

Canadian Employment and Labour Law Overview for U.S. Employers

Legal System

Canada is a federal state like the U.S. Both federal and provincial governments have authority to regulate labour relations and employment. Whether an employer is subject to federal or provincial legislation depends on the nature of their business.

Unlike the U.S., most employers are subject to the jurisdiction of provincial labour boards for unionized employee matters, rather than to a single federal tribunal.

The courts have jurisdiction over most non-union employee matters. Canadian courts generally award legal cost in favour of the successful party at trial.

Specialized government agencies, such as ministries of labour and tribunals also have jurisdiction over certain areas of the employment relationship, including enforcement of human rights, workers compensation, and employment standards.

Employment Standards Legislation

This legislation sets minimum standards for all employees relating to hours of work, public holidays, vacation, leave entitlements, minimum wages, and entitlements upon termination of employment.

Employees may enforce their rights by filing complaints with the applicable provincial or federal ministry of labour, which will then investigate the complaint and order the employer to comply with the legislation, and usually pay damages to the employee. The courts also have jurisdiction in Ontario to accept lawsuits based on a breach of employment standards.

Class-action lawsuits for unpaid overtime claims are a recent trend. These multi-million dollar lawsuits have many employers worrying they may be next.

Unionized Employees

The level of unionization of Canada's workforce is much higher compared to the U.S. Approximately 30% of the Canadian workforce is represented by a union. While this number has been relatively constant over the last several decades, Canadian unions have faced serious challenges in attempting to grow their membership.

Several large unions dominate the organized labour scene. Among the most significant national unions are the Canadian Autoworkers Union and the Canadian Union of Public Employees. International unions of significance include the United Steelworkers, the United Food and Commercial Workers, the International Association of Machinists, and the Teamsters.

The process by which unions obtain the right to represent employees varies from province to province. In some provinces unions provide for a vote in each case. In other provinces unions can gain the right to represent employees by signing up a sufficient number of employees as members.

Canadian "unfair labour practice" rules are similar to those found in the United States. However, the penalties for breaking these rules can be more severe than in the U.S. There are limits to what an employer can and cannot do in response to a union organizing campaign. For instance,

employers may not threaten employees with loss of employment if a union is certified. Most labour boards have the power to automatically certify a union as a bargaining agent if the employer is found to have committed an unfair labour practice.

The period of time for employers to respond to an application for certification from a union is generally much shorter than in the U.S. This means it is important for employers who are at risk of unionization to be ready to respond quickly to an application before it is even received.

Employees may apply to de-certify their union during “open window” periods defined by legislation. Employers are prohibited from supporting or initiating such applications.

Once an employer is organized through the certification process, they must bargain in good faith with the union to reaching a collective agreement. In Ontario, a union may apply to have a first collective agreement imposed if the employer does not bargain in good faith.

Once a collective agreement is settled, employees may not legally go on strike for the duration of the collective agreement. Employers also may not lockout employees. In the event of an illegal strike, employers may apply to the applicable labour relations tribunal ordering employees to return to work. It is also possible to seek criminal charges and damages against organizers of illegal strikes.

Canadian labour legislation imposes a process for all parties in a legal strike or lockout position. However, the great majority of collective agreements in Canada are negotiated without resorting to strikes or lockouts. About 95% of collective agreements are negotiated without job action occurring.

Human Rights

Canadian human rights legislation prohibits discrimination and harassment on certain specified grounds such as gender, race, religion, sexual orientation, and disability. The exact prohibited grounds of discrimination vary between jurisdictions.

Human rights tribunals have jurisdiction to decide cases involving allegations of discrimination in employment from employees. These tribunals have broad powers to reinstate employees who are terminated due to discrimination as well as to award damages. However, the typical amount in damages awarded is usually less than what U.S. courts award. Labour arbitrators in the unionized setting also have the power to enforce human rights laws. In Ontario, the courts now also have authority to award damages for breaches of human rights in the context of wrongful dismissal lawsuits.

Among the most onerous obligations for employers is the duty to accommodate employees who are disabled. The nature of physical and mental limitations pertaining to the duty to accommodate is broad.

Drug testing is an area where the laws of the U.S. and Canada diverge significantly. The rights of employers in Canada are far more restricted compared to the U.S. Random drug testing programs are generally deemed to violate human rights laws on the basis that they are a form of discrimination against employees who suffer from substance addictions, which is considered a disability. Drug testing may be permitted in certain limited circumstances.

Occupational Health and Safety

Each Canadian jurisdiction has its own legislation (and detailed regulations) to protect health and safety in the workplace. All workplace parties; workers, management, and employers have a personal responsibility to comply with the legislation. Breaches of obligation can lead to personal liability.

Significant fines can be imposed for health and safety violations. In serious cases, criminal charges can be brought against managers, company officers, and directors.

Workplace health and safety committees are required by law. Such committees usually have employer and employee representation proactively dealing with health and safety issues in the workplace.

In Ontario in recent years, the government has taken an aggressive approach to enforcing health and safety laws. New inspectors have been hired and new initiatives launched for the targeting of employers with a history of workplace injury and violation.

Employers can protect themselves with an effective system of health and safety “due diligence”. Such “due diligence” has been recognized by the courts as a defence to charges.

Workers’ Compensation

Unlike the U.S., in Canada private insurance companies play little or no role in providing workers’ compensation coverage. All provinces have government-run workers’ compensation systems that provide income replacement to workers absent from work as a result of workplace related illness or injury. In return, workers are not permitted to sue their employers for injuries or illnesses suffered in the course of their employment.

Participation is generally compulsory for employers engaged in an industry or activity covered by the insurance scheme. In some provinces such as Ontario, employers in low-risk activities (for example, strictly clerical operations) are not required to participate.

Generally, employers are required to contribute to plans in accordance with a rate schedule categorized by the type of industry or activity. Employers are required to pay a premium to the workers’ compensation fund based upon a dollar amount for each hour worked by employees. In return for participating in the workers’ compensation scheme, employers are relieved of tort liability to the employee as a result of workplace accidents. The employee’s claim is limited to the compensation and other benefits provided for under the plan.

Most workers’ compensation schemes pay the injured worker a percentage of his/her normal salary subject to maximums established under the legislation. The legislation provides for both temporary benefits for recovering employees and permanent benefits for employees who suffer permanent impairment of their earning ability. Organizations responsible for administration of workers’ compensation systems also provide rehabilitation services through their own facilities and/or the facilities provided by external agencies and professionals.

Employers doing business in any province are required to register with the provincial workers’ compensation agency and make payments required under that legislation. Employers are also responsible for reporting employee accidents and injuries to the compensation agency.

The Federal Government does not operate a workers' compensation scheme. Employees of federally regulated companies are covered under the provincial scheme in the province out of which they work.

Workplace Privacy

The federal government and some provinces have privacy legislation. The federal legislation, the Personal Information Protection and Electronic Documents Act (PIPEDA), applies to commercial activities in provinces without equivalent legislation. Currently, British Columbia, Alberta and Quebec are the only provinces with their own privacy statutes of general application.

PIPEDA governs the handling of personal employment information in relation to employees of federally regulated employers. The use of personal information relating to employment by provincially regulated employers is governed by provincial legislation in provinces that have enacted privacy legislation. In provinces without privacy statutes the use of personal information by employers in the private sector is currently not regulated. However, even in provinces without privacy statutes there are statutes of application, as well as specific privacy requirements, for specific classes of employees, such as public sector employees.

Executive Transfers

The *North American Free Trade Agreement (NAFTA)* contains special provisions for companies wishing to transfer executives, managers and specialized knowledge workers from the United States or Mexico to Canada on a time limited basis, *The Canada-Chile Free Trade Agreement (CCFTA)* contains almost identical provisions for Chilean nationals.

Employers wishing to transfer personnel from countries other than Mexico, Chile, and the U.S. or those wishing for longer-term transfers than NAFTA allows, can consider using the schemes available under G.A.T.S. or the Code E15 statutory exemption.

Employees working in Canada under the provisions of NAFTA can apply for permanent residence in Canada if they wish to stay beyond the duration of their work permit.

Pensions and Benefits

Employers are not obliged to provide any pension or benefits coverage to employees. Each jurisdiction has its own complex laws for the administration of pension plans. Strict rules apply for the funding of pension plans.

Given the complexity and substantial cost of funding pension plans, many employers are opting instead to contribute to employees' RRSPs (Registered Retirement Savings Plan) or provide group RRSPs. RRSPs are similar to 401(k) plans in the U.S.

Canada has a government-run universal health system. Some provinces fund the system through general tax revenues. In Ontario, a payroll tax is imposed on employers to raise revenue for the system. Draws are also made from general tax revenue.

Employees are generally responsible for their own prescription and dental care costs. Many employers provide privately held group benefits insurance to cover these costs as well as provide other benefits not covered by the public system.

Termination of Employment

Most Canadian employees have minimum entitlements to notice of termination or pay in lieu of notice under employment standards legislation. This notice is determined by a formula set out in the applicable legislation. In Ontario, the employer must also continue benefits for the applicable notice period. Some jurisdictions provide employees with severance pay in addition to notice depending on length of service. In the event of mass termination additional notice requirements may apply.

Employees in some jurisdictions, such as Quebec and federally regulated employees may have the right to apply for reinstatement to their jobs if the dismissal was “unjust” or there was no economic justification for the dismissal. Otherwise, employers in Canada are free to dismiss employees provided it is not for an unlawful reason, such as discrimination prohibited by human rights law or as a reprisal for seeking to enforce health and safety standards.

The concept of “at-will” employment does not exist under Canadian law. Non-unionized employees are entitled to “reasonable notice” of termination of employment under the common law unless they have an employment contract that provides some other entitlement.

There is no formula for determining the amount of reasonable notice under the common law. The courts consider the following main factors in assessing what is reasonable notice: 1) length of service, 2) age, 3) nature of the position, and 4) re-employment prospects.

Unfortunately for employers in Canada, the courts have become increasingly generous and unpredictable in the amounts of common law notices being awarded. Compounding the potential liability for employers is the proliferation of claims from dismissed employees of harsh or “bad faith” conducts by employers in carrying out the dismissals. Damages in hundreds of thousands of dollars have been awarded in recent cases. Accordingly, it has become more important than ever for employers to seek legal advice before dismissing employees.

Sales of Business and Corporate Restructurings

Purchasers of Canadian businesses may inherit a wide range of legal liabilities to the employees of the seller. These can include the carrying over of employees’ prior services for the purpose of employment standards and termination entitlements, as well as for collective agreements, union bargaining rights, pension and benefits plans, workers’ compensation premiums, and health and safety liabilities.

Labour tribunals closely consider whether a “sale of business” occurred for the purpose of transferring collective agreements and labour bargaining rights. This case-law is vast and quite complex. Suffice it to say that companies acquiring substantial assets from a unionized company need to carefully consider the risk of acquiring a union before completing the transaction.

A purchaser of assets from a bankrupt company should not assume that they will come free and clear of any employment liabilities. The courts hold that union bargaining rights and collective agreements can survive insolvency where a purchaser acquires a business.

Fortunately for purchasers, they can often limit the risk and scope of such liabilities through careful due diligence and structuring of the transaction to address the particular risk factors presented by a transaction. This often requires a deep understanding of the legal issues involved.