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What American Employers Should Know About Canadian Employment Law

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For American companies, expanding operations into Canada often makes good business sense. Our similar professional cultures make doing business together easy, and our economic ties make it almost inevitable. However, employers who take the countries' similarities for granted put themselves in a precarious position. It's easy to overlook small differences in American and Canadian employment laws, but by doing so, employers can expose themselves to far-reaching legal liability. Before commencing operations in Canada, American employers should be aware of several key differences in the countries' legal landscapes.

Structure of laws

In the United States, jurisdiction over employment matters is shared between local, state and federal governments. Canadian employment law is simpler in this respect—jurisdiction over employment matters typically lies with provincial governments, unless the particular industry is within federal jurisdiction. While legislation varies from province to province, employment law is largely similar across the country—with the exception of Quebec, the only Canadian province to use a European-style civil law system, rather than a common law system inherited from the United Kingdom. In Quebec, while common law principles are often respected in employment matters, additional care must be taken to recognize the applicable civil legislative employment codes.

Much of Canadian employment law will feel familiar to employers used to operating in the United States. In general, the legal regimes regulate the same kinds of behaviour and protect similar rights. However, Canadian employment law tends to adopt a more protective attitude towards employees. This is especially true of laws regulating matters directly tied to the security of employees' livelihoods, including accommodation rights, restrictive covenants and termination.

Employment agreements

It is crucial that employers beginning operations in Canada do not attempt to rely on existing employment agreements used in American workplaces. Employment agreements that contravene provincial standards, even unintentionally, will not be treated sympathetically by the courts. Canadian courts have clearly stated that they will not "blue pencil" or otherwise read-down an employment contract in terms of enforceability.

A fundamental difference between Canadian and American employment agreements is that, in Canada, the concept of "at-will" employment does not exist. Unless employees are dismissed with cause, they are entitled to notice of termination or pay in lieu. An employment agreement that attempts to restrict an employee's notice entitlement to less than statutory minimums is voidable, and may leave the employer liable to provide substantive notice to the terminated employee. Canadian law related to termination is discussed in more detail in the following section.

Some clauses used in American employment agreements may be unenforceable in Canada. Restrictive covenants, or clauses that purport to limit what employees may do after their employment ends, are scrutinized carefully by Canadian courts. Restrictive covenants that do not safeguard a legitimate proprietary interest deserving of protection, that are overbroad or unfair, or that are deemed contrary to the public interest will not be enforced. As Canadian courts will not "rescue" an employer's overly broad restrictive covenant, employers should seek legal advice when drafting these clauses to avoid them (and other aspects of the agreement) being struck in their entirety.

Agreements with independent contractors must be structured carefully in order to avoid creating employment relationships. In Canada, reviewing bodies closely scrutinize independent contractor arrangements, and regularly deem individuals to be dependent contractors or employees, notwithstanding parties' own characterization of their relationship. Under Canadian employment law, the parties' practice can be more determinative of the result, regardless of the written terms of the "independent" contract. Non-written factors, such as exclusivity and economic dependence are hallmarks of employment relationships. Employers drafting independent contractor agreements should seek legal advice on how to structure (and apply) these agreements in Canada to reduce the risk of a disgruntled former contractor alleging that they were actually a dependent contractor or an employee. When these allegations are successful, the employer does not have the benefit of an employment agreement restricting the individual's entitlements to statutory minimums, and may be liable to provide them with accrued and unpaid public holiday pay, vacation pay, overtime, or extensive notice of termination. Agreements with independent contractors should, among other things, indemnify the company from any judgment, order, claim or assessment resulting from a finding that the individual was an employee.

Finally, it is important to note that, in Canada, changes to employment agreements introduced to currently employed employees must always be supported by fresh consideration, generally in the form of a wage increase, bonus, or other clear benefit to the employee that otherwise would not have been provided except as related to the proposed contractual change. Continued employment, generally, does not constitute consideration capable of supporting a contractual amendment unless the employer can demonstrate forbearance from termination.

Termination

As noted above, there is no "at-will" employment in Canada. Employers' legal obligations with respect to termination depend in part on whether the employee is being dismissed with or without cause.

When dismissing an employee without cause, employers are required to provide reasonable notice of termination, or pay in lieu thereof, before dismissing an employee without cause. Minimum notice periods are set out in employment legislation, and typically entitle employees to approximately one to two weeks of notice per year of service, depending on the employee's length of service and the employer's payroll. It is extremely important to note, however, that unless their employment agreement specifies otherwise, employees will be entitled to reasonable notice at common law. The amount of reasonable notice to which an employee is entitled at common law typically exceeds statutory entitlements—sometimes drastically so. What constitutes "reasonable notice" at common law depends not only on an employee's length of service, but also on their age, the nature of their employment, and the likelihood that they will face difficulty securing a comparable job in a timely manner. To avoid unexpected, lengthy notice obligations or liability for an unintended wrongful dismissal, employers should seek legal advice to ensure that their employment agreements validly limit the amount of notice to which employees are entitled.

While employers need not provide notice before dismissing an employee on a with-cause basis, what constitutes "cause" does not always accord with employers' expectations. Though particularly serious misconduct may justify an employee's immediate dismissal, employers often have an obligation to engage in progressive discipline before resorting to termination. Because it can be difficult to know whether an employee's moderate misconduct or underperformance constitutes cause for dismissal without seeking legal advice, many employers will elect to provide notice even when they suspect an employee's dismissal is justified. Employers used to operating within the United States should remember that Canadian employment law relating to termination is quite different, and should take care not to underestimate the effect that the lack of "at-will" employment has on their legal obligations.

Compensation, payroll and remittances

In addition to human rights and anti-discrimination legislation, many provinces have legislation expressly prohibiting discriminatory or inequitable pay practices, some of which requires employers to collect and maintain certain data related to employee compensation. Failing to comply with this legislation, even inadvertently, can be costly—employers could be obligated to correct wage inequities by paying adjustments to affected employees, even those who no longer work for the company.

Canadian employers are legally required to retain payroll records for a period of six years. While Canadian employment law is largely a matter of provincial jurisdiction, employers in all provinces except Quebec

remit payroll taxes to the federal Canada Revenue Agency, the equivalent of the IRS. These remittances are comparable to those that American employers make in most states, and include contributions to the Canada Pension Plan (similar to social security) and Employment Insurance (similar to the Federal-State Unemployment Insurance Program). Employers and employees share the cost of funding these contributions.

In Manitoba, Quebec and Ontario, employers must also make contributions to the province's universal health care system. Starting January 2019, British Columbia employers with annual payroll over $500,000 are also required to pay an employer health tax to the province. Because all Canadian provinces provide universal health care, employers do not need to bear the responsibility of providing basic health insurance to their employees. However, many employers choose to offer supplemental insurance to their employees as part of their benefits plans. Typically, this insurance will cover vision and dental care and prescription drugs—medical services not paid for by public universal care.

Overtime

Canadian employment laws do not recognize classes of "exempt" and "non-exempt" employees with respect to overtime entitlements, particularly those based only on titles or manner of compensation. Unlike employees in the United States, the manner in which Canadian employees are compensated (salary vs. hourly) does not affect their (potential) statutory entitlement to overtime pay. While some employees are not entitled to overtime pay based on specific provincial exemptions (managers and supervisors, for example), such an overtime exemption depends on their actual job duties, and not on how their jobs are characterized by their employer or in their employment agreement.

In Ontario, eligible employees are entitled to overtime pay at the rate of one and one half times their regular rate after working 44 hours in a work week. Certain information technology professionals, certain salespersons, as well as other designated professionals are also exempt from overtime pay. When determining whether employees are entitled to overtime pay, employers should refer to how courts and the legislation define these positions.

Even if an employee's job duties do not fall within one of the above-noted exemptions, it may be possible to structure their employment agreements to reduce the overtime pay they accrue. An employee and employer can agree in writing that the employee will receive paid time off in lieu of overtime pay, or to average the number of hours worked by the employee over a specified period of two or more weeks. Under the latter arrangement, the employee would only qualify for overtime pay if their average number of hours worked exceeds 44 hours per week.

Vacation and leave

Employees in most Canadian and American jurisdictions have comparable vacation entitlements. Canadian minimum vacation entitlements vary somewhat by province, but are generally similar across the country.

In Ontario, employees are entitled to annual vacation time subject to their completion of a 12-month vacation entitlement year. Employees with less than five years of service are entitled to two weeks of vacation time, while employees with more than five years of service are entitled to three. Regardless of the length of their employment, all eligible employees are entitled to vacation pay at a rate of at least four per cent (or six per cent, for employees with more than five years of service) of their gross wages. Employment contracts may provide for vacation entitlements in excess of these statutory minimums.

Public holidays do not count towards an employee's vacation time. Most employees are entitled to take these days off and receive public holiday pay. While employers are not obligated to give employees time off to observe public holidays recognized in other jurisdictions, employees can agree to work on a Canadian public holiday for their regular wages, and take a substitute holiday on another date, on which they must be paid public holiday pay.

In Canadian jurisdictions, including Ontario, legislation protects an employee's ability to take leaves of absence in certain personal circumstances. These "statutory leaves" are generally unpaid job protected leaves, which apply in cases of maternity and parental leave, serious illness, or other exceptional personal

and/or family circumstances. It is not necessary for employers to set out the availability of these leaves in employment agreements or handbooks, nor is it a requirement of an employee to “save” personal time off to access such unpaid leaves of absence.

Human rights, health and safety, and accommodation

Like employers in the United States, employers in Canada are prohibited by law from engaging in discriminatory practices. Employers may not engage in differential treatment of employees on the basis of a protected ground, except where doing so is a bona fide occupational requirement (“BFOR”). To establish that a discriminatory practice is a BFOR, the employer must demonstrate: (1) an honest and sincere belief that the practice is necessary to achieve a legitimate business purpose; (2) that the practice is reasonably necessary to ensure the effective performance of the job without endangering the employee, others in the workplace, or members of the public; and (3) that it is impossible to accommodate the employees affected by the discriminatory practice without “undue hardship.”

In Canada, workplace human rights legislation is largely a matter of provincial jurisdiction. This legislation is remarkably similar across the country, and is more uniform than equivalent American state legislation tends to be. While both countries have laws prohibiting workplace discrimination, the scope of these laws is different in several important respects.

First, protected grounds in Canada include some characteristics that are not uniformly protected in the United States. Sexual orientation and gender identity are protected grounds in every Canadian province and territory. Gender expression is listed as a protected ground in every provincial and territorial human rights statute except those of Manitoba, Saskatchewan and the Northwest Territories. While provincial and territorial human rights legislation often does not expressly identify addiction as a protected ground, courts and tribunals across the country have consistently held that drug or alcohol dependence constitutes a disability subject to legal protection.

Second, Canadian employers have a greater duty of accommodation than many of their American counterparts. In Canada, employers are obligated to accommodate employees’ protected characteristics—including addiction—to the point of “undue hardship.” What constitutes “undue hardship” will depend on the facts of each case. Large, well-resourced employers will typically be expected to take greater measures to accommodate employees.

In addition to having obligations under the applicable provincial or territorial human rights codes, Canadian employers may have duties to accommodate under legislation aimed specifically at protecting individuals with disabilities. In Ontario, all employers are required to meet certain accessibility standards prescribed by the *Accessibility for Ontarians with Disabilities Act, 2005*. To comply with accessibility legislation, employers must implement certain workplace policies and training programs. Workplace health and safety legislation also requires similar actions. The obligation to comply with these pieces of legislation is another reason why employers should be wary of importing documents and protocols used in American offices without careful revision.

Privacy

In Canadian workplaces, employees generally have a higher expectation of privacy. While employers retain the right to monitor, for example, employees’ activities on company computers or phones for legitimate business-related purposes, they do not have an unfettered right to engage in workplace surveillance. Employers have an implied duty of good faith at common law, which may include an obligation to refrain from clandestine or unnecessarily invasive surveillance of their employees. In Ontario, an employer’s secret videotaping of an employee without adequate justification was found to have caused a poisoned workplace environment, amounting to the employee’s constructive dismissal.

Another area in which Canadian laws about workplace privacy differ from many states is with respect to random drug and alcohol testing. Random workplace drug and alcohol testing is almost always illegal in Canada, unless the employer can demonstrate that the practice is a BFOR. If an employee’s drug or alcohol use in the workplace is the result of an addiction, their employer may not be entitled to terminate their employment on the basis of that use without first accommodating the employee to the point of “undue hardship,” which can include granting the employee leave to complete a rehabilitation program.

Closing thoughts

Before commencing operations in Canada, American employers must take a number of steps. Employment and independent contractor agreements should be drafted from a Canadian perspective, to comply with statutory minimums. Existing workplace policies should be localized to ensure compliance with applicable health and safety and accessibility legislation, and new policies and protocols required by law should be implemented. Crucially, employers must not let the cultural familiarity of Canadian workplaces mask the importance of investigating their legal obligations just as thoroughly as they would before beginning to conduct business in any other international jurisdiction. There may not be many differences, but those that exist can have major implications.

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