



mcmillan

Employment Law
in Canada:
Federally Regulated Employers



Federal and provincial jurisdiction

In Canada, the power to make laws is divided between the federal and provincial governments.

In the area of employment law, the federal government has jurisdiction over employment laws for specific works and undertakings within exclusive federal constitutional jurisdiction, such as shipping, railways, broadcasting, airlines and banks. Many employment relationships, however, do not come within exclusive federal jurisdiction and are governed by the law of the province in which they are located. Only the federal laws will be addressed in this summary.

Minimum standards of employment

The *Canada Labour Code* (the “Code”) sets out the minimum standards that govern the basic terms and conditions of employment for federal workers, including minimum wage levels, vacation and holiday pay, hours of work, maternity and parental leaves, notice periods for termination, and severance payments. Employers and employees are not permitted to contract out of these minimum standards.

Some of the minimum standards for federal workers at the time of writing are set out below:

Minimum wage	Federal workers must be paid (at least) the minimum hourly wage rate set by the province in which the employee is usually employed. In Ontario the general minimum wage rate for most adult workers is \$11.25 per hour (\$11.40 per hour as of October 1, 2016).
Hours of work	8 hours per day 40 hours per week Overtime paid at 1.5 times regular wage.
Public holiday	9 holidays (New Year’s Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Remembrance Day, Christmas Day, Boxing Day).

Paid vacation	Two weeks after 12 months of employment for those employed for less than 6 consecutive years; three weeks after 6 consecutive years of employment 4% of wages as vacation pay for those employed less than 6 consecutive years; 6% of wages as vacation pay after 6 consecutive years of employment.
Pregnancy leave	17 week job-protected leave without pay parental/adoptive.
Leave	37 week job-protected leave without pay; 37 week aggregate leave for two employees in relation to the same birth or adoption.
Compassionate care leave	28 weeks job-protected leave without pay so an employee can care for or support a family member if a qualified medical practitioner issues a certificate stating that there is a serious medical condition with a significant risk of death within 26 weeks.
Sick leave	17 weeks job-protected leave without pay because of an absence due to illness or injury.
Critical illness leave	37 weeks without pay to care for a critically ill child if a specialist medical doctor has issued a certificate that states that the child is critically ill and requires the care or support of one or more of their parents and sets out the period during which the child requires that care or support.
Death or disappearance	Up to 104 weeks if the employee is the parent of a child who has died and it is probable, considering the circumstances, that the child died as a result of a crime or up to 52 weeks if the employee is the parent of a child who has disappeared and it is probable that the child disappeared as a result of a crime.
Bereavement	Leave, with pay, in the event of the death of a member of the employee’s immediate family on any of the employee’s normal working days that occur immediately following the day of the death.

Termination of employment

Termination of employment is one of the most significant areas of employment law. Usually, the analysis of a termination begins with an examination of whether there is “cause” 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 where it has “cause” in law to do so.

There is no end to the various types or degrees of conduct or misconduct that can constitute cause for the termination of an employee’s employment. However, cause may be thought of as existing on a spectrum, with single incidents of serious employee misconduct at the “high” end of the spectrum, and minor but repeated incidents of unsatisfactory conduct at the “low” end.

In all but the most serious of misconduct cases, a single incident of employee misconduct usually does not constitute cause for termination of the 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 the termination of the employee’s employment may exist. However, such cases are relatively rare.

Normally, cause or potential cause cases arise in the context of much less serious conduct, such as attitude, attendance or job performance problems. Cause may exist in these cases, but usually only if the employee has continuously failed to meet the employer’s reasonable, expressed expectations, despite repeated warnings to the contrary. In that regard, the Courts (and other authorities of this jurisdiction) generally require the employer to provide a series of clear, written warnings to the employee regarding the employee’s unsatisfactory conduct and the need to improve or correct that conduct, before terminating the employment relationship for cause. The employee should be notified that the employment relationship is in jeopardy as a result of the maligned conduct, and should be given a reasonable opportunity to improve or correct the conduct before being dismissed for cause.

As should be clear from the foregoing, termination of employment for cause is considered “exceptional”, and a substantial burden is placed on an employer to establish that it has cause to end the employment relationship without notice.

Employers should note that, under the *Code*, non-unionized employees who are not managers may have recourse to an “unjust dismissal” provision. The right to file a complaint under the *Code* is in addition to the right to commence an action for wrongful dismissal. The provision provides that an employee who has completed twelve (12) consecutive months of continuous employment may file a complaint if the employee considers the dismissal to be “unjust”: that is, without cause. The complaint will be referred to an adjudicator for hearing to determine whether the employee’s dismissal was unjust, notwithstanding any termination payments in lieu of notice offered by the employer, or alternatively whether the dismissal is exempt from the unjust dismissal provision for other reasons. These exemptions include where the employee has been laid off because of “lack of work” or because of “the discontinuance of a function”. If so, the adjudicator will not hear the complaint on its merits. However, in order to demonstrate that an exemption applies, the employer will be required to provide evidence as to why a particular employee was dismissed for “lack of work” or because of “the discontinuance of a function” as opposed to another employee.

When a complaint of unjust dismissal is upheld, the employee may be awarded reinstatement as well as additional compensation. Under the *Code*, an “unjust dismissal” complaint does not apply to an employee who is a “manager”. However, the threshold established under the decided cases as to who is a manager so as to be disentitled from accessing this *Code* provision is extremely high.

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.

A federally-regulated employee’s entitlements on termination without cause arise from three potential sources:

- i. minimum standards established by the *Code*;
- ii. the right to reasonable notice of termination at common law; and
- iii. termination provisions in an enforceable, written employment contract.

Each of these is briefly discussed below.

A. Canada Labour Code: Notice and Severance Pay

The *Code* sets out minimum standards for two types of potential termination entitlements: notice of termination and severance pay. These obligations may be avoided where there is cause for the dismissal of an employee, although the *Code* does not define what constitutes cause for dismissal. Determinations of whether there is cause for dismissal will be made on a case-by-case basis, based on common law principles. In the absence of such cause, notice and severance pay obligations must be considered, and each of these is discussed below.

1. Notice of termination

The *Code* provides minimum standards for individual notice of termination obligations and, where 50 or more employees are terminated from an establishment within a four-week period, mass termination obligations.

An employer can comply with the notice requirements under the *Code* by providing working notice, termination pay in lieu of notice or a combination of both.

Individual notice

Individuals employed less than three consecutive months are not entitled to notice. All employees who have completed three consecutive months of continuous employment or more are entitled to two weeks of notice.

Mass terminations

Additional requirements must be complied with in the case of a mass termination, which is the termination of 50 or more employees at the employer's establishment within a four-week period. In addition to providing notice to the individual employees affected, as prescribed above, an employer undertaking a mass termination must comply with certain statutory obligations including the provision of written notice to the federal Minister of Labour. Such notice must be provided to the Minister at least 16 weeks before the date of termination of the employment of the employee in the group whose employment is first to be terminated.

The written notice is to include information about the terminations, including the number of affected employees, the location at which the termination is to take place, the dates on which the terminations are to occur, the nature of the industry of the employer, the reason for the intended terminations and the name of any trade union certified to represent any employee in the group of employees whose employment is to be terminated. The employer must

provide copies of this notice to the Minister of Employment and Social Development, the Canada Employment Insurance Commission and any trade union representing an employee whose employment is to be terminated.

2. Severance pay

Severance pay is payable under the *Code* to all employees who have completed twelve consecutive months of continuous employment, unless:

- i. the employee has been dismissed for just cause; or
- ii. the employee is, either immediately upon ceasing to be employed by the employer or before that time, entitled to a pension under a pension plan contributed to by the employer or under a federal or provincial pension plan.

Severance pay is payable at the greater of:

- (a) two days wages at the employee's regular rate of wages for regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and
- (b) five days wages at the employee's regular rate of wages for his or her regular hours of work.

Unlike the requirement to give notice of termination, severance pay obligations cannot be discharged by way of working notice: severance pay must be satisfied in the form of pay.

B. The common law: reasonable notice

The entitlements to notice of termination and severance pay established by legislation 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. Common law is the law that has developed in 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 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 payment in lieu of notice, in the event of a termination without cause. The 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 in excess of the 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 following:

- 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 in respect of reasonable notice is that a managerial or professional employee is entitled to a month of notice, or pay in lieu of notice, for each year of service. This, however, is a very rough rule, and some courts have expressly disapproved of the use of such rules.

At the lower range of service, awards of notice for managerial and professional employees are generally greater than one month per year of service, whereas at the higher range of service, the awards are often less than one month per year.

When dealing with 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.

Is there a "maximum" notice entitlement at common law? A 24-month "cap" on notice has been tacitly acknowledged by some 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 appropriate legal advice on a case-by-case basis.

A claim for damages for wrongful dismissal brought about by the failure to provide reasonable notice usually includes claims for all compensation which should have been provided during the period of notice, less any income from alternative employment (or self-employment) earned during the notice period. However, employees are entitled, at a minimum, to their notice and severance pay entitlements under the *Code*, regardless of whether they earn income from other sources following termination.

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

Courts have also recognized that employers are held to a duty of good faith and fair dealing when terminating a person's employment. The extent of this duty is often debated. At a minimum, employers are expected to be fair, candid and compassionate in the manner of dismissal and not, for example, to allege just cause for termination without such cause. Failure to act fairly may result in an award of a lengthened reasonable notice period.

C. Contract

The parties to every employment relationship have an employment contract with one another, whether they realize it or not. An employment contract or agreement need not be in writing but may in fact 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 generally advisable, if possible, to enter into properly-drafted written agreements with employees, that 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

It should be noted that the common law principle of reasonable notice does not apply to unionized employees. A unionized employee's entitlements under the *Code* on termination derive from two sources: the right to notice and severance under the legislation, and any bargained rights set out in an applicable collective agreement.

Canadian Human Rights Act

Prior to the introduction of human rights legislation in Canada, freedom of contract reigned supreme. The notion of discrimination in contract, employment, housing or services was historically rebutted at common law. In response, comprehensive human rights statutes were introduced in Canadian jurisdictions as early as 1962.

Employers engaged in federal works or undertakings must abide by the provisions of the *Canadian Human Rights Act* (the "CHRA").

Purpose of the Canadian Human Rights Act

The CHRA is a federal law that confers equal rights and opportunities without discrimination in specific areas such as jobs, housing and services.

Prohibited grounds of discrimination

Accordingly, the CHRA, subject to numerous exceptions and qualifications, prohibits discrimination on the basis of certain personal characteristics which are known as "prohibited grounds of discrimination."

With respect to employment, prohibited grounds of discrimination include: race, national or ethnic origin, colour, religion, age, sex (including sexual harassment and discrimination based on pregnancy), sexual orientation, marital status, family status, disability and conviction for which a pardon has been granted or in respect of which a suspension order has been granted. The term "disability" means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug. Harassment in the workplace based on any prohibited grounds is equally prohibited.

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

Direct and indirect discrimination

Both direct and indirect discrimination are prohibited under the CHRA. Direct discrimination arises where a requirement or qualification is on its face discriminatory. "ABC Co. looking for strong men for yard work" is a clear example of direct

discrimination 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.

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:

- a. is rationally connected to the function being performed;
- b. was adopted in an honest and good faith belief that it was necessary to the fulfilment of that purpose; and
- c. 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

An individual who has reason to believe that he/she has been discriminated against can pursue the matter by filing a complaint with the Canadian Human Rights Commission ("Commission") setting out the particulars of the allegation. The Commission has the exclusive 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. No court action lies for claims of discrimination based on the CHRA.

Once a complaint is received, the Commission will determine whether the complaint is potentially valid or is frivolous or vexatious. The Commission does not adjudicate complaints – it only serves to screen complaints. Moreover, the Commission has the authority to refuse to entertain a complaint on various grounds.

If the Commission does not reject or otherwise refuse to deal with a complaint, the subject of the complaint will be served with a copy of the allegations. The Commission will request that a reply be provided within a set time line.

After receiving a reply, the Commission may attempt to mediate the issues between the parties. Alternatively, the Commission

may appoint a conciliator. If neither of these options prove successful, the Commission may then proceed to formally investigate the complaint. Investigators nominated under the CHRA have broad powers to enter premises, interview individuals and review documents.

If, after an investigation, the Commission is satisfied that there are valid grounds to pursue the matter further, the complaint will then be referred to a Tribunal, which is the administrative body responsible for adjudicating human rights complaints under the CHRA.

Potential remedies/damages

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

- a. adoption of a special program or plan to reduce disadvantages that are likely to be suffered by a particular group based on or related to the prohibited grounds;
- b. rights, opportunities or privileges that were denied as a result of the discriminatory practice be made available to the victim;
- c. compensation for past wage losses, compensation in lieu of reinstatement as well as for other expenses incurred by the victim as a result of the discriminatory practice;
- d. compensation of up to \$20,000 for any pain or suffering experienced as a result of the discriminatory practice; and
- e. other more general measures designed to prevent future discriminatory practices.

It is public policy in Canada to preserve and recognize the inherent dignity and self-worth of every individual regardless of the individual's colour, sex, or other personal characteristics. Employers are well advised to take human rights into consideration when defining and developing their hiring, recruiting and promotional practices, and other employment policies.

Workplace Safety And Insurance Act

In Canada, provincial governments have the right to require federal sector employers to participate in provincial workers' compensation schemes. For example, federal sector employers who have employees in Ontario are covered under the *Workplace Safety and Insurance Act, 1997* (the "WSIA"), which is Ontario's no-fault compensation insurance scheme for worker injuries arising out of, or in the course of, employment.

As the product of historical bargaining between workers and employers, the WSIA provides for benefits to workers injured in the course of employment or disabled by specified industrial diseases. In exchange, if their WSIA claims are covered under the insurance plan, workers relinquish their rights to commence civil actions against employers for negligence causing bodily harm.

Administration

Responsibility for administering the WSIA rests with the Workplace Safety and Insurance Board ("Board"). The Board adjudicates claims, dispenses benefits, manages early and safe return to work programs and generally mediates and adjudicates disputes between employers and workers concerning workers' compensation and their rights and obligations under the WSIA.

Employers or workers who are discontent with a final decision of the Board may have a right of appeal to the Workplace Safety and Insurance Appeals Tribunal. Appeals must be filed within prescribed time limits.

Who is covered?

The vast majority of employers are covered under the WSIA. The WSIA mandates that certain federal sector employees be covered including certain employees involved in railroads, shipping, telecommunications and airlines. However, certain industries, including banks, are not required to participate in the no-fault insurance plan.

Where employers are not required to participate in the provincial plan, they are required to subscribe to a plan that provides an employee who is absent from work due to work-related illness or injury with wage replacement, payable at an equivalent rate to that provided for under the applicable workers' compensation legislation in the employee's province of permanent residence. Note, however, that employers operating in industries not subject to the WSIA may elect coverage under the WSIA. The WSIA sets out procedures and requirements (including costs) for doing so. Sole proprietors, partners and executive officers, who are generally not subject to the WSIA, may also elect coverage.

Registration

Employers operating in industries subject to the WSIA must register their businesses with the Board within 10 days of hiring their first employee. Failure to do so could lead to a prosecution under the WSIA and, if convicted, a substantial fine.

Premiums

Employers collectively fund the WSIA insurance program by way of premiums. An employer who comes within the scope of the WSIA is required to contribute, while others who are not may elect to do so, if they wish. Different costs, rights and protections apply to those who do not come within the scope of the WSIA but nonetheless elect coverage.

For administrative purposes, employers are divided into industry classes and subclasses, depending on their hazard potential. Premiums are based on regular assessments, which take into account such factors as payroll, industry classification (i.e. related hazards) and experience ratings. Thus, employers judged more likely to cause compensable injuries contribute a proportionally greater share to the accident fund.

Compensable injuries

Not all injuries, illnesses or accidents are compensable under the insurance plan. A worker (or his or her beneficiary, as the case may be) who is injured or dies as a result of a work-related accident, or suffers a work-related illness, generally qualifies for benefits. Entitlement, however, may be denied if the injury is due solely to wilful misconduct, unless it results in severe injury.

In some instances, it may be difficult to determine whether an injury arises out of or in the course of employment. Therefore, the Board has developed policies on the issue in an effort to assist all parties concerned.

Claims

A worker who sustains an injury or becomes ill as a result of being exposed to hazardous substances in the workplace 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 (3) days to report the accident or illness to the Board in a prescribed form. In any event, workers must submit their claims for benefits within a period of six (6) months from the date of the accident or learning of their illness, which time frame may be extended by the Board in some circumstances.

Compensation benefits

If the Board approves a claim, the worker may be eligible for any of the following benefits depending on the circumstances and nature of the injury/illness:

1. benefits for Loss of Earnings (LOE)

Workplace insurance presently pays workers a percentage of their take home pay, up to a prescribed maximum. The Board regularly revises the threshold of insurable earnings.

2. benefits for Non-Economic Loss (NEL)

Workers who suffer permanent impairment may receive a non-economic loss benefit to compensate physical or psychological loss. Again, the WSIA sets out maximum amounts that workers may recover on account of permanent injuries.

3. benefits for Future Economic Loss (FEL)

Benefits to replace future income losses may be available to workers who were permanently injured after January 1, 1990 but before January 1, 1998.

4. health care

Costs for health care services may be paid by workplace insurance (i.e. doctor's or chiropractor's visits, prescription drugs or other appropriate expenses).

5. return to work assistance

The Board assists workers and employers in facilitating workers' early and safe return to work following injuries or illnesses. Employers are required to reinstate certain workers back into their employment. When an employer is incapable of re-employing a worker after an injury or illness, the Board may provide programs to help the worker to re-enter the workforce in another job or business. Labour market re-entry plans are generally assessed directly against an employer's account, and thus are generally very expensive endeavours.

6. survivor benefits

The Board provides benefits to the survivors of a worker who dies as a result of a workplace accident or injury, including the following types of benefits:

- i. survivor payments (lump sum and monthly payments);
- ii. funeral and transportation costs;
- iii. supportive and financial counselling; and
- iv. assistance in entering the workforce, if applicable.

7. retirement benefits

The Board sets aside a percentage of all loss of earning benefits to create a retirement fund for workers 64 years of age and under who have received benefits for 12 consecutive months, to create a retirement fund for such persons.

Retaliation

A worker who has sustained a workplace injury or illness and is receiving or has received benefits as a result is entitled to be free from retaliation from the worker's employer.

Bar against civil actions

The WSIA benefits replace and preclude a worker's right to commence a civil action against the worker's employer, save and except for prescribed exceptions (i.e. where a third party is involved and the worker elects to pursue a civil action). The WSIA provides an adjudicative mechanism process should an issue arise as to whether the WSIA bars a worker's civil action against either the worker's employer or a third party.

Finally, it should be noted that the WSIA confers various rights on workers and employers alike, and further prescribes numerous duties on all affected parties. Thus, reference should always be made to the statute in any given situation.

Occupational Health and Safety, Part II of the Code

Employers and employees both have a vested interest in workplace health and safety. Accordingly, occupational health and safety legislation places reciprocal rights and obligations on management and labour in an effort to ensure that Canadian workplaces are safe and healthy environments.

The *Code* contains provisions regulating occupational health and safety in relation to federal employers. Like most other occupational health and safety legislation in Canada, the *Code* sets out a comprehensive standard of conduct for both management and labour, all in the interest of health and safety in the workplace.

The *Code* sets out the rights and duties of management and workers generally, while the Regulations prescribe specific rights and obligations applicable to a variety of different workplaces, industries and a number of toxic substances. The *Code* may not apply to certain workplaces; thus reference to the statute is always recommended.

Administration and enforcement

The Canada Industrial Relations Board and health and safety officers delegated by the Minister of Employment, Welfare and Labour administer the occupational health and safety provisions of the *Code*. Health and safety officers are nominated under the *Code* to enforce its provisions, to inspect workplaces for compliance, and to investigate serious accidents or workplace fatalities.

Federally regulated workplaces are subject to routine compliance inspections and investigations. Officers possess extensive statutory powers, including, among others, the authority to: enter any workplace, question any individual, handle, use or test any equipment or machinery, inspect documents, take photographs, issue compliance orders and commence prosecutions.

General rights and duties

The *Code* attempts to balance the general right of management to direct its workforce and control its production process with workers' legitimate concerns for health and safety. Aside from the multitude of specific duties imposed on employers in the Regulations, employers are guided in the *Code* by an all encompassing duty to protect the health and safety of workers.

Recognizing that responsibility for health and safety in the workplace does not solely rest with employers, the *Code* is guided by three basic tenets:

The right to participate

As noted above, employers and workers share mutual obligations and rights for health and safety in the workplace. Thus, although liability for health and safety in the workplace may ultimately rest with employers (and owners, supervisors, corporate directors and officers, contractors and suppliers of equipment), workers also have extensive roles in ensuring safe and healthy workplaces.

Worker participation is generally done through a joint health and safety committee or, for smaller employers with fewer than 20 employees, a health and safety representative. Both work alongside the employer, supervisors, and workers to oversee and enforce health and safety in the workplace. At least half of a committee's members must be employees that do not have managerial functions. Specifically, some of their responsibilities include:

1. participating in the monitoring of work accidents, injuries and health hazards;
2. making recommendations on ways to improve workplace health and safety;
3. assisting in the development of health and safety policies and programs; and
4. participating in inquiries, investigations, studies and inspections pertaining to occupational health and safety.

The *Code* places a general duty on employers to cooperate with and assist joint health and safety committees or representatives to carry out their statutory obligations.

All federal sector workplaces are required to have either a health and safety committee or a health and safety representative, unless exempted by a health and safety officer as a result of a similar provision in a collective agreement. The *Code* sets out specific thresholds as to when committees or representatives are required, and further defines rules respecting eligibility for membership in health and safety committees.

Employers who employ 300 or more employees are required to establish a policy health and safety committee, the purpose of which is to handle issues that are organization-wide in nature.

The right to know

Workers have the right to know about any potential or real hazards to which they may be exposed. This extends to a right to be trained and to have access to information on machinery, equipment, working conditions, processes and hazardous substances.

As a corollary to this right, employers are required under the *Code* to, among other things:

1. instruct, inform and supervise workers to protect their health and safety;
2. appoint competent persons as supervisors;
3. ensure committees and health and safety representatives carry out their duties;
4. prepare and post a written occupational health and safety policy; and
5. comply with all prescribed duties, including:
 - i. provide and maintain in good condition any prescribed equipment, materials and protective devices;
 - ii. if required, establish and maintain an occupational health service for workers;
 - iii. maintain an inventory of biological, chemical or physical agents, substances and records of the handling, use, storage and disposal of such agents; and
 - iv. carry out prescribed training programs for workers, supervisors and committee members or health and safety representatives.

Employers are required to ensure that supervisors are adequately trained in health and safety and are informed of their responsibility under the *Code* to ensure standards are met.

The right to refuse work

Workers are entitled to outright refuse work, or to refuse to work with machinery or equipment that they believe is dangerous to either their own health and safety, or the health and safety of another worker, without retaliation from their employer. If a worker refuses work, the worker must immediately inform the worker's supervisor or employer.

The *Code* sets out specific procedures that must be followed in the event of a work refusal. In short, the *Code* mandates an internal investigation process, which involves the worker and any one of the following: a joint committee member, a health and safety representative or another worker. If the investigation does not resolve the work refusal, then either the employer or worker must notify a health and safety officer, who will then investigate and resolve the work refusal.

The *Code* spells out in great detail the worker's and employer's rights and obligations during a work refusal. Thus, reference should be made to the *Code* should a work refusal arise. Notably, specific procedures must also be followed in the event of a refusal to work by an employee on a ship or aircraft.

Offences and penalties

The *Code* can be enforced against anyone who has any degree of control over a workplace, materials or equipment found in a workplace, or control over the direction of the work force.

If the internal, self-enforcement mechanism of the *Code* fails to adequately address any health and safety issues in a workplace, or if the *Code* or the Regulations enacted under it are not complied with, the Ministry of Employment, Welfare and Labour has the authority to enforce the law.

The Ministry of Employment, Welfare and Labour may prosecute any person for a violation of the *Code* or its regulations, or for failing to comply with an order from a health and safety officer or the Minister of Employment, Welfare and Labour.

Presently, if prosecuted and convicted of an offence under the *Code*, an individual (i.e. supervisors, directors and officers) can be fined up to \$1,000,000 and/or imprisoned for up to two years. A corporation may be fined up to \$1,000,000.

The regulation of occupational health and safety is also covered by the *Criminal Code*. The *Criminal Code* imposes liability on employers, their corporate directors, executive officers, operations managers, plant managers, production managers and any other person who exercises control or who has authority over a workplace.

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* (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 enquiries that are made from time to time from employees contemplating sick, maternity or parental leave.

Eligibility and types of benefits available

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 or her own (i.e. layoff, or elimination of position) may be eligible for income replacement benefits known as regular benefits. If eligible, the claimant may be paid regular benefits for a certain period, the length of which depends upon 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.

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 maximum period of 15 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 newborn children or one or more adoptive children. Parental benefits are payable for a maximum period of 35 weeks.

5. Compassionate care benefits

Employees may be paid a maximum of six weeks of benefits during a leave of absence taken in order to care for gravely ill family members at risk of dying within 26 weeks. To qualify, employees must have worked a minimum of 600 insurable hours in the last 52 weeks. They must also be able to prove that their income has dropped by more than 40% because they have taken time off to care for a seriously ill relative and they must provide a medical certificate.

The EIA sets out various rules, requirements, limitations and exceptions that may affect entitlement to income replacement benefits, which are frequently amended from time to time. Therefore, reference should always be made to the EIA and its Regulations.

Benefits - quantum

At the time of drafting, the basic benefit rate under the EIA is 55% of a claimant's average insured earnings up to the maximum amount set out in the legislation, which varies depending upon the year in which the claimant's benefit period begins. The EIA sets out a specific formula for calculating "average insured earnings."

Benefits under the EIA are considered taxable income; therefore, amounts on account of 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:

1. issue a Record of Employment (ROE) within five calendar days after an employee: (a) quits employment, (b) was laid off, or (c) has had his or her earnings interrupted for a period of seven (7) consecutive days;
2. 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);
3. deduct and remit employment insurance premiums for each dollar of insurable earnings up to the yearly maximum; and
4. report severance payments, if any, paid to dismissed employees.

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 Employment Insurance Commission (the "Commission") oversees the EIA and manages the insurance fund. Human Resources and Social Development Canada administers income replacement benefits to eligible employees.

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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Who to contact

Toronto



Dave J.G. McKechnie

t: 416.865.7051

e: dave.mckechnie@mcmillan.ca

Toronto



George Waggott

t: 416.307.4221

e: george.waggott@mcmillan.ca

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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