FTR Nexus

Setting up Shop in Canada? What U.S. Employers Need to Know About Canadian Employment Law

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While Canada and the United States are alike in many respects, there are a few key differences in employment law that U.S. employers should be aware of if you are considering buying, selling or operating a business in Canada.

Five Key Features of Canadian Employment Law

Canadian employment law is generally governed by provincial law and may vary from province to province, with the exception of businesses considered to be “federal” in nature, in which case federal law governs. In this article, we highlight five key features of Canadian employment law that will be of interest to U.S. employers.

1.

Minimum Standards Apply

- All jurisdictions in Canada have minimum standards legislation which establish the basic terms and conditions in the workplace. Minimum standards govern issues such as minimum wage, vacation entitlement, public holiday entitlement, overtime pay, hours of work and termination and severance entitlement. As noted below, leaves of absence (mostly unpaid) are also provided.
- Employers must provide at least the standards specified. Any contractual provision that purports to limit an employee’s rights to less than what he or she would otherwise be entitled to under the minimum standards legislation will not be enforced by a court. However, in some jurisdictions, the legislation does give employers the latitude to provide benefits that depart from the minimum standards where an overall greater benefit results.

2.

Employees are Subject to Employment Contracts

- Every non-unionized employee in Canada operates under an employment contract: even where there is no written employment contract, terms of employment will be implied. Implied terms will be at least the minimum standard and in many cases may exceed the minimum standard.
- Implied terms include that the employment will be for an indefinite term, the employer may terminate employment for cause or with notice, the employee is required to attend at work and perform the work assigned and the employee is obligated to act with loyalty, fidelity and avoid conflicts of interest.
- Written or otherwise express terms of employment can override implied terms as long as the express terms meet the minimum standards.
- Employers cannot unilaterally change the fundamental terms (express or implied) of employment. Canadian courts will view this as constructive dismissal, giving rise to the damages referred to below.

3.

“At Will” Employment Does Not Exist in Canada

- In Canada, employers can terminate employees without any obligation for further payment where “**cause**” exists. Cause is defined under minimum standards legislation and under the common law. However an employer does *not* have the right to terminate an employee **without cause** unless it either pays the amount specified in the employment contract (which must not go below what is required by minimum standards legislation) or, in the absence of an employment contract, provides “reasonable notice.” Termination without payment may generally occur, however, during a statutory probationary period.
- Two provinces (Quebec and Nova Scotia) and the federal government have statutory “unjust dismissal” provisions under which terminations without cause cannot take place.
- “Reasonable notice” is generally based on an employee’s length of service, age, nature of the position and availability of comparable employment. If reasonable notice is not provided, employers usually pay an amount in lieu of reasonable notice that approximates the damages for not complying with the implied reasonable notice term. Recent cases suggest that the nature of the position is becoming less of a factor in the notice determination. Courts also consider issues such as inducement and whether the employer acted in good faith in the termination process, which may impact the quantum of damages.
- Damages payable upon termination of employment may include benefits during the reasonable notice period, including any bonuses and other incentives that would otherwise have fallen due during that period.

4.

Canadian Courts Take a Strict View of Restrictive Covenants

- Restrictive covenants (non-competition, non-solicitation and non-disclosure clauses) in employment contracts are viewed strictly by Canadian courts. The covenants will only be upheld where they are reasonable between the parties and reasonable in light of the public policy interest in discouraging restraints on trade. They will not be enforced where they are ambiguous or impose restrictions that prohibit an unnecessarily wide scope of activities.
- **Non-competition clauses** can be difficult to enforce as they are viewed by the courts as “restraint of trade” clauses. Generally, courts have been more willing to enforce such clauses in the context of a sale of a business than an employment contract or where the person against whom it is being enforced is a fiduciary. The clause must be reasonable as between the parties and in the public interest. It will be assessed on reasonableness of duration, geographic scope and scope of restricted activities.
- **Non-solicitation clauses** are generally viewed as more acceptable than non-competition clauses. These clauses must be reasonably drafted with respect to temporal factors.
- **Non-disclosure clauses**, by which one party agrees not to disclose another party’s confidential information, are generally acceptable.

5.

Numerous Leaves of Absence are Available

- The Ontario *Employment Standards Act, 2000* (ESA), for example, currently provides for several unpaid leaves of absences, including pregnancy leave, parental leave, family medical leave, family caregiver leave and organ donor leave. There are some leaves which have a paid component, however. Changes to the ESA in force January 1, 2018 will provide ten days of personal emergency leave to all Ontario employees, with the first two days of that leave paid. The changes also introduce a domestic or sexual violence leave, of which the first five days of leave are paid.
- During any leave of absence under the ESA, the employee enjoys job protection, and must, in the ordinary course, be returned to his or her position at the end of the leave. The employer must continue benefits during the leave, except

reservist leave, unless the employee indicates in writing that he or she will not pay his/her portion of benefits premiums.

- Leaves are to be counted in determining an employee's length of employment, length of service or seniority, but do not need to count toward a probationary period. Special rules apply where a leave conflicts with vacation.
- Pregnancy/parental leave in many jurisdictions may be for up to 52 weeks with, as noted above, job protection. Jurisdictions differ on whether the employer is required to return the employee to the exact same job as she or she held before the leave, or if an alternative job will suffice. Generally speaking, if the job still exists, or an alternative job exists, the employee must be reinstated. The job protection does not extend to provide the employee with immunity from a *bona fide* restructuring or downsizing. Employers should also be aware that recent changes to federal legislation and the Ontario ESA will significantly extend the length of pregnancy/parental leave, effective December 3, 2017.

Whether you are buying, selling or operating a business in Canada, Hicks Morley can help.

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