

M E M O R A N D U M

**To:** LAW – North America Labour & Employment Group  
**From:** W. Eric Kay  
**Date:** 15 September 2017  
**Subject:** **Ontario Labour and Employment Law**

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**Overview**

Canadian employment laws generally support employee rights to a greater extent than is the case in the United States. Canadian employers also face a far more intrusive regulatory system. Judicial attitudes towards employee rights and entitlements are also significantly more supportive of employee interests in Canada than in the United States.

**Contract of Employment**

In contrast to the United States where employment is generally “at will”, employment in Ontario is governed by principles of contract law and statute. Employment in Ontario is subject to a contract of employment, either express or implied, which must meet or exceed certain statutory requirements. If an employee does not have a written contract of employment, there is an implied contract of employment. Consequently, where the employer and employee have not agreed to fundamental terms such as notice of termination, the courts will determine what the parties would have agreed to if they had put their minds to it.

**Consideration**

Continued employment does not generally constitute valid consideration to support changes in the terms of employment in Ontario. Accordingly, if restrictive covenants or other terms are added to an Ontario employee’s contract of employment (such as a post-employment non-competition or non-solicitation covenants), fresh consideration such as an increase in salary or benefits should be provided. Again consistent with the contract of employment concept, material adverse changes to the terms and conditions of an Ontario employee’s employment can be only made on reasonable notice.

**Background Checks and Testing**

It is prudent and usually necessary to get written consent from prospective and current employees to conduct a reference, financial, criminal record or other background check in Ontario.

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Pre and post-hiring drug and alcohol testing in Ontario are very restricted, allowable only for safety sensitive positions or following an accident caused by impairment. Alcoholism and drug addiction are considered in Canada to be disabilities for which the law requires accommodation.

### **Termination of Employment**

In this context, employers in Ontario are required to give employees at least statutory notice of termination or pay in lieu pursuant to the applicable federal or provincial labour or employment standards legislation. The Ontario *Employment Standards Act* (“ESA”) requires notice of termination of 1 week per year of service or 1 weeks’ remuneration per year of service in lieu of notice to a maximum of 8 weeks. Benefits must be maintained during the statutory notice period. This standard is a minimum standard only and an employer may be required to give lengthier notice or pay in lieu and benefit continuation as provided by contract or company policy or under the common law.

### **Severance**

The Ontario ESA provides that employees with more than 5 years service, with the employer, which has a payroll in excess of \$2.5 million or is shutting down an establishment and terminating more than 50 employees, are entitled to 1 week’s pay per year of service to a maximum of 26 weeks. Again, this is a minimum requirement. If these thresholds are not met, there is no employer severance obligation under the Employment Standards Act.

### **Wrongful Dismissal**

Where an employee is not provided with sufficient notice or pay in lieu thereof, the courts take the position that the employee has been wrongfully terminated. Damages would generally be assessed in an amount corresponding to the employee’s remuneration for the period of time it would take the employee to find reasonably comparable employment (putting the employee in the position he/she would have been in if the contract, including implied contract, had not been breached). The amount of notice required, subject to such factors as age, position, length of service and availability of alternate employment, can approach 1 month per year of service (inclusive of statutory entitlements to termination and severance pay).

### **Minimum Standards**

Provincial legislation such as the ESA establishes minimum standards for working conditions, wages, hours of work, overtime pay, public holidays, vacation, pregnancy/parental leave, medical leave and personal emergency leave. Contracting out of these minimum standards is prohibited unless a corresponding greater right or benefit is provided.

### **Employment Litigation**

Employment litigation in Canada tends to result in predictable damage awards. There is, however, the possibility of punitive or mental distress damages and damages for employment-related human rights violations if the circumstances warrant an award of such damages.

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Litigation practice and procedure in Canada are quite different from the United States: rights of discovery are limited (ie. a party may as of right examine only one individual from a corporate party and examinations by one party of all adverse parties cannot exceed 7 hours without a court order); civil jury trials are rare; and generally the losing party pays the winning party's costs. In addition, consistent with the employment contract concept, an employer cannot unilaterally make significant changes to the terms and conditions of employment without either sufficient notice or consideration flowing to the employee.

### **Restrictive Covenants**

Ontario courts generally enforce non-competition and non-solicitation covenants that are reasonable (given the business interest to be protected) in time, geographic scope and the nature of the protected business, if they do not unduly limit an employee's ability to secure new employment. Ontario courts do not "blue pencil" or modify restrictive covenants, so a covenant that is too broad will be struck out completely.

### **Executive Compensation**

Information circulars prepared for an annual meeting of shareholders must include detailed disclosure about the compensation paid to certain executive officers and directors in connection with their office or employment by a reporting issuer or a subsidiary of a reporting issuer. The public disclosure requirements for executive compensation of named executive officers ("NEO's") include the following:

- (a) CEO;
- (b) CFO;
- (c) each of the three most highly compensated executive officers, or the three most highly compensated individuals acting in a similar capacity, other than the CEO and CFO, at the end of the most recently completed financial year whose total compensation was, individually, more than \$150,000; and
- (d) each individual who would be an NEO under paragraph (c) but for the fact that the individual was neither an executive officer of the company, nor acting in a similar capacity, at the end of that financial year.

Any awards, earnings, payments, or payables to an associate of an NEO, or of a director, as a result of compensation awarded to, earned by, paid to or payable to the NEO or the director in any capacity with respect to the company must also be disclosed.

### **Changes to Post-Retirement Benefits**

Mandatory retirement is unlawful in Ontario and in most other Canadian provinces pursuant to Human Rights legislation. In Canada, it is difficult to reduce post-retirement benefits without notice and even more difficult to reduce these benefits for existing retirees, again a corollary of the employment contract concept.

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## **Human Rights**

In Ontario, discrimination in employment is prohibited on specified grounds which include race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status or disability. Dealing with complaints under the Ontario *Human Rights Code*, even if frivolous, can be costly and time consuming for employers. In both federal and provincial jurisdictions, disability-based discrimination is prohibited by legislation, and employers have a duty to accommodate the disability. The duty to accommodate disability obligates an employer to accommodate an employee's disability to the point of "undue hardship" to the employer. "Undue hardship" is a very high standard.

## **Canadian Labour Relations**

While the general concepts of certification, the labour management relationship and the process relating to grievances are generally similar in Canada and the U.S., there are some important differences. In Ontario, during the life of a collective agreement, no strikes or lock outs are allowed. This is a fundamental principle in our labour relations law. Generally speaking, it is easier for a Union to achieve certification in Ontario than it would be in the United States. Where an employer threatens, intimidates, makes promises to employees or discredits or campaigns against a Union during an organizing drive, there is a serious risk that an Order of automatic certification or other serious sanction will be made by the Ontario Labour Relations Board. In order to win certification, only a majority of those in the proposed bargaining unit who cast a vote is required. It is also noteworthy that if an employer makes an inability to pay argument, the Union may have the right to require the employer to disclose financial information that would otherwise not be public. Another interesting provision in Ontario's legislation provides in effect that during negotiations, the employer must inform the Union of any pending/future decision that might impact bargaining such as a planned lay-off. Finally, we would emphasize that any purchaser of a unionized business must be well aware of the strong union successor right provisions in Ontario and other Canadian jurisdictions which if overlooked or ignored could have disastrous consequences for a purchaser buying a unionized business.

## **Health and Safety**

The employer must "take every precaution reasonable in the circumstances for the protection of a worker..." This includes a requirement to have a competent supervisor present in the workplace. In Ontario, employees are entitled to refuse to perform unsafe work as determined in the subjective judgment of the employee. An investigation is required by the employer, using the objective standard of what a reasonable person would be expected to do in the circumstances. The employer must fully investigate circumstances of the employee complaint. If the investigation does not persuade the employer that the work at issue is unsafe, the employer can offer the work at issue to another employee. If the employee who has made the complaint is not satisfied after the investigation, then the employee may request an investigation by the Ministry of Labour. If the inspector considers that there has been a violation of Ontario's *Occupational Health and Safety Act*, the employer can be charged under quasi-criminal provisions of the provincial (or if applicable federal) legislation. There is also potential for criminal charges under

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the Federal Criminal Code against officers, directors and senior employees of corporations who fail to take reasonable steps to prevent workplace accidents.

### **Workplace Harassment and Violence**

Since June 2010, all Ontario employers with more than 5 employees have been required to put in place a written policy to prevent harassment and violence in the workplace. As of September 2016, the definition of workplace harassment includes workplace sexual harassment. This means that employers face potential liability for workplace sexual harassment under Health and Safety and Human Rights legislation. Employers will also be under a statutory duty to investigate and report on allegations of harassment or violence in the workplace.

### **Applicable Legislation in Ontario**

An index of labour and employment legislation in Ontario is attached as a schedule hereto. Federally regulated employers such as banks and transportation companies are subject to Federal employment legislation such as the Canadian Labour Relations Act and Canadian Human Rights Code.

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The foregoing is a highlight summary of labour and employment law in Ontario. Should you have any questions or require any assistance in connection with labour or employment matters in Ontario, please contact:



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## **ONTARIO EMPLOYMENT AND LABOUR STATUTES SCHEDULE**

1. Agricultural Employees Protection Act, 2002, S.O. 2002, c. 16
2. Accessibility for Ontarians with Disabilities Act, 2005, S.O. 2005, c. 11
3. Apprenticeship and Certification Act, 1998, S.O. 1998, c. 22
4. Crown Employees Collective Bargaining Act, 1993, S.O. 1993, c. 38
5. Employment Standards Act, 2000, S.O. 2000, c. 41
6. Hospital Labour Disputes Arbitration Act, R.S.O. 1990, c. H.14
7. Human Rights Code, R.S.O. 1990, c. H.19
8. Labour Relations Act, 1995, S.O. 1995, c. 1, Sch. A
9. Ministry of Labour Act, R.S.O. 1990, c. M.29
10. Occupational Health and Safety Act, R.S.O. 1990, c. O.1
11. Ontarians with Disabilities Act, 2001, S.O. 2001, c. 32
12. Ontario College of Trades and Apprenticeship Act, 2009, S.O. 2009, c. 22
13. Ontario Labour Mobility Act, 2009, S.O. 2009, c. 24
14. Pay Equity Act, R.S.O. 1990, c. P.7
15. Personal Information Protection and Electronic Documents Act [2000, c. 5]
16. Provincial Schools Negotiations Act, R.S.O. 1990, c. P.35
17. Public Sector Dispute Resolution Act, 1997, S.O. 1997, c. 21, Sch. A
18. Public Sector Labour Relations Transition Act, 1997, S.O. 1997, c. 21, Sch. B
19. Public Service of Ontario Act, 2006, S.O. 2006, c. 35, Sch. A
20. Retail Business Holidays Act, R.S.O. 1990, c. R.30
21. Rights of Labour Act, R.S.O. 1990, c. R.33
22. Smoke-Free Ontario Act, S.O. 1994, c. 10
23. Trades Qualification and Apprenticeship Act, R.S.O. 1990, c. T.17

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24. Wages Act, R.S.O. 1990, c. W.1

25. Workplace Safety and Insurance Act, 1997, S.O. 1997, c. 16, Sch. A

Full copies of the foregoing statutes can be accessed at <http://www.canlii.org/en/index.html>.

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