FTR Nexus

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

Date: November 27, 2017

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

Seven Key Facts About Canadian Labo(u)r Law:

1.

Jurisdiction

Generally, private sector employees in the United States are subject to a national labor relations regime governed by the National Labor Relations Act (29 U.S.C. §§ 151-169). Certain employees are excluded, such as those who are employed by government.

Under the Canadian constitution, most employees are subject to provincial labour law regimes: while the issues across the provinces are similar, processes and procedures may differ.

A federal labour law regime exists but it only applies to those employees who work for federally regulated employers, which comprise a small portion of the Canadian workforce. Examples of federally regulated industries include banks, airlines, telecommunications and interprovincial rail and road transportation.

It is therefore critical to understand the regime which applies to your organization. Employers who have operations across the country may find themselves subject to different labour considerations.

2.

Certification Timing

U.S. employers are often surprised at the time frame involved in the union certification process in Canada. Canadian employers have a very short time to respond to an application for certification.

For example, in Ontario, a union must apply for certification to the Ontario Labour Relations Board (OLRB), or be voluntarily recognized by an employer. In almost every case, the OLRB will order a representation vote within *five* business days after the certification application is filed. Prior to that vote, if the employer disagrees with the description of the bargaining unit it has only *two* days after it receives the application for certification in which to propose its description of the bargaining unit.

The takeaway is that employers have to be ready to respond quickly to any move towards organizing and understand what they can and cannot do during an organizing drive (see below).

The stakes are high: potentially only a handful of employees can determine the future for the majority. For example, in

Ontario the outcome of the vote is determined only by those employees in the bargaining unit who cast a ballot; if 50% plus one of the employees who vote do so in favour of the union, the union will be recognized as the representative for all employees in the bargaining unit. If a proposed bargaining unit has 100 employees but only 10 vote, and 6 of those 10 vote in favour of the union, all 100 employees will be represented by the union.

3.

Disclosure

Disclosure obligations are part of the statutory duty to bargain in good faith and to "make every reasonable effort" to make a collective agreement. The OLRB has identified two specific aspects to the duty to disclose:

a) On its own initiative, an employer must reveal to a trade union any actual (including *de facto*) decision which is likely to have a significant impact on the bargaining unit. The following are elements of a *de facto* decision:

- it is one which has effectively been made, even if some formalities of the decision-making process have not yet been complied with, or if the details are not finalized
- it will, for example, include disclosure by an employer during collective agreement negotiations that it plans to close a plant

Whether a *de facto* decision has actually been made, in any given case, will depend on all the facts and circumstances.

b) An employer must answer "honestly" when asked by the union in bargaining whether it is seriously contemplating initiatives which are likely to have a significant impact on the bargaining unit. What constitutes an "honest" answer will depend upon a variety of circumstances:

- when was the question asked?
- what is the actual question?
- at what stage are the employer's plans?

However, what is clear in the case law is that the answer should be one that does not mislead the union as to the actual state of affairs.

Unions may also request information related to a proposal or position placed on the table by either party. Disclosure obligations are more limited here. The OLRB has stated that there is an obligation to disclose enough information so that a party can understand the position being taken by the other party, as well as the rationale for that position. There is no obligation to automatically disclose every piece of information in all cases. The obligation arises as a result of the positions and issues at the bargaining table.

A union's right to receive information from employers is not absolute. It will depend upon the particular circumstances of the request, including such factors as the content of the bargaining proposals, the stage of negotiations, collective agreement obligations, and the relationship between the parties. Employers are entitled to refuse inappropriate requests in certain cases

Amendments to the Ontario *Labour Relations Act, 1995* (LRA) in force January 1, 2018 introduce a provision that in certain circumstances a trade union will be able to apply to the OLRB for an order directing the employer to provide it with a list of employees in a proposed bargaining unit. That list must include the name of each employee in the proposed bargaining unit as well as a phone number and personal email for each employee, if the employee has provided that information to the employer. The OLRB will also have discretion to order the disclosure of other prescribed information relating to the employee.

4.

Communications During Organizing/Bargaining

An employer's ability to communicate with its employees during an organizing campaign is much more limited in Canada than in the United States.

Long-standing principles establish that employers cannot communicate for the purpose of disparaging the trade union or undermining its right to represent the employees in the bargaining unit, nor can they circumvent the bargaining process by bargaining directly with employees.

These prohibitions are balanced against the recognition of the right of an employer to communicate facts and its positions (and the reasons for the positions) as long as it does not use "coercion, intimidation, threats, promises or undue influence."

With respect to bargaining communications, these only become illegal when they represent an attempt to bargain directly with employees. Of key importance is the timing of the communications, for example whether they occur early or late in the negotiations, as well as their content. An employer is free to explain to its employees its position with respect to the negotiations after having engaged in collective bargaining with their bargaining agent on the matters that are the subject of the communications.

The LRA expressly authorizes employers to communicate with employees and simultaneously protects the right of the union to exclusively represent employees in collective bargaining, giving rise to the need to balance those often competing rights.

Communications during negotiations are an essential part of the process when there are contentious issues that may lead to a labour dispute.

Whether through miscalculation, misunderstanding, inadvertence or intention, employees are too often left without information which may impact qualitative decision-making about the offer and the reasons for its contents. Open communications keep the process honest and transparent.

5.

No "Right to Work" in Canada

In the "right to work" states in the United States, employees are protected by the collective agreements negotiated by the union but they are not required to join the union or to pay dues. There is no such right in Canada. Under the "Rand formula" all employees who work in unionized workplace are require to pay dues, regardless of membership.

6.

Legal Strike Timing

Legal strikes in Canada may only take place upon the expiry of a collective agreement. There is no provision for giving 10 days' noting in writing that a strike will take place in any Canadian industry, as there is for example in the U.S. health care industry.

7.

Constitutional Protections for Labour Processes

The Supreme Court of Canada has ruled that the process of collective bargaining and the right to strike are freedom of association rights and are therefore constitutionally protected.