mcmillan

Employment Law in Canada

Provincially Regulated Employers - Ontario

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 only has jurisdiction over specific works and undertakings within exclusive federal constitutional jurisdiction, such as shipping, railways and banks. The vast majority of employment relationships, however, do not come within exclusive federal jurisdiction and are governed by the law of the province in which they are located.

The general rule, therefore, is that the provinces have jurisdiction over employment matters generally, while the federal government has jurisdiction only in exceptional cases, in respect of specific works and undertakings. With the exception of Quebec, employment law is very similar from province to province. Only the laws of Ontario, Canada's most populous province, will be addressed in this summary. Information respecting the laws of Quebec, Alberta and British Columbia is available through McMillan's offices in Montreal, Calgary and Vancouver respectively.

Minimum standards of employment

All Canadian provinces have enacted legislation setting out minimum standards that govern the basic terms and conditions of employment, including minimum wage levels, vacation and holiday pay, hours of work, 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 Ontario, minimum standards of employment are defined by the Ontario *Employment Standards Act, 2000* (the "ESA"). Some of the minimum standards at the time of writing are set out here:

Minimum wage	$15.50 (Employees 18 or older) $14.60 (Student Employees Under 18) *Both rates change on October 1 each year according to change in CPI
Hours of work	8 hours per day 48 hours per week Overtime pay over 44 hours per week (1.5 times regular wage)
Public holiday	9 holidays (New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, Thanksgiving Day, Christmas Day, Boxing Day, Family Day)
Vacation Time and Vacation Pay	Two weeks after each 12-months of employment, and 4% wages (if employed less than 5 years) or 6% of wages (if employed 5 or more years) as vacation pay
Pregnancy leave	17 week job-protected leave without pay
Parental/adoptive leave	61 week job-protected leave without pay (if employee took pregnancy leave) 63 week job-protected leave without pay (all other new parents)
Family medical leave	28 week job-protected leave without pay Certificate from a qualified health practitioner stating that a prescribed individual has a serious medical condition with a significant risk of death within a 26 week period
Organ donor leave	13 week job-protected leave without pay
Family caregiver leave	8 week job-protected leave without pay Certificate from a qualified health practitioner stating that a prescribed individual has a serious medical condition
Critical illness leave	37 week job-protected leave without pay for critically ill minor child 17 week job-protected leave without pay for critically ill adult Certificate from a qualified health practitioner stating that a prescribed person is critically ill and requires the care or support of one or more family members and sets out the period during which the person requires the care or support
Child death leave	104 week job-protected leave without pay
Crime-related child disappearance leave	104 week job-protected leave without pay
Domestic or sexual violence leave	10 day and 15 week job-protected leave with pay for first 5 days of leave, remainder without pay
Sick Leave	3 days job-protected leave without pay
Family responsibility leave	3 day job-protected leave without pay
Bereavement leave	Two day job-protected leave without pay
Declared emergency and infectious disease leave	Job-protected leave without pay for as long as employee is not working due to prescribed emergency
Reservist leave	If deployed to a Canadian Forces operation to provide assistance in dealing with an emergency or its aftermath, job-protected leave without pay for the time necessary to engage in that operation

Termination of employment in Ontario

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 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.

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 in writing 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.

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 Ontario, an employee's entitlements on termination without cause arise mainly from three potential sources:

i. minimum standards established by the ESA;
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. Further, while less common than the above sources of termination entitlements, dismissed employees who have been discriminated or reprised against for trying to enforce their rights under human rights, health and safety and employment standards legislation may also be awarded compensation for past wage losses or reinstatement. Part of these are briefly discussed further below.

A. The Employment Standards Act: Notice and Severance Pay

The ESA 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 in the ESA cause is not a general concept, but rather, is comprised of a collection of specific, enumerated types of misconduct. In the absence of such misconduct, notice and severance pay obligations must be considered, and each of these is discussed below.

1. Notice of termination

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

An employer can comply with the notice requirements under the ESA by providing working notice, termination pay in lieu of notice or a combination of both. During the statutory notice period, the employer must generally maintain all benefits and allowances, such as group health, pension and welfare benefits, whether or not the employer chooses to provide working notice or pay in lieu of notice.

Individual notice

Individual notice of termination requirements are based on the length of the employee's period of employment, as follows:

Period of employment	Length of notice
less than three months	no notice
three months or more, but less than one year	one week
one year or more, but less than three years	two weeks
three years or more, but less than four years	three weeks
four years or more, but less than five years	four weeks
five years or more, but less than six years	five weeks
six years or more, but less than seven years	six weeks
seven years or more, but less than eight years	seven weeks
eight years or more	eight weeks

Mass terminations

A different set of requirements exists for mass terminations of employment, which is the termination of employment of 50 or more employees at the employer's establishment within a four- week period. Depending on the number of employees dismissed within that period, the mass notice requirements range from 8 weeks to 16 weeks for each employee (regardless of their period of employment). An employer undertaking a mass termination must comply with certain statutory obligations including the filing of a

Form 1 with the Director of Employment Standards ("Director"). A Form 1 requires information about the terminations, including the number of affected employees, the economic circumstances surrounding the intended terminations and the measures proposed to assist the employees. Notice to the employees is deemed not to have been given until the Form 1 is received by the Director.

2. Severance pay

Severance pay is payable under the ESA to employees with *five or more years of service* in either one of two circumstances:

i. where the severance occurred because of a permanent discontinuance of all or part of the business of an employer at an establishment and as a result, 50 or more employees have their employment relationship severed by the employer within a six- month period; or

ii. where the employees have their employment terminated by an employer with an annual payroll of $2.5 million or more. [emphasis added]

Severance pay is payable at the rate of one week of pay per year of employment (plus a prorated amount for any part-year of employment), to a maximum of 26 weeks' wages. It is important to emphasize that an employee does not qualify for severance pay until completion of five or more years of service.

Unlike the requirement to give notice of termination, severance pay obligations cannot be discharged by way of working notice; severance pay is 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 which has been 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. 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 significantly higher 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 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.

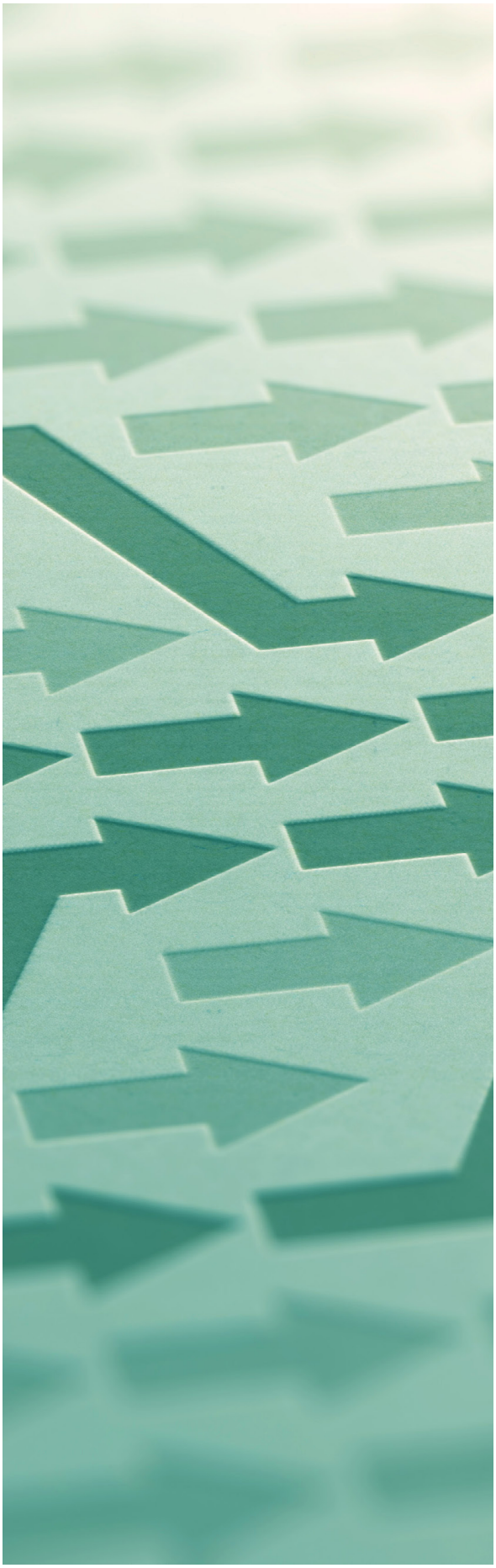
When dealing with non-managerial or non-professional employees, the common law entitlement to notice may be in the range of two to three weeks per year of service, although it may vary from that range.

Is there a "maximum" notice entitlement at common law? A 24-month "cap" on notice has been tacitly acknowledged by some courts, and is exceeded sparingly. 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.

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, plus an employee's legal costs to bring their action. However, employees are entitled, at a minimum, to their ESA notice and severance pay entitlements, regardless of whether they earn income from other sources following termination.

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 severance pay under the ESA. 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 in Ontario have also recognized that employers are held to a duty of good faith and fair dealing when terminating a person's employment. 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 the termination without such cause. Failure to do so may result in an award of additional damages such as for the employer's bad faith conduct.

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.

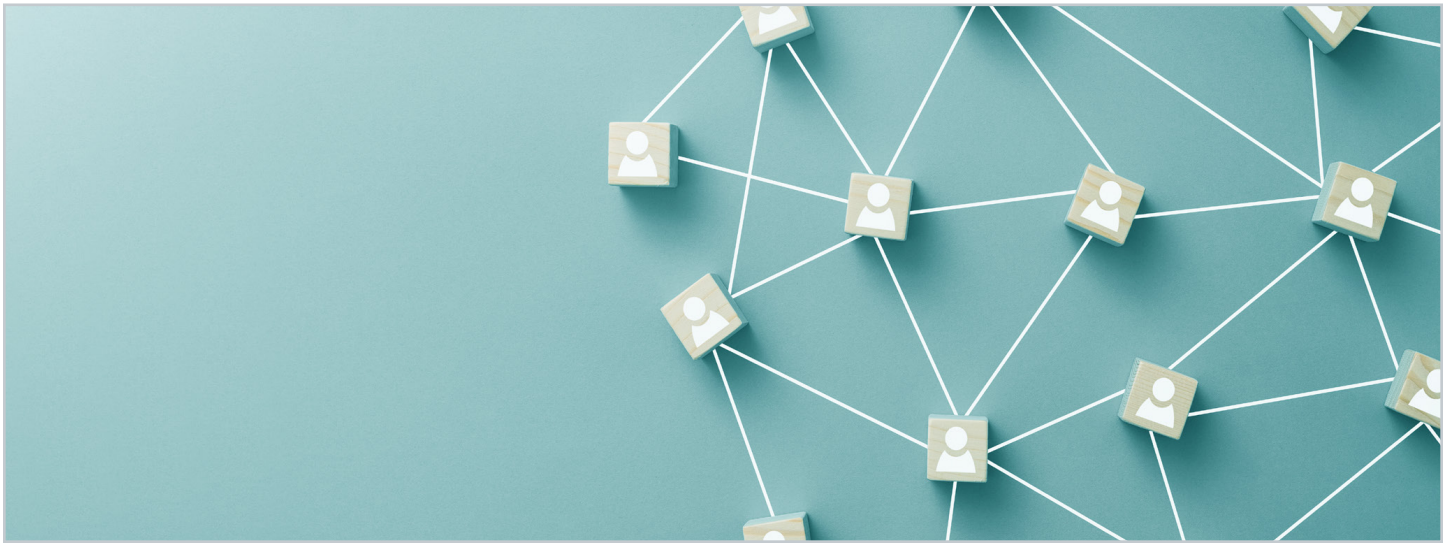
It should be clear from the foregoing summary of common law entitlements that it is generally advisable, if possible, to enter into properly-drafted written agreements with employees, that define (and limit) employee entitlements upon termination of employment. Otherwise, a dismissal can be an uncertain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

Provided the notice provisions of a contract are properly drafted and satisfy at least minimum statutory obligations for termination (including benefit continuation during the statutory notice period), 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.

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 and severance requirements and any rights contained in an applicable collective agreement.



Human Rights Code

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.

In Ontario, employers subject to provincial law must abide by the provisions of the Ontario *Human Rights Code* (the "Code"). Employers operating out of other provinces or who are subject to federal law must abide by the provisions of the human rights legislation in those jurisdictions, which, for the most part, are based on the same principles as Ontario's *Code*.

Purpose of the Code

The *Code* is a provincial law that confers equal rights and opportunities without discrimination in specific areas such as employment, housing and services.

Prohibited grounds of discrimination

Accordingly, the *Code*, subject to numerous exceptions and qualifications, prohibits numerous forms of discrimination which are known as "prohibited grounds of discrimination". With respect to employment, prohibited grounds of discrimination include: race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status and disability, which includes perceived disabilities or an injury that was the subject of a claim under the Workplace Safety and Insurance Act. Harassment in the workplace based on any of the prohibited grounds of discrimination is also prohibited.

The Code specifically prohibits workplace harassment on the basis of sex, sexual orientation, gender identity or gender expression by an employer or another employee.

The right to "equal treatment with respect to employment" covers things such as applying for a job, being recruited, training, transfers, promotions, terms of apprenticeship, 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:

a. the discriminatory standard, requirement or qualification is rationally connected to the function being performed;

b. the discriminatory standard, requirement or qualification 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. Undue hardship is a high threshold for employers to meet.

Complaint and adjudication process

An individual who has reason to believe that he/she has been discriminated against can file an application with the Human Rights Tribunal of Ontario ("Tribunal") setting out the particulars of the allegation. 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. No court action lies solely for claims of discrimination.

Once the application is received by the Tribunal and the respondent has submitted a response, the parties will generally have an opportunity to enter into a voluntary mediation. If the complaint is not settled at mediation, the Tribunal will conduct a pre-hearing assessment followed by a hearing. The Tribunal will then make its decision on the merits of the application and provide written reasons 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:

a. reinstatement in employment;
b. compensation for past wage losses or compensation in lieu of reinstatement;
c. compensation for other lost employment benefits such as pension or medical benefits;
d. compensation or restitution for injury to dignity, feelings and self-respect;
e. implementation of an anti-discrimination policy, or the holding of educational workshops for the employer's employees;
f. monitoring of certain company actions, such as terminations of employment, for a fixed period of time;
g. posting of copies of the Code at the workplace and training with respect to the Code; and
h. other more general measures designed to prevent future discriminatory practices.

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

Accessibility for Ontarians with Disabilities Act

The *Accessibility for Ontarians with Disabilities Act, 2005* ("AODA") sets standards designed to eliminate barriers to accessibility for disabled persons in the areas of customer service, information and communication, employment, transportation, and the built environment. The Integrated Accessibility Standard, which incorporates the customer service, information and communications, employment, and transportation standards are in force to-date. AODA does not limit or replace the requirements under the Code or any other legislation.

Integrated Accessibility Standard

Application

This standard applies to every person or organization that provides goods, services or facilities to the public or other third parties and has at least one employee in Ontario ("Providers").

Overview of general accessibility standard

This standard imposes general requirements on Providers to develop accessibility policies and plans in respect of how Providers will fulfill the standard's requirements, prevent and remove barriers to accessibility, consider accessibility when acquiring self-service kiosks, provide training on the standards as well as the Code (as it relates to disabled persons), and, for Providers with 50 or more employees, file an accessibility report with the Government.

This standard also incorporates the customer service, information and communication, employment, transportation and design of public spaces standards. Due to the narrow scope of the transportation and design of public spaces standards, they will not be addressed.

(a) Customer Service Standard

The Customer Service Standard imposes the following obligations on Providers:

1. Policies. Establish policies that specifically address the requirements set out in the Customer Service Standards. Providers with 50 or more employees must have a written version available to the public upon request.

2. Assistive Devices, Service Animals, Support Persons. The use of assistive devices, service animals and support persons on a Provider's premises must be addressed and, where such use is not possible, alternative arrangements must be considered and made available where possible.

3. Communication. Develop accessible modes of communication for disabled persons.

4. Notice of Temporary Disruption. Develop a procedure to notify of a disruption to a facility or service for disabled persons and identify the reason, expected duration, and any alternative facilities or services.

5. Training. Provide training on prescribed issues to all employees, volunteers and persons who provide goods, services or facilities on the Provider's behalf or who participate in the development of the Provider's policies.

6. Feedback. Develop a process for receiving and responding to feedback on accessibility.

7. Accessibility Report. Providers with between 20 and 49 employees must file with the Government an accessibility report on the Customer Service Standards only.

(b) Information and Communication Standard

The Information and Communications Standard imposes the following obligations on Providers:

1. Feedback. If a feedback process is in place, ensure it is accessible and notify the public of the availability of these accessible feedback formats.

2. Accessible Formats & Communication Supports. If requested, information and communication formats and supports must take into account persons' disabilities and be provided in a timely manner at no extra cost.

3. Emergency Procedure, Plans or Public Safety Information. If prepared and made available to the public, must also be available in accessible formats and with communication supports as soon as practicable upon request.

Websites & Web Content. Providers with 50 or more employees must make websites and web content accessible.

(c) Employment Standard

The employment standard imposes the following obligations on Providers:

1. Recruitment. Notify employees and the public about the availability of accommodation for disabled applicants in the recruitment process.

2. Hiring. Notify successful applicants of policies for accommodating employees with disabilities.

3. Notice of Policies & Procedures. Notify employees of policies used to support employees with disabilities, and any changes to such policies.

4. Accessible Formats & Communication Supports. Provide accessible formats and communication supports for job specific and workplace information, if requested.

5. Workplace Emergency Response. Provide "individualized" workplace emergency response information/assistance for employees with disabilities as soon as practicable, if required.

6. Individual Accommodation & Return to Work Plans. Develop and implement documented processes to prepare individual accommodation and return to work plans for disabled persons that address certain prescribed issues.

7. Performance Management, Career Advancement/ Development & Redeployment. Accessibility needs of employees and individualized accommodation plans must be considered.

Offences and Penalties

While AODA is premised on a system of self-certification, due to significant financial penalties, non-compliance is not an option for most employers. Offences carry significant fines of up to $50,000 for an individual or unincorporated organization and $100,000 for a corporation, for every day or part-day that the offence occurs.

Workplace Safety and Insurance Act

Most employers in Ontario are covered under the *Workplace Safety and Insurance Act,* 1997 (the "WSIA"), which is the provincial mandatory, 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 who suffer from an occupational disease. In exchange, workers relinquish their rights to commence civil actions against employers for negligence causing bodily harm, if their WSIA claims are covered under the insurance plan.

Administration

Responsibility for administrating 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 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?

As noted, the vast majority of employers in Ontario are covered under the WSIA. The WSIA mandates that industries such as mining, manufacturing, automotive, chemical and numerous other sectors are covered.

Although most industries are covered, there are a few industries that are not covered by the mandatory, no fault insurance plan. These include banks, trusts and insurance companies, private health care, trade unions, private day care, travel agencies, clubs (e.g. health club), photographers, barbers, hair salons, shoe shine stands, taxidermists and funeral directing and embalming.

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 voluntarily 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 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. 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. 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. A worker who suffers work-related chronic or traumatic mental stress may also qualify for benefits, although workers are not entitled to benefits for mental stress caused by the employer's decisions relating to the worker's employment, including decisions to change the work performed or working conditions, discipline the worker, or terminate the employment. In some instances, it may be difficult to determine whether a physical injury or mental distress 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 pays workers a percentage of their take home pay, up to a prescribed maximum amount. 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 them for 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 2, 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, etc.).

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 the following four (4) types of benefits to the survivors of a worker who dies as a result of a workplace accident or injury:

   i. survivor payments (lump sum and monthly payments);

   ii. burial and transportation costs;

   iii. bereavement 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 of 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

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 Act

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

In Ontario, occupational health and safety is regulated by the *Occupational Health and Safety Act, 1990* (the "OHSA"). Like most other occupational health and safety legislation in Canada, the OHSA sets out a comprehensive code of conduct for both management and employees, all in the interest of health and safety in the workplace.

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

Administration and enforcement

The Ontario Ministry of Labour administers the OHSA. Inspectors are nominated under the OHSA to enforce its provisions, to inspect workplaces for compliance and to investigate serious accidents or workplace fatalities.

Ontario workplaces are subject to routine compliance inspections and investigations. Inspectors 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 OHSA 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 enacted under the authority of the OHSA, employers are guided in the OHSA by an all-encompassing duty to take all reasonable precautions 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 OHSA is guided by four basic, two-pronged tenets: (1) The Right to Participate; (2) The Right to Know; (3) The Right to Refuse Work and (4) The Right to Stop Work.

Each of these tenets is discussed further below.

The right to participate

As noted above, employers and workers share mutual obligations and rights in respect of 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, etc.), workers also have an extensive role in ensuring safe and healthy workplaces.

Worker participation is generally accomplished through a joint health and safety committee or, for smaller employers, a health and safety representative. Such committee/ representative works alongside the employer, supervisors, etc. to oversee and enforce health and safety in the workplace.

Specifically, some of their responsibilities include:

1. identifying workplace hazards;

2. obtaining information from the employer regarding existing or potential occupational hazards, among other things;

3. making recommendations on waWWys to improve workplace health and safety;

4. investigating work refusals; and

5. investigating serious accidents.

The OHSA places a general duty on employers to cooperate with and assist joint health and safety committees or representatives to carry out their statutory obligations. However, not all workplaces are required to have joint health and safety committees or representatives. The OHSA sets out specific thresholds governing when a committee or representative is required, and further defines rules respecting eligibility for membership in joint health and safety committees.

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 OHSA 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, i.e.:

    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 and substances, as well as records of the handling, use, storage and disposal of such agents and sub stances; and

    iv. carry out prescribed training programs for workers, supervisors and committee members or health and safety representatives (i.e., Workplace Hazardous Material Information System course, forklift training, etc.).

In addition, supervisors are obliged, among other things, to: (1) ensure workers work in compliance with the OHSA; (2) ensure workers properly use or wear any protective clothing or devices required; and (3) take every precaution reasonable for the protection of workers. Finally, the OHSA also imposes various duties and obligations on owners, corporate officers and directors, contractors and suppliers who service equipment or machinery.

The right to refuse work

Workers are entitled to refuse work, or to refuse work with certain machinery or equipment, if they believe it 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 OHSA sets out specific procedures that must be followed in the event of a work refusal. In short, the OHSA mandates an internal investigation process, which involves the worker and any one of the following: a committee member, a health and safety representative or another worker who because of knowledge, experience and training is selected by a trade union that represents the worker, or if there is no trade

union, is selected by the workers to represent them. If the investigation does not resolve the work refusal, then either the employer or the worker must notify an inspector to investigate and resolve the work refusal.

The OHSA 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 OHSA and its regulations should a work refusal arise.

The right to stop work

In exceptional circumstances, the OHSA allows certified committee members to direct an employer to stop dangerous work altogether. However, work can only be stopped if the following three circumstances are met:

1. the OHSA or its regulations are being violated;

2. the violation poses a danger or hazard to a worker; and

3. any delay in controlling the danger or hazard may seriously endanger a worker.

The OHSA provides important limitations on workers' rights to stop dangerous work. Therefore, reference should be made to the OHSA and its regulations should the issue ever arise.

Reporting obligations

Employers are required to report workplace accidents or fatalities to an inspector, the committee, the health and safety representative, the trade union and the Director within prescribed time periods, which range from 48 hours to four days depending on the nature and gravity of the accident.

Violence and harassment in the workplace

The OHSA also requires employers to implement specific measures designed to protect workers from violence, the threat of violence and harassment 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. Workplace violence includes, but is not limited to, acts of physical violence (i.e. hitting, punching, kicking, and intimidation) and threats of violence.

The OHSA defines "workplace harassment" as engaging in a course of vexatious comment or conduct against a worker in a workplace that is known or ought reasonably to be known to be unwelcome. This includes any action that is likely to cause discomfort, offence or humiliation to any employee, such as bullying or verbally abusive behaviour. Workplace harassment, which is contrary to the OHSA, need not be based on one or more of the prohibited grounds of discrimination to be unlawful.

As of September 8, 2016, the definition of "workplace harassment" includes "workplace sexual harassment." "Workplace sexual harassment" means:

(a) Engaging in a course of vexatious comment or conduct against a worker in a workplace because of sex, sexual orientation, gender identity or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome; or

(b) Making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advancement to the worker and the person knows or ought reasonably to know that the solicitation or advance is unwelcome.

On September 8, 2016, several important changes took effect. Employers are required to have the following:

- A workplace harassment policy that addresses workplace sexual harassment;
- Procedures to enable workers to report workplace harassment incidents, including to a secondary individual if the employer or person to whom an incident would normally be reported is the alleged harasser;
- A procedure for investigating incidents and complaints of workplace harassment;
- A procedure for informing both complainants and alleged harassers of the results of any workplace harassment investigation, as well as any resulting corrective action required; and
- A procedure for ensuring that information about an incident or complaint is kept confidential unless required to conduct an investigation or by law.

As of September 8, 2016, OHSA inspectors also have the power to order an employer to hire, at its own expense, an impartial third party to conduct an investigation into an incident of workplace harassment.

Offence and penalties

The OHSA 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 OHSA fails to adequately address any health and safety issues in a workplace, or if the OHSA or its regulations are not complied with, the Ministry of Labour has the authority to enforce the law.

The Ministry of Labour may prosecute any person for a violation of the OHSA or its regulations, or for failing to comply with an order from an inspector, director or the Minister of Labour.

Presently, if prosecuted and convicted of an offence under the OHSA, an individual (i.e., supervisors, directors and officers) can be fined up to $1,500,000 and/or imprisoned for up to 12 months. The maximum fine for a corporation is currently $1,500,000.

Because the OHSA imposes strict liability, individuals who commit an offence risk imprisonment absent the criminal standard of moral blameworthiness. Although such cases are rare, recent case law confirmed that even first time offenders may be sentenced to imprisonment under the OHSA if the offence is sufficiently egregious.

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.

Mandatory occupational health and safety awareness training

As of July 1, 2014, the Ministry of Labour is tasked with enforcing occupational health and safety awareness training which is mandatory for all workers and supervisors in the province. The requirements are established in Ontario Regulation 297/13, Occupational Health and Safety Awareness and Training ("Regulation"), a new regulation pursuant to the OHSA.

Under the Regulation, employers are responsible for ensuring that workers receive health and safety awareness training as soon as practicable. Supervisors are also required to obtain training within a week of performing work as a supervisor.

While the Ministry of Labour has published materials with which to conduct the required training, businesses remain free to use health and safety training programs that are already in place, so long as they satisfy the legislated requirements.

The Regulation is subject to the existing enforcement and penalty provisions included in the OHSA. Employers are required to maintain records of worker and supervisor training, including records of workers and supervisors that are exempt from the new requirements. Employers also have to obtain proof from those claiming an exemption that they have completed a satisfactory training program.

The Regulation's training requirement does not replace other hazard-specific, sector-specific, or competency-specific training that may be required for supervisors or workers under the OHSA or its regulations.

Employers should review any health and safety training program which they already have in place, as well as anything provided to their workers in the past, to determine whether they satisfy the Ministry of Labour's new requirements. If the content of the training does not meet the requirements outlined in the Regulation, the training program needs to be revised. Employers also need to be able to provide written proof that any required training (whether for new employees and supervisors or when being used to support an exemption) has been completed.

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.

Document updated: August 2022. 00-230-0916-04

McMillan is a leading Canadian business law firm dedicated to providing solutions-oriented legal advice through our offices in Vancouver, Calgary, Toronto, Ottawa, and Montréal.

Our clients are located worldwide and include Fortune 100 multi-national corporations, financial institutions, private equity firms, institutional investors, along with large and middle market businesses in nearly every business sector. Our firm values – respect, teamwork, commitment, client service and professional excellence – are at the heart of McMillan's commitment to serve our clients, our local communities and the legal profession.

For more information, please visit our website at www.mcmillan.ca.

Notes

Vancouver

Royal Centre, Suite 1500
1055 West Georgia Street,
Vancouver, BC, Canada
V6E 4N7
604.689.9111

Calgary

TD Canada Trust Tower, Suite 1700
421 7th Avenue S.W.
Calgary, AB, Canada
T2P 4K9
403.531.4700

Toronto

Brookfield Place, Suite 4400
181 Bay Street,
Toronto, ON, Canada
M5J 2T3
416.865.7000

Ottawa

World Exchange Plaza, Suite 2000
45 O'Connor Street,
Ottawa, ON, Canada
K1P 1A4
613.232.7171

Montréal

1000 Sherbrooke Street West
Suite 2700,
Montréal, Québec, Canada
H3A 3G4
514.987.5000