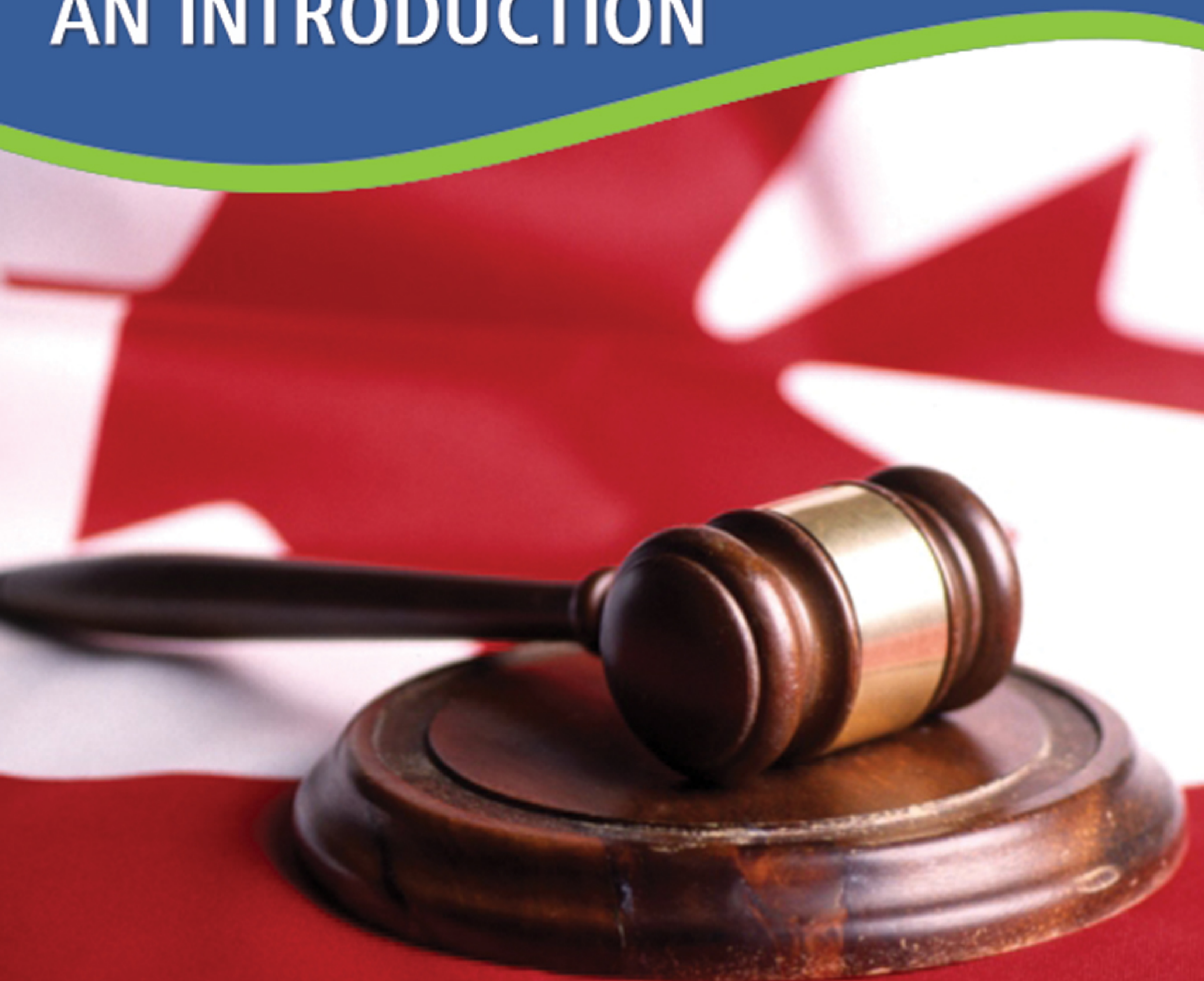
CANADIAN HR LAW:
AN INTRODUCTION



By Stuart Rudner, Employment Law Specialist, Rudner MacDonald LLP

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Stuart Rudner is a founding partner of Rudner MacDonald LLP, a boutique law firm specializing in Canadian Employment Law. He can be reached at 416.640.6402, 905.530.2484 or srudner@rudnermacdonald.com. Stuart speaks and writes extensively on Canadian HR Law issues; you can find valuable information from the following:

www.rudnermacdonald.com

Google+: https://plus.google.com/+Rudnermacdonald
YouTube: https://youtube.com/rudnermacdonald
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Rudner MacDonald LLP
The Next Chapter in Employment Law

Rudner MacDonald LLP helps clients throughout Canada address workplace issues. The firm provides senior counsel to employers and employees in all aspects of employment law including policies, procedures, hiring, employment agreements, bullying, harassment, human rights issues, downsizing, reducing labour costs, restrictive covenants, discipline, constructive and wrongful dismissal. They also offer mediation services for employment related disputes.

Introduction

"Toto, I have a feeling we're not in Kansas anymore."

We all know those words from a very different context, but the sentiment is apt when it comes to employment laws. The laws in Canada are very different from those in the United States, and treating Canada as the "51st state" when putting together employment contracts, policies or procedures can cost a company significantly.

I work with many US-based companies that have employees in Canada, and I know that some of the Canadian HR laws may come as a shock to those accustomed to the American approach. In many cases, the laws in Canada are more protective of the employees and, as a result, more onerous on employers. A prime example is the law of dismissal. In the United States, many workers are governed by an "employment-at-will" doctrine that allows employers to terminate the relationship without cause or notice, regardless of the length of service. In Canada, unless just cause for dismissal exists (which can be a high threshold to meet), then an employer must either provide notice of dismissal or pay in lieu (often referred to as "severance").

The differences between the laws often lead American companies to expose themselves unnecessarily to liability for failing to comply. It is crucial that employers work with an experienced HR lawyer in Canada in order to ensure they understand their rights and their obligations. In many cases, the *default* is quite onerous for employers, but there are ways in which they can reduce their obligations and maximize their HR rights. For example, by default all employees that are dismissed without cause are entitled to "reasonable notice," which can be months or even years. However, employers can use contracts of employment in order to reduce this obligation dramatically. This is discussed in more detail below, but is mentioned here as an example of how employers in Canada need to adopt a strategic approach to HR in order to ensure compliance and also maximize their usage of their human resources.

Jurisdiction – Which Laws Apply?

It is also a mistake to assume that the laws are the same all across Canada. To begin with, an employer will need to determine which laws apply to them. There are 14 different sets of employment and labour legislation across Canada: one federal and one for each province and territory. The legislation covers all aspects of the employment relationship, including working conditions, occupational health and safety, collective bargaining, and human rights. The general principles are similar in each jurisdiction; however, there are important distinctions of which employers should be aware.

An employer must determine whether they are federally or provincially regulated. This distinction is based solely upon the nature of the company's business; the vast majority of employers are governed by the legislation of the province(s) in which their business operates. Employers engaged in international or interprovincial transportation (airline, railway, bus, shipping, and trucking companies that cross borders in the course of business) in the telecommunications industry (telephone, radio, and television) and in the banking industry are examples of the few organizations that are subject to federal legislation. It is important to

remember that employers that have employees in multiple jurisdictions in Canada are subject to the laws of each jurisdiction. For that reason, applying policies and procedures across the board can be risky unless efforts are made to ensure that they comply with the applicable laws in each jurisdiction. For example, statutory holidays, hours of work and overtime requirements may differ from one province to another. What is lawful in Ontario may be a breach of employment standards legislation in British Columbia, or vice-versa. In order to have policies that are compliant with each set of laws, an organization would have to adopt the most liberal or employee-friendly version of each. Otherwise, they would have to have different policies in each province.

Employment relationships in Canada are also governed by the common law, which is judge-made and operates in conjunction with the applicable legislation. In many cases, such as the laws regarding termination, the statutory provisions serve as minimum rights which are supplemented by the common law. While the common law is subject to variation by contract, the statutory minimums are not. Courts will interpret and apply employment and labour legislation and can also rule on the constitutionality of the legislation. Employers must be aware of their rights and obligations pursuant to both statute and common law.

The common law applies throughout Canada with the exception of Quebec, which is governed by Civil Law like France. Generally speaking, the laws in most jurisdictions are similar with the exception of Quebec, which tends to be more “employee-friendly” than the rest of the country. As a result, it is particularly important to ensure that if you have employees in Quebec, you are aware of the specific laws of that province. Due to space concerns, Quebec laws are not addressed in any detail in this article; the comments apply, generally, to the balance of the jurisdictions in Canada. When I work with a client that has employees in Quebec, I always collaborate with my colleagues in that province.

The Hiring Process

Human rights considerations

Human rights legislation applies to employment relationships, and this extends to the hiring process. Applicants have the right to equal treatment and opportunity without discrimination based upon protected grounds. Legislation such as the Canadian Human Rights Act makes it a discriminatory practice to refuse to employ an individual on a prohibited ground or to establish or pursue a policy that deprives or tends to deprive an individual of any employment opportunities based on a prohibited ground of discrimination. However, an employer may treat an employee in a different fashion where the different treatment is based upon a bona fide occupational requirement (BFOR). Care should be taken not to ask questions that might elicit information about protected grounds (such as age, disability or family status), as they want to avoid any inference the decision was based upon such information.

Background checks

Compared to the US, background checks are far less common and extensive in Canada, where privacy legislation limits their use significantly. While consent is not always required for a

background check, it is advisable to only conduct background checks that are relevant to the position for which the applicant has applied. For instance, an employer may want to conduct credit checks of applicants being considered for positions that require the handling of money. Some professions, such as nursing and teaching, are governed by legislation that requires criminal record checks of applicants.

The manner in which the information obtained can be used will depend upon the jurisdiction. For instance, in Alberta, employers may make hiring decisions based upon an applicant's record of convictions. In B.C., employers cannot discriminate based on a criminal record that is not relevant to the employment. In Ontario, an employer may not make employment decisions based upon an applicant's convictions for provincial offences such as driving offences under the Ontario Highway Traffic Act. Further, in the federal jurisdiction, an employer may not make hiring decisions based upon an applicant's conviction for which a pardon has been granted. Nevertheless, even if a pardon has been granted or an applicant has been convicted of a provincial offence, an employer may be able to refuse to hire the applicant on the basis that having a clean record is relevant to a BFOR. For example, a taxi company could refuse to hire an applicant for a driver's position who has been disqualified from driving for offences under highway traffic legislation.

Pre-employment drug testing

Pre-employment drug testing is also far less common in Canada than in the U.S. It is more common in industries where there are heightened concerns about safety, such as the transportation and construction industries. However, there is some inconsistency between judicial decisions in various jurisdictions, so employers must proceed cautiously. Testing cannot be imposed "across the board" for all employees. When developing drug and alcohol policies, employers must keep in mind that addiction is considered to be a disability, and that protected grounds include "previous or existing dependence on alcohol or a drug," as well as perceived disabilities. To justify pre-employment drug testing, an employer must establish that the testing is a BFOR.

Use of Social Media and Internet Resources

The use of social media sites like Facebook in the hiring process continues to cause confusion and controversy. In recent months, headlines across North America have raised fears of employers demanding that job applicants hand over their Facebook username and password or asking them to log in to Facebook right then and there in the interview, so the employer can have full access to the applicant's account.

Many employers I speak with are still concerned it is somehow inappropriate or illegal to simply check an applicant's Facebook page or otherwise research them online. This concern is largely unfounded. There is nothing inherently wrong with accessing publicly available information about a candidate as part of the hiring process. In the vast majority of cases, I do not think there will be legitimate basis for going further and requiring access to private information. However, I recognize there may be situations where an employer can demonstrate it would be appropriate in the hiring process.

With respect to social media checks generally, I offer the guidelines below. As a general comment, there is nothing wrong with accessing publicly available information about a candidate, but any information should be used cautiously.

- a standard protocol should be used to research all applicants in a consistent manner
- employers should take steps to ensure that the material they find relates to the applicant and not someone with a similar name
- employers should take steps to ensure the material is accurate
- employers should take what they find with a grain of salt — one picture of an applicant with a beer in their hand should not disqualify them — but patterns of conduct can be relevant
- the person making the hiring decision should not be the person who performs the online search.

The reason for the last point is that online sources can be filled with potentially "dangerous" information. The best advice for some time has been that those in charge of hiring should not obtain any more information than they reasonably need in order to make the hiring decision. It is all too easy to envision a scenario where an organization stumbles across a picture of an applicant in a wheelchair, and although the decision not to hire the individual is entirely unrelated, the applicant can allege that they were not hired due to their disability. I advise clients to ensure the person making the hiring decision is not the person who performs the online search. That way, the person researching the applicant online can filter out any irrelevant or inappropriate information and prepare a summary of relevant material. If this is done properly, the company can credibly show it was not privy to inappropriate information, and any decision not to hire was not based upon a protected ground.

Contracts of Employment

If there is one piece of advice I offer employers, it is to **use written contracts of employment for every employee.** Doing so can allow employers to reduce their obligations and liabilities, and also to maximize their rights and efficiency.

As discussed below, employment agreements can be written or verbal. They can also be for a fixed period of time or indefinite. Often, employers refer to those who are hired for a fixed term as being "on contract" While technically correct, the reality is that all employees have a contract in one form or another. There is a common perception that those "on contract" do not have the same rights as "regular" employees, but that is primarily a function of the manner in which the contract is drafted rather than any applicable laws. By default, all employees enjoy the same rights. However, it is open to the parties in any case to agree upon specific terms.

In addition to using employment contracts, it is critical that employers keep them up to date and adapt them for specific individuals and positions. Many employers make the mistake of finding templates online, or borrowing them from precedents they have seen used by other companies. These will not properly protect you. Even if you have a template that was drafted by an employment lawyer for your organization, it is critical that it be kept up to date. Employment laws and practices change, and contracts should adapt accordingly. In recent years, several Canadian employment law decisions have called into question formerly best practices regarding termination clauses in employment contracts. As a result, templates should be updated. In addition, one size does not fit all; while it is important to have one or more templates that you can rely upon, it is always advisable to have an offer reviewed by an employment lawyer before presenting it. That way, you can be sure that it is tailored to the individual position or circumstances.

Verbal agreements

Contrary to popular belief, there is no such thing as an employee without a contract. However, in the vast majority of cases, the agreement is a verbal one. As a result, the terms and conditions of that agreement will be a combination of terms that are explicitly discussed and agreed to and terms that are implied by law. Typically, issues such as position, salary, and vacation days will have been discussed and form part of the explicitly agreed-upon terms. The balance of the terms and conditions will be established by the applicable law (both statutory and common law), and relate to such issues as hours of work, overtime pay, and notice in the event of termination.

For example, although virtually no one will discuss statutory holidays during the hiring process, every employee will claim an entitlement to those days off or pay in lieu thereof. Similarly, many of the other issues addressed in this chapter stem from either legislative requirements or common law obligations. Both requirements are implied into every contract of employment. While the statutory requirements cannot be overridden by contract, the common law obligations can be.

Written contracts

Most employers do not have a policy of having every employee sign a written contract of employment. Even those that do use written employment agreements tend to do so only for a limited scope of employees; for example, only for executives.

My recommendation is to have every single employee sign a contract of employment that sets out their duties and obligations along with the duties and obligations of the organization. Needless to say, the form of agreement, and the content thereof, may differ significantly between various types of employees. However, the existence of a written agreement will eliminate a significant amount of uncertainty and will also serve to limit the employer's obligations and potential liabilities.

In particular, a written employment agreement should include a provision which sets out the specific amount of notice of termination, or pay in lieu thereof, that the employer will be

required to provide should it decide to end the relationship. As discussed elsewhere in this chapter, in the absence of such a provision, the common law will require that the employer provide “reasonable notice.” Since there are no hard and fast rules with respect to how one calculates what is reasonable, the end result will be that at the time of termination, there will be differing opinions with respect to how much notice is required. This can result in the necessity of negotiating and potentially litigating the severance package, with corresponding legal fees. Some employers object to using termination clauses as they fear it will set the wrong tone at the time of hiring or, make the individual think that the employer is “out to get them”. As I often advise, employment contracts are like prenuptial agreements; no one wants to think about the possibility of divorce when they get married, but the reality is that most employment relationships will come to an end at some point. You can draft the termination clause to be as positive as possible, as well as being as fair as possible. Termination clauses do not have to be oppressive; they can simply provide certainty of the rights and obligations of each party.

There are innumerable ways of establishing the termination requirements, ranging from a hard cap to a formula based upon length of service. These can be tailored for individual positions or by level within the organization. Regardless of the particular approach adopted, we strongly recommend that a written employment agreement, with termination provisions, be used in all contexts.

To the extent that they are not explicitly addressed, the law will imply various terms into written agreements, as it does with verbal agreements.

There are some things to bear in mind when seeking to rely upon written employment agreements. First, any provision which provides a lesser benefit than the minimums required by applicable legislation will be unenforceable. Second, in order to create a binding contract, consideration must flow both ways. In other words, both parties must enjoy corresponding benefits and obligations. Many well-intentioned companies seek to impose an employment agreement after they have already hired the individual. At that point, there is already a verbal agreement in place. In order to create a new agreement that is enforceable, some sort of benefit will have to be offered to the employee in exchange for their agreement to accept the new terms and conditions. For that reason, we strongly recommend that the employment agreement be used as the method of offering employment to the individual, with wording that makes it clear that the offer is contingent upon the individual’s agreement to the terms and conditions set out therein.

Key terms

In addition to addressing the termination of the relationship, the employment agreement provides an opportunity to address all items of concern to the employer. Typically, employers will want to have provisions which address issues such as:

- duties of the employee;
- probation period;

- hours of work;
- permitted payroll deductions;
- variable pay;
- vacation entitlement;
- ownership of creations;
- restrictive covenants;
- applicability of policies;
- confidentiality; and
- termination of the relationship.

In addition, the employment agreement is a good opportunity to explicitly grant the employer discretion with respect to items such as bonus payments and salary increases, as well as to allow for modifications to the employment agreement and relationship (for example, relocation). This can help to avoid claims of constructive dismissal down the road, if the need arises for changes to the relationship.

Changing the agreement

Generally speaking, a unilateral and substantial change to a fundamental term of the employment agreement constitutes a constructive dismissal. As a result, it can be quite difficult to impose new terms upon an existing employee. It is helpful to explicitly state, in the agreement itself, that the employer will retain discretion to change particular terms and conditions. For example, the employer can retain the right to transfer the individual to a different location, or to change their duties, without triggering a claim of constructive dismissal.

If changes must be made that are not explicitly provided for in the agreement, the organization will have a few options. One will be to offer some form of consideration in exchange for the employee's agreement to the new terms. For example, a one-time bonus, or an additional week of vacation, can be appropriate consideration. Promotions or discretionary salary increases provide good opportunities. Another option would be to provide notice of the change. In effect, this is tantamount to notice of termination, and the amount of notice required will be the same as would be required in the event of an actual termination. However, while "terminating" the agreement, the employer can, at the same time, offer to re-employ the individual on the new terms and conditions.

Contractor and Consulting Agreements

Sometimes, the parties may prefer to characterize the individual as an independent contractor rather than an employee. There are several reasons why this form of employment relationship

is advantageous to both parties: among other things, there can be tax benefits to the individual, and the organization may avoid obligations to provide benefits, remit taxes, etc.

However, true independent contractors are few and far between. The reality is that many people who are described as such in their contracts are really employees. Regardless of how the parties characterize the relationship, the courts will look beyond the terminology involved and assess the true nature of the relationship.

There are many tests that have developed over the years in order to determine whether a particular individual is an employee or an independent contractor. The courts have focused upon factors such as control over the work done, ownership of the tools, and opportunity for profit/risk of loss. In a nutshell, the question to be asked is whether the individual in question is carrying on their own business and providing a service to the organization, or is really a part of the organization. Among other specific factors are the question of who controls how the work is done and whether the individual has the right to assign the work to others. If the reality is that the individual is the only one performing the duties in question and is dedicating themselves to the organization on a full-time basis, it is likely that they will be deemed to be an employee.

There are risks involved in treating someone as a contractor when they are truly an employee. Typically, the contractor relationship will involve payment of gross wages, without deduction for items such as income taxes or employment insurance. If the individual is found to be an employee, the employer can be liable for unremitted amounts, which can be substantial over a lengthy period of time. As well, there is a risk to the employer if the contractor is found to be an employee by the Workers' Compensation Board. If the contractor does not have coverage, the Board may charge the whole of the cost of the compensation claim to the employer. Furthermore, some government agencies can levy fines upon employers that have failed to make required remittances.

In recent years, the courts have recognized that the line between employees and independent contractors has blurred somewhat. As a result, the courts have acknowledged a third category--"dependent contractors"--which will be treated as somewhat of a hybrid. While the notice required in the event of termination will not be as lengthy as in the case of a true employee, it will be substantially longer than for a true independent contractor.

We recommend that individuals only be treated as independent contractors in very limited situations where such a designation reflects the reality of the situation.

Restrictive Covenants

The use of restrictive covenants such as non-competition and non-solicitation clauses is (pardon the pun) quite restricted in Canada. Canadian courts are extremely reluctant to interfere with an individual's ability to earn a living. In particular, they are wary of contractual provisions which effectively preclude an individual from working in the field in which they have acquired all of their experience, expertise, contacts, and resources. They will only enforce clauses that are necessary in order to adequately protect an employer's interests and that are reasonable with respect to the scope of the restrictions.

It is important to note that our courts will not "read down" clauses. In other words, they will not consider a two year restriction, deem it to be too harsh, and replace it with a one year restriction. If they find that any aspect of a clause is unreasonable, then the entire clause will be unenforceable. As a result, employers must carefully consider what is truly necessary and defensible, and draft the clause accordingly.

Noncompetition clauses

Noncompetition covenants, which are the most restrictive of the restrictive covenants, are, by default, unenforceable in Canada. This situation will be different when dealing with a person who has sold the company, or a portion of the company, and remained on as an employee. However, for "regular" employees, that is the reality.

Noncompetition covenants will only be enforced in situations where other forms of restrictive covenants, such as nonsolicitation clauses, will not sufficiently protect the employer's interest. That is not commonly found to be the case. Even in such scenarios, the noncompetition clause will only be enforced if the particulars of the covenant, including the time and geographic restrictions, are deemed to be reasonable. For instance, a restrictive covenant that precludes the individual from carrying on business anywhere in the world for a period of 10 years is extremely unlikely to be enforceable, particularly in a situation where the organization seeking to rely on it only does business in one city.

Nonsolicitation clauses

Clauses that restrict an individual's ability to solicit former customers and/or employees of an organization are more likely to be accepted and enforced by Canadian courts. Even so, the particulars of the clause must be reasonable. Furthermore, such clauses are difficult to enforce in practice, as the organization will be required to prove that the individual solicited the customer or employee that is involved. Unless there is some sort of documentary evidence of who contacted whom, and what was said, it is likely that the individual will simply claim that the customer or employee contacted them in order to pursue the relationship, and that they therefore have not breached the nonsolicitation covenant.

Use of policies

Organizations often seek to rely upon policies in order to regulate the conduct of their employees. This is advisable and helps the company to establish the rules of the workplace. However, this is often done so haphazardly or without appropriate planning and implementation; the net result is sometimes that the policies can't be relied upon, and the money spent is effectively wasted.

Policies can take various forms, from a memo posted on a bulletin board, to an e-mail broadcast, to a part of an extensive handbook filled with policies and procedures. Every now and then, a case will arise that raises the question of whether or not such policies are enforceable and, particularly, whether they can be relied upon in order to support allegations of just cause.

Organizations should bear in mind that drafting a policy is merely the first step in the process. It is crucial that any policy which the organization seeks to rely upon be publicized to all members of the organization and is consistently enforced. Failure to do so can result in a determination that the employee who breached the policy was not sufficiently aware of the consequences of doing so. Furthermore, behavior should be monitored and policies should be enforced routinely. Finally, policies should be updated to reflect changing circumstances and laws, and should also be drafted to comply with all jurisdictions where the organization has employees.

Policies must be made to be a part of the employment agreement. Along with contracts, policies can and should be used by employers in order to establish the workplace rules that they want to apply.

There are many standard types of policies and many issues that will be addressed as a matter of course in a policy manual. However, we always encourage our clients to consider any and all issues that they want to address. This can include anything from conflicts of interest to whether employees can eat or drink at their desks. If it is important to you, or if it something that is a cause of frustration, it should be addressed in a policy. This is the employers chance to establish the rules of the workplace.

Employment Standards Legislation

Every jurisdiction has legislation setting out minimum standards of employment. This legislation applies to most employees in the jurisdiction, with a few exceptions. For example, Ontario's legislation does not apply to holders of political, religious, or judicial office, nor to inmates or students participating in workplace experience programs. Furthermore, some workers are explicitly exempted from particular provisions of the legislation; some of these exemptions are discussed below.

Minimum wage

Every province has a minimum wage for adult workers. Some provinces also have special rates for students, minors, trainees, farm workers, and other types of employees. The minimums change regularly. Employers should contact the relevant government agency in their jurisdiction to ensure compliance with the current applicable minimum wage.

Hours of work & Overtime

Most jurisdictions have set the maximum number of hours an employee can be required to work per day at eight, with a maximum of 48 hours per week. However, many provide exceptions which allow the parties to exceed this amount in specific circumstances. These exceptions vary significantly between jurisdictions; some require ministerial approval of such agreements.

In Ontario, the hours of work standards do not apply to supervisory or managerial employees, information technology professionals, and professionals such as engineers, lawyers and public accountants, and others. However, the Ministry will not be swayed by an individual's title, and

will consider the nature of their duties in order to assess whether they are truly exempt. As well, the hours of work standards do not apply under certain emergency circumstances.

There are other exceptions and variations as well, such as route salespeople and intellectual technology professionals. These will vary from jurisdiction to jurisdiction, and some exemptions will only apply to some statutory requirements (for example, some positions will be exempt from hours of work and overtime laws, but not from vacation, whereas others will be exempt from vacation as well).

When employees work more than a prescribed number of hours, employers must typically pay overtime at a rate greater than the employee's usual hourly rate. This is true regardless of whether the individual is employed full-time, part-time, or on a casual basis. With some exceptions, the rate of overtime pay is one and one-half times the regular hourly rate. In some cases, employees can agree to take time off instead of receiving overtime pay. The parties can enter into agreements to, for example, average hours over several weeks.

Notably, there have been several class-action claims in recent years based upon alleged breaches of the applicable overtime legislation. Many employers fail to adequately monitor working hours and prevent employees from stockpiling overtime, either with or without specific approval. The widespread use of smartphones has exacerbated this risk. Arguably, providing an employee with off-duty access to email may create an expectation that they be available outside of their regular working hours. This could be used to argue that they are entitled to overtime pay for time spent reading and responding to emails.

Layoffs

In some circumstances, it is possible to temporarily layoff employees due to a shortage of work. When employees are laid off for a certain amount of time, they will be deemed to have been terminated by the applicable employment standards legislation. For example, in Ontario, if an employee is laid off for longer than a "temporary layoff" (there are various definitions of "temporary layoff" depending on the circumstances), they will be deemed to have been terminated, and the employer must comply with all termination obligations.

Many people are not aware that while the legislation may set out the acceptable parameters of a temporary layoff, it does not actually give employers the right to lay off employees. Unless the parties have explicitly or implicitly agreed that the organization will have the right to lay off the employee temporarily during the course of employment, the employer may face a constructive dismissal claim if they attempt to do so. That said, the law may be evolving in this area as well. One recent Ontario decision considered the previous case law, but then also considered the current economic realities and held that employers ought to have the right to temporarily lay off employees in poor economic circumstances, even in the absence of an express or implied right to do so. It remains to be seen whether that was an anomaly or a change in the law. However, it is always better to have a clear contractual right rather than relying upon the possibility that a court will agree with the action that was taken. As such, employers who may need the flexibility to lay off employees should explicitly include a provision regarding layoffs in the employment contract.

Holidays

Each jurisdiction provides statutory holidays, the majority of which are common to all jurisdictions. Employees are generally entitled to take the specific day of the holiday off from work with pay. Alternatively, they can agree to work the holiday and either take a substitute day off with pay, or be paid at a premium rate for the hours worked on the holiday. Employers should check the applicable legislation, as many people assume some days are statutory holidays when they are actually not; for example, the "civic holiday" or "August long weekend" is not a statutory holiday in provinces such as Ontario.

In Ontario, there are currently nine public holidays: New Year's Day, Family Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day, and Boxing Day.

In most jurisdictions, there will be specific requirements that must be met before an individual can receive holiday pay. For example, they must work their normally scheduled workdays before and after the holiday or have a reasonable justification for missing them.

Vacation

All jurisdictions provide for minimum annual vacation with pay for eligible employees, and with the exception of Saskatchewan, they all provide that eligible employees must receive two weeks of paid vacation after the first 12 months of employment. In Saskatchewan, employees must receive three weeks.

Employees are entitled to an additional week of annual vacation with pay after a certain number of years of service in many jurisdictions. For example, in Alberta and British Columbia employees are entitled to three weeks of annual paid vacation after working for the same employer for five consecutive years.

The employer may determine when the vacation is to be taken, subject to any relevant statutory requirements.

Typically, vacation pay is calculated by dividing the number of weeks of statutory paid vacation by 52 (the number of weeks in a year). As a result, in provinces where employees are entitled to two weeks of paid annual vacation, vacation pay is 4% of an employee's annual wages (two weeks/52 weeks).

In Ontario, the general rule is that employees must receive their vacation pay in a lump sum before taking a vacation. There are some exceptions to this requirement. If employers pay wages by direct deposit, the vacation pay may be paid on or before the pay day taking place in the pay period occurring during the vacation. The same payment method may be applied if the vacation period is less than one week. As well, employees may agree in writing that their vacation pay will be paid, as it is earned, on the pay day of every pay period. Employees may also agree in writing that the employer may pay the vacation pay at any time, as agreed to by the employee.

It should be noted that the right to vacation pay is different from the right to paid vacation. In other words, if an employee only works for two months, she is not entitled to any vacation time. However, she is entitled to be paid all vacation pay earned over the two-month period. In a jurisdiction with two weeks of statutory paid vacation, the vacation pay would be equal to 4% of the wages earned over the two-month period of work.

Leaves of absence

Leave entitlements in Canada arise in a number of circumstances. These leaves are generally unpaid, although the employment insurance scheme offers replacement income in some cases. In many cases, employers must continue to fund employment-related benefits during the leave period and must return the employee to their pre-leave position when at the conclusion of the leave.

Pregnancy and parental leave

All jurisdictions have legislated leaves for pregnant women and new parents. The language of the legislation varies between jurisdictions. Below, the pregnancy and parental leaves provided for in Ontario are described as an example of these legislated leaves.

In Ontario, a pregnant employee who is hired at least 13 weeks before the expected birth date may take up to 17 weeks of unpaid pregnancy leave. The leave may start up to 17 weeks before the due date (or earlier if the birth takes place before then), or as late as the baby's due date itself.

Employees must provide two weeks' written notice of their pregnancy leave. The written notice must include the start date of the leave and, upon the employer's request, a medical certificate confirming the due date. Employees are not required to inform their employers of when they intend to cease their leave and return to work. However, if the employee does not specify a return date, the employer can assume that the full 17-week leave will be taken.

In Ontario, new parents may take an unpaid leave when a baby or child is born or first comes into their care. Birth mothers who have taken pregnancy leave may take up to 35 weeks of parental leave. Other new parents, including new mothers who have not taken pregnancy leave, may take up to 37 weeks of parental leave.

For the purposes of parental leave in Ontario, a "parent" includes a birth parent, an adopting parent (even if the adoption is not yet final), and a person who is in a relationship of some permanence with a parent of a child and who intends to treat the child as his or her own.

An employee who took pregnancy leave and who is planning to take parental leave must give the employer written notice. The employee may give this notice at the same time that pregnancy leave notice is given or, alternately, must give this notice at least two weeks before the pregnancy leave ends. All other employees intending to take parental leave must provide two weeks' written notice of the leave.

An employee is not required to inform their employer of when they intend to end the parental leave and return to work. If the employee does not specify a return date, the employer may assume that the employee intends to take the full period of parental leave.

Personal emergency leave

Some jurisdictions allow for leaves of absence in order to allow employees to deal with "emergencies." In Ontario, personal emergency leave may be taken if employees experience personal illness, injury, or a medical emergency. It may also be taken in the event of a death, illness, injury, medical emergency, or urgent matter relating to specified family members including a spouse, parent, stepparent, foster parent, child, stepchild, foster child, grandparent, step-grandparent, grandchild, or step-grandchild of the employee or the employee's spouse, the spouse of an employee's child, a brother or sister of the employee, or a relative of the employee who is dependent on the employee for care or assistance. "Spouse" includes same-sex spouses for the purposes of this leave.

Only employees working for employers that regularly employ more than 50 employees are eligible for this leave, which is limited to 10 days of unpaid leave per calendar year.

Employees must inform employers of the leave before starting the leave, if possible. If this is not possible, employees must inform employers as soon as they are able. Employers are entitled to ask for proof of an employee's eligibility for personal emergency leave, and employees are required to provide evidence that is reasonable in the circumstances.

Family medical leave

Some jurisdictions also provide for leaves of absence in circumstances where a member of the employee's family is in critical medical condition.

In Ontario, employees may take up to eight weeks of unpaid family medical leave. The family member in need of care and support must have a serious medical condition with a significant risk of death occurring within a period of 26-weeks. A certificate from a qualified medical practitioner may be required by the employer to confirm this. The cost, if any, of securing the certificate is the responsibility of the employee. For the purposes of family medical leave, care or support is considered to include providing psychological or emotional support, arranging for care by a third-party provider, or directly providing or participating in the care of the family member.

The eight weeks do not need to be taken consecutively; however, they must be taken in periods of full weeks and must be taken within a specified 26-week period.

Family medical leave may be taken to provide care or support to specified family members including the employee's spouse, a parent, stepparent, or foster parent of the employee or the employee's spouse, a child, stepchild or foster child of the employee or the employee's spouse, a brother, stepbrother, sister, or stepsister of the employee, a grandparent or step-grandparent of the employee or of the employee's spouse, a grandchild or step-grandchild of the employee

or of the employee's spouse, a brother-in-law, step-brother-in-law, sister-in-law or step-sister-in-law of the employee, a son-in-law or daughter-in-law of the employee or of the employee's spouse, an uncle or aunt of the employee or of the employee's spouse, the nephew or niece of the employee or of the employee's spouse or the spouse of the employee's grandchild, uncle, aunt, nephew, or niece. "Spouse" includes same-sex spouses for the purposes of this leave. The leave may also be taken to provide care and support for people who consider the employee to be like a family member.

Employees are required to inform their employers of the leave in writing before commencing the leave. If this is not possible, the employee must inform the employer in writing as soon as they are able.

Other leaves

Other leaves are offered in different jurisdictions. Further, the types of leaves available continue to evolve. In recent years, the Ontario government has added many new forms of leave, including organ donor leave, family care giver leave, critically ill child care leave, and crime related child death or disappearance leave. In Alberta, they now have compassionate care leave. The types of leave available to employees vary from jurisdiction to jurisdiction, and continue to evolve.

Rules and obligations during periods of leave

Employees cannot be denied any of the above leaves and cannot be fired or otherwise discriminated against for exercising their rights to such leaves. As well, employees returning from pregnancy, parental, reservist and some other leaves must be reinstated to their most recently held position or to a comparable position if the previous position no longer exists. When they return, their salary must be the same as it was when they began their leave or what it otherwise would have been had they not taken a period of leave--whichever is greater.

Furthermore, in most cases, seniority and length of service must continue to accrue during the leaves described above. As well, employers must continue to pay their share of premiums to certain benefit plans during most leaves, with the exception of reservist leave, unless the employee clearly indicates that they do not intend to continue paying their portion of the premiums.

Enforcement process

All jurisdictions provide a mechanism for enforcement set out in their respective employment standards legislation. In addition to these quasi-judicial proceedings, employees can also seek the protection of the courts in some circumstances.

In Ontario, employees may file a claim with the Ministry of Labour if they believe their legislated employment rights have been infringed. The Ministry will often attempt to mediate the matter before launching an investigation. If mediation is not successful, an employment standards officer will investigate the matter. This can involve anything from a few telephone

calls to a fact-finding meeting. At fact-finding meetings, both parties have the opportunity to present their cases and any relevant evidence.

If it is determined that the employer has contravened an employment standard, the employer may voluntarily comply with the officer's decision and accompanying remedies. Voluntarily compliant employers may also be required to post a notice with certain information about employment standards or the results of the investigation. If the employer is not voluntarily compliant, the officer may issue an order to pay wages, a compliance order, a notice of contravention, or an order to pay compensation or reinstate. In some cases, employers and employees may appeal the decision if they do so within specified time limits.

If an individual refuses to comply with an officer's order, they are subject to prosecution and can be fined up to CDN $50,000 and/or imprisoned for up to 12 months. Corporations are similarly subject to prosecution and may be fined up to CDN $100,000 for a first conviction, CDN $250,000 for a second conviction, and CDN $500,000 for any subsequent convictions.

Termination of Employment

If a contract of employment is for a fixed term, then it will simply end in due course unless terminated earlier. Most contracts of employment, however, are for an indefinite period and will not end until one party or the other causes it to terminate.

Generally speaking, employers can terminate the employment relationship in two different ways:

1) for just cause; or

2) without just cause.

If just cause for termination exists, then the employer has no obligation to provide notice of termination, pay in lieu of notice, or severance. For that reason, just cause is often referred to as the "capital punishment of employment law"; the vast majority of dismissals are without cause.

Termination for cause

In Canada, just cause has historically been described along these lines:

> If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of willful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right to summarily dismiss the delinquent employee.

Simply put, just cause exists when an employee engages in conduct that is incompatible with the continuation of the employment relationship. However, the analysis of whether just cause exists in a particular set of circumstances is anything but simple.

In many cases, employers are surprised that the threshold for finding just cause is higher than expected. Behavior that many consider to be just cause for dismissal is sometimes found not to be.

Contextual approach

While not impossible to prove, the threshold for establishing just cause is often higher than people anticipate. What makes this area of the law particularly frustrating is that there are no hard and fast rules, and the contextual approach, described below, effectively precludes any absolute standards; whether or not a particular act constitutes just cause will depend largely upon other factors. In other words, what is just cause in one situation may not be in another. For example, a long-term employee with a spotless record may be entitled to another chance, whereas a recent hire may be dismissed for the same behavior.

When determining whether an employee's misconduct amounts to just cause for dismissal, the court will consider not only the alleged misconduct but also the entirety of the employment relationship. A finding that an employee engaged in misconduct does not necessarily equate to a finding of just cause; rather, the court will look at whether the misconduct was such that the employment relationship has been irreparably harmed.

The employer must not only prove that the employee engaged in misconduct, but must also prove that the misconduct irreparably harmed the employment relationship. This is a two step process:

1) First, the employer must prove that the alleged misconduct took place;

2) Second, the employer must prove that the nature or degree of the misconduct warranted dismissal.

A key consideration will be the requirement of proportionality; put simply, the punishment must fit the crime. If dismissal is found to be too harsh in light of the circumstances, it is likely that a court will be of the view that some form of progressive discipline should have been relied upon.

Generally speaking, where an employer relies on the accumulation of episodes of misconduct or the gradual deterioration in performance, an employer has a duty to warn an employee that his or her job is in jeopardy. That said, a single incident can provide just cause if it is so egregious that it amounts to a repudiation of the relationship.

The warning, whether written or oral, must be given in good faith and it must specify the alleged misconduct or unsatisfactory performance. It should also be clear that further misconduct will result in dismissal for cause.

In recent years, the courts have frequently suggested that dismissal was premature and that progressive discipline should have been relied upon. Historically, however, progressive discipline has been limited to warnings in nonunionized contexts. Suspensions without pay have generally been deemed to be a constructive dismissal unless the contract of employment

explicitly or implicitly allowed for such discipline. Recent judicial decisions suggest that there may be a change in this regard in order to allow for more progressive discipline instead of dismissal.

Potential grounds for dismissal, but are not limited to: dishonesty, harassment, performance issues, insolence, insubordination, absenteeism, impairment, off-duty conduct and conflict of interest.

Dishonesty

There is a general recognition that an employee has a duty of honesty to his or her employer which is a fundamental component of the employment relationship. A breach of that duty is, therefore, a breach of a fundamental term of the employment agreement. As a result, there used to be a common view that any act of dishonesty would constitute just cause for dismissal. However, the courts have made it clear that there is no absolute rule that dishonesty is, in and of itself, just cause for dismissal in all cases.

Like all other forms of just cause, an allegation of dishonesty requires a contextual analysis. In fact, the contextual approach was initially adopted by the Supreme Court in a case involving alleged dishonesty. Subsequent cases confirmed that it is to be applied in all cases where just cause is alleged. Not all employees are held to the same standard of honesty; an employee in a position of trust or authority will typically be held to a higher standard of honesty than other employees.

The context of the act itself will also be considered. For example, a lie that is immediately admitted and corrected will probably not be just cause for dismissal, as it does not suggest a dishonest character. Likewise, a dishonest statement that is blurted out in response to an inappropriate question, without any premeditation or malice aforethought, is unlikely to be considered just cause for dismissal. Persisting in a lie, and lying during the course of an investigation, will add weight to the argument that the requisite degree of trust no longer exists.

Performance issues

In many ways, this may be the most difficult basis upon which to successfully allege just cause. In this context, there is no allegation of “wrongdoing.” The basis for dismissal is that the employee has failed to perform at an acceptable level. Since the courts are reluctant to find just cause in circumstances where the employee’s behavior is morally blameworthy, it is not surprising that they are even more reluctant to do so in circumstances where the behavior is not.

The courts have recognized that by entering into an employment relationship, an employee implicitly warrants that they are reasonably competent to perform the duties of the job. At the same time, they expect that employers will have satisfied themselves of the applicant’s competency during the hiring process and any period of probation. As a result, it can be difficult

to rely on this ground of termination, especially where the employee has previously received positive performance reviews, promotions, or salary increases.

While true incompetence may be virtually impossible to prove, failure to perform at acceptable standards can be shown in the right circumstances. The courts will require that the employee be given fair warning that their performance is unacceptable and that failure to improve will result in termination. The employer has a duty to clearly set out the standard of performance that is required, to make it clear to the employees that their performance does not meet that standard, to provide an employee with a reasonable amount of time in order to meet the standard, and to provide reasonable assistance to the employee in that regard. Furthermore, the employer cannot rely upon standards that are impossible or unrealistic.

The contextual approach will usually result in a greater degree of incompetence or substandard work being necessary in order to justify termination of long-term employees.

Insolence & Insubordination

While often referred to interchangeably, insolence includes verbal or physical aggressiveness toward one's employer whereas insubordination involves the failure to obey the lawful orders of one's employer. While a single episode of insolence or insubordination will not generally amount to just cause, a single violent episode can.

Absenteeism

Excessive absenteeism can amount to just cause, although innocent absenteeism will generally engender different treatment from culpable absenteeism. Consideration of an employee's absenteeism should include consideration of any existing disability which might require accommodation.

Off-Duty Conduct

Contrary to popular belief, employees can be disciplined and even dismissed as a result of off-duty conduct. This has always been the law in Canada, but the reality is that it was largely irrelevant prior to the wide-spread use of Internet and social media.

Generally speaking, what an employee does on their own time is none of the employer's business. However, if the employee's off-duty conduct impacts the employment relationship, then the employer is entitled to take action. If the employee's conduct harms the reputation of the employer, impacts upon the working relationships, or the employer's ability to manage its workforce, or otherwise negatively impacts the organization, then discipline will be appropriate. In order to assess the appropriate level of discipline, and whether summary dismissal will be warranted, the same considerations will apply as would apply in the case of misconduct while at work. Similarly, the Internet and social media offer a plethora of opportunities for employees to engage in conduct when they are supposed to be working. It has become all too common to hear employers complain about staff that spend hours on Facebook throughout the work day. This "cyber slacking" is no different than employees

standing around the water cooler and gossiping. If employees are not carrying out their duties while they are at work, they are subject to discipline.

Employers are advised to monitor their employees' online conduct while at work. Generally speaking, courts have been consistent in finding that the employee's right to privacy is minimal when it comes to an employer's right to monitor online activity. This applies not only to use of corporate e-mail accounts, but also to personal e-mail accounts through corporate equipment and service. In other words, just because an employee sends e-mail from their hotmail or gmail account, that does not mean that the employer is not entitled to monitor it if it is being sent from their desktop. Of course, it is always prudent to clearly tell employees that they should have no expectation of privacy with respect to their online conduct.

Employers can also use online resources, including social media, in order to identify employee misconduct. For example, it is not unheard of for an employee to call in sick and then post photos of their waterskiing adventures later that day. Such online evidence can and should be relied upon by employers in handing out appropriate discipline.

Investigations

In recent years, investigations have become a significant part of employment law in Canada. To begin with, investigations will generally be required where there are allegations of harassment, including sexual harassment. In addition, some form of investigation will almost always be required where there is an allegation that an employee engaged in misconduct.

Also in recent years, several court cases have found that an employer failed to investigate allegations fairly and awarded substantial damages as a result. While the extent of the investigation required will vary with the circumstance, it is critical that employers do not react in haste, but take the time to assess whether the allegations are true. As well, it is critical that the employee in questions is confronted and given a chance to respond to the allegations.

In the course of writing my book, *You're Fired! The Law of Summary Dismissal in Canada*, I reviewed thousands of cases where courts have considered whether just cause for dismissal existed. What is notable is that in recent years, one of the most important factors has become the employee's response when confronted. As discussed above, the assessment of whether there is just cause for dismissal will depend upon not only the alleged misconduct in question, but upon all of the relevant circumstances. One of those will be the employee's response and trustworthiness. If the employee admits wrongdoing, offers an apology and suitable assurances that it will not happen again, then all else being equal, it is more likely that a court will find that they should be given a second chance. Conversely, if the employee lies about their misconduct and takes deliberate actions to cover it up, then the court is more likely to find that they are not trustworthy and that summary dismissal was appropriate.

Termination without cause

Employers are free to dismiss employees at any time for any reason other than those which are based upon protected grounds set out in human rights legislation. However, in the absence of

just cause, employers who choose to dismiss an employee must provide notice of termination or pay in lieu thereof. If a valid employment agreement has been entered into, it may establish the amount of notice required. **This is but one reason why it is advisable to have employment agreements for all employees.**

Otherwise, the notice required will be in accordance with applicable legislation and common law requirements.

Statutory requirements

The employment standards legislation of each jurisdiction set out the minimum amount of notice of termination, or pay in lieu thereof, that is required. The amount of notice required will generally increase as the length of service does, to a set maximum. The notice requirements are significantly lower than what is required by the common law, although some jurisdictions also provide for severance pay in certain circumstances. By way of example, the Employment Standards Act of Ontario provides for notice that is roughly one week for every year of service, up to a maximum of eight weeks. Some jurisdictions also provide for additional notice in the event of mass terminations or other circumstances.

In addition, some jurisdictions, including Ontario, provide for severance pay in certain circumstances. This severance pay is required to be paid over and above the statutory notice or pay in lieu thereof. In Ontario, severance payments are only required in circumstances where the individual being dismissed was employed for five years or more and either the employer's payroll is CDN $2.5 million or greater or the dismissal occurred due to a permanent discontinuance of all or part of the business involving the dismissal of 50 or more employees within a six-month period.

In Quebec, an employee terminated for a reason other than wilful misconduct is entitled to the statutory notice stipulated in the Labour Standards Act. It is therefore possible that an employee who is terminated for just cause will not be entitled to reasonable notice under the Civil Code but nevertheless be entitled to statutory notice. This will be the case where an employee is terminated for proven incompetence. This may be just cause but it is not willful misconduct.

Common Law requirements

Employment legislation only sets out the minimum notice requirements. Parties cannot enter into contracts that provide less than these requirements but can contract out of the Common law, which implies into every employment contract an obligation to provide "reasonable notice" of termination, or pay in lieu of notice, if employment is terminated without cause. Reasonable notice at common law is almost always more than the statutory minimums.

The assessment of what is reasonable is undertaken without hard and fast rules. It is often difficult to predict with certainty what the court would deem to be reasonable in a particular set of circumstances. In theory, the notion is that the notice period should approximate the length of time that the individual will need to find new employment. The most commonly used

factors are the individual's position/character of the employment; the length of service to the company; the employee's age; and the availability of alternate employment given the employee's training and qualifications. However, the courts have made it clear that the existing list of factors to be considered is not exhaustive. If the individual was induced to leave a previous secure job in order to join the organization that is now dismissing them without cause, the notice period is likely to be extended. There is no validity to the common myth that employees are entitled to one month of notice per year of service. Statistics show that the nature of an employee's position can have a significant impact on the notice period, as can the employee's age. Other factors, such as inducement, can also play a role. Furthermore, short-term employees tend to receive disproportionately lengthy notice periods.

Traditionally, more senior-level employees have been awarded longer notice periods, as have older employees, employees with lengthy periods of service, and employees with particularly specialized skill sets.

Notice of termination vs. pay in lieu

Federal and provincial employment legislation provides employers with the choice of providing actual notice or payment in lieu. Actual notice involves a period of working notice during which the employee knows that their employment will end on a particular date. Up until that date, the employee is expected to carry out his or her duties as they had in the past, and they will of course continue to be paid. Employers will, however, have an obligation to provide reasonable opportunities for the employee to seek new employment during the period of working notice, including attending job interviews.

In many cases, the employer will prefer to simply provide pay in lieu of notice, rather than continue to have the employee attend at the workplace after they have been told that they are going to be dismissed. In that case, the general requirement is that the employee should continue to receive all forms of remuneration that they would have received if they had continued to be employed through the notice period. This includes salary, bonuses, commissions, benefits, etc. Disputes often arise over outstanding or anticipated commissions, bonuses, and other forms of variable pay.

Employers should be aware that some insurance carriers will not continue coverage beyond the statutory notice period. However, this does not eliminate an employer's duty to provide the benefit, and a failure to do so can expose the employer to substantial liability. By way of example, if disability coverage is discontinued, and a dismissed employee becomes disabled during the notice period, the employer may be responsible for the lost benefits. Several recent cases have seen employers ordered to pay substantial damages due to their failure to continue disability coverage; effectively, the employer became the insurer. That can be a substantial liability, far beyond wrongful dismissal damages.

Mitigation

Employees that are dismissed without cause have a duty to mitigate their damages by finding new employment. If there is a potential or ongoing wrongful dismissal claim in which the

amount of notice/pay in lieu of notice required is an issue, or if the parties have entered into a termination agreement pursuant to which the employee's entitlement will change if they find new employment, then employers are fully within their rights to monitor the employee's mitigation efforts. An effective way to do so is to monitor the ex-employee's account on LinkedIn or similar services. While some ex-employees may "forget" to report their new employment to their former employer, they are often quick to post details of their new position to their online profile.

If employers include a termination clause in the employment contract, they should also include wording to confirm that the law of mitigation will apply. Otherwise, at least one Canadian case suggests that the employee can receive a windfall if they find new employment quickly.

Constructive dismissal

Constructive dismissal may occur when an employer unilaterally makes a substantial change to an essential term or condition of the employee's employment. An employee, within a reasonable time, may either accept the changes and continue working or treat the employment relationship as wrongfully terminated and leave. If the employee chooses not to accept the change but to leave their employment, they will be entitled to pay in lieu of notice as if they had been dismissed without cause.

The types of changes that often amount to constructive dismissal include demotions, lateral changes or promotions that interfere with an employee's career path, reductions in compensation, changes to an employee's work schedule, geographic transfers, and the creation of intolerable working conditions. It must be remembered that minor or nominal changes will not constitute constructive dismissal. A combination of changes may also amount to constructive dismissal, even if the combination takes place over a period of time rather than all at once.

Like all employees that are dismissed, constructively dismissed employees will have a duty to mitigate their damages. In the context of a constructive dismissal, they may be required to continue working under the new terms until they can find alternative employment. Courts will assess whether it would have been reasonable to expect the employee to work in the new position until they found other employment as a way to mitigate their damages. A failure to do so may be deemed to be a failure to mitigate properly.

There will usually be no constructive dismissal where reasonable notice of the change had been given, provided that the amount of notice is the same as that which is required in the event of dismissal without notice.

Probationary employees

Generally speaking, employees in a contracted probationary period can be dismissed with minimal or no notice of termination or pay in lieu. However, it will depend upon the terms of the contract. Employers should not assume anything with respect to probationary period; they are not "automatic" and the terms of any probation period must be spelled out in the contract.

The threshold for just cause for termination is lower in the context of probationary employees than for other employees. A conclusion that the individual is unsuitable for the job can be sufficient, although employers do have a duty to be fair in their assessment.

To be dismissed for unsuitability, a probationary employee must have been given a fair opportunity to demonstrate his or her ability and the employer's decision to dismiss must be reasonable and properly motivated. Most courts agree that an employer does not have to wait until the end of the probationary period to dismiss an employee. Rather, an employer may dismiss a probationary employee once it has been reasonably and fairly determined that the employee is unsuitable for the job.

While the legislation may not require notice of termination in the first few months of employment, the common law does and must be considered in order to have a true period of probation. Organizations that intend to have a period of probation should ensure that the terms thereof are clearly set out in an enforceable employment agreement.

Resignation

Like employers, employees that intend to terminate the employment relationship by resigning must provide notice. It is typical to expect that employees will provide two weeks of notice, but that is not the law. Unless there is a contractual provision that sets out the amount of notice of resignation that is required, employees must provide "reasonable notice" like employers. However, the actual amount of notice required will be quite different. Two weeks would be the norm, but more senior or difficult to replace positions can require more notice, so employees are well advised to think twice before assuming that they can give two weeks or less. It is possible for an employer to pursue legal action against an employee that does not provide sufficient notice of resignation, but the practical reality is that in most cases it is not viable. The employer would have to show that they suffered losses or damage due to the insufficient amount of notice, which will be difficult if not impossible in most cases. However, if the employer can show customers were lost or additional costs were incurred that would not have been incurred if the employee had provided reasonable notice, than they may want to consider pursuing a claim.

Human Rights

Employers have a responsibility to provide employees with a workplace that is free from discrimination and harassment based upon specified grounds. This applies to current employees and applicants. Any decision that affects an employee's rights or opportunities can be subject to scrutiny.

Each jurisdiction in Canada has human rights legislation that provides protection against workplace discrimination based upon protected grounds. Canadian courts and tribunals have interpreted the protected grounds of discrimination very broadly. If discrimination against an employee exists, an employer has a legal obligation to facilitate the employee's ability to participate in the workplace by eliminating the rule, standard, or practice that disadvantages

the employee. However, an employer can deny accommodation if the practice is based upon a *bona fide* occupational requirement (BFOR).

To establish a BFOR, an employer must prove that its practice: 1) was adopted in good faith, 2) is connected to the job being performed by the employee, and 3) that changing the practice to accommodate the employee would cause undue hardship to the employer, considering health, safety, and cost issues. For example, an airline may require its pilots to have a certain level of uncorrected vision in order to safely land a plane without instruments in an emergency.

Depending upon the jurisdiction, human rights-based claims can be brought to the applicable Tribunal or in the civil courts. In recent years, there has been an increase in the number of such claims, and particularly in claims relating to disability and family status. Claims based on family status can include child and elder care obligations.

Occupational Health and Safety

Ontario's legislation is representative of the statutory schemes found in the other 10 jurisdictions. It places obligations on a variety of types of employers to implement and/or follow both general and sometimes very specific workplace safety regulations applicable to industrial establishments, construction projects, and mining projects in addition to other regulations specific to particular forms of work. Each of the parties is defined by both legislation and the courts to provide for some overlap so as to minimize the risk of loopholes rendering the legislation inapplicable to a particular workplace. It is worth noting that most of this legislation applies to "workers", which is a term defined more broadly than "employees" and can include, for example, volunteers and contractors. Notably, recent changes to applicable legislation in some jurisdictions have expanded the protection to include workplace bullying and domestic violence that impacts the workplace. In Ontario, employers are now required to take proactive steps in order to ensure the safety of their workplaces and can be penalized for failing to do so, even in the absence of an incident or injury.

Criminal Liability

The criminal liability of a corporation is governed by the Criminal Code. Liability is not restricted to the conduct of senior executives with policy-making functions. Rather, a corporation may be held criminally responsible for the actions of its senior officers and representatives. Senior officers include directors, chief executive officers, chief financial officers, as well as individuals who play an important role in setting the corporation's policies or who are responsible for managing an important aspect of the corporation's activities. Representatives include directors, partners, employees, members, agents, and contractors of the corporation.

There are three ways a corporation may be found liable for crimes requiring fault other than negligence. First, if a senior officer is a party to the offence. Second, if a senior officer, possessing the requisite mental state to be a party to the offence, directs the work of any representative of the corporation so that the representative commits the offence. In both circumstances, the senior officer must be acting within the scope of his or her authority. Third, a corporation may be found liable if a senior officer, knowing that a representative is or is about

to be a party to an offence, does not take all reasonable measures to prevent the offence. In all three circumstances, the senior officer must have the intent, at least in part, to benefit the corporation.

A corporation may be found liable for criminal negligence where the acts or omissions of its representatives, acting within the scope of their authority, constitute an offence and the responsible senior officer(s) departs markedly from the standard of care that could reasonably be expected to prevent the offence. The entire offence does not need to be committed by one representative; rather, the individual actions of each representative can be combined to constitute the offence. Consider the following example: Four employees each switch off one separate safety device. The employees may not be individually liable for criminal negligence; however, the corporation may be liable because the corporation, through its employees, switched off the four safety devices.

If convicted of a criminal offence, a corporation may be fined up to CDN $100,000 for summary offences. For indictable offences, there is no maximum amount.

Corporations may also be placed on probation. For instance, a court may order a corporation to provide the public with information regarding the offence it committed and any measures that it is taking to reduce the likelihood of committing a subsequent offence.

As individuals, directors and officers are personally liable for the criminal offences they commit in the corporate context. Further, directors and officers may be found criminally liable if they aid or abet a person to commit an offence, counsel a person to be a party to an offence, or are an accessory after the fact to an offence.

If convicted of a criminal offence, directors and officers may be fined or imprisoned.

In response to one of Canada's worst mining disasters, the federal government amended the Criminal Code to ensure that managers may be held personally liable for their actions. As a result, everyone who has the authority to direct how another person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person and the public. If an individual breaches this duty with criminal negligence, he or she may be found criminally responsible. If convicted of a criminal offence, managers and supervisors may be fined or imprisoned.

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2000 Ultimate Way
Weston, FL 33326
1 800-432-1729
www.ultimatesoftware.com
ultiproinfo@ultimatesoftware.com