"Canadianizing" Employment Agreements — What Every Employer Venturing North Needs to Know

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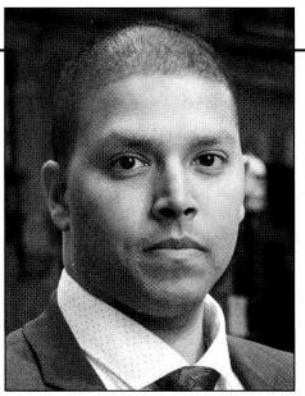

A clever person solves a problem. A wise person avoids it. —Albert Einstein

U.S. businesses that wish to expand north of the border may feel as though they are in a whole new world when it comes to employment law. Generally, employers in Canada are much more limited than their U.S. counterparts with respect to the types of employment agreement terms that they are able to enforce. This paper provides an overview of some of the differences between Canadian and U.S. employment law rules.

Provincial and Federal Jurisdiction

Labour and employment legislation is generally held to fall within provincial jurisdiction pursuant to Canada's *Constitution Act, 1867*. However, certain employers, including within the industries of inter-provincial and international trucking and shipping, fall within the jurisdiction of the federal government and are subject to federal law. For employers falling under federal jurisdiction, the *Canada Labour Code* provides basic standards that must be followed. Similarly, each province has their own employment standards legislation. Most of these regimes are fairly similar except for the Province of Quebec. The provincial employment standards legislation and the *Canada Labour Code* govern basic conditions of employment, including minimum wage, working hours, vacation pay, and termination pay. Employers are not permitted to contract out of the legislated minimum standards. In the absence of an employment contract, the common law will dictate what rights employees and employers have in an employment relationship. The first step in expanding operations to Canada is determining which legal regime applies to the company's operations. Generally, trucking companies will be subject to federal rules.

No At-Will Employment

Unlike in the U.S., there is no at-will employment in Canada. An employer is generally only entitled to terminate the employment relationship without notice where it has just cause to do so. Unless an employee is terminated for just cause, the employer must provide notice of termination to the employee. For employees that fall within the jurisdiction of Ontario, section 57 of the Ontario *Employment Standards Act, 2002* sets out the minimum notice periods. These can range from one week to eight weeks depending on how long the employee was employed with the company. With respect to provincially-regulated employees, the employer is allowed to provide termination pay to the employee in lieu of meeting the minimum notice requirements. The employer is also required to continue to make whatever benefit plan contributions would be required to be made in order to maintain the benefits to which the employee would have been entitled had he or she continued to be employed during the period of notice.

For employees that fall under federal jurisdiction, section 230 of the *Canada Labour Code* requires two weeks' notice so long as the employee has been employed for at least three consecutive months. Moreover, in federally-regulated industries, a recent Supreme Court of Canada decision confirmed that an employer cannot terminate an employee absent cause.[1] The Supreme Court rejected the argument that employment of a federally-regulated employee can be terminated without cause so long as minimum notice or compensation is given to an employee (as is permitted with respect to provincially-regulated employees in Ontario). This makes it significantly more difficult to terminate an employee in the federally regulated industries such as interprovincial trucking, telecommunications, and banking.

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The common law, in any event, substantially increases the termination notice period with respect to most employees, particularly employees in professional or senior roles. Generally, it is accepted in Ontario that a provincially regulated employee is entitled to notice, or pay in lieu of notice, of one month per year of service. It is fair to note that the more senior the employee, the longer the notice period the Court is likely to impose. Individual factors, such as an employee's employment prospects in view of his or her age and experience, also play a role in arriving at a decision with respect to the length of notice. Inserting a clause in an employment contract limiting notice and severance obligations to the minimum standards set out in the legislation is one way of attempting to limit exposure to large severance demands available under the common law. Whereas the Courts may choose not to enforce the clause, it puts the employer in a better bargaining position in the event of termination.

Constructive Dismissal

In light of the fact that it may be quite challenging and costly to terminate an employee, an employer may instead prefer that an employee simply quit his or her position. However, an employer must understand that in certain circumstances, an employee's quitting of a job may be deemed as a dismissal by an employer. Constructive dismissal can take two forms: that of a single unilateral act that breaches an essential term of the contract, or that of a series of acts that, taken together, show that the employer no longer intended to be bound by the contract.[2] This could include changes in hours, a reduction in pay, or a modification of duties. A constructive dismissal can be treated as a termination of employment, which would lead to the requirement that an employer pay termination pay in lieu of notice of termination (in the case of provincially-regulated employees), and which could possibly lead to a labour board reinstating the employment.

Constructive dismissal is somewhat different than constructive discharge, which in the U.S. occurs when an employer makes an employee's working conditions so intolerable that the employee is forced to resign. Constructive dismissal is more broad, and does not only include changes to the employment contract that are intolerable, but includes any type of a fundamental change to the terms of the employment contract that is unilaterally imposed by the employer.

Non-Competition and Client Non-Solicitation Clauses in Employment Contracts

Employment contracts in Ontario customarily include non-competition and client non-solicitation clauses. As is the case with other restrictive covenants, these are terms designed to protect a business from competition by a former employee that could harm the business. Generally, Canadian Courts will not enforce restrictive covenants that unnecessarily restrict an employee's freedom to earn a livelihood after the end of an employment relationship. Canadian Courts recognize that an individual is entitled to engage in any lawful trade or calling without restriction, and agreements that purport to restrain that trade or calling are most often characterized by the Courts as being against public policy and therefore unenforceable. Canadian Courts do recognize the important principle of freedom of contract and that employers will insist on restrictive covenants in order to protect their businesses. Much litigation in the employment law area is an effort of balancing the principles of "freedom of contract" versus "freedom of trade". However, the Supreme Court of Canada has held that the rules for interpretation of restrictive covenants relating to employment will not be applied with the same rigor as in other commercial contracts, in an effort to alleviate the imbalance that often characterizes the employer-employee relationship.[3] As a result, the outcome of individual disputes in Canada is frequently unpredictable.

The "inevitable disclosure" doctrine, which holds that employees who leave an employer to join a new employer will inevitably use the confidential information and trade secrets of the first employer when carrying out duties for the second employer, has been rejected in Canada.[4] In order to enforce a non-competition covenant, the former employer will have to satisfy the Court that the scope of the covenant is "reasonably necessary" for the protection of its business. What is "reasonably necessary" depends on all the circumstances of the employer's business, including:

a) the nature of the business;
b) its geographic reach; and
c) the former employee's role and responsibilities in that business.

Non-competition clauses are rarely enforced by Courts in Canada, even if they are very carefully crafted. For example, a non-competition clause with a two-year window in a 100 km geographic radius of Toronto could render an employee competitively paralyzed in Canada depending on the field of work, since many large professional service firms have their head offices there.

Unlike Non-competition clauses, which simply prohibit a former employee from becoming engaged in a business that competes with his or her former employer (and are generally not enforceable in Canada), non-solicitation covenants restrict the former employee's ability to solicit the customers or clients of his or her former employer, and in certain circumstances are enforceable. Generally, a non-solicitation clause which may be enforced by a Canadian Court will be drafted according to the following best practices:

a) non-solicitation covenants should only cover solicitation of existing or prospective clients, with whom

the employee had a direct business relationship at the time of termination or in a relevant time window prior to that date;

b) only solicitation that would reasonably result in the reduction of the former employer's business is prohibited, as opposed to general contact with the employer's clients;

c) the restrictions on non-solicitation should be for a limited time period (with duration of 12 months being the most common in Canada).

Overly broad non-solicitation clauses may be held to be unreasonable and unenforceable because they may be seen to amount to non-competition clauses.[5]

Confidential Information

Employers often require their employees to keep certain information about the business confidential, and may incorporate this requirement as a term of the employment contract. Such clauses are enforceable in Ontario and there is no specific requirement for the clause to refer to the length of time during which the information must be kept confidential. The common law test in Ontario for breach of confidence is as follows:[6]

a) the information itself must have the necessary quality of confidence about it;

b) the information must have been imparted in circumstances importing an obligation of confidence; and

c) there must be an unauthorized use of that information to the detriment of the employer.

Although confidentiality clauses are enforceable, the evidentiary burden on the employer to establish a breach of confidence is high. Finding a breach of confidence will depend on the facts and context of the disclosure. Questions often arise with respect to the scope of the protection with respect to particular documents. Accordingly, it is a good practice for the employer to mark confidential documents as such, and, to the extent possible, track who accesses them and when.

Accommodation of Employees with Disabilities

As in the U.S., Canadian employers cannot discriminate against employees on the basis of various protected grounds (e.g. sex, race, religious belief, disability, etc.). The *Canadian Human Rights Act* and various provincial human rights codes set out basic rights and responsibilities of private business organizations. An employer may be able to justify a discriminatory requirement or condition of employment if it can demonstrate that this is a bona fide occupational requirement by showing the following:[7]

1) that the employer adopted the standard for a purpose rationally connected to the performance of the job;

2) that the employer adopted the particular standard in an honest and good faith belief that it was necessary to the fulfilment of that legitimate work-related purpose; and

3) that the condition is reasonably necessary to the accomplishment of that legitimate work-related purpose (i.e. that it is impossible to accommodate individual employees sharing the characteristics of the employee discriminated against without imposing undue hardship upon the employer).

In light of the above, employers have a duty to accommodate employees with special needs by making reasonable efforts to modify the workplace to allow employees to carry out their work obligations. In Canada, an employer is required to accommodate an employee to the point of undue hardship. The Supreme Court has ruled that if the employer shows that, despite measures taken to accommodate the employee, the employee will be unable to resume his or her work in the reasonably foreseeable future, the employer will have discharged its burden of proof and established undue hardship.[8] The Court held that the test for undue hardship is not total unfitness for work in the foreseeable future. If the characteristics of an illness are such that the proper operation of the business is hampered excessively or if an employee with such an illness remains unable to work for the reasonably foreseeable future even though the employer has tried to accommodate him or her, the employer will have satisfied the test. The employer's duty to accommodate ends where the employee is no longer able to fulfill the basic obligations associated with the employment relationship for the foreseeable future.

For example, sleep apnea is a medical condition that may affect an employee's ability to stay awake and safely perform his or her job duties. It is particularly relevant to the trucking industry due to its potential to cause drivers to lose control of their vehicles and cause accidents. Given this potential, employers may wish to take preventative measures to both maintain a safe workplace for their employees and avoid potential liability to third parties that their employees may injure. However, some measures taken may conflict with an employer's duty to accommodate an employee's disability.

In the U.S., a relatively recent Appeals Court decision allowed a trucking company to require its employee to submit to a sleep study due to the employee having a body mass index of over 35, even though the employee did not exhibit any other factors associated with sleep apnea.[9] Such broad preventative testing for the purposes of determining whether an employee has a disability that needs accommodation would not likely be permitted in Canada. In Canada, the onus is on the employee to identify the disability to the employer and to request specific accommodations.[10] A bald request for accommodation, without specifics, and without medical evidence, does not trigger an employer's duty to accommodate.

Though not a case involving a truck driver, a Nova Scotia Labour Board allowed an employer to dismiss its employee, an IT maintenance specialist, after the two parties could not reach an agreement regarding the employee's modified work schedule.[11] Though the employee had sleep apnea, the Labour Board noted that the employer's requirement that the employee work certain on-call weekend and night shifts was a bona fide occupational requirement for the employee's line of work. Notably, the Labour Board held that the employer had made reasonable attempts to accommodate the employee's medical condition by modifying the work schedule to a degree. However, the employee did not attempt to return to work on the modified schedule and instead insisted that he not work any on-call nights or weekends at all. The employee's absence became unmanageable without imposing an undue hardship on the employer, especially since other employees would have to step in and perform the duties of the absent employee.

Drug and Alcohol Testing

Though random drug and alcohol testing is not illegal in Canada, an employer must meet a high standard to use it. The Supreme Court of Canada has held that a unilaterally imposed policy of mandatory random testing for employees in a dangerous workplace has been overwhelmingly rejected as an unjustified affront to the dignity and privacy of employees unless there is evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.[12] Generally an employer must show that there was reasonable cause to believe that the employee was impaired while on duty, was involved in a workplace accident or incident, or was returning to work after treatment for substance abuse. Employees cannot be generally screened for drugs and alcohol while they are off duty.

Hours of Work

Under sections 169 and 171 of the *Canada Labour Code*, a federally-regulated employee must be paid overtime for all hours worked beyond 8 hours in a day and/or 40 hours in a week. However, the *Motor Vehicle Operators Hours of Work Regulations*[13] replaces section 169 and 171 of the *Canada Labour Code* for highway motor vehicle operators (e.g. truck drivers who carry cargo between provinces). Highway motor vehicle operators must be paid overtime for all hours worked beyond 60 hours per week. All employers must keep complete and accurate records that show the hours an employee has worked each day These records can be used to calculate overtime pay, at a rate of a minimum of 1.5 times the regular hourly wage, and to demonstrate compliance should the need arise. Working hours do not include the following:

a) during a work shift when a worker is relieved of his or her job responsibilities by the employer for authorized meals and rest while en route,
b) time spent during stops en route due to illness or fatigue,
c) resting en route as one of two operators of a motor vehicle that is fitted with a sleeper berth, or
d) resting while en route in a motel, hotel or other similar regular place of rest where sleeping accommodation is provided.

Conclusion

When considering moving or expanding operations from the U.S. into Canada, it is not advisable for an employer to simply maintain its already-existing set of employment policies and contracts and use them in Canada. In light of the significant differences between U.S. and Canadian employment law, an employer will have to adapt its policies to Canadian requirements in order to ensure that the employment agreements are upheld. Such adaptation will include amendments to the policies and contracts to bring them in line with Canadian law. "Canadianizing" employment agreements will usually require more than just revising existing U.S. drafted forms. Without proper preparation and advice, an employer may later find itself attempting to solve problems that it could have avoided.

Endnotes

1 *Wilson v. Atomic Energy of Canada Ltd.*, 2016 SCC 29.
2 *Potter v. New Brunswick Legal Aid Services Commission*, 2015 SCC 10.
3 *Payette v. Guay Inc.*, 2013 SCC 45.
4 *Ims Health Canada Inc. v. Harbin*, 2014 ONSC 4350.
5 *Mason v. Chem-Trend Limited Partnership*, 2011 ONCA 344.
6 *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574; *Sabre Inc. v. International Air Transport Association*, 2011 ONCA 747.
7 *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 SCR 3.
8 *Hydro-Québec v. Syndicat des employé-e-s de techniques professionnelles et de bureau d'Hydro-Québec, section locale 2000 (SCFP-FTQ)*, 2008 SCC 43.
9 *Parker v. Crete Carrier Corp.*, No. 16-1371 (8th Cir. 2016).
10 *Toronto (City) v. Toronto Civic Employees Union, Local 416*, 2014 CanLII 22640 (ON LA).
11 *LeFrense v. IBM Canada Ltd*, 2015 CanLII 1720 (NS HRC).
12 *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34.
13 *Motor Vehicle Operators Hours of Work Regulations*, C.R.C., c. 990.