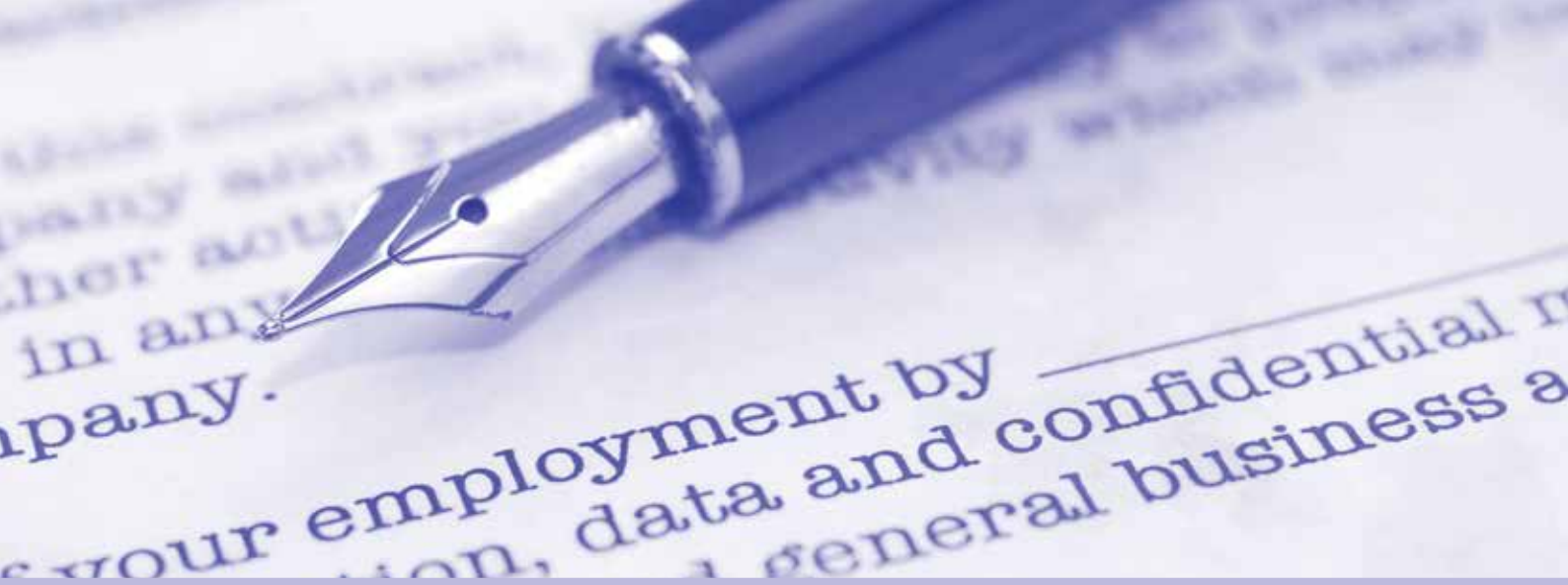

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The International Comparative Legal Guide to:

Employment & Labour Law 2017

7th Edition

A practical cross-border insight into employment and labour law

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General Chapters:

Country Question and Answer Chapters:

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the seventh edition of *The International Comparative Legal Guide to: Employment & Labour Law*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of labour and employment laws and regulations.

It is divided into two main sections:

Two general chapters. These chapters discuss the implications of Brexit on UK employment law, as well as global employment standards and corporate social responsibility.

Country question and answer chapters. These provide a broad overview of common issues in labour and employment laws and regulations in 35 jurisdictions.

All chapters are written by leading labour and employment lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editors Elizabeth Slattery and Jo Broadbent of Hogan Lovells International LLP for their invaluable assistance.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Chapter 8

Canada

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Several sources of employment law exist in Canada; firstly, there are a host of federal and provincial statutes specifically designed to deal with employment issues including employment standards, workers' compensation and workplace discrimination. There is also the common law in each province (the *Civil Code* in the province of Québec), as well as jurisprudence by Canadian courts. In Québec, various texts by legal scholars, called "*doctrine*", can also inspire employment law and finally, the contract of employment between the parties can be a source of law between them.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

Only workers who are considered "employees" are protected by employment law. Workers are distinguished on the basis of whether they are employees or independent contractors. Most employment laws will have specific definitions of who constitutes an employee within the meaning of that law. In general, an employee will be a person who works for remuneration according to the instructions and under the supervision or control of another person. Many protective measures benefit employees including, for example, the right not to be dismissed without just and sufficient cause if an employee has given more than two years of continuous service (Québec), protection against reprisals for employees who are pregnant, or who are required to be absent for the purposes of child or family care, etc. All employees are protected against the right to be dismissed with a prior reasonable notice if there is no cause for dismissal.

Employees can also be distinguished on the basis of whether they are ordinary employees or management personnel. Employees are distinguished from managers on a number of factors, including hours of work, mode of remuneration and whether they have the ability to hire and dismiss other workers in the course of exercising their work. The distinction is relevant as certain legal treatments may differ for employees and managers, as well as for senior managers.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

No. The employment contract is not subject to any particular formality in Canada. Even a verbal agreement can constitute an employment contract, assuming that it can be proven. In practice, the great majority of employment contracts in Canada are not made in writing. Nor is there any requirement that employees be provided with any specific information in writing at the time of hiring. As such, it is common for employees to have either a simple verbal agreement or an informal letter of hire when they are employed. More senior executives may have a more formal written agreement which will contain detailed terms and conditions of employment.

1.4 Are any terms implied into contracts of employment?

Yes. Regardless of what form the employment contract takes, all employment relationships implicitly include the employer's obligation to provide work, to pay for the work and to provide a safe working environment for its employees. As for the employee, every contract of employment implies that the employee will carry out the work and be loyal to his employer, not only during the term of employment but also for a reasonable period of time after termination of employment.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. Minimum terms and conditions of employment are contained in the various employment standards and legislation of each Canadian province and in the Canada Labour Code for federally regulated businesses. Thus, for example, there are minimum standards established for wages, vacation pay, overtime pay, statutory holidays, hours of work, leaves of absence, and termination of employment.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

The freedom to associate and to bargain collectively is a fundamental freedom under Canadian law. Approximately 30 per cent of the workforce, including public sector employees, have their terms and conditions of employment agreed through collective bargaining. This rate rises to close to 40 per cent in Québec and British Columbia. Collective bargaining can take place either at company level or, in certain circumstances (e.g., the construction industry), at industry level.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

In all jurisdictions, employees have the right and freedom to join or form a union of their choice. In order to be recognised or certified as the bargaining agent for a group of employees, a union must secure the support of a majority of the workers who form the bargaining unit. A "majority" is defined as 50 per cent of the workers plus one. Typically, employees will be approached to sign union membership cards; these cards will be compiled. Once a sufficient number of cards have been obtained, a petition will be filed before the appropriate labour board who will certify the union as a bargaining agent for the group of employees targeted. In certain circumstances, if the union obtains support of less than 50 per cent plus one but more than 35 per cent (or 40 per cent in certain provinces), a vote can be ordered by the labour board to determine whether the union will be recognised. If the employer does not agree with the bargaining unit as defined by the union, there is a procedure for contestation, and a hearing before the labour board will be held prior to certifying the union until such time as the bargaining unit has been properly defined. In certain jurisdictions in Canada, voluntary recognition by an employer of a union as a bargaining agent for employees is permitted.

2.2 What rights do trade unions have?

Canadians believe that it is in the public interest to resolve industrial disputes quickly and efficiently. The primary rights of a trade union are firstly to bargain collectively with an employer. Certification gives a union the exclusive authority to bargain collectively with an employer on behalf of all employees in the bargaining unit. Both parties have the legal duty to bargain in good faith. In the event that the parties are unable to reach an agreement, the employees, through their union, have the right to strike, and employers have the right to lock out employees. In Québec, there exists legislation which expressly prohibits the use of replacement workers during a strike or lockout.

A union also has the right to have disputes or grievances arising during the life of a collective agreement decided by arbitration. All disputes between a union and an employer concerning the interpretation, application, administration or alleged violation of a collective agreement must be settled by arbitration. Also, the union can, at any time during the collective bargaining process, request the intervention of a Government-appointed conciliator to facilitate the bargaining process. In the case of a first collective agreement, either party can also ask for binding arbitration if the collective bargaining or conciliation process is unsuccessful.

2.3 Are there any rules governing a trade union's right to take industrial action?

Yes. A union's right to take industrial action such as a strike or picketing is regulated by law; strikes can be conducted lawfully once majority support by the employees in the bargaining unit has been secured. Picketing actions (including secondary picketing) are permitted as a form of free expression but must be conducted in such a way as not to interfere with the flow of business on the employer's premises.

2.4 Are employers required to set up works councils? If so, what are the main rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

No. There are no requirements to set up works councils in Canada. Unions are the form through which employee representation occurs.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

This is not applicable. (See question 2.4, above.)

2.6 How do the rights of trade unions and works councils interact?

This is not applicable. (See question 2.4, above.)

2.7 Are employees entitled to representation at board level?

No, they are not.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. All jurisdictions in Canada have legislation designed to protect employees from unlawful discrimination. Several categories of employees are protected such as pregnant workers, disabled workers and those that are the subject of retaliation for having exercised their legal rights. All jurisdictions in Canada prohibit discrimination based on race, national, ethnic or place of origin, colour, creed, marital status, physical or mental disability or sex. Certain jurisdictions also prohibit discrimination on the basis of ancestry, criminal conviction and political beliefs. All jurisdictions prohibit discrimination on the basis of age, although the definition of age differs in each jurisdiction. In most jurisdictions, mandatory retirement has been abolished and an employee cannot be dismissed purely by virtue of the fact that he or she has reached the normal age of retirement.

3.2 What types of discrimination are unlawful and in what circumstances?

Employers are prohibited from discriminating in respect of hiring, apprenticeship, duration of probationary period, vocational training, promotion, transfer, displacement, layoff, suspension, dismissal or conditions of employment of an employee or the establishment of categories or classes of employment. Similarly, an employer cannot require a person to give information on a job application regarding any of the prohibited grounds of discrimination mentioned in question 3.1 above.

3.3 Are there any defences to a discrimination claim?

Yes. The principal defence raised against a charge of discrimination in employment is that the adverse action was taken for a legitimate,

non-discriminatory reason. There are also defences on the basis that discrimination on a prohibited ground is a *bona fide* occupational requirement. Thus, for example, if a certain level of physical fitness is an absolute requirement for a particular job, it may be permissible to refuse the position to a person who is handicapped and unable to meet the physical requirements of the job. However, no practice will be considered to be a *bona fide* occupational requirement unless it has first been established that the employer has tried to accommodate the needs of the employee affected, up to the point of undue hardship, taking into account health, safety and cost. In order to determine whether accommodating for the employee has reached the point of undue hardship, courts will look at various factors including the context of the situation, such as whether prior steps to accommodate the employee were taken, the impact on the organisational structure, any applicable collective agreement, provisions in force and any adverse impact on other employees in addition to the cost to the company. A workplace does not have to be entirely reorganised and employers are not expected to have to bear excessive financial costs or expose other workers or members of the public (or even the disabled employee himself) to unacceptable levels of risk to health, safety and general well-being.

In order to establish a *bona fide* occupational requirement, the employer must show three things:

1. that the employer adopted the requirement for a purpose rationally connected to the performance of the job;
2. that the requirement was adopted in an honest and good faith belief that it was necessary to the fulfilment of a legitimate work-related purpose; and
3. that the requirement is reasonably necessary to accomplish the legitimate work-related purpose.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

All Canadian jurisdictions have human rights commissions whose purpose is to promote the understanding, acceptance and compliance with legislation designed to prevent discrimination in the workplace. If an employee has reasonable grounds to believe that he has been the victim of a discriminatory practice, he may file a complaint with the appropriate human rights commission. Once a complaint is filed, the commission will typically designate a person to investigate the complaint. During the investigation, both parties are invited to provide their versions of events. At the conclusion of the investigation, the investigator submits a report of his findings to the commission. Upon receipt of the report, the commission decides whether to dismiss the complaint or refer the matter for a hearing before the human rights tribunal.

Employers are able to settle claims after they have been initiated by participating in a mediation exercise. At any time after a complaint has been filed, the human rights commission may appoint a conciliator to facilitate mediation between the parties. If the matter goes to a hearing, all parties are given the opportunity to appear in person or through legal counsel and to present evidence and make representations. These hearings are public unless confidentiality is essential to protect public security, the fairness of the hearing, undue hardship to the persons involved or the life, liberty or security of a person. In Ontario, claimants are able to address the human rights tribunal directly rather than having complaints first assessed and then forwarded by the commission.

3.5 What remedies are available to employees in successful discrimination claims?

The human rights tribunal has the power to order a person to cease any discriminatory practice and to take measures to prevent similar practices from happening again. The tribunal can also restore such rights, opportunity or privileges to the victim as were denied to him as a result of the discriminatory practice and to compensate the victim for any lost wages and expenses and other damages incurred as a result of the discriminatory practice, including moral and exemplary (punitive) damages where appropriate.

3.6 Do "atypical" workers (such as those working part-time, on a fixed-term contract or as a temporary agency worker) have any additional protection?

No. So-called atypical workers (i.e., part-time, fixed-term, contract or temporary agency workers) do not have additional protection but they do benefit from the same protections which prohibit discrimination in employment as are applicable to other categories of workers.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

The length of maternity leave can vary from one province to another as well as under federal jurisdiction. Each jurisdiction will generally state that a pregnant employee who has worked for the same employer for a specified period of time is entitled to unpaid maternity leave of approximately 16 or 18 weeks, depending on the jurisdiction.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

A woman on maternity leave is entitled to obtain employment insurance (EI) maternity benefits. In order to be eligible for these payments, an employee must have accumulated at least 600 hours of insurable employment during the qualifying period prior to the maternity leave. These benefits are payable during the period that commences eight weeks prior to the week in which delivery is expected or the week in which delivery occurs, whichever is the earlier. The maximum number of weeks for which benefits may be obtained during the maternity leave period is 15 (17 weeks minus a mandatory two-week waiting period).

As a general rule, the basic rate for calculating employment benefits is 55 per cent of the employee's average insurable weekly earnings, up to a maximum amount. Since 1 January 2012, the maximum yearly insurable earnings amount is $45,900, which means that, regardless of an employee's income, the maximum that a pregnant worker can receive from EI benefits during maternity leave is $485 per week.

It is not uncommon for employees to "top up" these amounts through a group plan.

4.3 What rights does a woman have upon her return to work from maternity leave?

While on maternity leave, a woman continues to be an employee. At the end of her leave, the employer is required to reinstate her to the

position that she held prior to the leave, or to an alternative position of comparable nature. Also, the employer may have to continue making payments to any applicable group benefit or insurance plans, or provide the employee with an option to maintain these benefits at her own expense. Finally, some jurisdictions prohibit any loss of seniority in respect of an employee who was on maternity leave.

4.4 Do fathers have the right to take paternity leave?

Yes. All jurisdictions provide for parental leave in their employment standards legislation. This means that leave is available for fathers as well as mothers. Parents are entitled to an unpaid parental leave of between 35 and 52 weeks, depending on the jurisdiction. Parental leave may be taken by both parents in some jurisdictions and must be shared between the parents in other jurisdictions.

4.5 Are there any other parental leave rights that employers have to observe?

The rights of adoptive parents are usually the same as those provided for natural parents. Moreover, all parents are protected against any form of discrimination or reprisal as a result of having taken maternity or parental leave.

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependants?

No. Employees are not entitled to work flexibly if they have dependent care responsibilities. However, an employee is entitled to unpaid leave ranging between three and 10 days, depending on the jurisdiction, in any given year, in order to meet the responsibilities related to the health, care or education of a family member. We are not aware of any law that would impose a general duty on employers to accommodate employees with respect to any responsibilities that they might have caring for dependants.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Upon the sale of shares by a vendor, the identity of the employer does not change but merely that of the shareholders. The employment contracts and collective agreements that are in force between the employer and its employees remain in full force and effect, and the employer simply retains all of its obligations and liabilities towards its employees.

In a sale of assets, the unionised employees are automatically transferred to the purchaser by operation of law. In all Canadian provinces other than Québec, the non-unionised employees are not automatically transferred to the purchaser upon the sale of a business. The purchaser has the option to employ or not to employ the seller's employees. The vendor retains liability relating to all employees who do not receive or who do not accept offers of employment from the purchaser.

In the province of Québec, all non-unionised employees are automatically transferred to the purchaser upon the sale of a business, on the same terms and conditions of employment as those which apply immediately prior to the closing of the sale.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

The successor employer is bound by the collective agreement entered into between the union and the vendor. The purchaser steps into the shoes of the seller and assumes all rights, powers, duties and liabilities in connection with the collective agreement and becomes a party to any proceeding relating to the said collective agreement.

In all Canadian provinces other than Québec, the purchaser who chooses to offer employment to non-unionised employees can determine the terms and conditions of employment that it offers to the employees of the vendor. However, the purchaser who employs the seller's employees has to recognise the past service of these employees with the seller for certain purposes set forth in employment standards legislation such as vacation entitlements and statutory notice of termination of employment. The purchaser is not obliged to assume the past years of service of the employees with the seller for the purposes of calculating the reasonable notice of termination of employment at common law. In practice, however, it is common for a purchaser to recognise the past years of service of the employees so as not to demotivate the employees from joining the purchaser's organisation.

In the province of Québec, the purchaser must recognise the employee's previous years of service for all purposes.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

There are no mandatory consultation rights on a business sale. However, collective agreements may contain provisions requiring the employer to inform the union in advance of a transaction affecting the business.

If the sale of a business results in a mass layoff, the employer will typically need to inform the Minister of Employment of the province in advance of the effective date of the collective dismissal.

5.4 Can employees be dismissed in connection with a business sale?

In Canadian provinces other than Québec, the purchaser has the option to employ or not to employ the seller's non-unionised employees. Employees who do not receive or do not accept an offer of employment from the purchaser will be terminated as a result of the business sale. All obligations and liabilities towards the employees remain with the seller, including responsibility for notice, severance or other termination entitlements.

In the province of Québec, all employees have a right to be transferred to the purchaser's business. If a purchaser fails to continue to employ one non-unionised employee after the sale of the business, such an employee, if he accumulated two years of service or more, has the right to challenge the termination of his employment and may seek to be reinstated in the purchaser's business if his dismissal is deemed to have been made without just and sufficient cause.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

In all Canadian provinces other than Québec, the purchaser who chooses to offer employment to employees of the seller can

determine the terms and conditions of employment that will apply effective as of the closing of the sale. In the province of Québec, the employment agreements of non-unionised employees are automatically transferred to, and binding on, the purchaser of the business. This means that the employees have a right to continue to be employed on the same terms and conditions of employment as those that applied immediately prior to the sale of the business.

In practice, in all Canadian provinces, it is customary for the purchaser to offer the seller's employees terms and conditions of employment substantially similar to those that applied immediately prior to the sale of the business.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

In Canada, the concept of "at will" employment does not exist. If the employer does not have just cause to terminate the employee's employment, the employee is entitled to receive prior notice of the termination of his employment. All Canadian provinces have enacted employment standards legislation which sets forth the statutory minimum notice of termination (and severance pay in the case of Ontario and federal jurisdiction) which must be given to employees in the event of the termination of their employment without just cause. Notice of termination can be given either in time (working notice), in money (pay *in lieu* of notice) or a combination of both. The duration of the notice of termination or the indemnity in replacement thereof that is required to be given to each employee varies with the length of the employee's service.

In Canada, employees are also entitled to receive a reasonable notice of the termination of their employment. What is "reasonable" is determined on a case-by-case basis after consideration of all relevant factors in each particular case, including: the nature of employment; the length of service; the age of the employee; the level of responsibility of the employee; the employee's salary and other remuneration; the availability of alternative employment; and the circumstances surrounding the hiring of the employee at the commencement of employment.

As a "rule of thumb", reasonable notice can be calculated by multiplying one, two, three, four or five weeks per each year of service, up to a maximum of 24 months, in the absence of extraordinary circumstances.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Not if this possibility is not included in the employee's employment contract. "Garden leave" arrangements are not common in Canada. This type of arrangement could be challenged by the employees on the basis that the employer is not fulfilling its obligation to provide work to its employees. This means that an employee could allege that the termination of his employment is effective as of the beginning of the "garden leave" and that the employee would therefore be entitled to receive all notice, pay *in lieu* of notice or severance pay flowing from the termination of his employment as of that date. Similarly, the starting point of the duration of post-employment restrictive covenants would be the date on which the "garden leave" begins.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Dismissals based on prohibited grounds of discrimination are illegal. Employees can file complaints before human rights tribunals or labour boards in order to contest the termination of their employment if it was based on a prohibited ground of discrimination. Moreover, in the province of Québec, employees who have accumulated two years of continuous service or more are protected against dismissal made without just and sufficient cause. The same protection applies to employees of federal undertakings who have accumulated 12 months of continuous service or more and to employees in the province of Nova Scotia who have accumulated 10 years of service or more.

Consent from a third party is not required before a dismissal takes place.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

Yes. Several categories of employees are protected, such as pregnant workers, disabled workers and those that are the subject of retaliation for having exercised their legal rights. All jurisdictions in Canada prohibit discrimination based on race, national, ethnic or place of origin, colour, creed, marital status, physical or mental disability, sex and family status (in certain provinces).

Employees of the province of Québec who have accumulated two years of continuous service or more, employees of the province of Nova Scotia with 10 years of service or more, and employees of federal undertakings with 12 months of service or more are also protected against dismissal made without just and sufficient cause.

In addition, employees subject to a collective bargaining agreement or to an employment contract may enjoy special protection against dismissal depending on the terms of the contract.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Employers are entitled to dismiss employees for reasons related to the individual employee or for business-related reasons, so long as those reasons do not violate an applicable employment agreement or laws prohibiting discrimination or retaliation. In the province of Québec, employers must show that they have just and sufficient cause for dismissing employees who have accumulated two years of service or more. The same applies to employees with 10 years of service or more in the province of Nova Scotia, and to employees of federal undertakings with 12 months of service or more.

Employees who are laid off due to business-related reasons or who are dismissed without just cause are entitled to receive notice, or pay *in lieu* of notice, of the termination of their employment. In addition, in Ontario and in the federal jurisdiction, severance pay obligations may apply.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

With respect to unionised employees, employees with two years of service or more in the province of Québec, employees with 10 years

of service or more in Nova Scotia, and employees with 12 months of service or more in federal undertakings, employers should follow a fair procedure to avoid a finding of unjust dismissal. What amounts to a fair procedure depends on the reason for the dismissal, but will generally involve respecting the rule of progressive discipline and imposing a sanction that is proportional to the offence committed by the employee. With respect to the termination of employment based on the employee's poor performance, the employee must have been given a reasonable opportunity to meet the required standards of performance and must have been warned that he was at risk of dismissal.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

A unionised employee who was dismissed may bring a grievance contesting his dismissal under the collective agreement. This grievance will be heard by an arbitrator or a board of arbitration. If the dismissal is found not to be for just cause, then the employer will have to reinstate the employee in his employment, normally with full back pay.

A non-unionised employee who is dismissed may bring an action at common law or civil courts alleging that the cause relied on by the employer was not such as to warrant dismissal without notice.

In the provinces of Québec and Nova Scotia, as well as under federal jurisdiction, employees can seek to be reinstated in their employment with full back pay if they have accumulated the required number of years of service. If reinstatement is deemed to be inappropriate or unpractical, employees can receive, in addition to the compensation for the wages that they lost since the date of their dismissal, an indemnity to compensate them for the loss of their employment.

6.8 Can employers settle claims before or after they are initiated?

Employers can settle employment claims either before or after they are initiated. Such a settlement must, however, comply with the employment standards legislation applicable to each province. In addition, in the province of Québec, employees cannot validly renounce in advance their right to receive a reasonable notice of termination of their employment.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

Yes. Most Canadian provinces have requirements that are specific for group terminations. These typically include an obligation to give written notice to the Minister of Employment of the province. Employers may also be required to establish or participate in a reclassification assistance committee or an adjustment committee whose role is to assist employees in order to minimise the impact of the dismissal and to facilitate the maintenance or re-entry into the labour market.

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Employees can file a complaint with the applicable employment standards commission.

In certain provinces, employers who fail to provide advanced notice of mass termination to the Minister of Employment may have to pay to their employees an indemnity equal to the employee's wages for a period equal to the time period or remainder of the time period within which the employer was required to give notice to the Minister. Furthermore, an employer who does not give notice of the collective dismissal to the Minister of Employment within the delay provided in the applicable employment standards legislation may be guilty of a penal offence and liable to pay a fine of an amount which is set forth in the applicable employment standards legislation.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Restrictive covenants usually include provisions protecting the confidentiality of information pertaining to the employer's business, non-solicitation clauses prohibiting the solicitation of the employer's customers, suppliers and personnel as well as non-competition clauses.

7.2 When are restrictive covenants enforceable and for what period?

In order to be enforceable, restrictive covenants must be limited to the protection of the legitimate interests of the employer. Restrictive covenants, such as non-competition clauses, must be reasonable in their duration, in their geographical scope and in the scope of the activities that are prohibited. Generally, non-competition clauses will not be enforceable if the duration is longer than 9–12 months in common law provinces or 18–24 months in the province of Québec. Courts will not "read down" or modify a covenant that they find to be unreasonable; the clause will simply be declared to be entirely unenforceable.

7.3 Do employees have to be provided with financial compensation in return for covenants?

When restrictive covenants are given at the time of an employee's hiring, the employment of the employee constitutes sufficient consideration for the restrictive covenant. In common law provinces, additional consideration is necessary if the restrictive covenant is entered into during employment.

7.4 How are restrictive covenants enforced?

An employer can enforce a restrictive covenant by seeking an injunction to prevent the employee from violating the covenant or by instituting a lawsuit claiming from the employee (and sometimes from his new employer) the damages suffered by the former employer as a result of the breach, by the employee, of the restrictive covenant.

8 Data Protection and Employee Privacy

8.1 How do employee data protection rights affect the employment relationship? Can an employer transfer employee data freely to other countries?

Certain provinces such as Québec, Alberta, Manitoba and British

Columbia have adopted private-sector legislation pertaining to the protection of personal information. The *Personal Information Protection and Electronic Documents Act* (PIPEDA), in turn, applies to federally regulated organisations across Canada. This law governs the collection, use, transfer and disclosure of personal information as well as record retention requirements and privacy rights.

Generally, an employer can transfer employee data with notice to the employee or, in some provinces, employee consent. In the case of transfer of personal information to other countries, some additional requirements may apply, such as the obligation for the employer to take reasonable steps: (i) to ensure that the information will not be used for purposes not relevant to the object of the file; (ii) to notify employees explicitly that personal information will be stored or processed outside of Canada, where it will be subject to the laws of the destination country; and (iii) in the case of nominative lists in Québec, to ensure that the persons concerned have a valid opportunity to refuse that personal information concerning them be used for purposes of commercial or philanthropic prospection.

8.2 Do employees have a right to obtain copies of any personal information that is held by their employer?

Yes. As a general rule, employees have a right to access personal information held by their employer. Exceptions to this rule do exist and include: information protected by legal privilege; information which would reveal confidential information regarding a third party; and information which would affect judicial proceedings in which either party has an interest.

8.3 Are employers entitled to carry out pre-employment checks on prospective employees (such as criminal record checks)?

Yes. Employers are entitled to carry out pre-employment checks on prospective employees, with the employee's written consent, provided that the pre-employment background checks are aimed at determining if the job candidate will be able to fulfil the requirements of the position for which he applies. For example, gathering extensive information about the financial situation of a candidate is not always necessary to determine a person's suitability for a position. Since background checks can reveal a broad range of information pertaining to a person, it is important to note that an employer is not entitled to discriminate against a candidate on the basis of one of the prohibited grounds of discrimination such as ethnic origin, physical or mental disability or religion.

In addition, generally, no one may refuse to hire a person owing to the mere fact that that person was convicted of a penal or criminal offence, if the offence is in no way connected with the employment or if the person has obtained a pardon for the offence.

8.4 Are employers entitled to monitor an employee's emails, telephone calls or use of an employer's computer system?

Employers are entitled to monitor an employee's emails or use of an employer's computer system, subject to certain conditions. Employers should have a policy governing the use of their information systems so as to minimise the employees' reasonable expectation of privacy when using the hardware and software belonging to their employer. An employer that monitors an employee must be acting on the basis of a legitimate concern or for a legitimate purpose (for example, to verify its reasonable suspicions that the employee is competing with its business). The employer shall only collect information relating to this purpose and shall use the least intrusive means possible to achieve this purpose.

8.5 Can an employer control an employee's use of social media in or outside the workplace?

Since the use of social media by employees is largely unregulated in Canada, employer policies and code of conducts may prove to be necessary.

Employees do not have a general "right" to use social media in the workplace. An employee's right to use social media is thus a function of the nature of the position held and the corresponding duty of loyalty owed to the employer as well as the employer policies in this regard. That being said, employers generally permit a reasonable use by employees of social media in the workplace, as long as this does not interfere with the performance of their duties.

Employees have a duty of loyalty towards their employer which includes an obligation not to disclose confidential information pertaining to their employer and an obligation to protect the reputation of their employer. An employer could adopt a policy on the use of social media which would include some rules to ensure that employees do not damage the employer's reputation or divulge confidential information pertaining to the employer, in social media, whether used at work or outside the workplace.

9 Court Practice and Procedure

9.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

Each province has its labour standards board or commission that hears employment-related complaints. Employees of federally regulated businesses must file their employment-related complaint with the Canada Industrial Relations Board.

Claims for reasonable notices of termination are brought before the civil law or common law courts.

9.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed? Does an employee have to pay a fee to submit a claim?

The applicable procedure depends on the forum in which the employment claim is brought. Conciliation is usually offered on a voluntary basis by the various labour standards commissions and is generally not mandatory for employment-related complaints.

There are no fees to pay by an employee wishing to file a claim before one of the many administrative boards. If an employee wishes to launch a civil suit, there are minor amounts due for judicial stamps upon filing, but these amounts are recoverable from the employer if the employee prevails in his action.

9.3 How long do employment-related complaints typically take to be decided?

Employment-related complaints will typically be heard by administrative boards within 12–18 months following the filing of said complaint. The delay increases before civil law and common law courts to 24–36 months.

9.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

Generally, it is possible to request that a decision of a labour standards board be reviewed on a point of law. Such motions for review must generally be filed within 30–90 days of the initial decision.

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