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Employment Law  
in Canada:  
Provincially Regulated Employers  
Alberta



# Introduction

The following provides a summary of aspects of Canadian law that may interest investors considering doing business in Canada and specifically in Alberta. The information may also be of interest and useful to human resources professionals seeking an overview of Alberta employment-related law.

A group of McMillan LLP lawyers prepared this information which is accurate at the time of writing. Readers are cautioned against making any decisions based on this material alone. This information does not constitute legal advice and any decisions should be made only after consultation with qualified professional advisors.

The information in this brochure is current to September 2016.

# Federal and provincial jurisdiction

In Canada, the power to make laws is divided between the federal government of Canada and the provincial governments. In the area of employment law, the federal government has exclusive constitutional jurisdiction over specific works and undertakings, such as shipping, interprovincial transportation including trucking and railways, banks, airlines and radio and TV broadcasting. The vast majority of employment relationships, however, do not come within exclusive federal jurisdiction and are governed by the laws of the province where the employment takes place.

The general rule, therefore, is that the provinces have jurisdiction over employment matters, while the federal government has jurisdiction only in respect of federal works and undertakings. With the exception of Québec, although there are some significant differences, employment law is similar from province to province. Only the laws of Alberta will be addressed in this summary.

Information respecting the laws of Québec, Ontario and British Columbia is available through McMillan LLP's offices in Montreal, Ottawa, Toronto and Vancouver, respectively.

# Minimum standards of employment

All Canadian provinces have enacted legislation setting out minimum standards that govern the basic terms and conditions of employment, including minimum wage levels, vacation and statutory holiday pay, hours of work and overtime, leaves

of absence, notice periods for termination, and, in some jurisdictions, severance payments. Employers and employees are not permitted to contract out of these minimum standards.

In Alberta, minimum standards of employment are defined by the *Employment Standards Act*, (the "ESC"). Some of the minimum standards at the time of writing are set out below:

Minimum wage	\$11.20 per hour (\$12.20 per hour effective October 1, 2016 and \$15.00 per hour effective October 1, 2018)
Hours of work	Maximum allowable hours of work per day is 12 hours  Overtime pay for time over 8 hours per day or 44 hours per week (1.5 times regular wage)  Note: Overtime does not apply to managers and there are special overtime rules for employees who are working under an "overtime agreement" as provided for under the ESC or for employees working for certain specific industries, including oilwell servicing, geophysical exploration and surveying.
Public holidays	9 holidays (New Year's Day, Alberta Family Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day)
Paid vacation	Two weeks after 12 months of consecutive employment  Three weeks after 5 years of consecutive employment  4 per cent of total wages as vacation pay  6 percent of total wages as vacation pay after 5 years of consecutive employment
Pregnancy leave	15 weeks of leave without pay
Parental/adoptive leave	37 weeks of leave without pay
Compassionate care leave	Up to 8 weeks of leave without pay (if employee has worked 52 consecutive weeks with employer)

During compassionate care, reservist, and maternity and parental job-protected leaves provided for under the ESC, employment is deemed continuous while the employee is on leave, and service accrues for purposes of calculating annual vacation entitlement and termination pay under the ESC. The ESC does not require an employer to make any payments to an employee, or pay for any benefits, during such leaves. However, if an employer benefits plan exists, there may be Alberta Human Rights obligations to make such payments.

## Termination of employment in Alberta

Termination of employment is one of the most significant areas of employment law. The analysis of a termination begins with an examination of whether “cause” exists for the termination, followed by an assessment of the employer’s obligations in connection with the termination.

### Termination for cause

There is no employment “at will” in Canada. An employer is generally only entitled to dismiss an employee from employment without notice or pay in lieu of notice where it has “cause” in law to do so.

The various types or degrees of misconduct that can constitute cause for termination are broad and can range from a single incident of serious employee misconduct to repeated incidents of less serious misconduct.

Except for the most serious types of misconduct, a single incident usually does not constitute cause for termination of employment. Single incidents of serious misconduct that constitute cause do occur from time to time. For example, employees are sometimes caught stealing or misappropriating significant assets or resources from their employer. In such cases, where strong evidence of the theft or misappropriation is obtained, cause for termination of the employee’s employment may exist. However, such cases are relatively rare.

Cause may also arise in the context of less serious misconduct, such as attitude, attendance or job performance problems, but generally only if the employee has continuously failed to meet the employer’s reasonable and clearly communicated expectations. The courts (and other authorities of this jurisdiction) generally require an employer to provide clear, written warnings to the employee regarding unsatisfactory conduct or performance, along with advice as to the employer’s expectations and the need for improvement, before the employer can successfully terminate the employment relationship for cause. The employee must be notified that the employment relationship is in jeopardy and be

given a reasonable opportunity to improve or correct the conduct or performance before being dismissed for cause.

Termination of employment for cause should be considered “exceptional”, and a substantial burden, or onus, is placed on an employer to establish that it has cause to end the employment relationship without notice or pay in lieu of such notice.

### Termination without cause

In the absence of cause for dismissal, employers must generally provide employees with working notice of termination of employment or pay in lieu of notice. In Alberta, an employee’s entitlements on termination without cause arise from four potential sources:

- i. minimum standards established by the ESC;
- ii. the right to reasonable notice of termination at common law;
- iii. termination provisions in an enforceable, written employment contract; and
- iv. in a unionized workplace the termination provisions, if any, contained in a collective agreement.

Each of these is briefly discussed below.

### A. Notice and termination pay

The ESC contains minimum standards for notice of termination or termination pay in lieu of notice. These obligations may be avoided where there is “cause” for the dismissal of an employee.

An employer can comply with the ESC’s notice requirements by providing written notice of termination or termination pay in lieu of notice, or a combination of both. If an employer gives written notice of termination the employee is entitled to be paid and can be required to work during the notice period. Once written notice is given, conditions of employment, including hours of work must not be altered without consent of the employee.

Notice of termination requirements or pay in lieu are based on the length of the employee’s period of employment, as follows:

Length of employment	Amount of notice or pay in lieu
Less than three months	no notice
After three months up to twelve months	one week
After twelve months up to three years	two weeks

After three years up to four years	three weeks
After four years up to five years	four weeks
After five years up to six years	five weeks
After six years up to seven years	six weeks
After seven years up to eight years	seven weeks
Eight years or more	eight weeks

ESA termination notice is not required in certain specific circumstances, including for employees who:

- i. have been terminated for just cause;
- ii. have been employed for three months or less;
- iii. are employed for a definite term or task of less than 12 months;
- iv. are employed on a seasonal basis and on the completion of the season the employment is terminated; and
- v. are employed in the construction industry.

## B. The common law: reasonable notice

The entitlements to notice of termination or to termination pay in lieu established by the ESC are minimum standards only; greater obligations may be imposed by the terms of an employment agreement or, in the absence of an agreement, by common law which is the law developed by the courts.

Where there is no explicit agreement between the employer and the employee that governs termination or notice, the court will imply into the parties' employment contract and relationship an unwritten term for termination on "reasonable notice". Such a contract term imports an obligation on the employer to provide reasonable notice of termination of employment or pay in lieu of notice, in the event of a termination without cause. Failure to provide an employee with reasonable notice gives rise to an action for damages for "wrongful dismissal".

Reasonable notice at common law is usually greater than statutory minimum entitlements to notice and severance pay. The determination of reasonable notice varies from case-to-case, and is dependent upon a number of factors, including:

- the employee's age;
- the position and responsibilities held by the employee;

- the length of the employee's service;
- the quantum of the employee's remuneration; and
- the availability of replacement employment.

A rough rule of thumb is that a managerial or professional employee is entitled to one month of notice, or pay in lieu of notice, for each year of service, to a maximum of 24 months. This, however, is a very rough rule and some courts have expressly disapproved of the use of such a rule.

In the case of short term employment service, reasonable notice for managerial and professional employees is generally greater than one month per year of service, whereas for long term employment, reasonable notice may be determined to be less than one month per year of employment.

For non-managerial or non-professional employees, the common law entitlement to notice may be in the range of two to three weeks per year of service, although it may vary from that range. Some recent court decisions suggest that the entitlement to reasonable notice should not be reduced simply because an employee is not in a professional or managerial position.

Is there a "maximum" notice entitlement at common law? A 24-month "cap" on notice has been generally acknowledged by Canadian courts, and is rarely exceeded. This level of award is generally reserved for employees of very long service, who are at a professional or managerial level.

It is sometimes said that determining reasonable notice for employees is more of an "art" than a "science". Employers are encouraged to avoid formulaic approaches to assessing notice obligations, but rather to obtain legal advice on a case-by-case basis.

An award of damages for wrongful dismissal brought about by the failure to provide reasonable notice includes claims for all compensation which would have been provided to the employee during the period of notice, less any income from alternative employment (or self-employment) earned during the notice period. However, it should be noted that the statutory requirements under the ESC to provide notice of termination or termination pay in lieu and severance pay exists regardless of whether the employee has earned income from alternate employment.

Reasonable notice of termination at common law is inclusive of minimum statutory entitlements under the ESC. Where pay in lieu of reasonable notice is given, rather than working notice, it may also be inclusive of termination and severance pay under the ESC. As is the case under the ESC, the common law reasonable notice entitlement can be satisfied by way of working notice, pay in lieu of notice or a combination of both.

The courts have also recognized that employers are held to a duty of good faith and fair dealing when terminating a person's employment and the failure to do so may result in an award of additional damages against an employer. At a minimum, employers are expected to be fair, candid and compassionate in the manner of dismissal and not, for example, to allege cause for termination where cause obviously does not exist. Moreover, even where an employer may terminate an employee without cause, it cannot do so in a capricious nor arbitrary manner. Thus, the common law duty of good faith extends also to an employer's discretionary power to terminate without cause under an employment contract.

## C. Contract

The parties to every employment relationship have an employment contract, whether they realize it or not. An employment contract or agreement need not be in writing, but may be oral or implied. The terms of the employment agreement may provide for such matters as the length of the employment relationship and the obligations arising in connection with the termination of the relationship. Generally, however, the terms of the employment agreement relating to such matters must be reduced to writing in order to be enforceable.

It should be clear from the foregoing summary of common law entitlements that it is advisable to enter into properly drafted written agreements with employees that specifically define (and limit) employee entitlements upon termination of employment. Otherwise, a dismissal can be an uncertain and expensive exercise.

Provided the notice provisions of a contract are properly drafted and satisfy at least minimum statutory obligations for termination, the employment contract may generally be terminated in accordance with such provisions, notwithstanding what the employee may have been awarded at common law. In the absence of such provisions, however, the termination obligations of the parties may be determined at common law, by a third party such as a Court or adjudicator.

Therefore, employers are advised to consult with employment law counsel when preparing employment agreements.

## D. Unionized employees

The common law principle of reasonable notice does not apply to unionized employees. A unionized employee's entitlements on termination are derived from two sources: the ESC and any rights contained in an applicable collective bargaining agreement.

# Labour Relations Code

The Alberta *Labour Relations Code* (the "LRC") governs the relationship between employers and trade unions in unionized workplaces in the province (except federally-regulated workplaces, which are governed by the *Canada Labour Code*).

The LRC establishes an independent administrative tribunal, the Labour Relations Board (the "Board"), to administer the LRC and to decide all matters arising under the LRC. The Board has wide powers to remedy contraventions of the LRC and to ensure that the purposes of the LRC are met.

## Right of employees to union representation

Under the LRC every employee is free to be a member of a union and to participate in its lawful activities. The decision whether or not to be represented by a union is one which employees have the right to make, without coercion or intimidation by either a union or an employer. Employers or unions who seek to persuade employees to join or not to join a union through coercion or intimidation commit an unfair labour practice under the LRC and are subject to legal sanctions. Employers do have the right under the LRC to express their views on any matter including the representation of employees by a trade union provided the employer does not use intimidation or coercion.

Examples of employer conduct that would constitute an unfair labour practice include:

- taking part in or interfering with the formation or administration of a trade union or the representation of employees by a trade union;
- contributing financial or other support to anti-union activities or groups of employees who are anti-union;
- contributing financial or other support to a trade union (as this could undermine the union's independence);
- discharging, suspending, transferring, laying off or otherwise disciplining an employee for exercising the right to union membership;
- in a contract of employment imposing any term or condition that attempts to stop an employee from exercising the right to union representation; and
- threatening a sanction or promising an advantage or benefit for the purpose of forcing or persuading an employee not to become or to no longer be a member of a union.

Examples of union conduct that would constitute an unfair labour practice include:

- attempting to organize employees at the employer's place of business during working hours except with the employer's consent; and
- expelling, suspending or imposing a penalty on a person or member for refusing or failing to participate in activities prohibited under the LRC.

## Union certification

A union may apply to the Board to be certified as the bargaining agent for a group of employees if it has obtained signed membership cards from at least 40% of the employees in the proposed bargaining unit. Upon receiving an application for certification, the Board will conduct an investigation as quickly as possible to ensure that the union has the requisite membership support in the proposed unit. The Board will also assess whether or not the union has applied for a bargaining unit that is suitable for collective bargaining.

In determining whether a group of employees is suitable for collective bargaining, the Board will consider a number of factors including:

- similarity in skills, interests, duties and working conditions;
- the physical and administrative structure of the employer;
- functional integration;
- geography;
- practice and history of the current collective bargaining relationship; and
- practice and history of collective bargaining in the industry or sector.

Only persons who meet the definition of an "employee" under the LRC are entitled to join a union and to be included in a bargaining unit. Under the LRC, persons performing the duties of a manager or superintendent or who are employed in a confidential capacity in matters relating to labour relations or personnel are excluded from collective bargaining under the LRC.

If the Board determines that the union has the requisite 40% membership support, and has applied for an appropriate bargaining unit, the Board will order a representation vote of the employees to be held as soon as possible after the date of application for certification. The representation vote is conducted by secret ballot. For the union to be certified as bargaining agent, a majority of the employees who vote must favour representation by the union.

The LRC prohibits employers from altering any term or condition of employment, without prior Board approval, upon the employer being notified of a union application for certification. If the union is certified, the employer must not increase or decrease the rate of pay or alter any other term or condition of employment until after the employees are in a lawful strike position, the union no longer has the right to represent the employees, or a collective agreement is negotiated, whichever occurs first, except if authorized by the Board.

## Effect of union certification

Once a union is certified for a group of employees it becomes the exclusive legal bargaining agent for all of the employees in the bargaining unit, and not just for those who joined the union and voted in favour of certification. The union has the legal duty to negotiate collective agreement terms and conditions of employment which will apply to all employees in the bargaining unit.

Following the certification of a union, the employer is no longer permitted to negotiate individual terms and conditions of employment with any of the employees in the bargaining unit. Because individual employees are no longer able to negotiate terms and conditions of employment directly with the employer, the union under the LRC has a statutory duty of fair representation to all employees in the bargaining unit and must not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employees in the bargaining unit.

## First collective agreement

Although the terms and conditions of collective agreements are generally negotiated freely between employers and unions through the collective bargaining process, the Board does have the authority to impose the terms and conditions of a first collective agreement following the certification of a union, where the parties are unable to reach agreement through the process of collective bargaining.

## Strikes and lockouts

The LRC regulates strikes and lockouts. A union is not entitled to strike and an employer is not entitled to lockout at any time when there is a collective agreement in force. Strikes or lockouts can only occur during the collective bargaining process, and only after the parties have engaged in good faith bargaining and have exchanged their respective negotiating positions.

Prior to commencing a strike or lockout, the parties must have been through the mediation process set out in the LRC and must wait through a 14 day "cooling-off" period before taking strike or lockout action. A vote conducted by secret ballot must

be taken in accordance with the LRC. Where the employees in the bargaining unit vote in favour of a strike, the union must then provide 72 hours of written notice of its intention to strike to both the employer and to the mediator before commencing any strike activity. Similarly, an employer must provide 72 hours of written notice of a lockout.

## Picketing

Following the commencement of a strike or lockout, employees are legally entitled to picket the workplace where they normally perform work. Alberta does not allow “secondary picketing”, which is picketing somewhere other than the place of employment. This restriction does not apply where the employer uses a third party known as an “ally” to assist in resisting the strike.

## Replacement workers

During a strike or lockout, the employer has the right to continue its business operations in order to resist the strike or advance the lockout. During a strike or lockout the employer may use “replacement workers” who are hired to replace employees who are engaged in a legal strike or who are locked out. The employer may also deploy non-bargaining unit personnel.

## Essential services

An employer may operate a business or undertaking which provides goods or services that are “essential” to the health, safety or welfare of Alberta residents. In the case of such operations, no strike or lockout action may be taken and compulsory binding arbitration is the method used to resolve collective bargaining disputes.

## Decertification

Just as employees are free to join a union and have that union become certified as their bargaining agent, employees are also free to apply for decertification. This can be accomplished where not less than 40% of the employees in the bargaining unit sign an application for cancellation of the certification.

Where the Board is satisfied that there is no evidence of coercion or intimidation, the Board will order that a representation vote be conducted as soon as possible after the date of the application and if a majority of those employees vote against the trade union, the certification of the trade union will be cancelled. However, there are certain restrictions on employees making a decertification application, including when such applications may be filed.

## Employer successorship on sale of a business

Where a business or part of it is sold, the trade union's bargaining rights do not automatically cease and they may continue to bind the successor employer. On application by an employer or trade union affected, the Board can investigate and determine whether an existing certification or collective agreement remains in effect and is binding on the new employer.

Where a business is sold or merged with another business that already has a collective bargaining relationship with a trade union, any person or union affected can apply to the Board to determine, among other things, which collective agreement should remain in effect and which trade union should represent the employees.

## Employee privacy: *Personal Information Protection Act*

Provincially regulated employers in Alberta operating in the private sector must comply with the Alberta *Personal Information Protection Act* (“PIPA”), which governs how organizations must handle personal information of customers, employees and other third parties.

### Purpose

The purpose of PIPA is to govern the collection, use and disclosure of personal information by organizations in a manner that recognizes both the rights of individuals to protect their personal information and the need of organizations to collect, use and disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

### What is personal information under PIPA?

Personal information means information about an identifiable individual. This would include name, home address, home telephone number, email address, any personal identification numbers including credit card information, physical description, educational or professional qualifications and other similar information. Generally, an organization is required to obtain consent before collecting, using or disclosing the personal information of any person.

## Appointment of privacy officer and development of privacy policy

Every organization must appoint one or more individuals to ensure that the requirements of PIPA are followed and to be the contact person for answering questions and handling access requests and complaints.

In addition, each organization covered by PIPA is required to develop a privacy policy. Some of the requirements of a privacy policy include:

- what information is collected and the purpose for collecting the information;
- how consent is obtained for collecting, using or disclosing personal information;
- how the organization ensures that personal information is correct, complete and current, and how the organization ensures that adequate security measures are in place; and
- how the organization processes access requests and responds to enquiries and complaints.

## Special workplace rules for employers

PIPA establishes special rules which apply in the workplace and must be followed by employers.

In the employment context, PIPA allows an employer to collect, use and disclose “personal employee information” without consent where it is reasonable to do so for the purposes of establishing, managing or terminating an employment relationship. However the employee is entitled to prior notice of and the purpose for the collection, use or disclosure of such information.

For example, in the hiring process an employer is entitled to collect information which is reasonably required to determine whether or not an employee is suitable for a position. This could include confirming educational or professional qualifications or contacting references whose names were provided by the employee on application for employment. Employers are also entitled to collect, use and disclose, without consent, information which is required to manage the employment relationship for such purposes as payroll, performance evaluation, discipline and other such purposes. Examples of where personal information could be disclosed by an employer would include providing such information to employee benefit plan carriers or to taxation authorities.

Under PIPA personal employee information does not include “business contact information”. Business contact information means information which allows an employee to be contacted at a place of business and includes the employee’s name and

work position or title, business telephone number, business address, business email, business fax number and other such business contact information. An organization may collect, use or disclose business contact information without consent or without providing notification to the employee.

## Business transactions and personal information

When buying or selling a business, an organization may collect, use and disclose information without consent when those involved agree to do so only for the transaction and when they need the information to decide whether to buy or sell.

Once the transaction is completed, the organization receiving the personal information may continue to use and disclose it. However, the information can only be used and disclosed for the purposes it was collected. Further, the information must relate solely to the carrying on of the business.

If the transaction does not proceed, the organization that received the personal information must destroy or return it.

## Employee access to employee personal information

Under PIPA, employees have the right to access personal information held by the employer and also the right to know how personal information has been used or disclosed by the employer.

There are certain exceptions to the statutory obligation of an employer to provide an employee with access to personal information including where doing so would reveal personal information about a third party, that would reveal confidential commercial information that if disclosed could harm the competitive position of the organization, that is subject to solicitor-client privilege, that could be expected to threaten the life or security of an individual, or which relates to a breach of the employment agreement or a contravention of law.

## Monitoring in the workplace

Employee privacy in the workplace is not absolute. For example, employers can establish policies, which confirm that employee emails on work computers may be monitored. Employers may also, in limited circumstances where it is reasonable to do so, set up surveillance systems in the workplace. However, employers should ensure that they obtain legal advice before undertaking monitoring or surveillance activity to ensure that they are entitled to do so in the circumstances and that they will not contravene PIPA or other applicable laws.

## Responsibility for retention and security of personal information

Organizations are required to take reasonable steps to ensure that collected personal information is accurate and complete to the extent necessary. Organizations must use reasonable safeguards to protect personal information from theft, modification, unauthorized access, collection, use, disclosure and destruction. Safeguards should be appropriate to the sensitivity of the information.

Personal information must only be kept for as long as reasonable to carry out business or legal purposes. Once the information is no longer needed it should be destroyed or anonymized. Care must be used in disposing of, or destroying, personal information.

## Complaint process

The Alberta Information and Privacy Commissioner has the statutory duty to investigate complaints and ensure compliance with PIPA. The Commissioner has the jurisdiction to make various orders, including requiring an organization to provide access to personal information held by the organization, to disclose the ways in which the personal information has been used and to confirm to whom personal information may have been disclosed. Fines may be imposed for certain conduct, including the use of deception or coercion to collect personal information in contravention of PIPA or for disposing of personal information with intent to evade a request for access to personal information. The amount of the fines can be, in the case of an individual, up to \$10,000, and in the case of a corporation, up to \$100,000.

## Human Rights

In Alberta, employers subject to provincial law must abide by the provisions of the Alberta *Human Rights Act* (the "HRA").

### Purposes of the HRA

The stated purposes of the HRA are to provide Albertans with protection of their human rights, which includes promoting a climate of understanding and mutual respect to achieve equality in dignity and rights, prevent discrimination prohibited by the HRA and provide a means of redress for those persons who are subjected to discrimination.

### Prohibited grounds of discrimination

The HRA provides protection against several forms of discrimination. With respect to employment, an employer

must not refuse to employ or refuse to continue to employ or discriminate against a person regarding employment or any term or condition of employment because of: race, religious beliefs, colour, gender, gender identity, gender expression, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation. Harassment in the workplace based on any of the protected grounds of discrimination is also prohibited.

The right to equal treatment with respect to employment covers things such as applying for a job, being recruited, training, transfers, promotions, terms of apprenticeship, dismissals and layoffs. It also covers rates of pay, overtime, hours of work, holidays, benefits, work assignments, discipline and performance evaluations.

### Direct and indirect discrimination

Direct and indirect discrimination are prohibited under the HRA. An application or advertisement for employment can be directly discriminatory if a requirement or qualification is on its face discriminatory. A job post reading "ABC Co. looking for strong men for yard work" is discriminatory as it excludes women from the selection process, and thus constitutes discrimination based on sex.

Indirect discrimination arises when a requirement or qualification, although not discriminatory on its face, has an adverse effect on a person identified by any one of the prohibited grounds of discrimination. "ABC Employer seeks applicants for great position. Applicants must have perfect vision." The requirement of "perfect vision" would have an adverse effect on the visually challenged, and therefore, could constitute discrimination on the basis of disability.

Of note, the HRA also prohibits job postings that require applicants to furnish information concerning any of the protected grounds of discrimination listed above.

### Bona fide occupational requirement and duty to accommodate

A discriminatory standard, requirement or qualification may be justified in certain circumstances, but only if it can be established that the discriminatory standard, requirement or qualification:

- is rationally connected to the function being performed;
- was adopted in an honest and good faith belief that it was necessary to the fulfilment of that purpose; and
- the individual cannot be accommodated without causing undue hardship to the employer, taking into account factors such as cost, financial assistance, if any, and health and safety concerns, if any.

## Complaint and adjudication process

A person who has reason to believe that he/she has been discriminated against can file a complaint with the Alberta Human Rights Commission (the “Commission”) setting out the particulars of the discrimination. The complaint must be filed with the Commission within one year of the alleged contravention, or in the case of continuing discrimination, within one year of the last instance of the contravention. The Commission has jurisdiction over allegations of discrimination, save and except in the unionized environment where parties may proceed by way of grievance arbitration if they so elect (and in some instance, both a grievance and a human rights complaint may be filed concurrently).

Once the complaint is received by the Commission and the respondent has submitted a response, the parties will generally have an opportunity to attend a voluntary settlement meeting with a conciliator assigned by the Commission. If the complaint is not settled, a hearing will generally be scheduled. The parties may present evidence, cross-examine witnesses and make submissions at the hearing before the Commission. The Commission will then decide the complaint and will provide written reasons for the decision to the parties.

## Potential remedies/damages

If the Tribunal finds that there has been a breach of the Code, it may exercise its broad remedial powers. For instance, it can order:

- the respondent to stop the discrimination that the complaint is about;
- the respondent to stop contravening the HRA in the same or any similar manner in the future;
- that the complainant be provided with the rights, opportunities or privileges that were denied because of the discrimination;
- the respondent to compensate the complainant for any lost wages, income, expenses or injury to dignity and self-respect because of the discrimination; and
- the respondent to pay the complainant damages.

## Workers Compensation Act

Most employers in Alberta are covered under the *Workers’ Compensation Act* (“the “WCA”), which is the provincial mandatory, no-fault compensation insurance scheme for worker injuries or occupational diseases arising out of and in the course of employment.

As a product of the historic compromise in which workers gave up the right to sue and employers agreed to fund a no-fault insurance system, the WCA provides for compensation for workers who are injured in the course of employment or who are disabled by an occupational disease.

## Administration

Responsibility for administering the WCA rests with the Workers’ Compensation Board of Alberta (“WCB”). WCB adjudicates claims, provides compensation, manages timely and safe rehabilitation and return to work programs and generally mediates and adjudicates disputes between employers and workers concerning workers’ compensation under the WCA.

Employers or workers who are dissatisfied with a decision of WCB may have a right of appeal to the Dispute Resolution & Decision Review Body and a right of further appeal to the Appeals Commission for Workers’ Compensation (“Appeals Commission”).

## Who is covered?

Except for employers who are covered under federal jurisdiction, the vast majority of employers in Alberta are covered under the WCA.

## Registration

Employers are required to register their business/firm with WCB. Failure to register could lead to a substantial fine and the employer could be charged the total compensation costs of an injury if a worker is injured, plus retroactive insurance premiums.

## Premiums

Employers collectively fund the WCA workplace insurance program by way of premiums.

For administrative purposes, employers are classified based on industrial activity depending on the level of risk. Premiums are calculated on the base rate established by WCB for the particular industry. Experience rating adjustments based on an employer’s claim history may result in a rebate or surcharge to the base rate for the industry. Rebates incentivize employers to have a good claims record; surcharges encourage employers with a poor claims history to take corrective action.

## Compensable injuries

Not all injuries, illnesses or accidents are compensable under the WCA. To be eligible for compensation, a worker must have

sustained a personal injury or occupational disease that arose out of and in the course of their employment. For an injury, this generally means that the worker must have been working when injured and the injury must have been caused by something to do with the job in order to be covered by WCB. For an occupational disease, this means that the disease must have been caused by the work or the work environment in order for it to be compensable.

## Claims

A worker who is injured or contracts an occupational disease must notify his or her employer as soon as possible to begin the claim process. Upon learning of a workplace injury or illness, an employer has three days to report the accident or illness to WCB in a form prescribed by WCB. In any event, workers must submit their claims for benefits within a two year period from the date of the accident that gives rise to the claim or, in the case of an occupational disease, after learning they suffer from the disease. Time limits may be extended by WCB in exceptional circumstances.

## Compensation benefits

If WorkSafeBC approves a claim, the worker may be eligible for any of the following benefits depending on the nature of the injury and the work:

### Wage-loss benefits

Wage loss benefits based on 90 percent of a worker's net earnings, up to a maximum amount set by WCB, are payable where an injury or disease resulting from a person's employment causes a period of temporary disability from work. These benefits usually commence shortly after the initial acceptance of a claim and cease either when the claimant recovers from the injury or the condition becomes permanent.

### Health care benefits

WCB is responsible for the cost of health care expenses associated with the treatment of the work injury, including necessary hospitalization, treatment provided by recognized health care professionals, prescription drugs and necessary medical appliances or equipment.

### Permanent disability awards

Permanent disability awards are made where a worker fails to completely recover from an industrial injury or disease and is left with a permanent residual disability.

## Compensation for non-economic loss

If a worker's injury results in permanent impairment, the worker may be entitled to compensation for his or her non-economic loss.

## Death benefits

In the case of work-related fatalities, WCB pays compensation benefits and funeral and other expenses to the dependents of the deceased worker.

## Rehabilitation and return to work

WCB assists workers and employers in facilitating workers to safely return to productive employment following injuries or illnesses. Employers are required to accommodate workers and reinstate workers when they are medically able to return to work. Where an employee is incapable of returning to his or her own job, WCB will assist the worker to retrain for different employment.

## Bar against civil actions

The WCA prohibits any lawsuit by an injured worker or a dependent of an injured worker against the employer or against any other worker in respect of any personal injury, disablement, or death arising out of and in the course of employment. However where a third party is involved the employee may have the election of pursuing a civil claim or seeking compensation under the WCA.

## Offence and penalties

A person who contravenes or fails to comply with the WCA is guilty of an offence and is liable to a fine not exceeding \$25,000, or to imprisonment not exceeding 6 months, or to both. In addition, the directors of a corporation that commits an offence under the WCA may be liable to the same penalties if the directors authorized, assented to, acquiesced in or participated in the commission of the offence.

# Occupational Health And Safety

Employers and employees have a vested interest in workplace health and safety. The *Occupational Health and Safety Act* ("OHSA"), together with the *Occupational Health and Safety Regulation* and the *Occupational Health and Safety Code* issued under the OHSA, establish legal requirements that must be met by most workplaces in Alberta. The main exceptions are domestic workers (e.g., nannies, housekeepers), federal government employees, workers in federally regulated industries (such as banking and interprovincial transportation) and farmers and their non-paid "family members".

The purpose of OHSA is to promote occupational health and safety and to protect workers and other persons present at workplaces from work-related risks to their health, safety and well being. Under the legislative framework, the OHSA prescribes basic duties and obligations of employers and workers, including mandatory technical standards and safety rules that employers and workers have to comply with to fulfill their obligations.

## Administration and enforcement

Alberta Occupational Health and Safety administers the OHS. Occupational Health and Safety officers enforce its provisions, inspect workplaces for compliance and investigate serious accidents or workplace fatalities.

Under the OHSA, Alberta workplaces are subject to compliance inspections and investigations. Occupational Health and Safety officers possess extensive statutory powers, including the authority to: enter any workplace, including a vehicle or mobile equipment; interview and obtain statements from persons at the worksite; take samples and conduct tests of equipment or machinery; inspect records; take photographs; issue compliance or stop-work orders and recommend commencement of prosecutions.

## General rights and duties

The OHSA balances the general right of management to direct its workforce and control the production process with the legitimate concerns of workers for health and safety. Under the OHSA, employers are subject to the all encompassing duty to ensure, as far as is reasonably practicable, the health and safety of workers.

## Establishment of an occupational health and safety management system

A health and safety management system involves the introduction of processes designed to decrease the incidence of injury and illness in the employer's operation.

The OHSA does not require that an employer put in place a health and safety management system. Rather, the Alberta government has developed the Partnerships in Injury Reduction program, which brings government together with industry, employers, safety associations and the WCB to encourage Alberta employers to build effective health and safety management systems.

Employers participating in this program conduct regular reviews of their health and safety management systems through annual audits that cover the basic elements of a health and safety management system, and require the use of personnel interviews, documentation review and workplace observation as data gathering techniques.

A Certificate of Recognition (COR) is issued jointly by a Certifying Partner and Partnerships in Injury Reduction (Partnerships) when an employer's health and safety audit meets Partnerships standards. Such employers are eligible for financial incentives (including reduced premiums) through WCB.

Regardless of whether an employer puts a health and safety management system in place, every employer is required by the OHSA to do a hazard assessment of the workplace and take effective measures to control the hazards identified. In addition, employers must ensure that all workers who may be affected by the hazards are familiar with the necessary health and safety measures or procedures before the work begins.

## Safety policy

Certain industries are required by OHSA to prepare a health and safety policy and inform their workers of the policy. Reference should be made to the OHSA, the Regulation and the Code for the specific requirements of such safety policies.

## Joint health and safety committees

A joint work site health and safety committee is a group of worker and employer representatives working together to identify and solve health and safety problems at the work site.

A joint work site health and safety committee is mandatory for any work site that is ordered to have a committee by the Minister responsible for Occupational Health and Safety. For all other work sites, the formation of a joint work site health and safety committee is voluntary.

The responsibilities of a joint work site health and safety committee are to:

- i. identify unhealthy or unsafe situations at the work site;
- ii. recommend corrective action; and
- iii. ensure health and safety education programs are established and maintained at the work site.

## The right to refuse unsafe work

Workers are entitled to refuse to carry out a work process or to refuse to operate a tool, appliance or equipment, without retaliation, if they have reasonable and probable grounds to believe that doing so would create an undue hazard to the health and safety of themselves or another worker. A worker who refuses to carry out a work process or operate a tool, appliance or equipment must immediately report the circumstances of the unsafe condition to his or her supervisor or employer.

The OHSA mandates an immediate internal investigation following a refusal to work. If the internal investigation does not resolve the work refusal, then the worker may notify a health and safety officer who is required to investigate the matter without undue delay and issue any necessary orders.

Reference should specifically be made to the procedure required under the OHSA should a work refusal arise.

## Reporting obligations

Employers are required to immediately report to Occupational Health and Safety any incident that causes death or critically injures a worker. Notice may also need to be given to the employer's health and safety representative and trade union, if any. An investigation must be conducted by the employer and a written report must be made available for inspection by an Occupational Health and Safety officer. Other less serious workplace incidents must be reported within three days of the incident.

## Violence and harassment in the workplace

The OHSA requires employers to establish procedures, policies and work environment arrangements designed to protect workers from violence, the threat of violence and from harassment in the workplace.

Employers must conduct an assessment of risks of violence and provide training.

## Young and new workers

The OHSA requires that employers take specific steps to ensure the safety of young and new workers by providing health and safety orientation and training specific to the workplace. Reference should be made to the OHSA for specific requirements dealing with training.

## Offences and penalties

A person may be prosecuted for contravening the OHSA or a specific order. On conviction, the penalties can be very severe, up to and including fines of \$1,000,000 for repeat offences or to a term of imprisonment not exceeding 12 months, or to both.

In addition, Canada's Criminal Code contains provisions which could expose supervisors and other employees to criminal liability in the case of a workplace accident. The Criminal Code provides that anyone who directs an individual to do work, or has the authority to do so, has a legal duty to take reasonable steps to prevent bodily harm. A supervisor could be charged criminally if that legal duty is not upheld, resulting in a criminal sentence of a fine, imprisonment, or both.

## Reprisals

Reprisals are prohibited because a worker has acted in compliance with OHSA, has sought enforcement of OHSA or has given evidence in a proceeding under OHSA, or in an inquest under the *Coroners Act*.

## Employment Insurance Act

Most Canadian workers and employers contribute to a statutory income replacement insurance program administered under the authority of the *Employment Insurance Act, 1996* (the "EIA"). The insurance scheme is entirely funded by employer and employee premiums, which are calculated based on "insurable earnings," a defined term in the EIA. As a general rule, most employment in Canada is insurable unless specifically stated otherwise in the EIA.

Under the system, employers are required to contribute a certain percentage of employees' insurable earnings into the fund, and withhold at source and remit their employees' contributions, up to a prescribed maximum insurable amount.

The following highlights basic obligations imposed on employers. It is intended to assist managers and human resource professionals in responding to inquiries that are made from time to time from employees contemplating sick, maternity or parental leave.

## Eligibility and types of benefits available

Apart from the regular benefits, there are essentially five (5) types of benefits available under the EIA, each intended to provide temporary income support in different circumstances. They are:

### 1. Regular benefits

An employee who has lost his or her job through no fault of his own (i.e. layoff, etc.) may be eligible for income replacement benefits known as regular benefits. If eligible, the claimant may be paid regular benefits for a period of 14 to 45 weeks, depending on the employment rate in the claimant's region at the time of filing the claim and the amount of insurable hours the claimant has banked. Eligible claimants must first observe a two week unpaid waiting period before receiving benefits.

To qualify for regular benefits, a claimant must have been without work and without pay for at least seven consecutive days and have worked the minimum prescribed number of insurable hours in the 52 weeks immediately prior to the claim. The minimum number of insurable hours required to qualify for regular benefits varies from region to region and from time to time, thus reference should be made to the EIA and its Regulations. The number of weeks for which benefits are payable to eligible claimants is contingent on the amount of insurable hours worked and the unemployment rate in the claimant's region, which again change from time to time.

### 2. Sick benefits

An employee whose earnings are interrupted as a result of illness, injury or quarantine, may apply for sick benefits. Sick benefits are payable to eligible claimants for a maximum period of 15 weeks, less a two week unpaid waiting period, for a net total of 13 weeks.

To qualify for sick benefits, the claimant must have accumulated at least 600 insurable hours in the previous 52 weeks or since the person's last claim. Qualifying requirements are amended from time to time. Thus reference to the EIA is always recommended.

### 3. Maternity benefits

Pregnant employees who have accumulated at least 600 insurable hours in the last 52 weeks (or since their last benefits claim) are eligible for maternity benefits. Maternity benefits are payable for a period of up to 15 weeks, less a two week unpaid waiting period, for a net total of 13 weeks.

### 4. Parental benefits

An individual who has accumulated at least 600 insurable hours in the last 52 weeks (or since the person's last benefits claim, save and except a claim for maternity benefits), is entitled to parental benefits. Parental benefits are available to natural or adoptive parents who wish to remain at home to care for one or more new-born children or one or more adoptive children. Parental benefits are payable for a maximum period of 35 weeks, less a two week unpaid waiting period, for a net period of 33 weeks. However, the two week waiting period may be waived if a parent has already served a two week waiting period while claiming maternity benefits.

### 5. Compassionate care benefits

An individual who has accumulated at least 600 insurable hours in the last 52 weeks (or since their last benefits claim) can receive compassionate care benefits of up to a maximum of six weeks if the person has to be absent from work to provide care or support to a gravely ill family member at risk of dying within 26 weeks. Compassionate care benefits are available for the care of a prescribed list of individuals, and may be shared with other members of an individual's family. A medical certificate must be provided to establish the entitlement.

## Benefits - quantum

At the time of drafting, the basic benefit rate under the EIA is 55 percent of a claimant's average insured earnings up to the maximum amount set out in the legislation. The EIA sets out a specific formula for calculating "average insured earnings." Moreover, benefit rates are often amended, so regular reference to the EIA is advised.

Benefits under the EIA are considered taxable income; therefore, provincial and federal taxes will be deducted. Claimants are entitled to earn up to a certain allowable amount while receiving income replacement benefits under the EIA, without affecting their benefit entitlement. Any monies earned over and above the allowable amount will be deducted dollar-for-dollar from the benefits.

## Employer obligations

The EIA sets out a number of obligations for employers. Particularly, employers are required to:

- i. issue a Record of Employment ("ROE") within five calendar days after the later of: (a) the first day of the interruption of earnings; and (b) the day on which the employer becomes aware of the interruption of earnings;

- ii. keep records of insurable hours worked for each employee, for a period of six years after the relevant year for which the records relate (since benefits are based on an hourly qualification system);
- iii. deduct and remit employment insurance premiums for each dollar of insurable earnings up to the yearly maximum; and
- iv. record the reason for separation, hours worked, gross earnings, and any money paid or payable on separation

In addition to the foregoing, the EIA sets out a number of other obligations and offences, breach of which could lead to penalties, fines and prosecution. Thus, reference should be made to the EIA and its Regulations should issues arise.

## Administration

The Canada Employment Insurance Commission (the "Commission") oversees the EIA and manages the insurance fund. If an employer or a claimant disagrees with the Commission's decision to either deny or grant income replacement benefits, then either party can appeal the decision within prescribed time limits to the adjudicative bodies authorized under the EIA to hear the appeal(s).

## A cautionary note

The foregoing provides a summary of aspects of Canadian law that may interest investors considering doing business in Canada. A group of McMillan lawyers prepared this information, which is accurate at the time of writing. Readers are cautioned against making decisions based on this material alone. Rather, any proposal to do business in Canada should most definitely be discussed with qualified professional advisers.

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# About McMillan

McMillan is a leading business law firm serving public, private and not-for-profit clients across key industries in Canada, the United States and internationally. With recognized expertise and acknowledged leadership in major business sectors, we provide solutions oriented legal advice through our offices in Vancouver, Calgary, Toronto, Ottawa, Montréal and Hong Kong.

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