

CANADIAN EMPLOYMENT, LABOUR AND PENSION LAW **FAQ**

Navigating Canadian employment and pension issues can be difficult. Stikeman Elliott's National Employment, Labour and Pension Group have developed a solid reputation of guiding firms through this landscape. Based on our experience, the following is a brief outline of some of the significant issues that corporations should consider when entering into the Canadian labour market.



Q: Does Canadian law recognize “at-will” employment?

A: No. There is no concept of “at-will” employment in Canada as that term is understood in the United States. Canadian employees who are terminated without just cause are entitled to notice of termination or pay in lieu of notice in accordance with applicable employment standards legislation. Ontario and federal legislation also provide for a statutory severance pay scheme. Non-unionized employees are also entitled to reasonable notice under common law (or pursuant to Quebec’s corresponding civil law principles). The common law obligation of reasonable notice can be quite onerous: in most provinces, it can require up to 24 months of compensation. Employees often have an expectation that they are entitled to one (1) month’s compensation per year of service. A written contract can limit an employer’s common law obligation to provide reasonable notice or pay in lieu thereof, provided that at a minimum it complies with the requirements set out in the relevant employment standards legislation. In Quebec, this will not be sufficient and the contract must provide for reasonable notice.

Q: Can we impose mandatory drug testing on our Canadian employees?

A: Random drug or alcohol testing may only be permissible in exceptional cases. Other types of testing, such as pre-employment or post-accident testing, are permitted in safety-sensitive positions in some jurisdictions but not in others. The Alberta Court of Appeal recently upheld mandatory pre-employment drug testing for applicants and new hires in safety-sensitive positions in the oil sands industry. The Quebec Court of Appeal recently struck out a provision for random drug testing in safety-sensitive positions in a tire manufacturing plant. Even to the extent that it is possible to impose pre-employment and post-accident alcohol and drug testing policies in the Canadian workplace, employers must be aware of the impact of human rights and privacy legislation in the province in which they wish to impose such testing. Alcohol and drug dependence and perceived dependence is caught by the definitions of “handicap” and “disability” in such legislation, with the result that there is generally a requirement to show that an employer policy (such as testing for alcohol or drugs) is a *bona fide* occupational requirement. Given the legal test that this involves, this can be difficult to achieve.

Q: Will we be able to use our standard non-competition agreement for our Canadian employees?

A: Canadian courts have typically been reluctant to enforce post-employment non-competition covenants, generally viewing them as restraints of trade, and will only uphold them if necessary to protect a legitimate proprietary interest. Non-competition provisions in employment contracts are not enforceable in Quebec when the employee has been dismissed without cause. Where a non-solicitation (of customers) provision would adequately protect the employer’s legitimate business interests, a non-competition provision is unlikely to be enforced. Any such provision must be drafted as narrowly as possible in terms of geographical scope, duration and scope of prohibited business activities. It is worth noting that the doctrine of inevitable disclosure is not generally recognized by Canadian courts although it has been upheld in a couple of instances in Quebec. Employers are advised to have Canadian counsel review their existing non-competition agreements for enforceability.

Q: What is the equivalent of a 401(k) plan and should we establish one?

A: Employers looking to establish a “401(k)-like” plan for their Canadian employees generally choose to implement a group registered retirement savings plan (“RRSP”). Although the tax and legal implications vary somewhat among the different Canadian defined contribution arrangements, an RRSP is a common choice for small groups of employees because it is relatively simple to administer. For larger groups of employees, other more tax-efficient options may make more sense. Our pensions and benefits specialists would be pleased to discuss all of your options to help you find the right plan for your organization.

Q: Do Canadian jurisdictions recognize the concept of exempt/non-exempt employees?

A: The employment standards legislation of each of the provinces (as well as the federal legislation that governs employers whose business is considered to be a “federal work or undertaking”) contains provisions that specifically set out which occupations are exempt from overtime pay. The categories of “exempt employees” tend to be narrower in Canada than in the United States. Accordingly, U.S. employers should be careful not to characterize like positions in Canada as being exempt without first seeking assurance that these positions are indeed exempt from overtime pay. We also note that there have been recent high-profile class action suits initiated in Canada with respect to unpaid overtime.

Q: Can my Canadian organization send employee information to our head office?

A: Employers should be aware of the *Personal Information Protection and Electronic Documents Act* (“PIPEDA”), which is intended to address concerns about the collection of personal information. Interestingly, while PIPEDA applies to all information collected in the course of commercial activities, it does not apply to employee information of a provincially regulated employer (most employers are provincially regulated). Privacy legislation has been introduced in Alberta, British Columbia, and Quebec and applies to the collection, use and disclosure of personal information (including employee information) for provincially governed employers operating in those provinces. Whether a Canadian organization can send employees’ personal information to a U.S.-based head office must be reviewed with reference to the legislation in force in the province in which the organization carries on business (as well as that of the province from which the information is being transferred, if it is not the same province).

Q: Can we issue restricted stock to our Canadian employees?

A: Although it is legally possible to grant restricted stock in Canada, it is undesirable to do so from a Canadian tax perspective. A common substitute in Canada for restricted stock is the restricted stock unit (“RSU”). Generally, RSUs granted to an employee may be redeemed for stock (or in some cases the equivalent value in cash) at a time in the future and/or upon the satisfaction of certain performance criteria. As with any plan of this nature, the devil is in the details: care should be taken in the design of an RSU plan for your Canadian employees and consultation with a Canadian tax professional is an absolute must.

Q: My Canadian plant has received an application for certification – what do I need to know?

A: Although the process for union certification differs by jurisdiction, typically a union must establish a minimum level of employee support through signed membership cards. In most Canadian jurisdictions, a vote is held to determine whether the required level of union support for certification exists. Canadian labour laws restrict the employer’s right to unduly influence the certification process and, accordingly, only certain types of information can be communicated to employees during the certification process. In some provinces, if an employer is found to have committed an unfair labour practice preventing the union from obtaining the required support, the applicable labour board may automatically certify the union as the

bargaining agent of the employees in question. The time limits for an employer’s response are very short, so you should act immediately upon receipt of the application for certification.

Q: We are buying a Canadian business – do we have to employ the seller’s employees?

A: The legal rights of employees are unaffected by a sale of shares. Accordingly, any post-closing modifications to existing terms of employment may attract claims of constructive dismissal. In an asset purchase transaction unless the laws of Quebec apply and absent specific negotiated business terms, the purchaser is free to decide whether to make offers of employment to any or all non-unionized employees. If the transaction constitutes the sale of a business (as this expression is defined by employment and labour legislation) then the purchaser will be required to recognize the employees’ service for certain statutory purposes including rights on termination. In Quebec, employees transfer to the purchaser of a business by operation of law. When all or part of a unionized business is sold, the union’s bargaining rights will generally be preserved unless the appropriate labour board (or a similar body) declares otherwise. In essence, the purchaser will be bound by the vendor’s collective agreement and will be a party to any proceedings that were pending when the transaction was completed. “Related employer” provisions exist to prevent the erosion of bargaining rights by employers transferring work to entities under common control or direction.

Q: What are the leave requirements for pregnant employees?

A: Although particular leave requirements differ according to provincial jurisdiction, most Canadian employees who have been employed by their employer for a minimum specified period of time are entitled to take job-protected unpaid maternity and/or parental leave. Where both maternity and parental leave are taken, the maximum combined leave is 52 to 54 weeks (parental leave taken individually generally runs 15 to 17 weeks). In Quebec, such leaves can total up to 70 weeks. Parental leave provisions apply to both natural parents and to adoptive parents, although specific allowances differ by jurisdiction. The employer must return the employee to employment following the leave and most jurisdictions require that it be to the job held before the leave commenced or a comparable position if the job no longer exists. Employers may face liability under statute and for claims of wrongful dismissal if they do not meet this requirement.

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With a practice that dates back more than 40 years, the **Employment, Labour and Pension Group** at Stikeman Elliott advises on all facets of the employment relationship and pension issues. Although members of the group have wide-ranging employment, labour and pension law experience, each has developed expertise in particular areas. This approach ensures that we can provide advice to our national and international clients in a timely, cost-effective and efficient manner. The Group draws upon expertise from the Corporate, Litigation and Taxation Groups of the firm, providing a flexible and multi-disciplinary solutions tailored to our client's specific needs. The Group has been recognized as a leader in the Canadian marketplace by Chambers Global 2008 *Guide to the Leading Lawyers for Business*.

Stikeman Elliott's unsurpassed experience in complex cross-border transactions has made us Canadian counsel of choice to leading U.S. investors, financial institutions and corporations.

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World Finance Magazine, 2008

#1 Law Firm in Canada

International Financial Law Review (IFLR), 2007

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