensation

The *Workplace, Health and Safety Compensation Act* establishes an insurance scheme which requires certain employers in Newfoundland and Labrador to obtain coverage for workplace-related incidents. The need to obtain workers' compensation insurance coverage is subject to several exceptions, which are outlined in the *Workplace, Health and Safety Compensation Act*.

This insurance scheme provides certain benefits to employees who are injured in workplace injuries. Specifically, under the *Workplace, Health and Safety Compensation Act*, employees are entitled to 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 willful misconduct of the worker.

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 "WorkplaceNL". 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 willful misconduct of the worker.

It is important to keep in mind that 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 from or to the workplace. Conversely, certain injuries sustained in an employer's physical workplace may not be insured.

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. The Commission then confirms if the employee is covered. 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.

An employer is required to cooperate in the early and safe return to work of a worker injured in his or her employment by:

- contacting the worker as soon as possible after the injury occurs and maintaining communication throughout the period of the worker's recovery;
- providing suitable employment that is available and consistent with the worker's functional abilities and that, where possible, restores the worker's pre-injury earnings;
- giving the Commission any information it may request concerning the worker's return to work; and
- doing any other things that may be prescribed in the regulations to the *Workplace, Health and Safety Compensation Act*.

The worker also must cooperate in his or her early and safe return to work by maintaining contact with the employer, assisting in finding accommodative jobs, and accepting suitable employment.

Employees and employers have the right to have a decision reviewed by the Commission upon request. The request must be submitted within 30 days of receiving the written decision of the Commission. An extension to this deadline may be permitted, but no application for review of a decision shall be accepted beyond one year from the date the Commission's decision was communicated to the person making the application.

Once the Commission received the review request, a review commissioner will review the decision and determine if it was made in accordance with the *Workplace, Health and Safety Compensation Act* and its regulations. Where it is determined that the *Workplace, Health and Safety Compensation Act* or regulations were contravened, the review commissioner

may set aside the decision of the Commission and make a new decision in accordance with the *Workplace, Health and Safety Compensation Act* or refer the matter back to the Commission for a new decision.

Following that process, an employee, employer, or the Commission may apply to the chief review commissioner for a reconsideration of a decision of a review commissioner. Such application must be made within 30 days of receipt of the decision that is the subject of the reconsideration being given. The chief review commissioner shall review the application and, where it is determined that reconsideration is appropriate, shall reconsider the decision, or order that the decision be reconsidered by another review commissioner who did not make the decision.

C. Leaves of Absence

Sick/Family Responsibility Leave

The *Labour Standards Act* provides that, where an employee has worked for a continuous period of 30 days or more, the employer will grant the employee a leave of absence without pay of up to 7 days (during a 12-month calendar period) to care for an immediate member of the employee's family. This maximum leave of seven days is to be combined with the employee's allotment of sick days, with a cumulative maximum for both leaves totaling seven days per year. An employee must provide a written statement outlining the nature of the family responsibility leave where the employee is absent from work for three consecutive days or more.

Bereavement Leave

The *Labour Standards Act* also provides an employee who has worked for a continuous period of 30 days or more with a maximum of three days of bereavement leave (consisting of one paid day and two unpaid days) upon the death of the employee's spouse, child, parent, sibling, grandparent, grandchild, or in-laws. If the employee has been employed for less than 30 days, then the employee is entitled to 2 days of unpaid leave.

Compassionate Care Leave

An employee who has worked for a continuous period of 30 days or more is entitled to a leave of absence without pay of up to 28 weeks to provide care or support to a family member where a legally qualified medical practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks from the day the certificate is issued or the day the leave began if the leave began before the certificate is issued. The leave may be broken up but must be taken in minimum blocks of one week. The leave ends with the last day of the week in which the family member dies or the expiration of 52 weeks following the first day of the week that the certificate was issued.

For purposes of this section, a family member includes the employee's spouse, cohabiting partner, child or step-child, parent or step-parent, sibling or step-sibling, grandparents or

step-grandparents, grandchildren and their spouse or common-law partner, “in-laws” (including father, mother, son, daughter, brother and sister) either married or common-law, aunts, uncles, nephews/nieces and their spouses or common-law partners, current or former wards, current or former guardians and their spouse or common-law partner, and any individual not related to the employee by blood, adoption, marriage or common-law partnership but who considers the employee to be like a close relative.

Leave related to Critical Illness

The Labour Standards Act also provides critically ill child care unpaid leave of up to 37 weeks to provide care or support to a child where a qualified medical practitioner (typically a doctor or a nurse practitioner) issues a certificate stating that the child is critically ill and requires the care or support of the employee and setting out the period during which the child requires the care or support. An employee must work for the same employer for at least 30 days to be entitled to such leave.

The Labour Standards Act also provides critically ill adult care unpaid leave of up to 17 weeks to provide care or support to a where a medical or nurse practitioner issues a certificate stating that the adult family member is critically ill and requires the care or support of the employee and setting out the period during which the child requires the care or support. An employee must work for the same employer for at least 30 days to be entitled to such leave.

Crime-related Child Death or Disappearance

The Labour Standards Act provides crime-related child death or disappearance unpaid leave of up to 52 weeks if the employee is the parent, spouse or cohabiting partner, adoptive parent, guardian, or foster parent of a child who has disappeared, and it is probable, considering the circumstances, that the child disappeared because of a crime. If the child has died because of crime, the period of unpaid leave is up to 104 weeks. An employee must have worked for the same employer for at least 30 days to be entitled to the leave of absence. An employee does not qualify if they are charged with the crime necessitating that leave of absence.

Reservist Leave

Reservists are entitled to an unpaid leave under the *Labour Standards Act* for a period of service, which includes a period for treatment, recovery, or rehabilitation in respect of a physical or mental health problem that results from deployment or training required for imminent deployment. The entitlement to leave is the period necessary to accommodate the period of service. An employee is not entitled to a second or additional period of unpaid leave for service unless at least one year has elapsed since the date the employee returned to work from the most recent reservists leave of absence granted. To be entitled to this leave, an employee must be a member of the reserves, have been employed by the same employer in civilian employment for a period of at least six consecutive months, and is required to be absent from work for that service.

Family Violence Leave

According to the *Labour Standards Act*, An employee employed with the same employer for a continuous period of 30 days is entitled to a family violence leave of three days paid and seven days unpaid in a year where the employee of person to whom the employee is a parent or caregiver has been directly or indirectly subjected to, a victim of, impacted or seriously affected by or witnessed family violence. An employee who intends to take a family violence leave must give written notice to their employer as soon as possible, unless there is a valid reason why notice cannot be given.

Communicable Disease Emergency Leave

Under the Labour Standards Act, an employee is entitled to a leave of absence from employment without pay if:

- The employee is under individual medical investigation, supervision or treatment;
- The employee is acting in accordance with an order under the Public Health Protection and Promotion Act;
- The employee is in isolation or quarantine or is subject to a control measure, including self-isolation, and the quarantine, isolation or control measure was implemented as a result of information or directions related to a designated communicable disease issued by the Chief Medical Officer of Health or the Government;
- The employee is under a direction given by his or her employer in response to a concern of the employer that the employee may expose other individuals in the workplace to a designated communicable disease;
- The employee is providing care or support to a qualifying individual for a reason related to a designated communicable disease that concerns that individual including a school or child care service closure; and
- The employee is directly affected by travel restrictions related to a designated communicable disease and, under the circumstances cannot reasonably be expected to travel back to the province.

Disability Leave

Disability leave is not regulated by statute in Newfoundland and Labrador except in the case of workplace injuries, which are generally covered by the *Workplace Health, Safety and 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

Under the *Labour Standards Act*, an employee who has been continuously employed for 20 consecutive weeks immediately before the expected birth date is entitled to unpaid pregnancy leave for a period not exceeding 17 weeks. Generally, an employee must request this leave at least two weeks before the anticipated start date of the leave and must provide a certificate from a qualified medical practitioner stating the estimated birth date. The leave

may commence no earlier than 17 weeks before the expected birth date. The pregnancy leave of an employee who is entitled to take parental leave ends 17 weeks after the pregnancy leave begins. For employees who are not entitled to take parental leave, the pregnancy leave ends either 17 weeks after the pregnancy leave began or the day that is 6 weeks after the birth, still-birth, or miscarriage, whichever is the later.

Employees who adopt a child, and for which the child is coming into the care and custody of the parent for the first time, are entitled to unpaid adoption leave of up to 17 weeks if they have been continuously employed for at least 20 consecutive weeks. Adoption leave commences when the child comes into the care and custody of the parent for the first time. An employee must give his or her employer notice in writing at least two weeks before the day the leave is to begin.

Employees are entitled to unpaid parental leave of up to 61 weeks if they have been continuously employed for at least 20 consecutive weeks. Parental leave begins on the day the child is born or the first time the child comes into the care and custody of the parent. Parental leave may begin no more than 35 weeks after the day the child is born or comes into the care and custody of the parent for the first time. Where an employee also is taking pregnancy leave, parental leave does not commence until the pregnancy leave ends unless the child has not yet come into the care and custody of the parent for the first time.

IV. DISCRIMINATION & HARASSMENT

A. Discrimination

- *Protected Classes and Activities*

Employers may not discriminate based on the protected grounds enumerated in section 9 of the *Human Rights Act*. Section 14 of the *Human Rights Act* states that an employer is not allowed to:

- refuse to employ or to continue to employ any person; or
- otherwise discriminate against a person regarding employment or a term or condition of employment,

because of the race, colour, nationality, ethnic origin, social origin, religious creed, religion, age, disability, disfigurement, sex, sexual orientation, gender identity, gender expression, marital status, family status, source of income, or political opinion of the person, or for the conviction for an offence that is unrelated to the employment. Discrimination may be direct, or indirect because it imposes an adverse effect by excluding, restricting, or preferring some persons because of a protected ground set out in the *Human Rights Act*.

Complaints under the Human Rights Act

An employee or job applicant may file a complaint to the Human Rights Commission of Newfoundland and Labrador in relation to any alleged discriminatory conduct. Quite often, discrimination complaints concern an employer's failure to accommodate an employee's disability, discriminatory practices in the hiring process, or the termination of an employee's employment for a discriminatory purpose. Complaints must be filed by the complainant within one year of the alleged contravention. In the case of an alleged continuing contravention of the *Human Rights Act*, the complaint must be filed within one year after the last incidence of the alleged contravention. The process for adjudicating complaints is articulated in the *Human Rights Act*. It provides the opportunity for the respondent employer to file a response to the complaint. The complaint can be assigned to a Voluntary Resolution Path (VRP), a form of dispute resolution, where the Commission works with the parties to resolve the dispute in an amicable manner. If the parties do not agree to a VRP, or if the complaint is not resolved, the file is given to a Human Rights Specialist to investigate the complaint. After all parties have responded to the investigation, the complaint and all evidence is reviewed by the Human Rights Commissioners. The Commissioners will decide one of the following:

- to dismiss the complaint because the evidence does not support the allegations. The complainant has the option to then file an application for judicial review in the Supreme Court of Newfoundland and Labrador, General Division if they disagree with the decision;

- to refer the complaint to "Commission-Directed Mediation" to enable the parties a final opportunity, with the assistance of a mediator, to try to resolve the complaint; or

- to refer the complaint to a Board of Inquiry (BOI) hearing.

A BOI is heard before one adjudicator in a public hearing. The process before the BOI stage is confidential between the parties. The parties to a BOI are the Commission, the complainant, and the respondent(s). Each party may be represented by legal counsel. The Commission takes the lead in presenting the complaint. Both the complainant and the respondent(s) have an opportunity to present their own evidence and arguments. The BOI is an adjudicative process that closely resembles a civil trial. A BOI can make a finding of discrimination and harassment and make certain orders which are binding on the parties. The BOI will also provide a written decision with reasons. The complainant and respondent(s) have the right to appeal the decision of a BOI to the Supreme Court of Newfoundland and Labrador, General Division within thirty days of receipt of the BOI order. The Court can confirm, reverse, or vary the decision and orders of the BOI.

For a complaint to not be dismissed at the outset, an employee or job applicant who alleges discrimination must first establish a *prima facie* case of discrimination. This is done when the complainant presents evidence that: (a) confirms the allegations that have been made, and (b) that, if believed, is complete and sufficient for a decision to be made in favour of the complainant, in the absence of an answer from the respondent.

While a complainant has the initial burden of establishing *prima facie* discrimination, employers have an obligation to promptly investigate allegations of discrimination when they

first arise. If there are findings of discrimination made because of the employer's own investigation, then that employer is tasked with taking the appropriate disciplinary steps against the parties involved.

Once a *prima facie* case is established, the onus shifts to the employer to provide a satisfactory explanation demonstrating that either the conduct did not occur as alleged or was non-discriminatory in nature. Conduct may be found to be non-discriminatory if the employer is able to establish that accommodating the complainant's needs would impose an undue hardship on the employer.

A further exception under the *Human Rights Act* applies to the prohibition against discrimination on the grounds of age in the operation of a retirement, pension, or insurance plan, provided the contravention is made in good faith. Whether the contravention is in good faith depends on whether it is reasonable and justifiable in the circumstances.

B. Harassment and Bullying

The Newfoundland and Labrador *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. 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 harassment is also addressed in the *Occupational Health and Safety Regulations* 2012, NLR 5/12 which requires workplaces to have a written harassment prevention plan and provide training related to harassment prevention.

Sexual solicitation is also prohibited under the *Human Rights Act*. A person who is in a position to confer, grant, or deny a benefit or advancement to another person cannot engage in a sexual solicitation with or make a sexual advance to the other person where he or she knows or ought reasonably to know that the solicitation or advance is unwelcome. Also, a person who is in a position to confer or deny a benefit or advancement to another person cannot penalize, punish, or threaten reprisal against that person for rejecting a sexual solicitation or advance.

Employers are vicariously liable for the acts of their employees. Employers are therefore legally responsible for actively discouraging and prohibiting harassment and discrimination in the workplace. 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.

B. Justification for Dismissal

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 notice or pay in lieu thereof. The following section will provide an overview of some of the issues that arise in these more contentious situations.

The distinction between termination with or without cause is of major significance. Notably, it dictates whether an employee is entitled to any notice or pay in lieu of 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 *Labour 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.

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 "without cause" termination.

The *Labour Standards Act* outlines minimum notice periods for employees based on their years of service with an employer. Employees who are terminated may have common law rights that are separate and distinct from the statutory requirements provided for in *Labour 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.

Some employers elect to include contractual clauses that limit the amount of notice or pay in lieu of 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 *Labour Standards Act* will be invalid and struck down by the Courts. Unique to Newfoundland and Labrador is a provision in the *Labour Standards Act* which stipulates that a collective agreement or written contract of service between the employer and employee that differs from the period of notice required to be given by the employer or employee under the *Labour Standards Act* is effective only if the period of notice of termination required to be given by the collective agreement or the contract of service is the same for the employer and the employee. There is case law in some Canadian jurisdictions that has found the entire agreement, not just the clause or provision in question, to be invalid. Provisions that state that an employee is only entitled to the minimum amount under the *Labour Standards Act* have been subject to a significant amount of scrutiny. In many cases, Canadian courts have found ways to get around these contractual provisions to award an employee damages in line with the 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.

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 Newfoundland and Labrador 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 releasing the employer from future liability.

The consideration must be something in addition to the statutory notice entitlement and any severance entitlement 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

- *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 by the employer that makes working conditions intolerable can constitute grounds for constructive dismissal, as a fundamental implied term of any employment relationship is that the employer will treat the employee 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 Newfoundland and Labrador Small Claims Court and the Supreme Court of Newfoundland and Labrador, General Division 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 $25,000. The Supreme Court has jurisdiction over all matters, including those where the damage claim exceeds $25,000, 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 Standards Division of the Department of Advanced Education, Skills and Labour, which is the administrative body responsible for the administration of the *Labour Standards Act* and its regulations. An employee may file a complaint alleging that an employer failed to comply with the *Labour Standards Act*. The Labour Standards Division has the authority to investigate and can issue an order to comply with the *Labour Standards Act*. Complaints regarding discrimination or harassment can be made to the Newfoundland and Labrador Human Rights Commission.

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 resolved before an adjudicator. 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.

Calculating Damages for Wrongful Dismissal

Once the notice period an employee is entitled to is determined, the next step is to calculate the value of the claim. Typically, most of the claim's value is 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 in 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 involves 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 assessing 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 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. If the employee obtains alternative employment, including self-employment, the court usually deducts any amount earned from these sources during the notice period established by the court.

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, should an employer refuse to provide a confirmation of employment letter or an employment reference, it may be more difficult for the employee whose employment has been terminated to mitigate his or her damages. This could increase the notice period as 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

A. Overview

An employee who is terminated must be given statutory notice of termination. During the period of notice (see the list below), the employee may be asked to continue to work, or his or her employment may be terminated as of the date of notice. If an employee is terminated, he or she must be paid his or her regular wages for that period, in lieu of working the notice period. The *Labour Standards Act* legislates how much notice, or pay in lieu thereof, must be given to employees who are being terminated.

B. Procedure

- *Mandatory Notice Periods*

Non-unionized employees must be given notice of termination, or pay in lieu of notice, as follows:

Length of Service	Amount of Notice
• 3 months to 2 years	1 week
• 2 to 5 years	2 weeks
• 5 to 10 years	3 weeks
• 10 to 15 years	4 weeks
• 15 or more years	6 weeks

Where more than 50 employees are to be terminated within a four-week period, employers must give notice to the affected employees as follows:

Number of Employees	Amount of Notice
• 50 to 199 employees	8 weeks
• 200-499 employees	12 weeks
• 500 or more employees	16 weeks

Layoffs of less than one week do not require notice to be given, but layoffs of more than one week require the same notice as that provided in termination situations. All layoffs of more than 13 weeks in a period of 20 consecutive weeks are deemed to be terminations.

- *Transfer of Undertakings/TUPE*

Newfoundland and Labrador does not have specific legislation in place that addresses Transfer of Undertakings. However, employees who work for an organization being sold or transferred are protected by a combination of statutory and common law principles.

The courts recognize that the realities of modern business life require a recognition of complex relationships between companies. There is case law concerning what happens to the employment relationship when and organization is sold or transferred. 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 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 or transferor 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 *Labour Standards Act* ensures that where and employer sells a business or undertaking, or part of a business or undertaking, and the purchaser employs an employee of the seller, the employment of the employee is deemed not to have been terminated or severed and his or her employment with the seller is deemed to have been employment with the purchaser for the purpose of any subsequent calculation of the employee's length or period of employment. Employers cannot contract out of this section.

Other principles that protect employees after transfers tend to expand the list of defendants liable for damages related to employment claims. Among them are the "common employer" doctrine (when more than one organization is 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 Newfoundland and Labrador for severance pay other than the termination notice, or pay in lieu of notice, provisions in the *Labour 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.

- *Severance Packages/Separation Agreements*

For a detailed analysis of severance packages and separation agreements, please see sections V.C and V.D. above.

VII. UNFAIR COMPETITION/COVENANTS NOT TO COMPETE

A. Trade Secrets

There are no statutes governing trade secrets as they relate to employment in Newfoundland and Labrador.

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 un-known 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 Newfoundland and Labrador.

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.

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, and, therefore, does not have the same right as an ordinary employee to compete with his or her former employer after the employment relationship ends.

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 for employees and customers as they relate to employment in Newfoundland and Labrador.

Non-solicitation agreements or clauses are more likely to be enforced by a court than non-compete agreements or 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. Employers in Newfoundland and Labrador should seek legal advice before

adding restrictive covenants to their employment contracts and should also be aware that courts are hesitant to enforce non-compete clauses in employment contracts.

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.

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, and, therefore, 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

For information on method of payment, payment frequency, and record-keeping requirements, please see Section II.B. above.

B. Required Postings

Subsection 31(2) of the *Labour 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 code of practice in a prominent location in the workplace. The employer must also post a copy of the workplace health and safety policy and the names of the occupational health and safety committee members in a prominent location in the workplace.

Collective agreements may also contain certain provisions regarding when an employer must post information.

C. Required Training

Employment-related training is mandated for certain safety-sensitive industries under the *Occupational Health and Safety Act* and its regulations.

D. Meal and Rest Periods

The *Labour Standards Act* provides that an employee must receive a one-hour unbroken rest period after each five consecutive hours of work. A collective agreement or written contract of service between the employer and the employee may provide for a rest period that differs from this requirement with respect to its duration and timing.

Except in the case of an emergency that constitutes an imminent hazard to life or property, an employer shall permit an employee to take and an employee shall take not less than eight consecutive hours off work in each unbroken period of employment.

E. Payment Upon Discharge or Resignation

The *Labour Standards Act* requires employers to pay terminated employees any and all outstanding wages to which they are entitled at the expiry of the notice period established by the *Labour Standards Act*.

F. Personnel Records

- ***Right of Access***

The Director and an officer or inspector may at reasonable times enter upon the premises of an employer where it is reasonably necessary to inspect, examine, or make copies of records or any other documents maintained by the employer. The Director, an officer, or inspector may also interview employees working on the employer's premises without interfering with the employees' duties.

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

- ***Retention Requirements***

The *Labour Standards Act* requires every employer to make and keep personnel records for four years after the date of last entry on the record for each employee. The records must contain certain information as required by the *Labour Standards Act*, including: the name,

address, and date of birth of the employee; the rate of wages of the employee, number of hours worked by the employee in each day, and the amount paid to the employee showing all deductions from wages paid; the date of the beginning of the employee's employment; the date of any temporary lay-off or termination, and if appropriate, the date notice of intention to terminate was given; particulars respecting annual vacation entitlements and use; the date on which required rest periods were given to the employee; and the date of expiry for fixed term employment.

Employers are privy to a significant amount of personal information regarding employees. The use of that information by private sector employers is not governed by legislation in Newfoundland and Labrador. 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 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*, in certain 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.

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. It also gives people the right to access their personal information held by an organization and to challenge its accuracy. 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 also 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*.

IX. PRIVACY

A. Drug and Alcohol Testing

There is no statute in Newfoundland and Labrador 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 (BFORQ). 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 the use of alcohol or drugs.

As drug and alcohol issues remain an ongoing concern in workplaces, employers have attempted to implement testing policies that aim to curtail drug and alcohol use. Those testing policies have generally taken five (5) distinct forms: pre-access testing, pre-employment testing, for cause testing, return to work testing, and random testing.

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 in drug and alcohol testing. In *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd.*, 2013 SCC 34 ("*Irving Pulp & Paper*") 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 balanced employer safety concerns with the privacy interests of the 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. As such, employers looking to implement alcohol and drug testing policies must approach that decision with caution.

The law regarding pre-access testing is evolving and appears to vary upon jurisdiction.

B. Off-Duty Conduct

There is no statute in Newfoundland and Labrador that specifically relates to off-duty conduct. Generally, an employer has no right to direct an employee's off-duty behaviour or activities.

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 rightly 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.

Determining whether off-duty conduct is grounds for discipline is done on a case-by-case basis and depends on several factors. Discipline, up to and including termination, may be justified where an employee's off-duty conduct prejudices the employer's interests. Certain egregious conduct, such as serious criminal conduct while off-duty, may be grounds for termination.

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.

C. Medical Information

Employers must be aware of privacy considerations in the collection, use, and disclosure of medical information. Employers must limit their request, use, and disclosure to only that which is necessary. Section VIII.F - Personnel Records above provides details concerning employers' obligations regarding the protection of privacy and maintaining confidentiality of employee personal information.

D. Searches

There is no statute in Newfoundland and Labrador that specifically regulates searching employees or the possessions of employees. However, employees are entitled to a reasonable expectation of privacy in the workplace. In unionized workplaces, the collective agreement may restrict or prohibit employee searches. 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.

E. Lie Detector Tests

There is no statute in Newfoundland and Labrador that contains specific provisions related to the administration of lie detector tests in the workplace or the ability to request employees to take a lie detector test.

F. Fingerprints

There is no statute in Newfoundland and Labrador that contains specific provisions related to the issue of fingerprinting. However, 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 Newfoundland and Labrador that prohibit the use of video surveillance and monitoring in the workplace.

Much like other kinds of workplace policies, 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 real and substantial problem, and that the scope of the surveillance is no broader than necessary.

I. Cannabis (medical and recreational use)

On October 17, 2018, the *Cannabis Act*, SC 2018, c 16 made Canada the second country in the world to legalize recreational cannabis and create a national cannabis market. The *Cannabis Control Act*, SNL 2018, c C-4.1 prohibits the recreational use of cannabis in the 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 informed that they are not to self-medicate with cannabis during work hours and they may be obligated to notify their employer about their use of prescription cannabis if it is impairing.

Employers should address cannabis use 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 of 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

Newfoundland and Labrador does not have any laws or statutes that address this issue.

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

K. Weapons/Workplace Violence Policy

Newfoundland and Labrador does not have specific legislation addressing weapons in the workplace. Weapons possession and use is strictly regulated in Canada and failing to comply can amount to an criminal offence. Employers who intend to utilize weapons in the course of business should consult the *Criminal Code*, RSC 1985, c C-46 and the *Firearms Act*, SC 1995, c 39. 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, holds the applicable firearms license. In almost all circumstances, it is illegal for individuals to carry concealed weapons in Canada.

Regulation NRL 5/12 under the *Occupational Health and Safety Act* states that employers must conduct risk assessments in the workplace to assess the risk of violence. In doing so, employers must consider the previous experience in the workplace, occupational experience in similar workplaces, and the location and circumstances in which the work takes place.

Should the employer identify a risk of violence, the employer must establish procedures, policies, and work arrangements to eliminate the risk of violence. Where the elimination of the risk of violence is not possible, the employer must establish procedures, policies, and work arrangements to minimize the risk to workers.

The employer must inform employees who may be exposed to the risk of violence of the nature of the risk and the precautions that may be taken to prevent the risk. The duty to inform workers includes a duty to provide information related to the risk of violence from persons who have a history of violent behaviour and whom employees are likely to encounter in the course of their work.

X. EMPLOYEE INJURIES AND WORKERS COMPENSATION

A. Work Related Injuries

Newfoundland and Labrador employees who are injured on the job receive compensation under the Newfoundland and Labrador *Workplace, Health and Safety Compensation Act*. For more information on workers' compensation in Newfoundland and Labrador, see Section III.B – Workers' Compensation above.

B. Non-work related injuries

It is important to keep in mind that 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 from or to the workplace. Conversely, certain injuries sustained in an employer's physical workplace may not be insured. Where injuries are not covered by workers' compensation, but the injury results in a disability, employers will have an obligation pursuant to the *Human Rights Act* to accommodate the employee up to the point of undue hardship.

XI. UNEMPLOYMENT COMPENSATION

A. Eligibility

Employment insurance benefits for employees in Newfoundland and Labrador are governed by federal legislation, the *Employment Insurance Act*, RSC 1996, c 23. The *Employment Insurance Act* is administered by Employment and Social Development Canada. Briefly, an employee may qualify to receive employment insurance benefits at times when the employee is unemployed or not working due to a variety of circumstances. 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.

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 Newfoundland and Labrador, the health and safety of workers is governed by the *Occupational Health and Safety Act* and its regulations. The *Occupational Health and Safety 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, as well as any other workers present at a workplace at which 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. An employee's general duty is to take reasonable care to protect his or her own health and safety, as well as the health and safety of other workers and persons at or near the workplace.

Employee involvement is generally through participation in a Joint Occupational Health and

Safety Committee (JOHSC). In Newfoundland and Labrador, a JOHSC is required in all workplaces with 10 or more employees. In addition, these workplaces require the adoption of a written occupational health and safety program that must meet certain statutory requirements. Employers with less than 10 employees must establish a written occupational health and safety policy.

Under the *Occupational Health and Safety Act*, an employee can refuse to perform work where he or she has reasonable grounds to believe that the work is dangerous to his or her health and safety, or to the health and safety of others. Where an employee refuses to perform work, the *Occupational Health and Safety Act* sets out a complaint and investigation procedure to ensure that the complaint is valid and, if so, to determine when it is safe for the employee to perform the intended work.

An employer must ensure that its workers are aware of their responsibilities and duties under the *Occupational Health and Safety Act*. This includes providing adequate communication and instructions of safety precautions to employees to ensure that the instructions are carried out. Employers must provide and maintain in good condition personal protective equipment and clothing as required by the *Occupational Health and Safety Act* and ensure that their workers use such equipment.

Under the *Occupational Health and Safety Act*, Occupational Health and Safety Officers ("Officers") may at any reasonable hour enter and inspect a work site. In carrying out an investigation, the Officers can request and examine any records or documents that relate to the health or safety of workers. They may also do any of the following: inspect or seize material, product or equipment; make tests and take photographs or recordings in respect of any work site; and interview and obtain statements from persons at the work site.

If an Officer makes an adverse finding regarding the safety or the health of workers in a workplace, then he or she may issue an order to address that finding. The power to issue orders is outlined in the *Occupational Health and Safety Act* and includes the power to order a work stoppage.

The *Occupational Health and Safety Act* requires employers to immediately notify the assistant deputy minister of any accident that takes place at the workplace and which results in a serious injury to or death of a person, or which had, or continues to have the reasonable potential of causing serious injury to or death of a person.

Any person who contravenes or fails to comply with a provision of the *Occupational Health and Safety Act* or an order is guilty of an offence and, upon conviction, is liable to a fine of not more than $250,000 or imprisonment for a term of not more than 12 months, or both. Offences under the *Occupational Health and Safety Act* are strict liability offences. If the Crown proves beyond a reasonable doubt that the employer is guilty of an offence, the burden of proof shifts to the employer to show that on a balance of probabilities, it exercised due diligence. The employer must show that it exercised all reasonable care or had a mistaken belief in a set of facts, which if true, would have rendered its actions innocent.

An employer has the right to appeal, in writing, any order issued by an Officer under the

Occupational Health and Safety Act to the assistant deputy minister within 7 days of the order. The assistant deputy minister may confirm, revoke, or vary the order of the officer. An order made or confirmed by the assistant deputy minister may be appealed to the Labour Relations Board within 30 days of the order or confirmation thereof. The Board may confirm, revoke, or vary the order. The Board's order is final and not subject to review by a court.

In May 2023, the provincial government amended its *Occupational Health and Safety Act*, that became effective March 1, 2024. The changes to the *Act* raise the worker threshold for occupational health and safety programs and committees from 10 or more, to 20 or more workers at a worksite.

Now, employers with fewer than 20 workers at a worksite still require an occupational health and safety policy, and representative, under the *Act*. Where there are fewer than 6 workers at a worksite, the employer is to appoint a workplace health and safety designate.

B. Regulatory Requirements

- *Social Elections*

Newfoundland and Labrador does not have any laws or statutes that address this issue. For more information, please reach out to us.

- *Works Councils*

Newfoundland and Labrador does not have any laws or statutes that address this issue. For more information, please reach out to us.

- *Health and Safety Committee*

For information on an employer's obligation to establish a Joint Occupational Health and Safety Committee, see Section XII.A above.

XIII. TRADE UNIONS – INDUSTRIAL RELATIONS

A. Overview

Labour relations in Newfoundland and Labrador are governed primarily by the *Labour Relations Act* and its regulations. This statute is administered by the Labour Relations Board (the "Board"), which is the independent and impartial tribunal responsible for the day-to-day administration of Newfoundland and Labrador's labour laws.

The *Labour 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 *Labour 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*

Newfoundland and Labrador does not have any laws or statutes that address this issue. For more information, please reach out to us at 1-902-377-2233.

- *Prevalence of Trade Unions*

Newfoundland and Labrador does not have any laws or statutes that address this issue. For more information, please reach out to us at 1-902-377-2233.

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

Newfoundland and Labrador 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 Council*

Newfoundland and Labrador does not have any laws or statutes that address this issue. For more information, please reach out to us at 1-902-377-2233.

- *Challenges for a Unionized Business*

Newfoundland and Labrador does not have any laws or statutes that address the challenges faced by unionized businesses. However, the *Labour Relations Act* and regulations govern the relationship between employers and trade unions, including certification, collective bargaining, and the resolution of labour disputes.

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

In Newfoundland and Labrador, every employee has a Constitutional right to become a member of a trade union and participate in its activities. A union may apply to become the certified bargaining agent for a unit of employees claiming to have, as members in good standing, a majority of employees of one or more employers in a bargaining unit.

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. Where an application for certification is supported by not less than 40% of the employees in the unit to which the application relates, the Board shall take a vote of the employees in the unit to determine their wishes with respect to the certification of the applicant trade union as their bargaining agent. A vote is not required where the trade union and the employer in the unit to which the application relates jointly request that the Board not take a vote.

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, the Board of its own motion or on application may revoke the certification of the bargaining agent. Following the revocation, the employer is no longer required to bargain collectively with the bargaining agent.

Voluntary recognition is an alternative means for a union to acquire bargaining rights. An employer and trade union can agree that the employer recognizes the union as the exclusive bargaining agent for its members.

The *Labour Relations Act* imposes strict timelines in bargaining and should be referred to carefully to ensure compliance.

C. Managing a Unionized Workforce

- *Collective Bargaining*

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.

Once concluded, the *Labour 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*

Section 86(1) of the *Labour Relations Act* states that a collective agreement shall contain a provision for final settlement without stoppage of work, by arbitration or otherwise, of all differences between the parties to or persons bound by the agreement or on whose behalf it was entered into, where those differences arise out of the interpretation, application, administration or alleged violation of the agreement or a question as to whether a matter is arbitrable.

The *Labour Relations Act* provides the Board with the authority to restrict strike activity. Strikes and lockouts are permitted only after a conciliator has been unable to bring the parties to agreement in collective bargaining circumstances, and the appropriate timelines for filing reports by either the conciliator or mediator have been followed.

The Minister has discretion to appoint a conciliation officer to help the parties to conclude a collective agreement. The Minister may appoint a conciliation board to bring about an agreement between the parties where the conciliation officer fails to bring about an agreement between the parties engaged in collective bargaining or before or after the commencement of a legal strike or lockout. Following the commencement of a legal strike or lockout, either party may request the appointment of a conciliation board and the minister may appoint a conciliation board in accordance with the *Labour Relations Act*.

An employer or an employers' organization that is bound by or party to a collective agreement is prohibited from declaring or causing a lockout while the agreement is in force. Similarly, during the term of the collective agreement, an employee who is bound by such an agreement, or on whose behalf the agreement has been entered, is prohibited from going on strike. Furthermore, a bargaining agent that is a party to the agreement cannot declare or authorize a strike of that employee.

- *Impact on Management Rights*

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 in respect of which the application is made is appropriate for collective bargaining and the Board may include additional employees or exclude employees from the bargaining unit. The Board may certify the trade union as the exclusive bargaining agent of the employees in the unit (1) where the majority of employees in the unit are members in good standing of the trade union; or (2) as a result of the vote of the employees of the unit, the Board is satisfied that a majority of them have selected the trade union to be the bargaining agent; or (3) where, as a result of a vote of the employees in the unit, the board is satisfied that at least

70% of the employees in the unit have voted and a majority of those voting have selected the trade union to be the bargaining agent on their behalf.

Where an employee has applied in writing for membership in a trade union, the expression "member" or "member in good standing" includes a person who has paid at least $1.00 to the trade union on his or her own behalf with respect to initiation fees, or monthly or other periodic dues. If a trade union is unsuccessful in certifying a bargaining unit, the Board may prescribe a waiting period before a new application can be considered.

Employers cannot attempt to prevent an employee from becoming a union member or from exercising other rights under the *Labour 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.

Voluntary recognition is an alternative means for a union to acquire bargaining rights. An employer and trade union can agree that the employer recognizes the union as the exclusive bargaining agent for its members.

The *Labour Relations Act* imposes strict timelines in bargaining and should be referred to carefully to ensure compliance.

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 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.

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 is also 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

Newfoundland and Labrador Provincial Nominee Program

Through the Newfoundland and Labrador Provincial Nominee Program ("NL PNP"), prospective immigrants with the skills and experience targeted by Newfoundland and Labrador 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.

To access the NL PNP, employers must first obtain a positive Job Vacancy Assessment, which is a labour market test similar to an LMIA application.

Currently, the following nomination streams are available under the NL PNP:

- The **Skilled Worker Express Entry Stream** invites candidates to apply for nomination who have a profile in the federal Express Entry pool and have a job offer from a Newfoundland and Labrador ("NL") employer in a skilled role and has previously skilled work experience.

- The **Skilled Worker Stream** is for candidates who have a job offer from a NL employer at any skill level. Applications are not accepted from candidates who hold post-graduate open work permits.

- The **International Graduate Stream** is for recent graduates of a Canadian post-secondary institution, hold a post-graduate open work permit and have a job offer in a skilled role from an NL employer. If the applicant completed their studies outside of NL, the job offer must be directly related to their field of studies.

- The **International Entrepreneur Stream** is for experienced business owners or senior business managers who want to live in NL. Applicants are required to start a new business or purchase an existing business in which they actively participate in the day-to-day management. Priority is given to applicants intending to support regional economic development or focus on in-demand industries/sectors.

- The **International Graduates Entrepreneur Stream** is for international graduates from Memorial University or College of the North Atlantic who hold a post-graduate work permit. Applicants are required to start a new business or purchase an existing business in which they actively participate in the day-to-day management. Priority is given to applicants intending to support regional economic development or focus on in-demand industries/sectors.

XV. ADDITIONAL INFORMATION

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**.

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