FTR Nexus

Setting up Shop in Canada? What U.S. Employers Need to Know About Canadian Labour Law – Part 1 [Video]

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In this series, David Bannon walks through some key differences in labo(u)r law that U.S. employers should know when buying, selling or operating a business in Canada. In this instalment, David explores the governing regimes for labour relations in Canada, the timing of the union certification process and an employer's duty to disclose certain information to a trade union.

In the second instalment, David discusses employer's ability to communicate with employees during organizing and bargaining, the lack of "Right to work" jurisdictions in Canada, the timing of legal strikes and constitutional protections for labour processes.

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Transcript

Hi I'm David Bannon and today I'm going to take you through some 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.

Jurisdiction

Generally, private sector employees in the United States are subject to a national labour relations regime governed by the National Labor Relations Act. 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 greatly.

A federal labour law regime does exist, 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 in different provinces.

Certification Timing

U.S. employers are often surprised at the timeframe 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. Where there is an application, 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 from which to propose it's own 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.

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 actually cast a ballot; if 50% plus one of those employees 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 vote in favour of the union, *all* 100 employees will be represented by that union.

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) First, 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 have not yet been finalized
- it will, for example, include disclosure by an employer during collective agreement negotiations that it plans to close a plant or part of 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?

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 if 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 that are taken at the bargaining table.

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

Recent amendments to the Ontario *Labour Relations Act* in force January 1, 2018 have introduced a provision that in certain circumstances a trade union will be able to apply to the Labour Relations Board for an order directing employers to provide a list of employees of a proposed bargaining unit. That list must include the name of each employee in the 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 Labour Board will also have discretion to order the disclosure of other prescribed information relating to those employees.