SHERRARD KUZZ LLP

Employment & Labour Lawyers

Canadian Labour and Employment Law
Doing Business in Canada

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With so many similarities between workplaces in Canada and the United States, it's difficult to believe our labour and employment laws could be so different. More than the spelling of labo(u)r, some distinctions are so fundamental they change the way organizations do business.

Sherrard Kuzz LLP regularly assists foreign organizations successfully enter and navigate Canada's legal workplace landscape, and integrate the organization's global strategy with Canadian law.

The following is an introductory overview of eight key differences American organizations should appreciate when considering doing business in Canada.

1

With limited exception, Canadian employment and labour law is regulated at the provincial or territorial level – not federally.

In Canada, employment and labour law is primarily governed by the laws of the province or territory in which the employment takes place. Federal jurisdiction over employment and labour law generally exists only in respect of a "federal work or undertaking", including for example, railways, interprovincial transport, banking, airlines, broadcasting and communications. The result is that for the majority of businesses operating in Canada, employment and labour law is regulated at the provincial or territorial level.

Local provincial regulation means there are 14 different employment and labour regimes in Canada, each with its own workplace laws regarding employment minimum standards, hiring and firing, human rights, labour law, management-union issues, occupational health and safety, workplace safety and insurance, *etc.* Although there is some commonality across jurisdictions, there are several important differences. Accordingly, it is critical an employer operating in more than one Canadian jurisdiction understand and comply with the laws in each of the relevant jurisdictions.

2

There is no "employment at will" in Canada (which is why an employment contract is a *good thing* for employers in Canada).

Unless an employer has "just cause" to warrant immediate dismissal of an employee (usually a serious infraction), a non-unionized employee could be entitled to common law reasonable notice (addressed below) or, at a minimum, statutory notice of termination which can be working notice, pay in *lieu* of working notice or a combination of the two. In some cases, an employer must also pay statutory severance pay.

For a "without just cause" dismissal in Canada there are two legal regimes an employer must consider when determining the extent of its potential liability: i. statute law, and ii. common law.

Statute Law: Each jurisdiction (provincial, territorial, or federal) has legislation which sets out the minimum amount of notice, or pay in *lieu*, an employer must provide when dismissing an employee without just cause. The amount varies across Canada but, generally, takes into consideration the employee's length of service. Important to note: the statutory minimum is merely the floor of entitlement which is almost always significantly exceeded by common law reasonable notice. In Ontario and the federal jurisdiction, an employee may (depending on certain factors) also be entitled to "severance pay" which, in Ontario, is equivalent to one week's pay for each year of service to a maximum of 26 weeks. Unlike the obligation to provide notice, the obligation to pay severance pay cannot be satisfied by increasing an employee's working notice. In some Canadian jurisdictions, termination without just cause is not permissible for certain employees and can, in particular circumstances, result in an order to reinstate the employee with back pay.

Common Law (except in Quebec, where Civil Law applies): An employer may be required to provide a departing employee with common law reasonable notice or pay in *lieu* of such notice. Reasonable notice is a term used by courts as a measure of the amount of notice, or pay in *lieu* of notice, to which an employee dismissed without cause is entitled, having regard to relevant factors. The range of factors includes length of service, type of work, degree of expertise or training, age, remuneration, availability of alternative employment, and custom in the trade or business regarding termination. In addition, luring an employee from secure employment can be a factor. When assessing the length of reasonable notice at common law the statutory notice period and statutory severance pay (if any) is included.

Unfortunately, despite years of case law there is no hard and fast formula to determine the period of reasonable notice. Although there was once a concept that a month per year of service was a guidepost, courts do not follow that approach for employees with shorter periods of service, who typically receive a considerably higher ratio. In most circumstances twenty-four months' notice can be considered a practical upper cap, although this is restricted to employees of exceptionally long service.

During the notice period an employer is required to continue all employment-related entitlements as if the employee had worked throughout the period. This may include salary, benefits, bonuses, and stock option vesting, *etc.* (although there are ways to draft a bonus and/or stock option program to limit entitlement during the notice period).

Following dismissal from employment, an employee typically has an obligation to mitigate losses during the period of reasonable notice by actively seeking comparable employment. In turn, compensation from a new job will reduce an employee's common law entitlements. However, statutory termination and severance pay entitlements are not reduced, even if the dismissed employee fully mitigates their losses. Finally, the employer has a substantial onus to prove the employee has failed in their duty to seek replacement employment.

The potential for costly termination liability is one important reason Canadian employment counsel strongly encourage clients to put into place a properly drafted and implemented written employment contract (including for an hourly employee). In many cases, a written employment contract can limit the notice entitlement to as little as one week per year of service (in some cases, even less). However, as with many employment-related entitlements, it is critical to understand the specific

contract-law requirements in each Canadian jurisdiction in which the organization operates. For example, in every jurisdiction a contractual entitlement cannot be less than the employee's minimum statutory entitlement and failure to respect this obligation can invalidate the termination provision.

In Quebec (unlike other Canadian jurisdictions), the contractual amount must also be considered 'reasonable' at the time of termination and the contract may not be applicable at all, depending on the reason for termination.

The employer (the party most often seeking to rely on the terms of an employment contract) must also be able to demonstrate the employee received consideration for entering into the employment contract. This is commonly (but not exclusively) achieved by showing the contract was executed prior to the employee commencing employment.

3

An independent contractor arrangement is permitted, but is nuanced and requires careful planning.

The good news is an independent contractor arrangement is permissible in Canada. This can be an attractive option for an American employer, particularly if it has a small Canadian operation not meriting a separate branch or physical office. However, prior to retaining an independent contractor, it is important to appreciate the potential tax implications and employment-related liabilities.
As in the United States, an adjudicator may examine all elements of the relationship to determine whether the independent contractor is, in fact, an employee. Moreover, an individual may be considered an independent contractor for tax purposes but an employee for purposes of employment and labour law.

Misclassification can result in the requirement to pay taxes, other employment-related remittances, fines and penalties, as well as statutory and common law termination entitlements addressed in Key Difference #2.

In Canada, there is also a class of contractor between employee and independent contractor, known as a 'dependent contractor'. A dependent contractor is considered so economically dependent on an employer the dependent contractor has common law termination entitlements similar to an employee. As such, even if a worker is properly characterized as a contractor for tax purposes, the employer must assess whether the worker's reliance on the employer is so economically significant that a "dependent contractor" relationship is created.

Ironically, the flexibility to end the relationship is often one of the primary reasons to have an independent contractor arrangement, yet it is the very structure that affords flexibility and limits post-engagement obligations that can be the source of significant liability. These are not risks that can be effectively managed through a US-based choice of laws clause. The best opportunity to manage risk is to explore the suitability

of an independent contractor arrangement, structure the relationship to maximize independence between the parties, and draft a contract that proactively addresses potential liability in the event of its termination.

4

A restrictive covenant must be highly tailored to be enforceable. There is no "blue penciling" in Canada.

Canadian courts have severely limited the circumstances in which a restrictive covenant, such as a non-competition or non-solicitation provision, is enforceable.

Considered to be a form of post-employment restraint of trade, the burden rests with the employer to demonstrate a restrictive covenant represents the minimal degree of restriction required to protect the organization's legitimate business interests.

An enforceable restrictive covenant must clearly define the activity to be restricted (with a significant degree of specificity) and contain reasonable time limits. In the case of a non-competition covenant, it must also contain reasonable geographic limits. If a court finds a restrictive covenant to be overly broad (temporally, geographically, or in the activity it purports to limit), ambiguous (such as failing to clearly define its geographic scope or the restricted activity), or overly restrictive, the court will refuse to enforce the restrictive covenant and will not alter its wording in order to render the covenant enforceable.

It is therefore critical that any employer contemplating the use of a restrictive covenant in Canada work closely with counsel to structure the contract in a manner that creates the best opportunity for it to be enforceable.

5

The union certification process in Canada might shock you.

Many Canadian jurisdictions have a card-check system, by which a union may certify employees in a workplace simply by obtaining a signed union membership card from a majority of employees in the proposed bargaining unit (referred to in Canada as "card-based certification"). This means a group of employees can become unionized without a vote taking place or an employer having the opportunity to educate and inform employees about the pros and cons of unionization.

At present, card-based certification exists in Quebec, New Brunswick, Prince Edward Island, Nova Scotia (construction only), Ontario (construction only) and federally regulated workplaces.

Whether the process is card-based or vote-based, an employer must act swiftly and strategically with the assistance of experienced counsel.

If a vote is required it may take place as soon as *three days* after the employer becomes aware of the application for certification (the petition).

In addition, each Canadian jurisdiction has its own rules regarding permissible employer conduct during a union organizing campaign. With the exception of Manitoba, all Canadian jurisdictions permit an employer to engage with employees and share opinions and information, provided the employer's activities do not threaten, intimidate or amount to undue influence. Should a breach occur, in some Canadian jurisdictions the labour board has authority to remedy the breach by immediately certifying the union regardless of the degree of support the union has among employees.

An employer that does not share its views on unionization may lose a valuable opportunity to lawfully persuade its employees. This, together with the strict rules regarding employer do's and don'ts and the very short timelines imposed by law, means it is critical to proactively consult with labour counsel knowledgeable and experienced in this area.

6

There is a high onus on an employer to accommodate an employee with a disability.

Under all Canadian human rights legislation an employer must accommodate an employee with a disability to the point of "undue hardship" to the employer.

While each jurisdiction has its own definition of "disability", all include physical and mental disability, which includes drug or alcohol addiction. In Canada, the same accommodation obligations apply whether or not the disability is work-related.

Workplace accommodation often involves modification to the work schedule (including time off), a physical assistive device (such as modification to a machine or an aid to accessibility) or reorganization of work tasks.

Equally important is the procedural requirement an employer make suitable inquiries of the employee to determine what, if any, accommodation is possible. Failure to do so may, in some circumstances, amount to discrimination even if accommodation is not possible.

The term "undue hardship" is open to interpretation and varies depending on the nature of the workplace and disability. Under some human rights legislation, undue hardship can only be based on health and safety risks and/or financial cost. However, Canadian adjudicators have been clear - cost alone is not undue hardship unless it impacts the viability of the organization itself. As a result, cost is rarely a deciding factor in an accommodation case. More often, undue hardship is recognized when a genuine attempt to accommodate has proven futile or the employee refuses to engage in the accommodation process.

The employer and employee are both required to participate in the accommodation process. The employer has a duty to explore all reasonable modes of accommodation, but is not required to provide whatever accommodation an employee demands. The employee has a duty to participate in the process, including to provide sufficient information to enable the employer to assess accommodation options, and to make best efforts to work in the accommodated job unless doing so would jeopardize health and safety.

In a unionized setting, the union also plays a role in the accommodation process. This includes potentially waiving aspects of a collective agreement, such as a job posting obligation, if accommodation cannot be achieved through other means. While the duty to accommodate may result in an employee being awarded a vacant position to which the employee might not otherwise be entitled under the collective agreement, the duty to accommodate generally does not require an employer to bump another employee out of an existing position.

7

Drug and alcohol testing is permitted only in narrow circumstances.

When assessing the permissibility of drug and alcohol testing in Canada adjudicators balance the competing interests of privacy, human rights and safety.

Drug and alcohol testing of an employee doing safety-sensitive work can be implemented as a component of a broader policy to address drug and alcohol use in the workplace in the following circumstances:

Reasonable Cause: The employer has reasonable cause to believe the employee is impaired while working.

Post Incident/Near Miss: The employee has been directly involved in a workplace accident or significant incident/near miss where there is reason to believe alcohol or drugs may have been a contributing factor.

Return to Work: The employee is returning to work after treatment for substance abuse and testing is a condition of the return to work arrangement.

Random: If the employer can establish it operates a dangerous workplace and there is a general alcohol or drug problem in that workplace.

Pre-Employment: Testing may be permitted in very limited circumstances provided an employee who fails a test due to addiction has the opportunity for further medical assessment and accommodation.

Even in the limited circumstances in which an employer is permitted to test, a failed test does not necessarily result in termination of employment. Drug or alcohol addiction (including the perception an employee is addicted) is considered a disability under Canadian human rights law. As such, an employer is required to accommodate that disability to the point of undue hardship.

Usually, accommodation involves providing a job-protected leave to secure addiction treatment and often includes more than one period of leave to accommodate anticipated relapse. An employer is generally not required to provide paid leave in these circumstances, although some benefit plans may provide disability payments to an employee.

8

Just because an employee is salaried doesn't mean the employee is exempt from overtime payments.

In every Canadian jurisdiction employment standards legislation defines which employees are eligible for overtime pay. Although the rules and exemptions vary, most jurisdictions exempt an employee who is managerial or supervisory. However, simply having the title "manager" or "supervisor", or being a salaried employee, is rarely sufficient to meet this test and courts and adjudicators look to the substance of the individual's responsibilities. Overall, the threshold for exemption from overtime payments is considerably higher in Canada than in the United States.

Failure to understand Canada's various overtime laws and properly implement overtime policies can expose an organization to considerable financial liability, including a class-action lawsuit for unpaid overtime wages.

Sherrard Kuzz LLP regularly assists American and other foreign organizations successfully navigate Canada's workplace laws.

To learn more, contact a member of the Sherrard Kuzz LLP team.

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