EMPLOYMENT

By Ben Aberant and Pat Pengelly

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Employment in Canada is a heavily regulated area governed by either federal or provincial legislation. The majority of employers are covered by provincial legislation, with the exception of "federal works or undertakings," which include businesses involved in banking, shipping, railways, pipelines, airlines and airports, interprovincial transportation, broadcasting and telecommunications industries.

The types of employment-related legislation with which employers operating in Canada should be familiar include legislation dealing with:

— employment standards;
— labour relations;
— human rights;
— occupational health and safety;
— accessibility standards;
— federal and provincial privacy rules; and
— employment benefits, including pension, employment insurance and workers' compensation.

The employment relationship in Canada is governed by a broad array of legislation and common law principles. Employers need to be aware of the various legal considerations to avoid attracting liability in the workplace

Employment Standards

All jurisdictions in Canada have enacted legislation that establishes certain minimum employment standards. Generally, employment standards acts (ESAs) are broad and apply to employment contracts, whether oral or written. The standards defined in the ESAs are minimum standards only, and employers are prohibited from contracting out of or otherwise circumventing the established minimum standards. These laws spell out which classes of employees are covered by each minimum standard and which classes of employees are excluded. Although standards vary across jurisdictions, many topics covered are common to all ESAs, including minimum wages, maximum hours of work, overtime hours and wages, rest and meal periods, statutory holidays, vacation periods and vacation pay, layoff, termination and severance pay and leaves of absence. The leaves of absence protected by ESAs vary across provinces, but may include sick

leave, bereavement leave, maternity/paternity/parental/adoption leave, reservist leave, compassionate care/family medical leave, organ donor leave, personal emergency leave, family responsibility leave and crime-related death and disappearance leave.

Unlike employers in the United States, Canadian employers may not terminate employees "at will." Generally, employers must provide required notice of termination, unless they have just and sufficient cause (Cause) to terminate an employee without notice. The length of the required notice period varies among jurisdictions, but generally increases with an employee's length of service. In Alberta, for example, employees with a minimum of three months of service are generally entitled to at least one week's notice of termination, with a maximum eight-week notice period for employees with 10 or more years of service. Employers are required either to give "working notice" of an employee's job termination or provide pay in lieu of notice.

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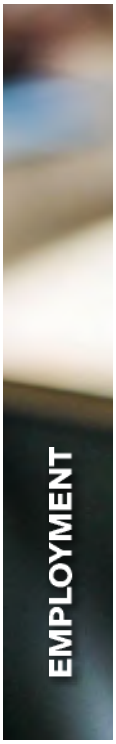


Subject to narrow exceptions, an employer is not required to give notice or pay in lieu of notice if the termination is for Cause. Cause is a high standard and includes, for example, wilful misconduct or serious disobedience.

Certain classes of employees, including construction workers, employees on a temporary layoff and employees terminated during or as a result of a strike or lockout may, on certain conditions, be exempted from the termination notice provisions of the legislation depending on the jurisdiction.

In most jurisdictions, special provisions apply where a significant number of employees are terminated within a specified period of time. These provisions include, at the very least, advance written notice to the director of employment standards or an equivalent governmental authority.

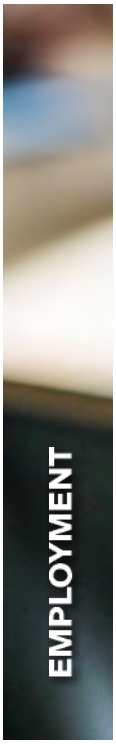
Some jurisdictions provide for severance pay as an additional benefit to employees. For example, under the federal rules, all employees who have been employed for 12 consecutive months are entitled to severance pay equal to the greater of: five days of regular pay or two days of regular pay for each completed year of service.

In Ontario, an employee with five or more years of service may be entitled to severance pay if the employer, as a result of the discontinuation of all or part of its business, terminates 50 or more employees in a six-month period or if the employer has an annual payroll of C$2.5 million or more. Severance pay is calculated on the basis of an employee's length of service and may reach a maximum of 26 weeks of regular pay. As with pay in lieu of notice of termination, employees may be disqualified from receiving severance pay if they have engaged in wilful misconduct or disobedience or if they fall within other exceptions specified in the legislation.

In addition to minimum statutory termination and severance pay entitlements, a terminated non-union employee may be entitled by common law (or civil law in Québec) to additional notice of termination or pay in lieu of notice. This right may be enforced before the courts. The amount of notice will depend on the employee's individual circumstances, including length of service, age, the type of position held and the prospect for future employment. In most jurisdictions, an employer can limit its liability to the statutory minimum in an employment contract. Employers who wish to avoid or limit liability for common law pay in lieu of notice should therefore have clear terms in written contracts. The manner in which an employer treats an employee at the time of dismissal is also important because an employer may be liable to compensate an employee for any actual damages caused by tortious conduct.

The *Canada Labour Code* does not permit federally regulated employers to dismiss employees without Cause (with the legislated exceptions of employees with less than 12 months' service, managerial employees and dismissals that occur due to lack of work or elimination of a position). Accordingly, a federally regulated employer may also face a complaint of unjust dismissal under the *Canada Labour Code* if it dismisses an employee to whom this protection applies without Cause. If an adjudicator finds that the employee's complaint is valid, the remedy can include an award for lost wages and benefits and reinstatement of employment.

Similarly, in Québec, an employee with at least two years of uninterrupted service to whom an *Act Respecting Labour Standards* is applicable may make a complaint for dismissal without good and sufficient cause. Upon finding that the complaint is valid, the adjudicator may also order reinstatement, the payment of lost wages and any other order that he or she believes to be fair and reasonable, taking into account all the circumstances of the matter.



In Québec, the ESA specifically provides all employees — unionized or not — with a right to a psychological harassment-free workplace and creates a special recourse for employees who believe they have been victims of such harassment. Employers are required to take reasonable steps to prevent psychological harassment and, should such harassment occur, take reasonable steps to put an end to it.

Labour Relations

The federal government and each province have enacted legislation governing the formation and selection of unions and their collective bargaining procedures. In general, where a majority of workers in an appropriate bargaining unit are in favour of a union, that union will be certified as the representative of that unit of employees. An employer must negotiate in good faith with a certified union to reach a collective agreement. Failure to do so may result in penalties being imposed. Most workers are entitled to strike if collective bargaining negotiations between the union and the employer do not result in an agreement; however, workers may not strike during the term of a collective agreement.

Human Rights

The *Canadian Charter of Rights and Freedoms* (Charter) is a constitutional charter that governs the content of legislation and other government actions. It contains anti-discrimination provisions that may be enforced by the courts. In addition, all Canadian jurisdictions have enacted human rights codes or acts that specifically prohibit various kinds of discrimination in employment, including harassment. Whereas the Charter applies only to the actions of government, human rights legislation applies more broadly to the actions of private individuals and corporate entities, including employers of virtually every description.

HUMAN RIGHTS LEGISLATION STATES THAT PERSONS HAVE A RIGHT TO EQUAL TREATMENT AND A WORKPLACE FREE OF DISCRIMINATION ON THE BASIS OF ANY OF THE PROHIBITED GROUNDS.

Human rights legislation states that persons have a right to equal treatment and a workplace free of discrimination on the basis of any of the prohibited grounds. These vary somewhat from one jurisdiction to another, but generally include race, ancestry, place of origin, colour, ethnic origin, religion, gender (including pregnancy), sexual orientation, gender identity,

gender expression, age, marital status, family status and physical or mental disability (which may include a diagnosed dependency), among others. In some jurisdictions, discrimination on the basis of a criminal record that is not related to the individual's ability or fitness to perform the job is also prohibited. The law prohibits direct discrimination on such grounds and also constructive or systemic discrimination, whereby a policy that is neutral on its face has the effect of discriminating against a protected group. However, employers may maintain qualifications and requirements for jobs that are bona fide and reasonable in the circumstances.

The first step in the analysis of discrimination is for an employee to demonstrate that discrimination has occurred, or that he or she has been treated differently in a term or condition of employment on the basis of one of the enumerated grounds. Once an employee or former employee can demonstrate that discrimination has likely occurred on the basis of one of the enumerated grounds, the employer has the burden of proof to establish that the offending term or condition of employment is a bona fide occupational requirement (BFOR). The duty to accommodate arises when considering whether a workplace requirement or rule is a BFOR. An employer must demonstrate that the workplace rule was adopted for a rational purpose and in a good faith belief that it was necessary, and that it is impossible to accommodate individuals without undue hardship. "Undue hardship" is a high standard, requiring direct, objective evidence of quantifiable higher costs, the relative interchangeability of the workforce and facilities, interference with the rights of other employees or health and safety risks. The employer must assess each employee individually to determine whether it would be an undue hardship to accommodate his or her particular needs.

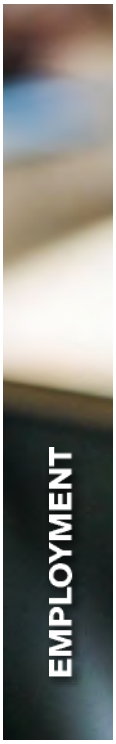
THE FEDERAL GOVERNMENT AND ALL PROVINCIAL JURISDICTIONS HAVE ENACTED LAWS DESIGNED TO ENSURE WORKER HEALTH AND SAFETY, AS WELL AS TO PROVIDE COMPENSATION IN CASES OF INDUSTRIAL ACCIDENT OR DISEASE.

Occupational Health & Safety

The federal government and all provincial jurisdictions have enacted laws designed to ensure worker health and safety, as well as to provide compensation in cases of industrial accident or disease. Employers must set up and monitor appropriate health and safety programs. In provinces such as Alberta, Saskatchewan, Manitoba and Ontario, occupational health and safety legislation requires a

workplace violence and/or harassment policy. The purpose of occupational health and safety legislation is to protect the safety, health and welfare of employees, as well as the safety, health and welfare of non-employees entering work sites.

Occupational health and safety officers have the power to inspect workplaces. Should they find that work is being carried out in an unsafe manner or that a workplace is unsafe, they have the power to order the situation to be rectified and to make "stop-work" orders if necessary. Contraventions of the acts, codes or regulations are treated very seriously, and may result in fines or imprisonment. Recent changes to the *Criminal Code* have also increased potential employer liability for failing to ensure safe workplaces.



Workplace Violence and Harassment

As part of maintaining a safe workplace, most Canadian jurisdictions have legislation providing for employer obligations in respect of the prevention of workplace violence and harassment, including violence or harassment by customers or the public. In several jurisdictions, these obligations extend to the duty to prevent and to address incidents of sexual harassment. In the province of Québec, psychological harassment in the workplace is addressed in employment standards legislation. The requirements of workplace violence and harassment legislation vary by jurisdiction, but employers need to ensure that they are aware of their obligations and remain in full compliance. Some key features of the legislation require employers to:

— assess risk in the workplace, based on a number of prescribed factors;

— develop policies and procedures relating to workplace violence and harassment;

— provide employee training; and

— develop procedures for investigating incidents of workplace violence or harassment.

Accessibility Standards

In Ontario, the *Accessibility for Ontarians with Disabilities Act, 2005* (AODA) places specific disability accommodation requirements on various categories of organizations in Ontario. The goal of the AODA is to provide

accessibility for all those with disabilities. The obligations on employers and businesses have been rolled out slowly since 2012. In 2016 and 2017, the last significant block of employment obligations becomes effective on all employers. The AODA imposes a number of employment related obligations on employers. Among the obligations imposed by the AODA are that employers must:

— develop, adopt and maintain an accessible employment policy statement;

— provide disability awareness training (for employers with more than five employees) to be completed between three and five years from the time the standard comes into force;

— develop, adopt and maintain procedures for accommodating employees in the recruitment, assessment, selection and hiring stages;

— provide internal and external notification of disability accommodation and consult with job applicants requesting accommodation about possible accommodation;

— develop and maintain individualized accommodation and return to work plans for employees;

— maintain materials regarding policies and procedures that support employees with disabilities and information on how to request accommodation; and

— provide AODA mandated policies and/or materials to inspectors as requested.

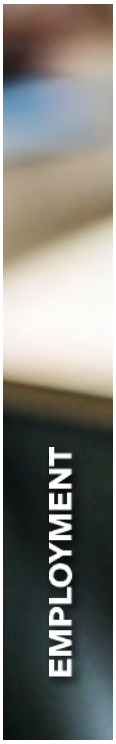
In addition to the obligations relating to employment, the AODA also imposes accessibility obligations on companies with respect to customer service, physical premises and information and communications.

The AODA was the first of its kind in Canada. Manitoba and Nova Scotia have since passed similar legislation. On June 21, 2019, the Canadian federal government passed similar legislation, the *Accessible Canada Act*, which applies to federally regulated entities, including private sector employers.

Privacy

Employers in Canada must be aware that Canada has privacy laws governing the collection, use, disclosure, storage and retention of personal employee information, as well as an employee's right to access such information. This is especially important in Québec, Alberta and British Columbia, which have already enacted privacy legislation separate from the federal legislation. See **Privacy Laws**.

Employment Benefits



The Canada Pension Plan is a federally created plan that provides pensions for employees, as well as survivors' benefits for widows and widowers and for any dependent children of a deceased employee. All employees and employers, other than those in the Province of Québec, must contribute to the Canada Pension Plan. The employer's contribution is deductible by the employer for income tax purposes. Québec has a similar pension plan that requires contributions by employers and employees within Québec.

In addition to the Canada Pension Plan, both employees and employers must contribute to the federal Employment Insurance Plan, which provides benefits to insured employees when they cease to be employed, when they take a maternity or parental leave and in certain other circumstances. The employer's contribution is deductible for income tax purposes. Québec also has its own Parental Insurance Plan, which provides benefits to insured employees when they take a maternity or parental leave and to which both employers and employees in Québec contribute. All provinces provide comprehensive schemes for health insurance. These plans provide for medically necessary treatment, including the cost of physicians and hospital stays. They do not replace private disability or life insurance coverage.

Funding of public health insurance varies from one provincial plan to another. In some provinces, employers are required to pay premiums or health insurance taxes. In other provinces, individuals pay premiums or the entire cost of health insurance is paid out of general tax revenues.

Employers commonly also provide supplemental health insurance benefits through private insurance plans to cover health benefits not covered by the public health insurance plan.

Employers may be required to provide sick or injured worker benefits in the form of workers' compensation, a liability and disability insurance system

that protects employers and employees in Canada from the impact of work-related injuries. This benefit compensates injured workers for lost income, health care and other costs related to their injury. Workers' compensation also protects employers from being sued by their workers if they are injured on the job.

Other laws in Canada address additional benefits such as private pensions and private benefit plans. For example, most Canadian jurisdictions have pension standards legislation that establishes minimum requirements for private pension plans.

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