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Employment Law in Canada:

Provincially Regulated Employers British Columbia

Introduction

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

A group of McMillan 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 legal advisors.

The information in this brochure is current to July, 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 law 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 British Columbia will be addressed in this summary.

Information respecting the laws of Ontario, Québec and Alberta is available through McMillan's offices in Toronto, Ottawa, Montréal and Calgary 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 British Columbia, minimum standards of employment are defined by the *British Columbia Employment Standards Act* (the "ESA"). Some of the minimum standards at the time of writing are set out below

Minimum wage	$10.45 per hour (will increase to $10.85 in September 2016) (Exceptions exist for certain industries, such as liquor servers)
Hours of work	8 hours per day 40 hours per week Overtime pay for time over 8 hours per day or 40 hours per week (1.5 times regular wage) Overtime pay for time over 12 hours per day (2 times regular wage) Note: Overtime does not apply to managers and there are special overtime rules for employees who are working under an "averaging agreement" as provided for under the ESA or for employees working in certain industries, such as for a high technology company
Public holidays	10 holidays: New Year's Day (January 1), Family Day (Second Monday in February), Good Friday (Friday before Easter), Victoria Day (Monday on or preceding May 24), Canada Day (July 1), British Columbia Day (First Monday in August), Labour Day (First Monday in September), Thanksgiving Day (Second Monday in October), Remembrance Day (November 11), Christmas Day (December 25)

Paid vacation	Two weeks after 12 months of consecutive employment Three weeks after 5 years of consecutive employment 4 percent of total wages as vacation pay 6 percent of total wages as vacation pay after 5 years of consecutive employment
Pregnancy leave	17 weeks leave without pay
Parental/adoptive leave	35 or 37 weeks leave without pay 35 weeks if the employee took pregnancy leave 37 weeks if the employee did not take pregnancy leave
Family responsibility leave	5 days of unpaid leave during each employment year to meet responsibilities related to the care, health or education of a child in the employee's care or the care or health of any other member of the employee's immediate family
Compassionate care leave	8 weeks of unpaid leave to provide care or support to a family member if a medical practitioner issues a certificate stating that the family member has a serious medical condition with a significant risk of death within a 26 week period
Bereavement leave immediate family	3 days unpaid leave on the death of a member of the employee's
Jury duty	unpaid leave for the duration of time the employee is required to attend court as a juror

During leaves provided for under the ESA as summarized above, employment is deemed continuous while the employee is on leave or jury duty, for purposes of calculating annual vacation entitlement, termination pay under the ESA and entitlements to any pension or medical plan. During leaves the employer must continue to make payments to any pension, medical or other plan beneficial to the employee where the employer pays the entire cost of such plan. Where both the employer and employee share the cost of the plan, and the employee chooses to continue to pay his or her share of the cost of the plan during the absence, the employer must continue to make its own share of the plan costs.

Termination of employment in British Columbia

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 and expectations to the employee regarding unsatisfactory conduct or performance, and the need for improvement, before terminating 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.

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 British Columbia, an employee's entitlements on termination without cause arise from four potential sources:

i. minimum standards established by the ESA;

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. The *Employment Standards Act*: Notice and Termination Pay

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

1. Individual notice of termination or pay in lieu

An employer can comply with the individual 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 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.

Individual 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

2. Group termination

Additional requirements exist under the ESA for group terminations of 50 or more employees at a single location within any two month period. Depending on the specific number of employees dismissed within that period, the group termination notice requirements range from eight weeks to 16 weeks for each employee (regardless of their length of employment). An employer undertaking a group termination must provide written notice to each employee who will be affected, to the trade union certified to represent or recognized by the employer as the bargaining agent of any affected employees, and to the Minister of Skills Development and Labour of the following:

- the number of employees who will be affected;
- the effective date or dates of the termination; and
- the reasons for the terminations.

If written notice of group termination is not provided as required under the ESA, the employer is required to provide equivalent termination pay in lieu of notice.

Group termination notice or termination pay in lieu requirements under the ESA are in addition to the employer's requirement to provide individual notice or termination pay in lieu as discussed above.

B. The common law: reasonable notice

The entitlements to notice of termination or to termination pay in lieu established by the ESA 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 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 is often 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 remuneration, which would have been earned by the employee during the period of notice, less any income from alternative employment (or self-employment) which the employee earned, or should have earned, during the notice period. However, it should be noted that the statutory requirement under the ESA to provide notice of termination or termination pay in lieu exists regardless of whether the employee has earned income from alternate employment.

Reasonable notice of termination at common law is inclusive of minimum statutory notice entitlements under the ESA. Where pay in lieu of reasonable notice is given, rather than working notice, it may also be inclusive of termination pay under the ESA. As is the case under the ESA, 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 does not exist.

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 termination notice provisions of a contract are clear and unambiguous and at least meet the minimum ESA

statutory obligations for termination, and provided the contract is signed on or before the commencement of the employment relationship, the employment relationship may generally be terminated in accordance with the agreed-upon contractual entitlement, even though

the employee may have a greater entitlement at common law. In the absence of such an enforceable notice termination provision, the termination obligations of the parties may be determined at common law, by a third party such as a Court or adjudicator.

Of note, if the termination notice provisions of a contract do not meet the minimum ESA statutory obligations for termination, the termination notice provisions are wholly unenforceable.

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 on termination are derived from two sources: the ESA notice of termination or pay in lieu requirements and any rights contained in an applicable collective bargaining agreement.

Labour Relations Code

The British Columbia *Labour Relations Code* (the "*Labour Code*") governs the relationship between employers and trade unions in unionized workplaces in the province (in federally regulated workplaces the *Canada Labour Code* governs the relationship between unions and employers).

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

Right of employees to union representation

Under the *Labour Code* every employee is free to be a member of a union and to participate in its lawful activities. The decision whether 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 *Labour Code* and are subject to legal sanctions. Employers do have the right under the *Labour Code* to express their views on any matter including the representation of employees by a trade union provided the employer does not use intimidation, coercion or inducements to influence the decisions of its employees.

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

- interfering with a union including contributing financial or other support;
- 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 attempting 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 unfair labour practices, which are prohibited under the *Labour Code* 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 *Labour Code*.

Union certification

A union may apply to the Labour Relations Board to be certified as the bargaining agent for a group of employees if it has obtained signed membership cards from at least 45% of the employees in the proposed bargaining unit. Upon receiving an application, the Labour Relations Board will conduct an investigation to ensure that the union has the requisite membership support, and to ensure that the union has applied for a bargaining unit that is appropriate for collective bargaining. In determining whether a group of employees is appropriate for collective bargaining, the Labour Relations 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 *Labour Code* are entitled to join a union and to be included in a bargaining unit. 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 *Labour Code*.

If the Labour Relations Board determines that the union has the requisite 45% membership support, and has applied for an appropriate bargaining unit, the Labour Relations Board will order a representation vote of the employees to be held, normally within 10 days of 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 *Labour Code* prohibits employers from altering any term or condition of employment, without prior Labour Relations 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 four months after the Labour Relations Board certifies the trade union as bargaining agent or a collective agreement is negotiated, whichever occurs first, except if authorized by the Labour Relations 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 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 Labour Relations 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 *Labour Code* 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, but only after the parties have engaged in good faith bargaining and have exchanged all of their respective negotiating positions.

Prior to commencing strike action, a strike vote conducted by secret ballot must be taken in accordance with the regulations under the *Labour Code*. Where the employees in the bargaining unit vote in favour of a strike, the union must then provide 72 hours written notice of its intention to strike to both the employer and to the Labour Relations Board before commencing any strike activity. Similarly, an employer must provide 72 hours 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, but generally cannot picket at other locations. There are exceptions to this general rule, for example, where an employer attempts to move "struck work" to a different location, or 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. However, during a strike or lockout the employer is prohibited from using "replacement workers," who are hired to replace employees who are engaged in a legal strike or who are locked out. The employer is restricted to using non-bargaining unit personnel who normally work at the struck location and who were not hired or transferred from a different location after the date of the commencement of the strike or lockout, as long as they consent to doing the work.

Essential services

An employer may operate a business which provides goods or services that are "essential" to the health, safety or welfare of British Columbia residents. In the case of such businesses, if the Minister of Jobs, Tourism & Skills Training & Responsible for Labour considers that a dispute poses a threat to health, safety or welfare, they may direct the Labour Relations Board to designate essential services. No strike or lockout may then occur until the Board has first designated those employees who will not be allowed to strike or who cannot be locked out in order to ensure that essential services continue to be provided during the strike or lockout.

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 45% of the employees in the bargaining unit sign an application for cancellation of the certification.

Where the Labour Relations Board is satisfied that there is no evidence of coercion or intimidation, the Labour Relations Board will order that a representation vote be conducted within 10 days of the

application and if a majority of those employees who vote against the trade union, the certification of the trade union will be cancelled. However, there are certain restrictions on employees making an application for cancellation of the certification including no application may be made for decertification during the 10 months immediately following the certification of the trade union as bargaining agent.

Employer successorship on sale of a business

Where a business or part of it is sold, the purchaser becomes the "successor" employer under the *Labour Code*. The union certification transfers with the business being sold. The purchaser will be bound by the Union certification and by the terms and conditions of any collective agreement, which may be in force between the union and the employer selling the business.

Employee privacy: *Personal Information Protection Act*

Provincially regulated employers in BC operating in the private sector must comply with the BC *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 right 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 includes name, home address, home telephone number, 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. However, this does not include the individual's business contact information or work project information.

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.

Complaint process

The B.C. Information and Privacy Commissioner (the "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 and 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, such as the use of deception or coercion to collect personal information in contravention of PIPA, for disposing of personal information with an intent to evade a request for access to personal information or for obstructing the commissioner or an authorized delegate of the commissioner in the performance of their duties under the *Act*. The fines are limited to, in the case of an individual, not more than $10,000 and to any other entity, a fine of not more than $100,000. In addition, the Commissioner has the jurisdiction to make an order of damages for actual harm that a person may have suffered as a result of a violation of PIPA.

Special workplace rules for employers

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

In the employment context, PIPA allows an employer to collect, use and disclose "employee personal 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, and discipline. Examples of where personal information could be disclosed by an employer include providing such information to employee benefit plan carriers or to taxation authorities.

Under PIPA, personal information does not include "contact information" or "work product information."

Contact information means information which allows an employee to be contacted at a place of business and includes employee's name and work position or title, business telephone number, business address, business email, business fax number and other business contact information. An employer may collect, use or disclose contact information without consent or without providing notification to the employee.

Work product information refers to information which is prepared or collected by individuals or employees as part of their activities or responsibilities in the context of their work or business. Employees have no right of privacy under PIPA with respect to work product information and employers can collect, use and disclose work product information without the consent of, and without notifying, employees who prepared or collected the work product information. However, it is important to note that work product information does not include personal information about some other employee or individual who did not prepare or collect the work product information.

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

Employers under PIPA are required to retain employee personal information which is used to make a decision that directly affects the employee for a period of one year after using the employee personal information. Employers are also required to establish safeguards to ensure the security of employee personal information.

Human Rights Code

In British Columbia, provincially regulated employers must abide by the provisions of the British Columbia *Human Rights Code* (the "*Code*").

Purposes of the *Code*

The purposes of the *Code* are to promote a climate of understanding and mutual respect to achieve equality in dignity and rights, prevent discrimination prohibited by the *Code*, and provide a means of redress for those persons who are subjected to discrimination.

Prohibited grounds of discrimination

The *Code* provides protection against forms of discrimination which are known as "prohibited grounds 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, colour, ancestry, place of origin, political belief, religion, marital status, family status, physical or mental disability, sex, sexual orientation, age, whether the person has been convicted of a criminal or summary conviction offence that is unrelated to the employment or to the intended employment of that person. Harassment in the workplace based on any of the prohibited grounds of discrimination is also prohibited.

The right to "equal treatment with respect to employment" includes 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 *Code*. 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:

- 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 British Columbia Human Rights Tribunal (the "Tribunal") setting out the particulars of the discrimination. The complaint must be filed with the Human Rights Tribunal within six months of the alleged contravention, or, in the case of continuing discrimination, within six months of the last instance of the contravention. The Tribunal has 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.

Once the complaint is received by the Tribunal and the respondent has submitted a response, the parties will generally have an opportunity to attend a voluntary settlement meeting with a mediator. 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 Tribunal. The Tribunal 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:

- reinstatement in employment;
- compensation for past wage losses or compensation in lieu of reinstatement;
- compensation for other lost employment benefits such as pension or medical benefits;
- compensation for injury to dignity, feelings and self-respect;

- an order that the person or organization engaging in discrimination take action or adopt a
- program to fix the discrimination;
- a cease and refrain order which orders the person engaging in discrimination to stop and not to commit the same or similar discrimination again;
- expenses as a result of the discrimination; and
- interest on amounts ordered.

Workers Compensation Act

Most employers in British Columbia 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 British Columbia (WorkSafeBC). WorkSafeBC 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 discontent with a decision of WorkSafeBC may have a right of appeal to the Review Division, and a right of further appeal to the Workers' Compensation Appeal Tribunal ("WCAT").

Who is covered?

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

Registration

Employers are required by law to register their business/firm with WorkSafeBC. 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 WorkSafeBC for the particular industry. Experience rating adjustments based on an employer's claim history may result in a discount or surcharge to the base rate for the industry.

Compensable injuries

Not all injuries, illnesses or accidents are compensable under the insurance plan. 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 WorkSafeBC. 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 WorkSafeBC in a form prescribed by WorkSafeBC. In any event, workers must submit their claims for benefits within a one-year period from the date of the accident or learning of their illness, which time limit may be extended by WorkSafeBC 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 calculated on the basis of a worker's "average earnings" 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

WorkSafeBC is responsible for the cost of health care benefits for compensable injuries and occupational diseases, 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. Where a permanent disability is total, the worker will receive a lifetime pension in an amount equal to 90% of the worker's average earnings. Where the permanent disability is partial, the worker will receive a pension in an amount being the higher of the two figures produced by the loss of function/ physical impairment method or the projected loss of earnings method.

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

Rehabilitation and return to work

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

Prohibition against discriminatory action

The WCA prohibits employers from taking or threatening discriminatory action against workers for exercising any right (including making a claim for compensation) or carrying out any duty under the WCA.

Bar against civil actions

The WCA prohibits a 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.

Occupational Health And Safety Regulation

Employers and employees have a vested interest in workplace health and safety. The *Occupational Health and Safety Regulation* ("*OHS Regulation*") under the WCA establishes legal requirements that must be met by all workplaces under the inspectional jurisdiction of WorkSafeBC. This includes most workplaces in British Columbia, except mines to which the *Mine Act* applies and federally regulated workplaces.

The purpose of the OHS Regulation is to promote occupational health and safety and to protect workers and other persons present at workplaces from work-related risks to their health and safety.

Administration and enforcement

WorkSafeBC administers the OHS Regulation. WorkSafeBC officers enforce its provisions, and inspect workplaces for compliance and investigate serious accidents or workplace fatalities.

Under the OHS Regulation, BC workplaces are subject to compliance inspections and investigations. WorkSafeBC officers possess extensive statutory powers, including the authority to: enter any workplace, including a vehicle, vessel or mobile equipment, question any persons, including requiring questions to be answered under oath or affirmation, 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 OHS Regulation 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 OHS Regulation, employers are subject to the all encompassing duty to ensure that all work is carried out without undue risk of injury or occupational disease to any person.

Establishment of occupational health and safety program

Every employer with a workforce of 20 or more workers at a workplace with a moderate or high risk

of injury (as determined under a test established by the OHS Regulation), and every employer with a workforce of 50 or more workers is required to establish an occupational health and safety program that is designed to prevent injuries and occupational diseases. Some of the elements, which are required in an occupational health and safety program are:

- a statement of the employer's aims, and the responsibilities of the employer, supervisors and workers;
- provision for regular inspection of premises, equipment, work methods and work practices;
- provision for prompt investigation of incidents;
- appropriate written instructions, available for reference by all workers, to supplement the Occupational Health and Safety Regulation
- maintenance of records and statistics including reports of inspections and incident investigations;
- provision by the employer for the instruction and supervision of workers in the safe performance of their work; and
- provision for holding periodic management meetings for the purpose of reviewing health and safety activities and incident trends, and the determination of necessary courses of action.

For employers in smaller workplaces where formal occupational health and safety programs are not required, the employer under the OHS Regulation has the following three basic responsibilities when implementing and maintaining a less formal program:

- hold regular monthly meetings with workers for discussion of health and safety matters;
- ensure meetings deal with correction of unsafe conditions and practices and the maintenance of cooperative interest in the health and safety of the workforce; and
- maintain a record of the meetings and the matters discussed.

Joint committees and worker representatives

A joint health and safety committee must be established by the employer at each workplace where 20 or more workers are regularly employed, and at any other workplace where WorkSafeBC orders the establishment of a joint committee.

The joint health and safety committee must consist of at least four members and at least half of the members of the committee must be worker representatives selected by workers at the workplace.

The duties and functions of a joint health and safety committee include:

- identifying situations that may be unhealthy or unsafe for workers and advise on effective systems for responding to those situations;
- considering and expeditiously dealing with complaints relating to the health and safety of workers;
- consulting with workers and the employer on issues related to occupational health and safety and occupational environment;
- making recommendations to the employer and the workers for the improvement of the occupational health and safety and occupational environment of workers;
- making recommendations to the employer on educational programs promoting the health and safety of workers and compliance with this Part and the regulations and to monitor their effectiveness;
- advising the employer on programs and policies required under the regulations for the workplace and monitoring their effectiveness;
- advising the employer on proposed changes to the workplace or the work processes that may affect the health or safety of workers;
- ensuring that accident investigations and regular inspections are carried out as required by this Part and the regulations;
- participating in inspections, investigations and inquiries as provided in this Part and the regulations; and
- carrying out any other duties and functions prescribed by regulation.

In smaller workplaces where a joint health and safety committee is not required, a worker health and safety representative must be selected by the workers at the workplace who do not exercise managerial functions.

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 cause to believe that doing so would create an undue hazard to the health and safety of any person. 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.

Following a refusal to work, the OHS Regulation mandates an immediate internal investigation by the employer or supervisor to either ensure that any unsafe condition is remedied without delay, or to inform the person who made the report that the report is not valid. If this does not resolve the matter and the worker continues to refuse to work, the supervisor or employer must investigate the matter with any of the following: a joint health and safety committee member, a worker who is selected by a trade union representing the worker, or any other reasonably available worker selected by the worker.

If these two internal investigations do not resolve the work refusal, then both the worker and the supervisor, or the employer, must notify an officer of WorkSafeBC, who is required to investigate the matter without undue delay and issue any necessary orders.

Reference should specifically be made to the OHS Regulation should a work refusal arise.

Reporting obligations

Employers are required to immediately report any incident that causes death, risk of death or seriously injures a worker immediately to the WorkSafeBC emergency and accident line. Other less serious workplace incidents must be reported to WorkSafeBC within three days of the incident. If there is an injury on the job, the injured worker's employer must complete and submit an Employer's Report of Injury of Occupational Disease (form 7).

Violence in the workplace

The OHS Regulation requires employers to establish procedures, policies and work environment

arrangements designed to protect workers from violence and the threat of violence in the workplace.

Workplace violence includes the use, attempted use or threatened use of physical force by a person against an employee in a workplace that causes or could cause physical injury to the employee. It includes any threatening statement or behavior which gives a worker reasonable cause to believe that he or she is at risk of injury.

Bullying and harassment in the workplace

In order to ensure the health and safety of workers, OHS policy requires employers to not engage in bullying and harassment, to develop a policy statement on bullying and harassment, take steps to prevent or minimize bullying and harassment, to develop procedures for reporting and investigating bullying and harassment, to train workers on recognizing, responding to, and reporting bullying and harassment in the workplace and to annually review the policy statement and procedures.

Workplace bullying and harassment is defined as any inappropriate conduct or comment by a person towards a worker that the person knew or reasonably ought to have known would cause that worker to be humiliated or intimated, but excludes any reasonable action taken by an employer or supervisor relating to the management and direction of workers or the place of employment.

Examples of bullying and harassing behaviour include:

- verbal aggression or yelling;
- humiliating initiation practices or hazing;
- spreading malicious rumours; and
- calling someone derogatory names.

WorkSafeBC has the legal authority to levy financial penalties or other sanctions against employers for breaches of the OHS policy on workplace bullying and harassment.

Young and new workers

The OHS Regulation 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 OHS Regulation for specific requirements dealing with young and new workers.

Offences and penalties

Under the WCA, employers who fail to provide payroll information and/or pay their assessments on time are subject to being charged penalties, interest and claims costs.

In addition, WorkSafeBC may impose administrative penalties on employers for the failure to take sufficient precautions for the prevention of work related injuries or illnesses or where the employer has not complied with specific provisions of the WCA, the OHS Regulation or an applicable order or where the employer's workplace or working conditions are not safe. The maximum administrative penalty which may be imposed is

presently $628,034.57.

Also, a person may be prosecuted for contravening the WCA, the OHS Regulation or a specific order. On conviction for an offence, the penalty in the case of a first conviction is a fine of not more than $652,774.38 and in the case of a continuing offence, a further fine of not more than $32,638.75 for each day the offence continues and imprisonment for a term not exceeding six months. In the case of a subsequent conviction, the penalty may be a fine of not more than $1,305,548.74, and in the case of a continuing offence a further fine of not more than $65,277.44 for each day during which the offence continues after the first day and imprisonment for a term not exceeding 12 months.

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.

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.

6. Benefits for parents of critically ill children

An individual who has accumulated at least 600 insurable hours in the last 52 weeks (or since their last benefits claim) can receive benefits for up to 35 weeks if the person's earning have decreased by more than 40% because the person needs to provide care or support to a critically ill or injured child.

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. 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:

1. 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;
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. 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.