

CANADIAN EMPLOYMENT, LABOUR AND PENSION LAW **FAQ**

Navigating through Canadian employment and pension issues can be difficult. Stikeman Elliott's National Employment, Labour and Pension Group has developed a solid reputation for guiding firms through this landscape. Based on our experience, the following is a brief outline of some of the significant issues that corporations might want to consider when entering the Canadian labour market.

Q: Does Canadian law recognize “at-will” employment?

A: No. There is no concept of “at-will” employment in Canada as that term is understood in the United States. Canadian employees who are terminated without just cause are entitled to notice of termination or pay in lieu of notice in accordance with applicable employment standards legislation. Ontario and federal legislation also provide for a statutory severance pay scheme. Non-unionized employees are also entitled to reasonable notice of termination under common law (or pursuant to Quebec’s Civil Code). The common law obligation of reasonable notice can be quite onerous: in most provinces, it can require up to 24 months of compensation. Employees often have an expectation that they are entitled to one (1) month’s compensation per year of service although this is not a rule of law. A written contract can limit an employer’s common law obligation to provide reasonable notice or pay in lieu thereof, provided that it complies with the minimum requirements set out in the relevant employment standards legislation. In Quebec, this will not be sufficient and the parties may not contract out of the obligation to provide reasonable notice.

Q: Can we impose mandatory drug testing on our Canadian employees?

A: Random drug or alcohol testing is only permissible in exceptional cases. Other types of testing, such as pre-employment or post-accident testing, are permitted in safety-sensitive positions in some jurisdictions. The Alberta Court of Appeal recently upheld mandatory pre-employment drug testing for applicants and new hires in safety-sensitive positions in the oil sands industry. The Quebec Court of Appeal recently struck out a provision for random drug testing in safety-sensitive positions in a tire manufacturing plant. Even to the extent that it is possible to impose pre-employment and post-accident alcohol and drug testing policies in the Canadian workplace,

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employers must be aware of the impact of human rights and privacy legislation in the province in which they wish to impose such testing. Alcohol and drug dependence and perceived dependence fall within the definitions of “handicap” and “disability” in such legislation, with the result that there is generally a requirement to show that an employer policy (such as testing for alcohol or drugs) is a bona fide occupational requirement. Given the legal test required, this can often be difficult to achieve.

Q: How do I deal with a disabled employee.

A: Under the Canadian Human Rights legislation, every person has the right to be free from discrimination due to disability or perceived disability. Persons with disabilities have the right to equal treatment, which includes the right to an accessible workplace. Employers have a duty to accommodate the disabled employee up to the point of undue hardship. Such a determination involves a case-by-case analysis that must consider the following factors: (i) financial cost; (ii) safety risks; and, (iii) outside sources of funding, if any. Employers might be able to dismiss an employee for “frustration” of the employment relationship, but in all cases, they should exercise caution before terminating a disabled employee because of the sympathy that courts will show in this type of situation.

Q: What is the equivalent of a 401(k) plan in Canada and should we establish one?

A: Employers looking to establish a “401(k)-like” plan for their Canadian employees generally choose to implement a group registered retirement savings plan (“RRSP”). Although the tax and legal implications vary somewhat among the different Canadian defined contribution arrangements, an RRSP is a common choice for small groups of employees because it is relatively simple to administer. For larger groups of employees, other more tax-efficient options may make more sense. Our pensions and benefits specialists would be pleased to discuss all of your options to help you find the right plan for your organization.

Q: Can my Canadian organization send employee information to our head office outside of Canada?

A: Employers should be aware of the Personal Information Protection and Electronic Documents Act (“PIPEDA”), which is intended to address concerns about the collection of personal information. Interestingly, while PIPEDA applies to all information collected in the course of commercial activities, it does not apply to employee information of a provincially regulated employer (most employers are provincially regulated). Privacy legislation has been introduced in Alberta, British Columbia, and Quebec and applies to the collection, use and disclosure of personal information (including employee information) for provincially governed employers operating in those provinces. Whether a Canadian organization can send employees’ personal information to a U.S.-based head office must be reviewed with reference to the legislation in force in the province in which the organization carries on business (as well as that of the province from which the information is being transferred, if it is not the same province).

Q: Do Canadian jurisdictions recognize the concept of exempt/non-exempt employees?

A: The employment standards legislation of each of the provinces (as well as the federal legislation that governs employers whose business is considered to be a “federal work or undertaking”) contains provisions that specifically set out which occupations are exempt from overtime pay. The categories of “exempt employees” tend to be narrower in Canada than in the United States. Accordingly, U.S. employers should be careful not to characterize like positions in Canada as being exempt without first seeking assurance that these positions are indeed exempt from overtime pay. This is especially so given the recent high-profile class action suits initiated in Canada with respect to unpaid overtime.

Q: Can I enrol my Canadian employees in my US-based incentive plan?

A: An incentive plan designed to comply with US tax and employment law may not be appropriate for Canadian employees. Certain features common in US plans may result in adverse tax consequences for Canadian employees. For example, a bonus

that is not fully payable before the end of the third year following the year in which it was earned (for any reason, including 409A compliance) may be taxable in the year of grant as opposed to the year of payment. Care should be taken in adapting US and other foreign-based plans for a Canadian workforce so as to maximize Canadian tax efficiency and comply with Canadian employment rules.

Q: My Canadian plant has received an application for union certification – what do I need to know?

A: Although the process for union certification differs slightly by province, typically a union must establish a minimum level of employee support through signed membership cards. In most Canadian jurisdictions, a vote is held to determine whether the required level of union support for certification exists although automatic certification can be obtained in certain circumstances. Canadian labour laws restrict the employer's right to unduly influence the certification process and, accordingly, only certain types of information can be communicated to employees during the certification process. In some provinces, if an employer is found to have committed an unfair labour practice preventing the union from obtaining the required support, the applicable labour board may automatically certify the union as the bargaining agent of the employees in question. The time limits for an employer's response are very short, so you should act immediately upon receipt of an application for certification.

Q: Is there a faster and more cost-effective way to litigate civil claims?

A: Recently, Rule 76 of Ontario's Rules of Civil Procedure, the "Simplified Procedure" rule was amended. The amendments increased the monetary threshold from \$50,000 to \$100,000, thereby increasing the likelihood of certain employment litigation matters being governed by Simplified Procedure. The Simplified Procedure process essentially reduces the cost of litigating relatively modest claims by eliminating certain costly procedural elements, such as an extensive discovery process, and by providing for mandatory mediation in Toronto, Ottawa and Windsor, as well as shortened deadlines. Similarly, Quebec's civil procedure has been revised and provides for expedited process for certain types of claims.

Q: What are the leave entitlements for pregnant employees?

A: Although particular leave entitlements differ by province, most Canadian employees who have been employed by their employer for a minimum specified period of time are entitled to take job-protected unpaid maternity and/or parental leave. Where both maternity and parental leave are taken, the maximum combined leave is 52 to 54 weeks (parental leave taken individually generally runs 15 to 17 weeks). In Quebec, such leaves can total up to 70 weeks. Parental leave provisions apply to both natural and adoptive parents, although specific allowances differ by jurisdiction. The employer must return the employee to employment following the leave and most jurisdictions require that it be to the job held before the leave commenced or to a comparable position if the job no longer exists. Employers may face liability under statute and for claims of wrongful dismissal if they do not comply with these requirements.

About Stikeman Elliott

With a full service practice that dates back more than 40 years, the Employment, Labour and Pension Group at Stikeman Elliott advises on all facets of the employment relationship and pension issues. Although members of the group have wide-ranging employment, labour and pension law experience, each has developed expertise in particular areas. This approach ensures that we can provide advice to our national and international clients in a timely, cost-effective and efficient manner. The Group draws upon expertise from the Corporate, Litigation and Taxation Groups of the firm, providing a flexible and multi-disciplinary solutions tailored to the specific needs of our clients. The Group has been recognized as a leader in the Canadian marketplace by *Chambers Global 2010 Guide to the Leading Lawyers for Business*.

Stikeman Elliott's unsurpassed experience in complex cross-border transactions has made us Canadian counsel of choice to leading U.S. investors, financial institutions and corporations.

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