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HUMAN RESOURCES
LAW AND ADVOCACY

AVOIDING EMPLOYMENT PITFALLS IN INTER-JURISDICTIONAL HIRINGS AND TRANSFERS

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Introduction

Transferring an employee to or from Canada, or hiring an employee from outside of Canada can be a complicated process. In addition to resolving any immigration issues, employers need to turn their minds to contractual employment issues.

The following paper is a checklist of "things to think about" when presenting an offer of transfer or an offer of employment to an individual located outside of Canada.

Who is the Employer?

Most companies with multi-jurisdictional operations will have separate corporate entities in the different jurisdictions. For employment purposes, in addition to having a payroll account registered with the Canada Revenue Agency, there may be obligations for an employer to register with various provincial employment government agencies such as Workers Compensation Boards. For practical reasons, it will be easier for an employee working in Canada to be employed, at least for payroll purposes, by the registered Canadian corporate entity.

Does that mean that the Canadian company is the Employer for all purposes? Not necessarily. There are examples in the case law where the Courts have accepted the concept of a common employer where an

individual is found to be employed by more than one legal entity at a time.[1] It is for this reason that it is recommended that a written employment agreement be used and the identity of the specific corporate entity be clearly set out. In circumstances where an employee is transferring corporate entities it also recommended that the change in employers be clearly set out in the offer letter or other communication with the employee. Even with these safeguards, the courts may still find that there is a common employer. However, the risks are minimized where there is a written agreement.

Does Canadian Employment Law Apply?

For some companies, it may be preferable for the law of a different jurisdiction to apply to the employment relationship with the employee working in Canada. Canadian employment laws are generally more generous to employees than other jurisdictions. A specific example of this is the notice requirements on termination of employment in Canada that do not apply in most American states where employment is considered to be at-will. An employer transferring an employee from an at-will state to Canada may prefer that the employment relationship continue to be at-will.

Parties to a written employment contract can agree to apply the law of a particular jurisdiction to their agreement. In Canada, these clauses will be enforced in appropriate circumstances. In the text *Canadian Conflicts of Laws,* the author writes:

> When the parties have expressly selected a governing law, there is no difficulty identifying the 'law intended by the parties.' That law will govern the contract provided that the choice is *bona fide* and legal, and there is no reason for avoid the choice on the grounds of public policy."[2]

In addition, the parties may agree to continue employment related benefits that an employee currently enjoys in a different jurisdiction. At the same time, a Canadian employer must comply with the minimum standards of the province in which an employee works. Every province and territory in

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[1] See for example, *Vanderpool v. Aspen Trailer Co.,* [2002] B.C.J. No. 709 (S.C) and *Downtown Eatery (1993) Ltd. v Ontario* (2001), 54 O.R. (3d) 161 (C.A.)

[2] Janet Walker, *Canadian Conflict of Laws,* 6th ed. (Markham:Lexis Canada Inc. , 2005) Volume II, s.31.2.a at 31-3

Canada has minimum standards legislation that applies to employees in the province or territory. For example, the *Ontario Employment Standards Act, 2000,* S.O. 2000, c.41 provides that the act applies

> 3.(1)… 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.

Employers and employees cannot contract out of minimum standards legislation. They also cannot contract out of other employment related statutes such as human rights, occupational health and safety and workers compensation legislation. Assuming that the employer complies with the applicable statutes, any contractual terms that exceed the minimum requirements can be governed by the law of another jurisdiction. A practical example of the application of this requirement is that an employee who has agreed that the law of an at-will state will apply to his or her employment contract will nonetheless be entitled to notice and, if applicable, severance if his or her employment is terminated for reasons other than cause. However, he or she may not be entitled to any further notice as the employment contract is otherwise considered to be at-will.

Other practical examples include:

- The employer must provide eligible employees with the public holidays recognized under the applicable provincial or territorial legislation. If the parties have agreed to provide the employment benefits of the other jurisdiction, the employer may be obliged to provide both the applicable Canadian holidays and those from the other jurisdiction.

- The employer must provide pregnancy and parental leave of at least that provided for under the applicable provincial or territorial minimum standards legislation (typically 52 weeks in total). This is greater than the twelve weeks provided for under American legislation. On the other hand, if the parties have agreed that the benefits under the law of certain European jurisdictions applies, it

may have to provide for greater leaves, or even employer paid leaves.

- An employee in most provinces and territories cannot be required to retire at age 65 while mandatory retirement may be permitted in other jurisdictions.

It is recommended, particularly in a transfer situation, that the parties consider which laws will apply and which benefits will be provided. In order to make that decision the employer should obtain advice from local legal counsel in both jurisdictions in order to properly understand what the minimum requirements are in each jurisdiction and how the proposed employment contract will be interpreted under the law of each jurisdiction.

Where Can the Employee Go to Seek Redress Under the Employment Contract?

Just as parties can agree that a the law of a particular jurisdiction will govern their employment contract, they can call agree that disputes under the agreement will be heard in a particular jurisdiction. Absent a "forum selection" clause in an employment contract, there can be some disagreement between the parties as to where an employee can sue for redress under the employment agreement.

The court will consider whether there is a real and substantial connection between the forum and the defendant or the between the forum and the subject matter of the action. The Court will consider eight factors (with no one single factor being determinative) in assessing the real and substantial connection:

- The connection between the forum and the Plaintiff's claim
- The connection between the forum and the Defendant
- Unfairness to the Defendant in assuming jurisdiction
- Unfairness to the Plaintiff in not assuming jurisdiction
- The involvement of other parties in the law suit
- The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

- Whether the case is interprovincial or international in nature
- Comity and the standards of jurisdiction, recognition, and enforcement prevailing elsewhere.[3]

In the context of a dispute regarding an employment contract, the location where the Plaintiff was employed is an important consideration, but not determinative. The following additional issues have been considered in determining the appropriate forum for contractual disputes:

- The location where the contract in dispute was signed
- The applicable law of the contract
- The location where a majority of witnesses reside
- The location of key witnesses
- The location where the bulk of the evidence will come from
- The jurisdiction where the factual matters arose
- The residence or place of business of both parties. [4]

Applying the above factors to an employment contract requires a close analysis of the facts in each case. For example, in *Vanderpool v. Aspen Trailer Co.*[5] the plaintiff was employed by Aspen Trailer Company in British Columbia. He was transferred to Georgia where he was employed by Aspen Trailer Inc., which was incorporated in Minnesota. There was also another entity, Aspen Trailer Company (Alberta) which was incorporated in Alberta. When the plaintiff's employment was terminated, he commenced a law suit against Aspen Trailer Company in British Columbia. Aspen Trailer Inc. sought to stay the proceeding, claiming that the plaintiff was employed by Aspen Trailer Inc., the Minnesota company, and that we worked and was paid in Georgia.

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[3] *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.)

[4] *Eastern Power Ltd. v. Azienda Communale Energia and Ambiente,* [1999] O.J. No. 3275 (C.A.)

[5] *Supra,* note 1

The court found that British Columbia was the convenient forum. After concluding that the three corporate entities operated as a "related entity" for the purpose of employing the plaintiff, the court found that there was a sufficient connection between the employer and British Columbia for British Columbia to retain jurisdiction over the law suit. The court noted that even though the work was performed in Georgia, the transfer to Georgia was arranged in British Columbia and the plaintiff was paid by the British Columbia entity for the first three months of his transfer to Georgia. As well, corporate policies emanating from the British Columbia company still affecting him. The plaintiff sold trailers on behalf of all three corporate entities and was paid his base pay by the American company and commission by the entity that built the trailer sold. There was no presence of the defendant in Georgia, as the office of the plaintiff had been eliminated, and there were no witnesses in Minnesota, nor had any part of the employment contract been performed or terminated there.

As another example, in *Lozeran v. Phasecom Systems Inc.*[6], the Plaintiff worked for the MasTec group of companies which operated throughout North America, and included the defendant. The plaintiff started working for an Alberta company in Edmonton. The company was amalgamated to Phasecom Systems Inc, incorporated in Ontario. In 1997 the plaintiff was relocated to Louisiana to work for Phasecom America Inc. He was offered employment which set out terms and conditions, including payment in U.S. dollars and a 401(k). He continued with Phasecom America Inc. and was officially terminated from Phasecom Systems Inc.

The plaintiff was promoted to Vice President in 2002 and relocated to California. He became dissatisfied with his arrangements. He submitted his resignation, which was not accepted, and moved back to Edmonton. The plaintiff continued his duties from there. He was offered to relocate to Florida but declined. His employment was then terminated through notification in Edmonton. He filed a statement of claim in Edmonton, serving the Canadian and American corporate entities. The defendants argued that the claim should have been started in Florida where the head office was located.

The first issue dealt with by the court was who was the employer of the plaintiff. The plaintiff argued that the corporate entities were a common employer. The court concluded that it would be difficult to determine who

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[6] [2005] A.J. No. 510 (Q.B.)

the plaintiff's proper employer was which was sufficient to conclude that there was a substantial connection between the defendants and Alberta jurisdiction. The court did not otherwise decide the common employer question.

The court determined that Alberta was the proper jurisdiction for the claim. The contract was terminated in Alberta (apparently during a meeting at the Edmonton airport) and the plaintiff worked and lived in Edmonton. In addition, the court found that the plaintiff would be disadvantaged if he had to bring his claim in Florida as the state is an at-will state and he would have no entitlement to wrongful dismissal damages.

Employers and employees may agree that disputes arising under an employment contract will be resolved in a particular jurisdiction. In Canada, forum selection clauses are recommended because they are persuasive to the courts. However, they are not determinative of jurisdiction. The other factors set out above will also be considered. It is recommended that in choosing the jurisdiction for a forum selection clause that the parties consider the other factors above and choose a jurisdiction that makes sense for the type of dispute that might arise.

Benefits

It is recommended that employers transferring employees to Canada or another jurisdiction, or hiring from outside of Canada consider the following issues regarding benefit coverage in advance of hiring the employee:

- Is the employee eligible for government health care?
- Is the employee eligible for insurance benefits?
- Will the transfer affect pension or other retirement savings plans? Can the employee continue to participate in the plan in the jurisdiction they are leaving?
- Will the transfer affect eligibility for stock options or other incentive/deferred compensation plans?
- Are there benefits that the employee current enjoys that are not available in the new jurisdiction?

If there are any concerns that benefits will change or not be available for an employee, it is recommended that the employee be informed before accepting any offer.

Statutory Benefits

As mentioned above in the section on which laws apply, different jurisdictions provide different statutory protections and benefits for employees (holidays, job protected leaves of absence, overtime, etc). A change in jurisdiction may result in an employee gaining or losing statutory benefits. In circumstances where an employee may be losing a valuable benefit, it is recommended that the employee be informed of the changes in the new jurisdiction before he or she agrees to the offer.

Taxes

It is recommended that employee considering a transfer be advised to seek advice regarding their tax obligations should they accept a transfer. It is not uncommon for executives to be provided with tax counselling as a benefit under their employment contracts. However, there is no legal obligation to pay for the advice.

Termination Clauses

One of the most valuable benefits of a written employment contract in Canada is to provide certainty regarding an employee's entitlements upon termination of employment. As set out above, each province provides for a minimum amount of notice, and in some cases severance, that an employee is entitled to upon the termination of his or her employment. Under the common law, an employee is entitled to "reasonable notice of termination" which is often the subject of litigation. A valid written employment contract that clearly sets out an employee's entitlement upon termination minimizes the risk of a law suit following the end of an employee's employment.

It is important to note that including a termination clause in a written employment contract does not mean that the contract is not an "indeterminate job offer". No jobs are truly indeterminate as they are always subject to the employee performing at an acceptable level and economic circumstances. As long as a job offer is not for a fixed term that ends regardless of the employee's performance, it will be sufficiently "indeterminate" for the purposes of obtaining a work permit.

A good termination clause for a transferring employee, or one moving to the jurisdiction will address the following:

- No notice for termination for cause
- The loss of the legal right to work in Canada is cause for termination
- The amount of notice that will be provided in the event of termination not for cause
- Whether the notice will be working notice, pay in lieu of notice, or a combination of both
- What benefits will continue during the notice period
- Whether costs of moving the employee back to their original jurisdiction will be paid
- In a transfer situation, whether the employee has a right to be transferred back to his or her prior job
- Whether mitigation will apply during the notice period.

Service

Employment service gives rise to benefits such as vacation and notice of termination. For the purposes of provincial and territorial minimum standards, service outside of the jurisdiction may not be considered. However, for the purposes of the common law, it will count unless the parties have expressly agreed otherwise.

It is recommended that prior to making an offer to transfer an employee, the issue of service be addressed directly. Given the importance of service to employment related benefits, it is better not to have surprises after the employee has accepted the offer.

