

## Minimum Standards Monitor

# Can Americans Who Work for Ontario Companies in the United States Opt into Ontario's Minimum Standards?

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The provisions of the *Employment Standards Act, 2000* (Act) may not always be enforceable by the Ministry of Labour even though an employment contract entered into by an American with an Ontario company contains a "choice of law" provision (Ontario) as well as references to the Act. All factors must be considered.

A recent decision of the Ontario Labour Relations Board considered whether the Ministry of Labour and the Board can enforce an employment contract with an Ontario "choice of law" provision and references to the Act, where the work under the contract was performed mostly outside Ontario.

Parties to an employment contract will often agree that the laws of a specific jurisdiction apply to the contract. This is referred to as a "choice of law" clause. In some cases, the parties will also reference specific statutes in the contract. The chosen jurisdiction typically matches the jurisdiction where the employee works. However, in some cases the parties may deliberately choose a different jurisdiction. In other cases, a template agreement may be used without realizing the significance of the "choice of law" clause.

In [Karpowicz v Valor Inc.](#) an American employee who worked from Michigan signed an employment contract that stated that Ontario law applied. The contract also specifically referenced the Act in both the termination and the bonus provisions.

After the employee's employment was terminated, the employee filed a claim with the Ontario Ministry of Labour Employment Standards Branch asserting a violation of the reprisal provisions of the Act. He argued that, by choosing Ontario law and referring to the Act in the contract, the parties had agreed that he could seek to enforce his claim under the Act's enforcement mechanisms administered by the Ministry of Labour.

The employer argued that, notwithstanding the "choice of law" clause, the Ministry of Labour and the Board had no jurisdiction over the claim.

## The Act's Application to Work Performed

The application of the Act is set out in section 3:

3.(1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

- (a) the employee's work is to be performed in Ontario; or
- (b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

## Details of the Employee's Work

The employee who filed the claim with the Ministry of Labour lived and worked in Michigan. His employment contract was offered to him and accepted by him in Michigan. He travelled to visit customers in the United States. He only occasionally came to Ontario for meetings at the company's head office in Burlington. He did have customers in Ontario but he serviced them from Michigan and did not have occasion to visit them in Ontario.

## The Ontario Labour Relations Board: Insufficient Connection with Ontario

Vice Chair Patrick Kelly concluded that there was an insufficient connection between the employee's work and Ontario. The work that the employee did perform in Ontario was a continuation of his work in Michigan, not the other way around. Vice Chair Kelly concluded that the Board was precluded from entertaining the merits of the claim of reprisal because the work did not fall within section 3(1) of the Act. He commented:

It may be that, as a matter of contract, parties can agree to have certain statutes apply to their relationship even when the facts of their relationship make the statute inapplicable. That, however, is a matter for enforcement through the courts. The parties cannot confer authority on the administrative agency charged with enforcing the statute to deal with their dispute when the statute is on its face inapplicable to their dispute.

## Key Takeaway for Employers

This decision suggests that a "choice of law" provision and references to the Act in an employment contract are not sufficient to require the Ontario government to enforce the Act where the work is not performed in Ontario. However, that does not mean that Ontario law does not still apply to the contract. Where and how the contract can be enforced will depend on many other factors that are beyond the scope of this article. In all cases employers should be cautious when using template employment contracts across jurisdictions.

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