



**BLG**

Borden Ladner Gervais  
*It begins with service*

# Labour & Employment Law in Ontario

A Practical Guide

2018



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## Introduction

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In Ontario, as in other Canadian provinces, laws dealing with employment matters come within the jurisdiction of the local legislature (called the Legislative Assembly of Ontario), except where employment in a work or undertaking falls within one of the heads of federal legislative power of the Parliament of Canada. The latter include: aeronautics; shipping and navigation; longshoring (stevedoring) activities; national railways; banking; inter-provincial and international bus and transport companies; radio and television broadcasting; cable TV and other forms of telecommunications; operations which are declared to be for the general advantage of Canada, or two or more provinces (such as grain elevators and nuclear facilities), and any other business which is an integral and essential part of a federal work or undertaking.

The federal Parliament has exclusive jurisdiction over employment insurance benefits and bankruptcy, whereas workers' compensation is a provincial matter.

Distinct federal and provincial legislation and regulations exist governing minimum employment and labour standards, collective bargaining, occupational health and safety, workplace safety and insurance, human rights, mass termination, pay equity, protection of personal information, pension plans and successor rights and obligations, all of which apply separately to federally and provincially-regulated employers.

This practical guide provides only an overview of Ontario's provincial legislation and regulations. Employers operating in Ontario, or contemplating carrying on business in Ontario, should therefore consult with their professional advisors to determine their specific rights and obligations under applicable statutes and regulations, as well as common law and contractual obligations. Employers falling under federal jurisdiction should exercise particular care, as many of the statutes and regulations reviewed in this paper do not apply to them.



## Employment Standards

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Each jurisdiction in Canada has legislation that sets out the minimum standards to be observed in an employment relationship. It is unlawful for employers to contract out of these standards, and any contractual clause or policy that undercuts statutory minimums will be unenforceable. However, employers may choose to provide conditions of employment that are more favorable than those which are already provided by employment standards legislation.

### Wages

Minimum wage is the lowest wage rate an employer can pay an employee. Most employees are eligible for minimum wage, whether they are full-time, part-time, casual employees, or are paid an hourly rate, commission, piece rate, flat rate or salary.

On January 1, 2018, the general minimum wage rate in Ontario increased to \$14.00 per hour. If the employee is a student under the age of 18 who works 28 hours or less when school is in session, or works during a school break or summer holidays, the minimum wage rate is \$13.15 per hour.

In addition, the *Employment Standards Act, 2000* (the “**ESA**”) establishes distinct minimum wage rates for certain categories of workers. Employees who serve liquor directly to guests in licensed premises and receive tips or other gratuities as a regular part of their work have a minimum wage of \$12.20 per hour as of January 1, 2018. Homeworkers (defined as employees who do paid work in their own homes, such as tailoring for a clothing manufacturer, working at a call center or conducting software writing) receive a minimum wage of \$15.40 per hour as of January 1, 2018. Hunting and fishing guides receive a minimum wage based on blocks of time: \$70.00 as of January 1, 2018 for less than five consecutive hours worked in a day. This amount increases to \$140.00 as of January 1, 2018 in the case for employees working five or more hours in a day (whether or not the hours are consecutive).

## Equal Pay for Equal Work and Status

Under the ESA, no employer shall pay an employee of one sex at a rate of pay less than the rate paid to an employee of the other sex when: (a) they perform substantially the same kind of work in the same establishment; (b) their performance requires substantially the same skill, effort, and responsibility; and (c) their work is performed under similar working conditions.

Furthermore, in amendments to the ESA that came into force on April 1, 2018, employers cannot pay an employee at a rate of pay less than the rate paid to another employee because of a difference in employment status when: (a) they perform substantially the same kind of work in the same establishment; (b) their performance requires substantially the same skill, effort, and responsibility; and (c) their work is performed under similar working conditions. However, there can be a difference in pay if it is made on the basis of: (a) a seniority system; (b) a merit system; (c) a system that measures earnings by quantity or quality of production; or (d) any other factor other than sex or employment status. There is a similar Equal Pay provision that applies to temporary help agencies which must also pay assignment employees an equal rate of pay relative to an employee of the client, but that provision is not subject to the same exceptions listed above. If an employment standards officer finds that an employer or temporary help agency has not paid an employee equally (based on the employee’s employment status), that officer may determine the amount owing to an employee as a result of the contravention. In addition, that amount shall be deemed to be unpaid wages for that employee.

If an employee or assignment employee believes that their rate of pay does not reflect equal pay for equal work or their employment status, the employee may request a review of their rate of pay from their employer or temporary help agency. The employer, or temporary help agency, may then adjust the employee’s pay accordingly or provide a written response to the employee, setting out the reasons for the disagreement with the employee’s belief.



## Hours of Work and Overtime

The ESA sets out limitations on hours of work as well as the threshold at which overtime must be paid.

With respect to hours of work, the ESA stipulates that standard hours of work are eight (8) hours per day and 44 hours per week, while the maximum hours of work permitted are 13 hours in a 24-hour period and 48 hours per week.

Employees are considered to be at work when they are at the workplace waiting for work to be available, when they are required to attend training sessions, when they travel for work purposes (excluding a daily commute), or are on a break.

Under the ESA, employers have considerable flexibility in scheduling regular hours of work. However, the Ministry of Labour has the authority to exercise scrutiny with respect to arrangements that may require employees to work excess hours. An employer may permit an employee to work more than 48 hours a week only if the employer obtains a written agreement from the employee (or from the union if the workplace is unionized) and the employer applies for and obtains approval from the Director of Employment Standards. The requirement to obtain the employee or union's written agreement also applies if an employer wants an employee to work more than eight (8) hours a day. Furthermore, such written agreements between an employee or union and an employer are only valid if, prior to making the agreement, the employer provides the employee or union with the most recent *Information Sheet for Employees About Hours of Work and Overtime Pay* prepared by the Director of Employment Standards. The agreement must specifically include a statement in which the employee acknowledges receipt of this information sheet.

In most cases, the ESA also requires that an employee receives at least 11 consecutive hours off work each day. However, this rule does not apply to employees who are on call, or who are called in to work during a period when they would not normally be working. Generally speaking, this requirement cannot be altered by written agreement between the employer and the employee.

With respect to overtime, the provisions of the ESA provide for overtime at the rate of time-and-a-half for each hour worked in excess of 44 hours in a week. In Ontario, there is no concept of daily overtime. It is permissible to enter into averaging agreements so that an employee's hours of work are averaged over a two or more week period so as not to trigger the 44 hour overtime threshold. Once again, an employer must receive the approval of the Director of Employment Standards in order to implement such an averaging agreement.

In Ontario, an employee and an employer can also agree in writing that the employee will receive paid time off work instead of overtime pay. In this case, the employee must be given one and a half (1 1/2) hours of paid time off work for each hour of overtime work.

Overtime pay and restrictions on hours of work generally do not apply to the level of supervisors and above. In Ontario, a person whose work is supervisory or managerial in character “and who performs occasional non-supervisory work on an irregular or exceptional basis” is exempt from the hours of work and overtime provision. Case law under the ESA has consistently held that to come within this exception, the employee must be making decisions that affect the employment of other employees or be engaged in the direction of the business. To the extent that an employee regularly performs work that is non-managerial in nature, the employee will not qualify for the managerial overtime exclusion – such work may only be performed on an irregular or exceptional basis. Other employees who are exempt from overtime entitlement under the ESA include: ambulance drivers, first aid attendants, firefighters, individuals employed in hunting, fishing and certain agricultural sectors, as well as certain students whose work involves the supervision of children.

As of January 1, 2019, employees who regularly work more than three hours, report for work at the request of their employer and who have worked fewer than three hours, despite being available to work longer, are entitled to be paid the higher of (1) the sum of, the amount the employee earned for the time worked and wages equal to the employee’s regular rate for the remainder of the time, or (2) wages equal to the employee’s regular rate for three hours of work.

Ontario employers are not required to provide their employees with coffee or rest breaks, but if they do so, the employee must be paid at least the minimum wage for that time. If the employee is free to leave the workplace, the employer does not need to pay for the coffee or rest time. Ontario employees are entitled to a meal break of at least 30 minutes after five consecutive hours of work. The meal break is unpaid, unless the employee’s employment contract requires payment.

## Leaves of Absence

Ontario law provides for a number of leaves of absence, including pregnancy and parental leave, personal emergency leave, family medical leave, family caregiver leave, critical illness leave, child death leave, crime-related child disappearance leave, domestic or sexual violence leave, organ donor leave, and reservist leave.

### **Pregnancy and Parental Leave**

#### ***Pregnancy Leave***

Pregnancy leave is up to 17 weeks of job-protected, unpaid time off work. A pregnant employee is entitled to pregnancy leave whether she is a full-time, part-time, permanent or contract employee. The employee must have been hired at least 13 weeks before the baby’s expected birth date.

Before beginning a pregnancy leave, an employee must give the employer at least two weeks' written notice. The employer may also request a certificate from a medical practitioner stating the baby's due date. Finally, the employee will be required to provide two weeks' written notice should she decide to change the start of a pregnancy leave to an earlier date, to a later date, or four weeks' written notice to change the date a pregnancy leave ends to an earlier or later date. An employee's pregnancy leave ends 17 weeks after it begins if she is entitled to parental leave. If she is not entitled to parental leave, the pregnancy leave ends on the day that is the later of, (i) 17 weeks after the pregnancy leave began, and (ii) six (6) weeks after the birth, still-birth or miscarriage, if the leave started before January 1, 2018, or 12 weeks if the leave started on or after January 1, 2018.

Employees on a pregnancy leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

### ***Parental Leave***

As a new parent (e.g., birth parent, adopting parent), the employee has the right to take job-protected, unpaid time off work when a child is born or first comes into his or her care. To qualify, the employee must have been hired at least 13 weeks before the start of the leave.

Employees who take pregnancy leave are entitled to take up to 61 weeks of parental leave. Those who do not take pregnancy leave and all other new parents can take up to 63 weeks of parental leave. Parental leave may begin no later than 78 weeks after the date the child was born or first came into their care. If the child is born or first came into the employee's custody, care and control before December 3, 2017, the time period is 52 weeks instead of 78 weeks.

Except in certain cases, the employee must inform the employer in writing two (2) weeks before beginning a parental leave. In addition, the employee must provide four (4) weeks' written notice if he or she is changing the end date of the leave.

Employees on a parental leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

### **Personal Emergency Leave**

Personal emergency leave is job-protected time off work for up to two (2) paid and eight (8) unpaid days per calendar year. The paid days must be taken first, and are only available to employees who have been employed for one week or longer. Personal emergency leave pay is equal to the wages the employee would have earned had they not taken the leave. If the leave day falls on a day when overtime pay, shift premium, or is a public holiday, the employee is not entitled to premium pay.

This leave may be taken for personal illness, injury or medical emergency, or for the death, illness, injury, medical emergency or urgent matter relating to:

- the spouse of an employee;
- a parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of an employee or an employee's spouse;
- the spouse of an employee's child;
- the brother or sister of an employee; or
- an employee's relative who is dependent on him or her for care or assistance.

'Spouse' includes both married and unmarried couples, of the same sex or the opposite sex.

Before starting the leave, the employee must inform the employer that he or she will be taking a personal emergency leave of absence. If an employee has to begin a personal emergency leave before notifying the employer, the employee must inform the employer as soon as possible. The notice does not have to be given in writing; verbal notice is sufficient. Employers are permitted to request evidence reasonable in the circumstances supporting the employee's entitlement, but cannot require the employee to provide a certificate from a qualified health practitioner. If an employee takes any part of a day as leave, the employer may deem the employee to have taken one day of leave.

Employees on a personal emergency leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

### **Family Medical Leave**

Family medical leave is unpaid, job-protected time off work for up to 28 weeks in a 52-week period.

This leave may be taken to provide care or support to certain family members and people who consider the employee to be like a family member and who has a serious medical condition with a significant risk of dying within a period of 26 weeks.

The medical condition and risk of death must be confirmed in a certificate issued by a qualified health practitioner.

The leave ends after the earlier of (1) the last day of the week in which the family member dies; and (2) the last day of the 52-week period starting on the first day of the week in which the entitlement begins. If two or more employees take this leave due to the same family member, the total of the leaves cannot exceed 28 weeks during the 52-week period.

If the family member does not die within the 52-week period, the employee may take another leave.

Family medical leave is available to an employee whether he or she applies for federal Employment Insurance compassionate care benefits or not. If an employee applies for Employment Insurance compassionate care benefits, a copy of the medical certificate submitted to Human Resources and Social Development Canada may be also used for the purpose of family medical leave.

An employee must inform the employer in writing that he or she will be taking a family medical leave of absence. If an employee has to begin a family medical leave before notifying the employer, he or she must inform the employer in writing as soon as possible after starting the leave.

Employees on a family medical leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

### **Family Caregiver Leave**

Family caregiver leave is an unpaid, job-protected leave for the purpose of caring for or supporting the following family members suffering from a serious medical condition:

- a spouse;
- a parent, step-parent, foster parent, child, step-child, foster child, grandparent, step-grandparent, grandchild or step-grandchild of the employee or the employee's spouse;
- the spouse of the employee's child;
- a brother or sister; and
- a relative who is dependent upon the employee for care or assistance.

An employee is entitled to up to eight weeks of family caregiver leave per calendar year with respect to each family member listed above. If an employee takes any part of a week as leave, the employer may deem the employee to have taken one week of leave. Employers are permitted to request a copy of a medical certificate supporting an employee's family caregiver leave. Employees are required to provide notice of family caregiver leave either before it begins or as soon as possible thereafter.

Employees on a family caregiver leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

### **Critical Illness Leave**

Critical illness leave is unpaid, job-protected time off work to provide care or support to a critically ill family member. An employee is eligible for critical illness leave where a critically ill minor child or adult, who is a family member of the employee, requires care or support of one or more family members. Critically ill means that the baseline state of health of the minor child or adult has significantly changed, and their life is at risk as a result of the illness or injury.

Critical illness leave is available to an employee after having been employed with the employer for six (6) consecutive months, and is available for a period of up to 37 weeks for a critically ill minor child or 17 weeks for a critically ill adult in a 52-week period. Employers are permitted to request a copy of a medical certificate supporting an employee's critical illness leave. Employees are required to inform the employer of their intention to take the leave, and provide a written plan indicating the weeks during which the employee will be taking the leave, either before taking the leave or as soon as possible thereafter.

Employees on a critical illness leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

### **Child Death Leave and Crime-Related Child Disappearance Leave**

Child Death Leave and Crime-Related Child Disappearance Leave are separate leaves under the ESA, providing unpaid, job-protected time off. An employee is eligible for child death leave if their child, step-child or foster child under 18 years of age dies of any cause, and are eligible for crime-related child disappearance leave if an employee's child, step-child or foster child who is under 18 years of age disappears as a result of a crime.

Child death leave is available to an employee after having been employed with the employer for six (6) consecutive months, and is available for a period of up to 104 weeks within a 105-week period if a child of the employee dies.

Crime-related child disappearance leave is available to an employee after having been employed with the employer for six (6) consecutive months, and is available for a period of up to 104 weeks during the 105-week period that begins in the week the child disappears if it is probable, considering the circumstances, that the child disappeared as a result of a crime. An employee is not entitled to this leave of absence if the employee is charged with the crime or if it is probable, considering the circumstances, that the child was a party to the crime.

Entitlement to crime-related child disappearance leave ends if the circumstances no longer seem probable that the child died or disappeared as a result of a crime. If the child is found alive within the 104-week period, the employee is entitled to remain on leave for 14 days after the child is found. If the child is found dead, the leave ends at the end of the week in which the child is found and the employee will be entitled to commence a Child Death Leave of up to 104 weeks.

Employers are permitted to request evidence reasonable in the circumstances supporting the employee's entitlement. Employees are required to advise the employer of their intention to take the leave in writing, and provide a written plan indicating the weeks during which the employee will be taking the leave, either before taking the leave or as soon as possible thereafter.

Employees on a Child Death Leave or Crime-Related Child Disappearance Leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

## Domestic or Sexual Violence Leave

Domestic or sexual violence leave is job-protected paid leave for the first five days. An employee is eligible for domestic or sexual violence leave if the employee or the employee's child, step-child, foster child, or child who is under legal guardianship of the employee under 18 years of age experiences domestic or sexual violence or the threat of domestic or sexual violence, and the leave is taken for seeking medical attention, obtaining services from victim services organizations, obtaining counselling, relocating, seeking legal or law enforcement assistance, or other prescribed purposes. An employee is not eligible for domestic or sexual violence leave if the violence is committed by the employee.

Domestic or sexual violence leave is available to an employee after having been employed with the employer for 13 weeks, and it consists of two blocks of time off: 10 days and 15 weeks. The first five days of leave are paid. The pay is equal to the wages the employee would have earned had they not taken the leave. If the leave day falls on a day when overtime pay, shift premium, or is a public holiday, the employee is not entitled to premium pay.

Employers are permitted to request evidence reasonable in the circumstances supporting the employee's entitlement. Employees are required to advise the employer of their intention to take the leave in writing, either before taking the leave or as soon as possible thereafter. The employer must ensure that mechanisms are in place to protect the confidentiality of records given to or produced by the employer related to this leave.

## Organ Donor Leave

Organ donor leave is job-protected leave of up to 13 weeks, for the purpose of undergoing surgery to donate all or part of certain organs to a person. In some cases, organ donor leave can be extended for an additional period of up to 13 weeks.

An employee is entitled to organ donor leave whether he or she is a full-time, part-time, permanent, or contract employee.

To qualify for organ donor leave, the employee must have been employed by his or her employer for at least 13 weeks prior to the commencement of the leave and must undergo surgery to donate all or part of one of the following organs to another person:

- Kidney
- Liver
- Lung
- Pancreas
- Small bowel

Generally, organ donor leave begins on the date of the surgery. However, it may begin on an earlier date, as specified in a certificate issued by a legally qualified medical practitioner.

An employee who wishes to take organ donor leave must provide the employer with at least two weeks' written notice both before beginning or extending the leave, if possible. If this is not possible, the employee must provide written notice as soon as possible after beginning or extending the leave. The employer may ask the employee to provide a medical certificate justifying the leave.

Employees on an organ donor leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

### **Reservist Leave**

Employees who are military reservists and who are deployed to an international operation or to an operation within Canada that is or will be providing assistance in dealing with an emergency or its aftermath (including search and rescue operations, recovery from natural disasters such as flood relief, military aid following ice storms, and aircraft crash recovery) are entitled under the ESA to unpaid leave for the time necessary to engage in that operation. In the case of an operation outside Canada, the leave would include pre-deployment and post-deployment activities that are required by the Canadian Forces in connection with that operation.

In order to be eligible for reservist leave, an employee must have worked for the employer for at least six (6) consecutive months. Generally, reservists must provide their employer with reasonable written notice of the day on which they will begin and end the leave.

Employees on a reservist leave are entitled to be reinstated to the same position if it still exists or to a comparable position if it does not.

### **Leave Relating to Elections**

Employees acting as returning officers or poll officials are entitled to an unpaid leave of absence to perform their election duties. The employee must provide the employer with at least seven (7) days' notice of the leave.

Employees must also be provided with three consecutive hours off of work to vote on Election Day. If the employee's hours of work do not allow for three consecutive hours off within established voting hours, the employer must give the employee sufficient time off with pay to meet the three consecutive hour requirement. An employer cannot make deductions from wages or impose a penalty on any employee for the time the employer allows the employee to vote.

Finally, an employer may exercise its discretion as to how it chooses to schedule the timing of any leave relating to either federal or provincial elections.



## Jury Duty

If an employee is required to attend court as a juror, the employee is entitled to an unpaid leave for the duration of the duty. An employer cannot terminate an employee, change a condition of employment or impose sanctions against an employee on the grounds that he or she has been summoned to act as a juror.

## Individual Notice of Termination of Employment

Assuming that an employee has not engaged in “willful misconduct, disobedience or willful neglect of duty,” certain entitlements at termination arise under the ESA.

### Notice Provisions

The ESA provides for notice of termination (e.g., working notice) or pay in lieu of notice. Under the ESA, a person’s employment is terminated if the employer:

- dismisses or stops employing an employee, including an employee who is no longer employed due to the bankruptcy or insolvency of the employer;
- “constructively” dismisses an employee and in response the employee resigns within a reasonable time (constructive dismissal may occur when an employer makes a significant change to a fundamental term or condition of an employee’s employment without the employee’s actual or implied consent); or
- lays an employee off for a period that is longer than a “temporary layoff.”

In most cases, when an employer ends the employment of an employee who has been continuously employed for three (3) months, the employer must provide the employee with either written notice of termination, termination pay or a combination thereof (as long as the notice and the termination pay together equal the length of notice the employee is entitled to receive).

When an employee is terminated, the written notice required under the ESA is generally determined by how long someone has been employed by an employer. The following chart specifies the periods of statutory notice required:

Length of Employment	Notice Required
Less than 3 months	None
3 months but less than 1 year	1 week
1 year but less than 3 years	2 weeks
3 years but less than 4 years	3 weeks

Length of Employment	Notice Required
4 years but less than 5 years	4 weeks
5 years but less than 6 years	5 weeks
6 years but less than 7 years	6 weeks
7 years but less than 8 years	7 weeks
8 years or more	8 weeks

An employee who does not receive the written notice required under the ESA must be given termination pay in lieu of notice and must have their benefit coverage, if any, maintained through the notice period. Termination pay is a lump sum payment equal to the regular wages for a regular work week that an employee would otherwise have been entitled to during the written notice period plus at least 4% vacation pay upon such wages (employees having length of employment of 5 years or more are entitled to at least 6% vacation pay). As a general statement and in our experience, most employers in Ontario terminate employees effective immediately and provide pay in lieu of notice.

### Severance Pay

Severance pay under the ESA compensates an employee for loss of seniority and job-related benefits, and recognizes an employee's long service. Severance pay is not the same as termination pay.

Under Section 64 of the ESA, an employer is obligated to make severance payments to those employees with five (5) or more years of service if:

- 50 or more employees are terminated in a period of six (6) months or less and the terminations are caused by a permanent discontinuance of all or part of the business of the employer at an establishment; or
- an employee is terminated by an employer with an annual payroll (in Ontario) of at least \$2.5 million dollars.

A person's employment is 'severed' when their employer:

- dismisses or stops employing the employee, including an employee who is no longer employed due to the bankruptcy or insolvency of his or her employer;
- "constructively" dismisses the employee and the employee resigns in response within a reasonable time (constructive dismissal may occur when an employer makes a significant change to a fundamental term or condition of an employee's employment without the employee's actual or implied consent);

- lays off the employee for 35 or more weeks in a period of 52 consecutive weeks;
- lays off the employee because all of the business at an establishment closes permanently (an 'establishment' can, in some circumstances, include more than one location); or
- gives the employee written notice of termination and the employee resigns after giving two (2) weeks' written notice, and the resignation takes effect during the statutory notice period.

The amount of severance pay an employee is entitled to receive is calculated by taking the employee's regular wages for a regular work week, multiplied by the sum of:

- the number of years of employment completed; **and**
- the number of months of employment completed divided by 12 for a year that is not completed.

The maximum amount of severance pay required to be paid under the ESA is 26 weeks. It cannot be satisfied by giving notice: a payment is required. Any entitlement an employee may have to be paid severance pay under the ESA is entirely separate from the requirement to provide notice of termination under the ESA.

## Public Holidays

Pursuant to the ESA, Ontario has the following 9 public holidays:

- New Year's Day
- Family Day (Third Monday of February)
- Good Friday
- Victoria Day
- Canada Day
- Labour Day
- Thanksgiving Day
- Christmas Day
- Boxing Day (December 26)

Employees qualify for public holidays as soon as they commence employment. However, they must work their regularly scheduled shift before and after the holiday in order to qualify for public holiday pay, unless they have a reasonable cause for not working. An employee's public holiday pay for a given public holiday is equal to the total amount of regular wages earned and vacation pay payable to the employee in the four weeks before the work week in which the public holiday occurred, divided by 20. However, this calculation formula has been under review by Ontario's Ministry of Labour as of July 2019 and may be subject to changes in the future.

Employees who have satisfied this qualification are entitled to the holiday off with pay. However, there is no prohibition against an agreement to work on a holiday. Such an agreement may stipulate that (1) an employee who works on a public holiday will be paid public holiday pay plus premium pay for the hours worked on the public holiday or, (2) their regular rate for hours worked on a holiday and they receive another day off (called a “substitute” holiday) with public holiday pay. If a day is substituted for a public holiday, an employer must provide the employee with a written statement, before the public holiday that sets out (1) the public holiday on which the employee will work; (2) the date of the day that is substituted for a public holiday; and (3) the date on which the statement is provided to the employee.

In addition to the ESA public holidays, the first Monday in August, which is often called the “Civic Holiday”, is generally observed in Ontario. This is not a public holiday under the ESA but is rather a municipal holiday and, as a result, the ESA rules do not apply. Accordingly, the decision to give employees the day off rests with the employer.

## Annual Vacation

Under the ESA, employees are entitled to both vacation time and vacation pay.

### Vacation Time

Ontario employees are entitled to two (2) weeks of vacation time after each vacation entitlement year that the employee completes, if the employee’s period of employment is less than five years; or at least three (3) weeks of vacation time after each vacation entitlement year that the employee completes, if the employee’s period of employment is five years or more. Ordinarily, a vacation entitlement year is a recurring 12 month period beginning on the date of hire. Where the employer has established an alternative vacation entitlement year that begins on a date other than the date of hire, the employee is also entitled to a pro-rated amount of vacation time for the period (referred to as a “stub period”) that precedes the alternative vacation entitlement year.

The vacation entitlement year and stub period will include time the employee spends away from work because of:

- layoff;
- sickness or injury;
- pregnancy, parental, family medical, personal emergency, declared emergency, organ donor and reservist leaves; and
- any other approved leaves (e.g., where there is no break in the employment relationship).

The vacation time earned with respect to a completed vacation entitlement year or a stub period must be taken within 10 months following the completion of the vacation entitlement year or stub period. Under the ESA, the employer has the right to schedule vacation as well as an obligation to ensure the vacation time is scheduled and taken before the end of that 10 month period. If the employee's period of employment is less than five years, the vacation must be a two-week period or two periods of one week each, unless the employee requests in writing that the vacation be taken in shorter periods and the employer agrees to that request. If the employee's period of employment is five years or more, the vacation must be a three-week period or a two-week period and a one-week period, or three periods of one week each, unless the employee requests in writing that the vacation be taken in shorter periods and the employer agrees to that request.

An employee may forego vacation time with the employer's written agreement and the approval of the Director of Employment Standards.

### **Vacation Pay**

If the employee's period of employment is less than five years, vacation pay must be at least 4% of the employee's "gross" wages (excluding any vacation pay) earned in the 12 month vacation entitlement year or stub period (where applicable). If the employee's period of employment is five years or more, vacation pay must be at least 6% of the employee's "gross" wages (excluding any vacation pay) earned in the 12 month vacation entitlement year or stub period (where applicable). An employee's gross wages include regular earnings, commissions, most bonuses, overtime pay, holiday pay and termination pay.

In most cases, the vacation pay earned during a completed vacation entitlement year or stub period must be paid to an employee in a lump sum at a time before he or she takes the vacation time earned. There are four (4) exceptions:

- when the vacation time is being taken in periods of less than one (1) week;
- when the employee has agreed in writing that his or her vacation pay will be paid on each pay cheque as it accrues;
- if the employee agrees in writing, the employer can pay the vacation pay at any time agreed to by the employee; and
- if the employer pays the employee his or her wages by direct deposit into an account at a financial institution.

### **Compliance Issues Under Employment Standards Legislation**

In Ontario, the Ontario Ministry of Labour administers and enforces the ESA and its regulations. Ministry staff, known as Employment Standards Officers, investigate complaints to determine whether or not a violation has occurred and can order an employer to pay amounts found owing. Investigations are usually initiated in response to a complaint made by an employee but, in rare circumstances, may also be initiated by the Ministry.

## Filing a Claim

Most employees covered under the ESA may file a claim with the Ontario Ministry of Labour if they believe their employer is not complying with the law. If the employee and the employer are unable to resolve the matter, the employee may choose to file a claim. An employee who is covered by the ESA cannot file a claim if the employee is represented by a trade union, or if the employee has filed a claim in a court of law.

With respect to the recovery of wages, an employee must file a written claim with the Ministry of Labour within six (6) months of the date the wages became due in order to try to recover them. There are 2 exceptions:

- Unpaid vacation pay may be recovered if the claim is filed within 12 months of the date the vacation pay came due.
- Where an Employment Standards Officer finds that an employer has violated the same section of the ESA more than once with respect to an employee, the employee will be entitled to recover the wages due for all violations of the same provision that occurred in the 12 month period before the claim was filed. At least one of the violations must have occurred in the 6 month period before the claim was filed.

In other cases, the employee has two (2) years after a violation to file a claim with the Ministry. This two (2) year time limit applies where:

- The employee believes an employer has violated a non-monetary section of the ESA (e.g., the employer did not give proper meal breaks, failed to provide wage statements); or
- The employee is seeking compensation and/or reinstatement in cases where, for example, the employer has penalized or has threatened to penalize an employee for exercising rights under the ESA.

## Investigating Violations

Once a claim has been filed, it is assigned to an Employment Standards Officer for investigation. After investigating a claim, the Employment Standards Officer makes a decision as to whether the employer has or has not complied with the ESA.

If the Officer finds that the employer has complied with the ESA, in cases where an employee filed a claim with the Ministry of Labour, the employee is notified in writing of this decision, and can apply for a review within 30 days.

If the Officer finds that the employer has not complied with the ESA, the employer may resolve the issue by voluntarily complying with the Officer's decision (e.g., by paying money that is owing to an employee or employees, or by adopting new, or changing existing, workplace practices).

## Enforcement

If an employer is unwilling or unable to comply with an Employment Standards Officer's decision, the Officer can issue an order to pay wages to an employee or employees, a compliance order, a ticket, a notice of contravention or, for certain violations, an order to reinstate and/or compensate an employee. An order to compensate an employee can be paid to the employee directly or in trust to the Director of Employment Standards.

A \$10,000 cap applies to an order by an Employment Standards Officer in respect of any unpaid wages that came due prior to February 20, 2015. As a result of recent amendments to the ESA, an order issued by an Employment Standards Officer for unpaid wages that came due on or after February 20, 2015 is not subject to any limit. Similarly, no limit applies to claims under those sections of the ESA in which reinstatement and/or compensation can be ordered (e.g., provisions relating to leaves of absence; the right of an employee not to be penalized for exercising his or her rights under the ESA, such as a retail employee's right to refuse to work a public holiday).

Where an order to pay wages is issued, the employer must either comply or seek an appeal of the order within 30 days of the date the order is served. By contrast, compliance orders will specify a particular date by which the employer is required to comply.

## Review (Appeal) of an Officer's Decision

If employees or employers are not satisfied with an Officer's decision, they may have the right to apply for review (appeal). Reviews are conducted by the Ontario Labour Relations Board, an independent, quasi-judicial tribunal.

For employees, the Application for Review must be submitted within 30 days of the date the letter advising the employee that an order has been issued against the employer, or advising that the Officer has refused to issue an order has been served on the employee. For employers, the Application for Review must be submitted within 30 days of the date of being served with an order or notice.



## Labour Relations

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### Climate of Labour Relations in Ontario

Between 1981 and 2012, rates of unionization generally declined across all provinces. The rate of unionization in Ontario – 27% – was the second lowest among Canadian Provinces in 2012 and remained relatively unchanged from Ontario’s 1999 unionization rate. Union density is far greater in Ontario’s public sector than the private sector, where approximately 78% of Ontario’s workers are employed.

### Procedure for Certification

#### Union Access and Solicitation

The labour relations legislation in Ontario, the *Labour Relations Act, 1995* and labour board case law seek to strike a reasonable balance between the employer’s property rights, its legitimate interest in maintaining its operations and the right of its employees to organize. The genesis of organizing campaigns can occur in many different ways; however, most often it is a dissatisfied employee or a group of employees who invite a union organizer to meet with their fellow employees. The union representative will make contact with the workforce and will launch an organizing campaign if there appears to be a core of support.



A union may independently target a business for an organizing campaign, for reasons such as size, membership potential or its proximity to other businesses represented by the union. It is usually in the union's interest to move quickly once the campaign begins, to get the necessary cards signed and to file its application for certification.

The union organizer's first challenge is to identify and obtain access to the employees the union seeks to represent. The organizer relies heavily on insiders for assistance in compiling a list of employees, persuading employees to attend union meetings, making personal introductions to facilitate contact outside the workplace and carrying the message to their fellow employees. The union organizer has no right to enter the employer's premises (except in very limited circumstances), which is the best place to raise the merits of unionization with uncommitted employees. In contrast, the insider has daily access to the workplace and is permitted to discuss union matters with other employees during break periods. This is why lists of employee addresses and phone numbers should always be kept in a secure place.

As of January 1, 2018, the *Labour Relations Act, 1995* allows a union to make an application to the Ontario Labour Relations Board (the "**Board**"), for a list of employees in a proposed bargaining unit of any employer. Upon receipt of an application for an employee list, an employer may disagree with the proposed bargaining unit or the estimated number of employees. If the Board determines that 20 percent or more of the individuals in the proposed bargaining unit were members of the union on the date of the application, it can direct the employer to provide the list. The list must include the names, phone numbers and personal emails for each employees (if the employee has provided this information to the employer). The Board also has the discretion to order additional content such as job titles, business addresses, and other means of contacting an employee (but not a home address). The use of the list is restricted for the purpose of a campaign by the union to establish bargaining rights, and must be destroyed after one year.

With the exception of vendors, customers and other authorized personnel, an individual not employed by the employer, including an outside union representative (except in very limited circumstances), has no right to be on company property. The employer has the legal right to ask such a person to leave the property.

Employers are permitted to maintain and enforce a policy that restricts the solicitation and distribution of non-work related materials. The employer has a legitimate interest in promoting a working environment in which employees are neither distracted nor harassed by non-work related causes and solicitation. It is for this reason that bulletin boards and other methods of internal communication should not be available for the transmission of non-work related materials (e.g., notices, messages and other information relating to charities, political causes, commercial activities and union affairs). If the internal communication network is routinely used for personal or non-work related purposes, there will be little justification for refusing access to employees who wish to advance any union, political or other cause.

Individual employees who are authorized to be on the employer's premises are free to discuss union matters during break periods. They are also permitted to distribute union materials during non-working time. However, it is not permissible for an employee to engage other employees in discussion over union issues during the performance of their duties on company time.

## **Employer Communication**

Employers encounter a great deal of difficulty in communicating with employees if the communications are initiated solely in response to the threat of unionization. The opportunities for the employer to influence employee decisions are limited once union organizing has commenced. It is crucial for management to understand the restrictions on employer communications within the context of a union organizing campaign.

There are numerous provisions in the provincial labour relations statutes that deal with "unfair labour practices" such as the employer's interference with unions, the employer's interference with employees' rights, and intimidation and coercion. These provisions significantly limit an employer's freedom of action when dealing with union organizing or an application for certification. An employer is free to express its views in these situations, but may not use intimidation or coercion of any kind that could reasonably have the effect of compelling or inducing a person to become or refrain from becoming a member of a trade union, including threats (e.g., of plant closure or job losses) or promises (e.g., of better pay or benefits) in an attempt to defeat the union. Similarly, an employer may not question employees with respect to their position (or the position of other employees) regarding union representation or the union's activities. Employers also may not conduct surveillance to ascertain which employees support the union or to develop intelligence regarding the union's activities.

In general, Canadian employers are not afforded the same level of free speech that exists for employers in the United States when dealing with union organizing campaigns. The type of employer statements considered permissible in Canada would be somewhat tame by American standards. Furthermore, employer statements are usually limited to letters delivered to employees, while videos and film screenings and other such efforts are not common. Finally, so-called "captive audience" speeches, in which employees are asked to attend to listen to management's reaction to the union organizing campaign, are viewed with inherent suspicion by the Board, and must be carefully managed and scripted.

The following are examples of certain permitted and prohibited employer campaign conduct:

### ***Permitted Conduct***

- The employer has the right to express a preference for remaining non-union and for maintaining a direct relationship with employees.

- The employer has the right to communicate with employees on the positive features of the existing employment relationship (e.g., wages, benefits, continuity of employment, etc.). It is legitimate for the employer to demonstrate to employees that pay and benefits are competitive with industry and local standards and to explain the steps taken, such as regular wage surveys, to ensure competitiveness.
- The employer has the right to correct or clarify misinformation circulated by the union during the organization campaign. Union letters and leaflets often create an opportunity for the employer to respond.
- The employer has the right to explain how the certification process works (e.g., stages in the procedure, how support for the union is determined, and the employees' right to participate).
- The employer may explain the significance of signing a union card.
- The employer may point out the effects of the collective bargaining process, such as the deduction of union dues. However, statements predicting the adverse consequences of unionization, such as those often made in the United States, are not permitted.
- The employer may issue communications explaining its position if balanced by statements recognizing the employees' freedom of choice and the legal right to unionize.

### ***Prohibited Conduct***

- Actively soliciting information from employees about the union organization drive or asking employees to state their views on unionization.
- Prohibiting discussion of union issues or distribution of union literature among employees in the workplace during non-working time, unless such activity disrupts employees in their work.
- Shadowing employees who attempt to communicate with other employees on union issues during non-working time.
- Disciplining or discharging an employee for participating in activities on behalf of the union.
- Supporting or applying less restrictive conditions to employees who oppose the union campaign.
- Threatening loss of jobs, layoffs, reductions in income, reduction in hours, or discontinuance of any privilege or benefits in the event that a union is certified.
- Convening compulsory captive audience meetings to discuss union issues.

The existence of an organizing campaign does not prevent an employer from managing its business and, if necessary, from disciplining or discharging employees. However, the labour relations statutes in each province clearly prohibit any reprisal for employee participation in an organizing campaign. Remedies may include reinstatement, back pay and a declaration that the employer violated the statute.

## Certification Process

There are three (3) ways for a union in Ontario to become legally recognized as the employees' exclusive bargaining agent:

1. by applying to the Board for certification;
2. through voluntary recognition by an employer; and
3. as a result of a remedial order arising from employer misconduct.

By far, the most common method is an application for certification. The labour relations statutes in each province establish the certification procedure by which a union can acquire the right to represent employees of an employer.

The *Labour Relations Act, 1995* excludes from the definition of "employee" individuals who exercise managerial functions or functions of a superintendent or who are employed in a confidential capacity in matters relating to labour relations or personnel (e.g., salary information, critical financial figures and projections, personnel files, etc.). Managers who are excluded must exercise managerial or supervisory "control" over an organization or over the employment relationships of those within the organization.

A union may file an application for certification with respect to unrepresented employees at any time. The application must be accompanied by membership evidence showing the union has the requisite level of support in the form of union membership cards signed and dated by employees in the proposed bargaining unit. The Board will only consider the number of employees who are members of the union on the certification application date.

One of the key elements in the certification process is the Board's determination of an appropriate bargaining unit. The decision will determine the scope of relevant membership evidence and define the unit on behalf of which the union may ultimately bargain. The union proposes the initial bargaining unit description in the application for certification. The employer has the opportunity to agree or disagree in the response. If there is a dispute, a labour relations officer may be appointed to assist the parties and the Board will make the final determination as to the appropriate bargaining unit. The Board has exclusive authority to make the determination of the appropriate bargaining unit.

Once it is determined that 40% or more of the eligible employees in the union's proposed bargaining unit have signed union membership cards, the Board will order a secret ballot representation vote (except where the union has elected to proceed with card-based certification for the select industries where this is permitted). The vote usually takes place within five (5) business days of the union filing its application for certification.

If more than 50% of the ballots cast in a certification vote are in favour of the union, the union will be certified as the exclusive bargaining agent for every employee in the bargaining unit, whether or not the employee is a member of the union. If the union receives 50% or

fewer of the ballots cast, that union will lose its application. The union will also be barred from re-applying for certification for one year. This one-year statutory bar also applies to other trade unions.

An employer that has unlawfully attempted to prevent the formation of a collective bargaining relationship may have union certification imposed by the Board as a remedy for its misconduct.

As of January 1, 2018, three industries are subject to card-based certification without a vote:

- a) Building services industry
- b) Home care and community services industry
- c) Temporary help agency industry

The Union's application for certification must include evidence that at least 40% of the employees in the proposed bargaining unit are members of the union. The employer must provide information within two days of receiving notice of the application for certification, including the names of the employees in the proposed bargaining unit and a description of the bargaining unit it says is appropriate. If this threshold is met, the Board can certify the union without a vote, subject to any dispute about the bargaining unit.

A case involving a United States retailer demonstrates an extreme application of the Board's power to grant automatic certifications. The decision was so controversial that it led to the repeal of the Board's authority to order remedial certification, a power that has since been restored. The union's key allegation against the retailer was that it refused to answer questions posed by employees on matters relating to job security. In the context of the retailer's commitment to a culture of openness and communication, the Board found that the failure of management to answer employee questions relating to the possible closure of the store was a breach of the statute and as a remedy automatically certified the union. As an interesting footnote, a short time later the employees decertified the union, through a process that is described below.

## Procedure for Decertification

The *Labour Relations Act, 1995* permits employees to apply to terminate bargaining rights at specified times.

### Decertification Process

If the union has not been successful in negotiating a collective agreement within one year of certification and is not endeavouring to do so, an employee claiming to represent a majority of the employees can bring an application to terminate the bargaining rights. If a collective agreement has been negotiated, the same application can be brought during the last three (3) months of the agreement's term.

In dealing with this application, the Board must satisfy itself that a majority of the employees no longer wish to be represented by the union. If the Board determines that 40% or more of the employees in the bargaining unit appear to have expressed a wish to no longer be represented by the union, it will order a secret ballot representation vote which is to take place within five (5) business days of the filing of the application. If 50% of the ballots cast are cast in opposition to the union, the Board will declare that the union no longer represents the employees in the bargaining unit.

The Board must also be satisfied that the employer has not assisted the dissenting employees in any way. If the Board is satisfied that the employer or a person acting on its behalf initiated the application or engaged in threats, coercion or intimidation in connection with the application, it may dismiss the application.

In addition to employees bringing an application, bargaining rights may be terminated:

- by certification of another union;
- for fraud;
- for failure to bargain;
- during the first year after a voluntary recognition agreement was entered into, or during the first year of the parties' first voluntary collective agreement, where the union was not entitled to represent the employees at the time the agreement was entered into;
- by revocation of the certificate on such grounds as abandonment, if the union has ceased to be a union or the employer has ceased to be the employer of the employees in the bargaining unit; or
- by a collateral ruling of the Board in other proceedings.

When a union's certification to represent a bargaining unit is cancelled and no other union is certified to take its place, any collective agreement that was in force between the union and the employer becomes void.



## Other Employment-Related Issues

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### Human Rights Legislation

In Canada, both the federal and provincial levels of government are empowered to pass human rights legislation. In Ontario, this statute is known as the *Ontario Human Rights Code* (the “ORHC”).

There are many similarities between the United States and Canadian approaches to discrimination in employment. Concepts such as the “duty to accommodate” and “adverse effect discrimination” have been imported into Canada directly from American law. However, from a procedural point of view, there are numerous differences, including as a starting point that protection from discrimination for employees exists solely under human rights legislation, as one comprehensive statute. In addition, the OHRC applies more broadly than similar legislation in the United States, as it applies to all employers and their employees regardless of the number of employees on payroll.

The OHRC prohibits discrimination on an extensive list of grounds, including but not limited to race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. Employers are also prohibited from discriminating against an employee based on their criminal record.

Discrimination based on these grounds is prohibited in five (5) major areas: employment; housing; goods, services and facilities; contracts; and membership in trade and vocational associations.

The OHRC prohibits specific practices in the employment context. For example, an employer may not refuse to employ or continue to employ or otherwise adversely differentiate on the basis of a prohibited ground of discrimination. Also, employers are obligated to accommodate employees to the point of undue hardship where, for example, an employee's creed (*i.e.*, genuinely-held belief) or disability impacts an employee's ability to comply with terms and conditions of employment. The extent to which an employer is obligated to accommodate an employee is the subject-matter of numerous human rights tribunal and court decisions, including decisions from the Supreme Court of Canada.

In determining the extent of accommodation necessary in any particular case, an analysis must be undertaken of such factors as the size of the employer, the impact of the accommodation on the employer, and the impact of the disability or other prohibited ground on the employee's ability to perform the core functions of his or her job, among others. The analysis will necessarily be a subjective one, which will vary significantly with the unique facts of each case.

### **Human Rights Tribunal Proceedings**

Employees may file applications alleging discrimination under the OHRC directly with the Human Rights Tribunal of Ontario (the "**HRTO**"). Human rights allegations can also be part of civil law claims. In most cases, and as an initial step in the progression of an application, the HRTO will attempt to assist both sides to reach an agreement that settles the matter through a formal mediation process.

Where an application cannot be settled, the HRTO will hold a hearing to decide whether discrimination or harassment occurred. If the HRTO finds that the applicant experienced discrimination or harassment, the HRTO can make an order to address the discrimination or harassment. This can include ordering the employer to pay financial compensation to the applicant, and/or orders to prevent further human rights violations. If the HRTO finds that discrimination did not occur, it will dismiss the application.

Pursuant to the OHRC, the HRTO has authority to order both monetary and non-monetary compensation in addition to being specifically empowered to award monetary compensation for "injury to dignity, feelings and self-respect." A previous \$10,000 limit for mental distress damages has been eliminated, as has the requirement to prove that a violation was willful or reckless. The HRTO's ability to award monetary compensation for injury to dignity, feelings and self-respect, coupled with the removal of the requirement that the violation be willful or reckless, has made it significantly easier for applicants to obtain monetary compensation for an infringement of their rights, although the overall awards will generally remain substantially lower than those seen in the United States.



The OHRC does not permit civil actions based solely on a human rights infringement, and requires that such claims be coupled with another cause of action. However, the current regime expressly provides for civil remedies for human rights infringements. Pursuant to the OHRC, a court in a civil proceeding is empowered to:

- Make an order directing the party who infringed the right to pay monetary compensation for losses arising out of the infringement, including compensation for injury to dignity, feelings, and self-respect; and/or
- Make an order directing the party who infringed the right to make restitution, other than through monetary compensation, for losses arising out of the infringement, including restitution for injury to dignity, feelings and self-respect.

## Pre-Employment Testing

### Medical Testing

Medical testing is curtailed by human rights legislation meant to protect people with disabilities, as well as privacy legislation meant to protect people's privacy and limit the collection of personal information.

Medical tests at the time of hire in Ontario are permissible only after a conditional written offer of employment has been made. Second, the employer can test only for characteristics directly related to the applicant's ability to perform the essential duties of the job. Third, revocation of the offer on the grounds of the test results is allowed only if the limitation in question is directly related to the applicant's ability to do the job and reasonable accommodation is not possible in the circumstances.

The employer is relieved of the duty to accommodate only if the accommodation will cause "undue hardship", taking into account factors such as the cost of the accommodation, additional sources of funding, if any, and the health and safety requirements of the job. Furthermore, in Ontario, as in the United States, medical testing must be done across the board. Employers who pick and choose which employees will be tested expose themselves to charges of discrimination under the OHRC.

### Drug Testing

Drug and alcohol testing is a very contentious issue in Canadian law.

Human rights legislation in Ontario considers alcoholism and drug dependency to be disabilities, and consequently extends protection to those who are, or who are perceived to be, alcoholics or drug-dependent. Such employees are entitled to be reasonably accommodated up to the point of undue hardship, which in the case of a current dependency often includes offering a rehabilitation program or an opportunity to attend such a program, but is determined on a case-by-case basis.

In Ontario, the current state of the law is that drug and alcohol testing is *prima facie* discriminatory. Accordingly, it has become very difficult for Canadian employers to justify some types of alcohol and drug testing.

Drug and alcohol testing will usually be permitted only where there is “reasonable cause” or post-accident/incident or where an employee has disclosed a drug or alcohol dependency. With few exceptions, random and universal drug or alcohol testing and testing required prior to commencing employment is generally considered unlawful. The key exception is that such testing may be considered justifiable and reasonably necessary where employees work in “safety-sensitive” positions such as driving vehicles or operating machinery. However, the Supreme Court of Canada recently held that the dangerousness of the workplace does not automatically justify unfettered random testing but rather there must also be “*evidence of enhanced safety risks, such as evidence of a general problem with substance abuse in the workplace.*”

These types of drug and alcohol tests may, for example, be allowed where Canadian employees (e.g., truck drivers) are required to meet cross-border testing requirements in order to gain entry to the United States.

Although drug and alcohol testing is *prima facie* discriminatory, employers can nevertheless justify discriminatory rules if they can meet the following three-part test to show it is a bona fide occupational requirement:

1. The employer has adopted the standards or test for a purpose that is rationally connected to the performance of the job;
2. The employer adopted the particular standard or test in an honest and good faith belief that it was necessary to the fulfillment of that legitimate work-related purpose; and
3. The standard or test is reasonably necessary to the accomplishment of that legitimate work-related purpose. To show that the standard is reasonably necessary, it must be demonstrated that it is impossible to accommodate individual employees sharing the characteristics of the claimant without imposing undue hardship upon the employer.

Employers are still required to take steps to formulate a policy to ensure that individuals who suffer from substance-related disabilities and who test positive are accommodated to the point of undue hardship.

For an employer to be able to test for drugs or alcohol, it should be capable of answering “yes” to each of the following three questions:

1. Is there sound reason to believe that job performance would be adversely affected by the drug or alcohol dependency?
2. With respect to a specific employee, is there sound reason to believe that unscheduled or recurring absences from work are related to a drug or alcohol dependency?

3. Is there a reason to believe that this addiction or dependency will adversely affect the safety of coworkers or members of the public?

The case law demonstrates strong resistance among human rights tribunals, labour arbitrators and the courts to random or universal drug and/or alcohol testing programs. The following principles emerge from the present case law and should be kept in mind:

- Employers have had very little success in defending universal or random drug and alcohol testing programs. Such testing is considered overly intrusive and not reasonably connected to job performance for most employees (with some exceptions, e.g., international trucking).
- Drug and alcohol testing for reasons other than a reasonable suspicion basis, particularly in non–safety-sensitive positions, will have little chance of withstanding the scrutiny of a human rights tribunal, labour arbitrator or a court.
- Selective drug and alcohol testing may be permissible as part of a larger program where there is reasonable cause to suspect that an individual’s job performance is adversely affected by drug or alcohol abuse, where an individual has been involved in a workplace accident or incident giving rise to reasonable suspicion of impairment, or where an employee attends work in an impaired state.
- In order for an employer to act on a positive result, it generally must be demonstrated that the detected level of substance corresponds to a state of impairment. Note that adjudicators have found that, because many types of drug testing only measure the presence of drugs in an employee’s system, and do not measure impairment at the time of the test, it can be difficult to demonstrate that the testing is a bona fide occupational requirement that justifies the intrusion into an employee’s privacy rights. Drug and alcohol testing is governed by applicable privacy legislation as well as human rights.
- Other elements of a drug and alcohol abuse policy may include employee assistance programs, health promotion programs, peer intervention, supervisory assessment, and comprehensive work rules prohibiting impairment.

### Screening Assessments

Employers often use personality, skill, or aptitude tests to determine whether an applicant possesses certain traits. However, employers who rely on such tests leave themselves exposed to charges of adverse effect discrimination under human rights legislation.

Concerns about adverse effect discrimination arise because many “neutral” tests may contain biases that “stack the deck” against racial or ethnic minorities. For this reason, any test that produces markedly different results between racial groups, or between men and women, may be struck down as discriminatory.

Employers are also barred from using tests as a way of screening out disabled individuals or individuals above a certain age. In order to avoid allegations of discrimination on the basis of age or disability, employers should use physical ability tests only when physical skills such as strength and endurance are validly related to an essential requirement of the job.

Properly designed employment tests can be used to the extent they concern job-related skills. Increasingly sophisticated methods of designing and validating tests exist. The actual hiring decision, however, must take into account the right of a disabled applicant to be reasonably accommodated if he or she can then perform the essential requirements of the job.

Lie detector or polygraph tests are sometimes used in conjunction with personality testing. In Ontario, pursuant to the ESA, these tests are prohibited as part of the hiring process.

## Criminal Background Checks

There are three categories of police record checks that may be requested in Ontario:

- Criminal record checks;
- Criminal record and judicial matters checks; and
- Vulnerable sector checks.

The information that may be disclosed under each of these checks is limited by legislation, and mental health records and non-conviction information will only be disclosed in certain limited circumstances where an employee will be working with a vulnerable population.

In Ontario, human rights legislation protects against discrimination on the basis of either federal or provincial offences, by defining the term “record of offences” as a conviction for:

- an offence in respect of which a pardon has been granted under the *Criminal Records Act* (Canada) and has not been revoked, or
- an offence in respect of any provincial enactment.

An employer will therefore violate the OHRC if an employee or applicant is discriminated against in employment (that is, refused employment, terminated or otherwise denied an employment benefit) because of a criminal conviction which has been pardoned, or because of a conviction for a provincial offence (subject to the exception described below). The OHRC does not prohibit discrimination in employment based on *Criminal Code* offences for which a pardon has not been granted.

Even if an employee or applicant has received a pardon for a criminal conviction, or has been convicted of a provincial offence, employment may still be denied if the employer can establish that it is a *bona fide* occupational requirement (a “**BFOR**”) for a prospective employee to have a clear record because of the nature of the employment. The BFOR exception is interpreted narrowly. For example, a clean record under the *Highway Traffic Act* may be a BFOR if driving is an essential duty of the position being sought (e.g., as in the

case of a truck driver). However, it is not permissible to withhold employment on the basis of a *Highway Traffic Act* offence if driving is not an essential duty of the job.

## Credit Reports

In Ontario, there is no privacy legislation to restrict an employer's ability to require potential employees to undergo credit checks. However, the Ontario *Consumer Reporting Act* (the "CRA") governs credit bureaus and access to credit information.

Pursuant to the CRA, "credit information" is defined as "*information about a consumer as to name, age, occupation, place of residence, previous places of residence, marital status, spouse's name and age, number of dependents, particulars of education or professional qualifications, places of employment, previous places of employment, estimated income, paying habits, outstanding debt obligations, cost of living obligations and assets.*"

A credit report can also include "personal information," which is defined to mean "*information other than credit information about a consumer's character, reputation, health, physical or personal characteristics, mode of living, or about any other matter concerning the consumer.*"

Thus, "credit information" can include information implicating characteristics protected by the OHRC, such as age, marital status, sexual orientation or place of origin. "Personal information" may include information relating to an individual's disability or record of offences. To the extent that a credit check discloses such information, the employer's ultimate decision not to extend an employment offer could be challenged under the OHRC. Accordingly, an employer should ensure that it requests and receives only credit information respecting an individual's paying habits, outstanding debt obligations and cost of living obligations. Information that would implicate protected grounds of discrimination should be excluded.

If an adverse decision is made based on the credit information, the prospective employee must be so advised.

## Personal Reference Checks

Generally, an employer may conduct a personal reference check by contacting an applicant's previous employer or contacting the character references provided by the applicant. However, given the application of human rights and privacy law, employers should obtain the consent of the applicant before performing a personal reference check.

## Employment Forms

At the time of hiring, employers are naturally motivated to discover as much as possible about the applicant's abilities, education, experience and personality. The employer's inquiry must respect the applicant's right to pursue employment opportunities without discrimination.

The OHRC prohibits the use of any application form or written or oral inquiry that directly or indirectly classifies an applicant as being a member of a group that is protected from discrimination. An employment form should relate only to qualifications and requirements relevant to the job and the hiring decision, and should not ask for information related to any prohibited grounds. Although there are exceptions in the relevant provincial statutes that allow for some questions that would otherwise be discriminatory, these generally apply to the interview stage.

The following is a chart containing a sample of prohibited grounds, and the permissible and prohibited questions relating to each of them:

Prohibited Grounds	Permissible Questions	Prohibited Questions
Race / Ancestry / Color	None	Questions about or relating to physical characteristics such as color of eyes, hair, height, weight, or requests for photographs;
Creed	None	Questions about or relating to religious affiliation, religious institutions attended, religious holidays, customs observed, willingness to work on a specific day which may conflict with requirements of a particular faith (e.g., Saturday or Sunday Sabbath days);
Citizenship Place of Origin Ethnic Origin	Are you legally entitled to work in Canada?	Questions about or relating to Canadian citizenship, landed immigrant status, permanent residency, naturalization, requests for Social Insurance Number (A S.I.N. may contain information about an applicant's place of origin or citizenship status. A S.I.N. may be requested following a conditional offer of employment);
Sex / Gender Identity / Gender Expression	None	Categories on application forms or inquiries such as surname or last name before marriage (maiden or birth name); Mr., Mrs., Miss, Ms.; relationship with person to be notified in case of emergency or insurance beneficiary;

Prohibited Grounds	Permissible Questions	Prohibited Questions
Sexual Orientation	None	Categories on application forms or inquiries such as married, divorced, common-law relationship, single, separated; information about spouse (e.g., is spouse willing to transfer?); relationship with person to be notified in case of emergency or insurance beneficiary;
Marital Status	None	Same as above;
Record of Offences	Have you ever been convicted of a criminal or summary conviction offence (for which a pardon has not been granted), related to the position being hired for?	Generally, questions regarding an applicant's record of offences should focus on offences that are related to the position being offered by the employer (e.g., in the case of cashier, whether or not the applicant has ever been convicted of theft or fraud, among other possible monetary-related offences);
Age	Are you 18 years of age or older?	Questions about or relating to age, date of birth or requests for birth or baptismal records, or other documents such as driver's license, or educational transcripts which indicate age;
Disability / Handicap	None	Questions about or relating to health, disabilities, mental disorders, physical or intellectual limitations, developmental handicaps or intellectual impairment, medical history, injuries or Workers' Compensation claims, medication, membership in medical or patient associations (e.g., Alcoholics Anonymous).

## Termination of Employment

### Statutory Notice

Please refer to Section I above, entitled “*Employment Standards*,” for a more detailed review of the statutory notice requirements in Ontario.

### Reasonable Notice

As discussed above, the statutory notice and statutory severance provisions are minimum standards to be observed by the employer. Assuming that an employer does not have “just cause,” which is discussed below, further entitlements at termination arise at common law upon termination of an employee.

Absent a specific termination provision in an employment contract which enforceably limits an employee’s entitlements upon termination to statutory minimums, an employee who is employed for an indefinite term is entitled to reasonable notice of termination of employment, or pay in lieu thereof, at common law.

To determine reasonable notice, Canadian courts take into consideration the following main factors:

- The character of employment (junior, senior, managerial);
- The length of service of the employee;
- The age of the employee; and
- The availability of similar employment, having regard for the experience, training and qualifications of the employee.

Generally, it has been held that employees who hold a senior position, have long service, are older in age and will be unlikely to find similar employment, are entitled to longer notice periods. Past court decisions are the only reliable guide to predict notice periods in any particular case. The notice entitlement can be as much as one month of notice, or pay in lieu, for each year of service and is often more for short service managerial employees. There is no fixed maximum notice period under the common law, but it is not common for an employee to be awarded more than 24 months’ notice or pay in lieu of notice.

In addition to notice or payment in lieu, Canadian courts have consistently held that an employee is entitled to all payments he or she would have received had they remained in the employ of the employer for the notice period. Accordingly, damages for lost benefits, bonus and other such entitlements are routinely awarded.

Following termination of employment, an employee has a common law obligation to mitigate whatever losses or damages he or she may otherwise suffer. In this regard, there is a positive obligation placed upon terminated employees to seek alternate comparable employment.



Once such alternate employment is obtained, any income earned by the employee is deducted from any damages for reasonable notice. It should be noted that the statutory minimum standards must be complied with even if an employee secures comparable alternate employment immediately following termination, as those payments/entitlements are not subject to mitigation.

### ***Working Notice***

As indicated above, an employee's common law entitlement is notice of termination or pay in lieu. That is to say, it is open to an employer to provide an employee with working notice of their termination date. During a working notice period, the employee continues to work, performing the same duties and tasks and receiving the same employment income and benefits. It is also possible for employers to utilize a combination of working notice and pay in lieu of notice in order to limit their specific financial obligations at termination. However, from a practical point of view, working notice is usually not a viable option.

## **Just Cause v. Near Cause**

### ***Just Cause***

The common law rule in Ontario is that an employee may be terminated without notice if cause for summary dismissal exists.

"Just cause" is not defined but is determined on a case by case basis by the court. Just cause includes serious misconduct, neglect of duty, or incompetence or other actions of an employee that fundamentally breaches the employee's obligations under the employment relationship.

Since the employee is otherwise entitled to reasonable notice of termination, termination for cause is considered exceptional; therefore, the employer has a substantial burden of establishing just cause. Conduct that may amount to just cause falls into two broad categories: (1) acts of misconduct, such as theft or other improprieties, which relate to character or trust, and (2) performance-related actions.

### ***Near Cause***

At one time, there was a debate in the Canadian case law as to whether "near cause" or blameworthy conduct on the employee's part that fell short of the just cause standard could operate as a factor reducing the employee's reasonable notice entitlement.

This argument had some appeal as a way of "sawing off" the all or nothing approach of either cause with no payments or reasonable notice with full payments. It seemed a way for the employee's entitlement to some notice to be balanced with the employer's legitimate concerns over poor performance or conduct that might not be serious enough to establish

just cause.

In 1998, however, the Supreme Court of Canada clearly rejected the existence of near cause as a factor to be considered in determining notice periods at common law. Thus, the all or nothing approach remains.

### **Mass Termination (Collective Dismissal)**

The ESA contains “mass termination” provisions which state that an employer must provide eight (8) weeks of notice to each employee with over three (3) months of service if terminating 50 to 199 employees; 12 weeks of notice if terminating 200 to 499 employees; and 16 weeks of notice if terminating 500 employees or more.

In order to trigger a mass termination, the terminations must occur within a specified period of four (4) weeks or less. It follows that layoffs may be staggered to avoid the mass notice requirement. If the employer knows its requirements far enough in advance, it is possible to wind down or downsize an operation over a longer period of time, keeping the number of employees laid off in any four-week period below the 50 person or other such threshold.

When a mass termination occurs, the employer must submit a “Notice of Termination of Employment” form to the Director of Employment Standards *before* giving notice to the affected employees. Notice of mass termination is not considered to be effective until the employer submits this form.

In addition to providing employees with individual notices of termination, on the first day of the notice period the employer must post a copy of the above-mentioned form in the workplace where it will come to the attention of the employees it affects.

The mass termination rules do not apply if:

1. The number of employees whose employment is being terminated represents not more than 10% of the employees who have been employed for at least three (3) months at the establishment; and
2. None of the terminations are caused by the permanent discontinuance of all or part of the employer’s business at the establishment.

Furthermore, all of the exceptions to the statutory notice requirement (e.g., term or task employees; temporary layoffs; refusal of reasonable alternate work; strikes; casual employees; statutory cause for dismissal – willful misconduct, disobedience, and willful neglect of duty) may apply in a mass termination situation.

### **Work Performed by Employees under a Certain Age**

The minimum age for working is 14 years of age for most types of work. However, certain regulations specify a higher minimum age for certain types of work, as follows:

- 14 years old: work in offices, stores, arenas or restaurant serving areas;

- 15 years old: work in most factories, including restaurant kitchens; produce and meat preparation or shipping and receiving areas in grocery stores; laundries and warehouses; repair shops;
- 16 years old: construction work or work in a logging operation, mining plant or at a surface mine;
- 18 years old: work in an underground mine or at the working face of a surface mine; window cleaning.

Pursuant to the Ontario *Education Act*, 14, 15, 16 and 17 year olds are not to be employed during school hours unless they have been excused from school attendance in accordance with the *Act*.

## Employment Contracts

### Written Contract? If so, for What Level of Employee?

Written contracts of employment are more commonly used when hiring managers or executives, individuals in key positions, individuals handling confidential information and employees hired for a particular term or task. They are also often used when an employer wishes to deal with the issue of termination arrangements directly, as opposed to leaving it to the courts.

In an oral contract, the terms of employment consist of those matters expressly agreed to and those terms implied by law. Express terms agreed to by the parties may include hours of work, rate of pay, benefits, vacations, and bonuses. Implied terms are those that are not discussed but that any reasonable person would understand to be in the contract. Implied terms include the employer's obligation to pay the employee and the employee's obligation to work to the best of his or her abilities. Since none of the Canadian jurisdictions recognize the "at-will" principle used in the United States, an implied term in all employment contracts is that the employer must provide the employee with reasonable advance notice or, instead, a payment in lieu of notice in the event of dismissal without just cause, except with fixed term contracts when the employment terminates upon expiry of the fixed term.

It is also common for an employment contract to contain many terms that are referenced in writing without the parties specifically entering a written agreement. For example, an offer of employment may be in a letter setting out salary, benefits, start date, title, and job duties. The employee may be given a handbook that details insured benefit plans and employer policies or rules governing probationary period, absences, safety, discipline, and so forth.

For the typical employment relationship, this combination of oral and written terms is a more than adequate arrangement. This approach also has the advantage of flexibility, as it easily allows for the degree of change that characterizes the ongoing employment relationship – a new position, salary increases, benefit plan amendments, and so on.

The important question for employers is when does a more comprehensive written contract become advisable? The employer's objective in using a formal written contract, besides certainty of terms, is usually either to clarify the reasonable notice period owed by law; to shore up confidentiality, non-solicitation, and non-competition covenants; or to introduce specific contractual terms considered particularly important to the position. The following are examples of situations where written contracts of employment are commonly used by employers in Canada.

### **Fixed Term or Task**

The statutory obligation to give notice of termination, discussed in the employment standards section of this document, can be avoided by hiring on a fixed-term or task basis provided the employee is not terminated without cause prior to the end of the fixed-term or defined task. Hiring for a specific task, such as the completion of a software installation or for a specific term such as the busy retail holiday season, may also protect the employer from being held liable for the reasonable notice requirement if the task is finite and well defined. For obvious reasons, fixed-term or task agreements are best put in writing.

Fixed-term contracts should be used selectively. It is not appropriate as a general device to avoid notice of termination for all employees. A series of rolling, fixed-term contracts will usually be set aside by a court on the grounds that the employee has, in reality, been employed under a contract of indeterminate duration. Similarly, an employee who works even a day beyond a fixed-term without a new contract may be considered as having thereby become an indefinite-term employee. Moreover, the employer faces a serious administrative challenge in attempting to monitor and renew a multitude of individual fixed-term contracts expiring at different times. Accordingly, it is best to restrict usage of the fixed-term contract to hiring for specific, temporary needs.

### **Executives**

In the case of senior management, a written contract is usually created not to avoid the reasonable notice requirement, but to clarify the severance package at the outset of the relationship in the event of termination – much like a prenuptial agreement in the case of marriage. If the parties negotiate and put in writing the amount of notice or pay in lieu to be given on termination, the arrangement will be enforceable if it is not unreasonable or ambiguous or in breach of the minimum statutory notice requirements. Typically, an executive agreement will address all or some of the following issues:

- The length of advance notice of termination or the amount of a payment instead;
- The decision whether the termination payment is to be a salary continuance or a lump sum;
- The continuance of fringe benefits such as life insurance, short and long-term disability, and health and welfare insurance; and
- The treatment of other benefits and perquisites such as pension, bonus, stock option, and car allowance.

When an employer is recruiting a senior executive, any written agreement defining severance will likely be fair, if not generous. The advantages of a written contract – while generally not a cost saving for the employer – are certainty, finality, and the avoidance of litigation. Also, the termination arrangement can be linked to non-competition, non-solicitation, and confidentiality covenants as discussed in the next section.

### **Restrictive Covenants**

As companies become more reliant on information technology and as they begin to invest more time and money in training employees, non-competition and non-solicitation clauses are becoming something to consider not only for key executives, but also for other employees who have access to sensitive information or close dealings with clients. However, in Canada, as in the United States, such clauses are considered a restraint of trade and are quite difficult to enforce. Since such clauses will be enforced only if they are “reasonable” and limited to what is reasonably necessary for the protection of the business, the key is not to overreach in drafting such clauses. They also must be clear and unequivocal. In addition, specific agreements that address confidential information and intellectual property rights are also being considered by more employers and are either incorporated into or form attachments to a written employment agreement.

Non-competition clauses that seek to protect information such as customer lists or valuable trade secrets, that impose short periods of non-competition, and that limit non-competition to a reasonable geographic area are more likely to be upheld. Similarly, if the employer’s greatest fear is that the former employee will exploit customer contacts, a commitment not to solicit customers for a specified period is more likely to be enforced than a ban against working for a competitor. Courts will no longer read down restrictive covenants to make them enforceable. Instead, if it is determined that any part of the covenant is not valid, Courts will deem the whole clause unenforceable.

For key employees, there may be a practical advantage in negotiating such clauses. Whether or not the clause is ultimately enforceable, a reasonable agreement may act as a restraint on the conduct of the former employee and his or her new employer.

Covenants aside, there is some protection for employers in that the common law imposes on senior employees a duty of confidentiality and a fiduciary duty not to compete. The purpose of a written clause is, therefore, to firm up these obligations, possibly to expand upon them, and to bring the obligation specifically to the employee’s attention.

### **Employee Handbook**

In the absence of a written contract, express terms of employment, such as salary, benefits, vacation entitlement, start date, title and job duties, most likely will be included in a simple, brief offer of employment.

The employer also may want to provide employees a handbook that details insured benefits plans and employer policies or rules governing probationary period, absences, safety, discipline, and so forth. Employee handbooks are quite common for many Canadian employers.

Should an employer decide to provide employees with an employee handbook, the provisions of the handbook should be stated as binding on the parties, subject to the employer's ability to change the policies and procedures contained therein. This approach will allow the employer to rely on the provisions included in the handbook, without having to enter into a separate written employment agreement with each individual employee. An acknowledgement of receipt of the handbook on the part of an employee will suffice. If the employer expressly reserves the rights to modify the policies unilaterally, while it may in some circumstances be obligated to give advance, reasonable notice of such changes, such a reserved right maximizes the degree of flexibility the employer retains.

## Successor Rights and Obligations

A purchaser can become a successor employer under Ontario's employment standards legislation if it acquires all or a part of a business and hires employees previously employed by the vendor. A purchaser becomes a successor so long as an employee of the predecessor business is hired by the successor employer within 13 weeks of the earlier of his or her last day of employment with the seller and the day of the sale. Employees who are employed by a successor employer are deemed to have been continuously employed *by the successor* from the time that they commenced employment with the predecessor company. Among other things, this will impact upon the length of notice – or pay in lieu of notice – that these employees will be entitled to in the event of their termination without cause. The successor employer will also inherit the predecessor's severance pay obligations and some pension liabilities.

Accordingly, a predecessor employer will not be liable to provide notice or severance pay to employees who are hired by a successor employer.

The determination of whether or not a company purchasing assets and hiring employees is a successor employer may be complex in some circumstances. In those cases, the following factors are considered to determine whether a purchaser is a successor employer:

- the physical assets acquired by the purchaser;
- whether goodwill, customer lists, trademarks and other intangible assets are acquired by the purchaser;
- the nature of the business carried on by the purchaser after the transaction is complete;
- the number of employees that are transferred or retained by the purchaser and the type of jobs assumed;

- the length of time between the debtor ceasing to carry on his or her business and the purchaser commencing the business; and
- whether there has been a change of control.

As it is not possible for an employee to contract out of their minimum entitlements under employment standards legislation, an employment contract provision stating that a purchaser is not a successor employer would not likely be enforceable by a court.

## Related Employer Obligations

In the union context, a union may bring a related employer application to the Ontario Labour Relations Board where it suspects that an employer is attempting to undermine bargaining rights through the use of multiple corporations.

The *Labour Relations Act, 1995* contains provisions which allow the Board to treat related or associated employers as one employer for the purpose of the Act where the employers' activities are carried on under common control or direction, and where the business activities of apparently separate entities are related or associated.

Factors considered by the Board in determining if two or more employers are under common control or direction include:

- common ownership, directors, officers, shareholders or financial control;
- common management;
- inter-relationship of operations;
- policies of the enterprises are closely co-ordinated;
- presentation to the public as a common enterprise; and
- control of labour relations.

The Board also may consider the following factors, among others, to determine whether the businesses or activities are related or associated:

- they are of the "same character";
- they serve the same general market;
- they employ the same mode or means of production;
- they utilize similar employee skills; or
- they are carried on for the benefit of related principals.

Accordingly, where separate entities are operated, multiple measures to ensure their separation are advisable to ensure against a finding of shared liability as related employers.

## Private Pension Plans

Private pension plans in Ontario are governed by the *Pension Benefits Act*. Each private pension plan requires an administrator who is responsible for the oversight, management and administration of the pension plan, and the administration and investment of the pension fund.

Usually, the employer assumes the role of administrator. However, the administrator may also be: a board of trustees; a pension committee; or an insurance company. The administrator is responsible for a pension plan's compliance with applicable legislation and owes a fiduciary duty to plan beneficiaries. This means that administrators must act with the utmost good faith in the best interests of pension plan members. The administrator's responsibilities to plan beneficiaries include:

- Selecting and revising the menu of investment options solely in the best interests of the beneficiaries;
- Maintaining an even hand between beneficiaries;
- Ensuring accurate and complete information about the plan is provided to those entitled to receive it;
- Employee enrollment in the plan;
- Determining entitlements and making payments to plan beneficiaries as these come due; and
- Responding to inquiries from plan beneficiaries and informing beneficiaries of their rights under the plan.

Regulations of private pension plans in Ontario are currently overseen by the Financial Services Commission of Ontario (FSCO). The role of the FSCO includes:

- Registering new pension plans and pension plan amendments;
- Processing required filings and applications from pension plan administrators;
- Monitoring pension plans and pension funds to ensure they are being administered, invested and funded in compliance with legislated requirements;
- Investigating alleged breaches of the Pension Benefits Act and regulations, and taking enforcement action when required;
- Responding to inquiries and complaints from plan beneficiaries; and
- Issuing various policies and guidance documents for use by plan administrators.

Recently, the Ontario Government passed legislation establishing the Financial Services Regulatory Authority (FSRA) to replace the FSCO and to bring about a modernization of pension regulation in Ontario. As this new agency takes shape and becomes vested with regulatory authority, Ontario's approach to regulation and oversight of pension administration may undergo significant change in coming years.



Ontario has also recently adopted new rules establishing pension advisory committees, composed of active, retired and former members of the pension who monitor the pension plan and make recommendations regarding its administration.

## Grow-in Pension Benefits

Grow-in benefits give a pension plan member in Ontario, in certain circumstances, the right to receive:

- a pension in accordance with the terms of the pension plan, if, under the pension plan, the member is eligible for immediate payment of the pension benefit;
- a pension in accordance with the terms of the pension plan, beginning at the earlier of,
  - the normal retirement date under the pension plan, or
  - the date on which the member would be entitled to an unreduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date; or
- a reduced pension in the amount payable under the terms of the pension plan beginning on the date on which the member would be entitled to the reduced pension under the pension plan if the activating event had not occurred and if the member's membership continued to that date.

If a member has at least ten (10) years of continuous employment with the employer or has been a member of the pension plan for at least ten (10) years, bridging benefits offered under the pension plan must also be included.

Pension plans are required to provide grow-in benefits for a member, if all of the following conditions are satisfied:

1. The member ceases to be a plan member on the employer's termination of the member's employment and the effective date of the termination of employment is on or after July 1, 2012.
2. The termination of employment is not a result of willful misconduct, disobedience or willful neglect of duty by the member that is not trivial and has not been condoned by the employer or other circumstances as prescribed.
3. The combination of the member's age plus years of continuous employment or membership in the pension plan equals at least fifty-five (55) on the effective date of termination.

Accordingly, if these three conditions are satisfied, a terminated employee will be entitled to grow-in benefits in the manner set out in the legislation.

## Workers' Compensation

Ontario has adopted a statutory “no-fault” insurance scheme to compensate workers for occupational illness and injury. Also, as in the United States, employers receive protection from civil liability in exchange for participating in the workers’ compensation system.

The workers’ compensation system is administered by a statutory body; namely, the Ontario Workplace Safety and Insurance Board (the “**WSIB**”). The WSIB administers the fund from which claims are paid, set employer assessment rates and manage investments. They also administer rehabilitation services for workers, enforce reinstatement rights for injured workers and determine and pay compensation claims. Employer assessments are based on a percentage of payroll by industry rate.

Worker benefits include medical care; 85% of net average earnings loss for accidents; permanent disability lump sum payments for non-economic loss; payments and extended benefits for economic loss; pension at age 65; and dependents’ benefits, lump sums and pensions. The maximum wage rates are adjusted annually and have been set at \$88,500 for the 2017 year.

Workplace accidents must be reported within three (3) business days of the incident or injury occurring or of the employer becoming aware of the incident or injury. However, the employer is responsible for paying from the day of the injury. Statutory-appointed officers are responsible for adjudicating individual claims. Disputed decisions are subject to internal review and an appeal process to an independent quasi-judicial agency.

New employers are required to register with the applicable workers’ compensation body as soon as the first employee commences work. At the time of registration, the employer must provide the WSIB with the following information, among other details:

1. The employer’s legal name and mailing address;
2. A description of the employer’s business activities;
3. The date the first worker commenced employment; and
4. An estimate of annual assessable earnings.

This information is used to determine the appropriate classification for the employer’s business activity, to assign the employer with both an account number for paying assessments and a firm number to keep track of claim costs and determine how frequently the employer will report and pay assessments.

The classification of employment is determined by the primary business activity. Employers that have multiple businesses with segregated payrolls may be eligible for multiple classifications. Basic assessment rates are set based on the rate group’s total payroll and the total projected cost of accidents to workers in the group. Group rates are set to keep the system self-sufficient during the year.

While the rate group determines the employer's basic assessment rate, the actual amount paid by the employer is also affected by the employer's experience rating. To obtain this rating, the statutory body compares the firm's individual accident record to the expected accident record for employers of similar size in the same rate group. It then adjusts the employer's annual assessment accordingly by way of refund or surcharge.

## Accessibility Legislation

Employers in Ontario are governed by the *Accessibility for Ontarians with Disabilities Act*, 2005 which mandates accessibility standards in key areas of public life, including customer service, the built environment, employment, information and communications and transportation. The AODA's compliance obligations come into effect on a staggered basis, with deadlines dependent upon the size of the organization and whether it operates within the private or public sector. Pursuant to the statute, large private organizations are those with 50 or more employees, while small private organizations are those with fewer than 50 employees.

All private organizations (both large and small) that provide goods and services to the public in Ontario are required to comply with the AODA's Accessibility Standards for Customer Service (the "ASCS"). The ASCS essentially oblige employers to establish policies, procedures and employee training with respect to interaction with and service for disabled individuals. The ASCS also require that employers post a notice publically in advance of a disruption in services used by disabled persons, and file annual accessibility reports that are used to assess compliance with the relevant legislative provisions.

Private organizations with 50 or more employees are also required to ensure that their websites and web content conform with Web Content Accessibility Guideline 2.0 Level A. Conformity with Web Content Accessibility Guideline 2.0 Level AA will be mandatory as of January 1, 2021.

With respect to employment standards, the AODA imposes a number of obligations upon employers including notifying employees and applicants about available accommodations, providing suitable accommodation upon request, and providing individualized workplace emergency response information to employees who have a disability. Large private organizations were required to comply with the AODA's employment standards by January 1, 2016, and small private organizations by January 1, 2017.

Although the AODA does not enable individuals to claim damages against an organization for a failure to meet applicable accessibility standards, substantial fines may be imposed for contraventions. Where an organization fails to comply or is found to have committed an offence under the AODA, a fine of \$100,000 may be ordered for each day or part day during which the offence continues to occur.

## Workers' Health and Safety

### Occupational Health and Safety

Employers are also required to comply with minimum occupational health and safety standards governed by the *Occupational Health and Safety Act* (the “**OHSA**”).

Responsibility for ensuring compliance with the OHSA is broadly distributed to include the employer, its officers and directors, its supervisors, the workers, owners of property, contractors and suppliers. In this respect, Ontario has adopted the concept of joint responsibility of the workplace parties for health and safety. Joint responsibility recognizes that while there must be a capacity in government to regulate and, in appropriate cases, to enforce compliance, emphasis should be placed on the promotion of participation and voluntary compliance by labour and management.

Workplace-based self-regulation is achieved by conferring important powers on joint health and safety committees (a “**JHSC**”), composed of representatives from workers and management. Worker JHSC representatives have broad powers to initiate stop-work orders where they have reason to believe that dangerous circumstances exist at a workplace.

Ontario has enacted specific regulations governing the composition of JHSCs. They must be composed of four (4) members for workplaces numbering over 50 employees and two (2) members for smaller workplaces. Non-managerial worker representatives on the JHSC must make up at least half of the committee and must be selected by the workers. If a union represents the workers, the worker members of the JHSC are selected by the trade union. JHSCs are co-chaired by a member selected by the worker representatives and a worker selected by the management representatives. At least one worker representative and one management representative on the JHSC must be “certified”. Certified members attend training where they are instructed about ensuring health and safety in the workplace, the responsibilities of joint committees, the relevant legislative provisions, job safety analysis, inspections and accident investigations.

The Ontario Ministry of Labour's health and safety inspectors enforce compliance with the OHSA, and may enter into any workplace at any time without a warrant. During workplace inspections, government inspectors must be accompanied by a worker-JHSC representative, and all workplace parties must assist the inspectors. Further, inspectors who find a health and safety contravention that is a danger or hazard to workers may issue stop-work orders on the spot.

The right to refuse unsafe work is more broadly defined than in the United States. It is not necessary for the worker to establish that he or she reasonably believed that they were at imminent risk of death or serious bodily injury; rather, the legislation in each province allows a worker to refuse to perform work if he or she has reasonable grounds to believe it is unsafe - a more subjective test. The applicable legislation in each province sets out a detailed procedure that workers may follow to exercise their right to refuse unsafe work. In general, the employer must investigate a worker's initial work refusal and take corrective action, if necessary. If

the worker refuses to work despite such measures, a government safety inspector must investigate and decide whether the work is unsafe. The worker may again refuse to work following an inspector's determination; however, the worker then bears the burden to justify the validity of the refusal.

Employers who breach the legislation can face significant fines. The maximum fine is \$500,000. Convicted individuals may face a range of fines or even imprisonment for up to six (6) months in the case of a first conviction and up to one year for subsequent convictions, or both fines and imprisonment.

Similar to the United States' position, the primary defense for prosecutions is due diligence. The employer will not be guilty of failing to comply with prescribed safety measures if it can prove that it took "*every precaution reasonable in the circumstances.*" Canadian courts have held that because occupational health and safety legislation imposes strict liability for offences, which means that intent need not be established by the prosecution, the legislation must allow for a due diligence defense. The courts have not laid down a definitive list of factors to be considered to establish a due diligence defense, however, it is clear that the determination is factually driven.

Adequate steps in the basic areas of health and safety controls, regular inspections, safety audits, training and education of workers, proper supervision, discipline of workers who do not follow safe practice and good faith cooperation with the health and safety committee are elements that support a defense of due diligence generally. Particular circumstances, such as the hazards of the industry, the employer's safety record and the foreseeability of risks are factors considered in determining whether the controls and precautions are reasonable in each particular employer's situation.

### ***Criminal Code***

In addition to the regulatory environment, the Canadian *Criminal Code* creates duties for organizations, including all Canadian corporations to take all reasonable steps to prevent bodily harm to persons, including workers, contractors, and the general public.

The duty under the *Criminal Code* is as follows: "*Everyone, including an organization, who directs how a person does work or performs a task is under a legal duty to take reasonable steps to prevent bodily harm to that person, or any other person (which would include the general public), arising from that work or task.*"

Criminal prosecution of an employer for criminal negligence requires the police and the courts to be satisfied that there was a failure to perform the legal duty to prevent bodily harm to a person; and that the failure occurred in a way that shows "wanton or reckless disregard" for the safety of others. Wanton or reckless disregard requires extreme lack of caring, or recklessness, to amount to behavior that is a "crime."

The *Criminal Code* creates a specific two-step process to establish the necessary proof of the above matters to convict an employer of criminal negligence. The Prosecution must prove beyond a reasonable doubt that:

1. One or more representatives of the organization behaved in a criminally negligent manner where the potential result is serious injury or death; and,
2. A senior officer with operational or executive authority responsible for the aspect of the activities relevant to the offence departed markedly from the standard of care reasonably expected in the circumstances.

## **Workplace Violence and Bullying and Harassment**

The OHSA defines “workplace violence” as (a) *“the exercise of physical force by a person against a worker, in a workplace, that causes or could cause physical injury to the worker”*, (b) *“an attempt to exercise physical force against a worker, in a workplace, that could cause physical injury to the worker”* or (c) *“a statement or behavior that is reasonable for a worker to interpret as a threat to exercise physical force against the worker, in a workplace, that could cause physical injury to the worker.”*

The legislation in Ontario also requires employers to monitor and create policies and programs related to “workplace harassment,” which is defined 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”* or *“sexual harassment.”* In turn, “sexual harassment” is defined as *“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.”*

The OHSA expressly provides that a reasonable action taken by an employer or supervisor relating to the management and direction of employees or the workplace is not workplace harassment.

Employers are required to adopt workplace violence and harassment policies and programs, to be reviewed at least annually. Employers with six or more employees will be required to post the policy in a conspicuous place in the workplace.

In Ontario, employers are also required to:

- conduct an assessment of the risk of workplace violence and report the results to the JHSC or to a health and safety representative (or directly to the workers if there is no JHSC or representative);
- take every reasonable precaution to protect the worker if the employer is aware or ought to be aware that domestic violence that is likely to expose a worker to physical injury may occur in the workplace;

- in certain circumstances, provide a worker with information about a person with a history of violent behavior who the worker may be expected to encounter in the course of their work;
- advise employees who allege workplace harassment by a supervisor of the measures and procedures that they can follow;
- ensure that an investigation is conducted into incidents and complaints of workplace harassment that is appropriate in the circumstances; and
- to maintain the confidentiality of information obtained about an incident or complaint of workplace harassment, unless the disclosure is necessary for the purposes of carrying out an appropriate investigation or taking corrective action with respect to the incident or complaint, or is otherwise required by law.

Workers have the right to refuse work if workplace violence is likely to endanger the worker.

## Cannabis

Ontario's *Cannabis Act, 2017* is legislation coming into force alongside Canada's Federal Cannabis Act in October 2018.

Key elements of Ontario's regulated access to cannabis under the Ontario Act include:

- Minimum age to use, buy, possess and cultivate non-medical cannabis will be 19.
- Non-medical cannabis use is restricted to private residences.
- Adults over age 19 may grow up to four plants.
- Non-medical cannabis use will be prohibited in public places, workplaces, schools, motor vehicles and boats.

A separate medical access regime remains in place for medical cannabis users. The *Access to Cannabis for Medical Purposes Regulations* (ACMPR) allow possession of cannabis for medical purposes if obtained:

- (i) from a licenced producer
- (ii) from a health care practitioner in the course of treatment for a medical condition, or
- (iii) from a hospital

Individuals who claim to be medical cannabis users must show supporting documents to police on demand. It is also reasonable for employers to request such documents in connection with the duty to accommodate a disability.

If an employee is a medical cannabis user, the matter will be treated like any other accommodation of a disability, as set out above. In the accommodation process, cannabis will be considered like any other medication. Employers will need to undertake an individual assessment of an employee's disability and the options for reasonable accommodation,

including where a person may be impaired due to medical use of cannabis. Employees must participate in the accommodation process by providing information, including medical information, about their cannabis use and level of impairment (if any).

Employers must decide, on an individual basis, whether accommodating an employee with a disability requires tolerating a certain level of impairment during the working day. Employers can continue to take the position that impairment at the workplace is not acceptable, particularly where employees carry out safety-sensitive roles. The legal access regime described above does not provide anyone in Ontario with a legal right to consume or possess cannabis at the workplace, or to be impaired at the workplace without any recourse to the employer.

## Pay Equity

Ontario's *Pay Equity Act* applies to private sector employers with 10 or more employees. The purpose of the *Pay Equity Act* is “to redress systemic gender discrimination in compensation for work performed by employees in female job classes.” Systemic gender discrimination is identified by comparing the compensation and value of work between female and male job classes.

Female and male job classes must be compared within the employer's “establishment,” which includes all employees in a prescribed geographic division. Essentially, the employer's operations in a given territory are treated as one establishment.

Pursuant to the legislation, pay rates, including the value of benefits, must then be compared between job classes through a process of job evaluation and comparison. This process can be quite complex.

Following the value of the comparison exercise, identified pay inequities indicate which job rates require adjustment. Schedules must then be developed for implementing any required adjustments. Once pay equity is achieved within a given establishment, it must also be maintained on an ongoing basis.

New employers commencing operations in Ontario are expected to implement a compensation system that complies with pay equity from the outset. The *Pay Equity Act* was phased in through the early 1990s allowing existing employers time to correct historic pay inequalities. However, the statutory requirement for a new business in Ontario is immediate compliance.

The *Pay Equity Act* also contemplates the creation of a “pay equity plan” in certain circumstances, such as for large employers with 100 or more employees. The requirement to create a pay equity plan does not expressly apply to new employers starting business in Ontario today.

However, documentation that the requirements of pay equity have been met remains necessary evidence in the event of a complaint. Therefore, it is prudent for a new employer in Ontario to develop human resources capacities to ensure immediate compliance with the *Pay Equity Act*.

As of January 1, 2019, it is anticipated that detailed pay transparency reports including various legislated details will also be required to be provided by employers in accordance with legislated deadlines under Ontario's Pay Transparency Act, 2018.





## Privacy Legislation

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In Ontario, the federal *Personal Information Protection and Electronic Documents Act* (“PIPEDA”) applies to the collection, use and disclosure of personal information of Ontario-based organizations in the course of their commercial activities. However, PIPEDA does not apply to the collection, use and disclosure of personal information belonging to an organization’s employees, unless the organization in question is a federal undertaking for the purposes of the statute.

Ontario has also enacted health information privacy legislation, entitled the *Personal Health Information Protection Act*. This legislation applies primarily in connection with the collection, use and disclosure of personal health information in the health services and health research contexts; however, it also has a significant impact on employers when they are in receipt of personal health information of an employee such as medical notes and health benefits information. In such situations, employers are subject to various obligations regarding the collection, use and disclosure of an employee’s personal health information including the obligation to only use the information for the purpose for which it was disclosed to the employer.

Finally, it is important to note that the Ontario Court of Appeal recently established a new tort or civil right of action for the invasion of personal privacy, referred to as the tort of “*intrusion upon seclusion*.” This tort will be proven when an individual or organization intentionally or recklessly intrudes (physically or otherwise) upon the seclusion of another person’s private affairs, if the intrusion would be highly offensive to a reasonable person. Proof of harm to a recognized economic interest is not required. Accordingly, while some may view Ontario’s privacy legislation as not being as robust as other Canadian jurisdictions, the potential application of the new tort of intrusion upon seclusion should be borne in mind by employers.

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The reader will appreciate that in order to make reference to an extensive number of matters, it has been necessary to do so using general commentary only. Borden Ladner Gervais would be pleased to provide more detailed information should any specific concerns arise from this review. This document is informative only and does not constitute a legal opinion on any given matter.



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