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Borden Ladner Gervais

# Labour & Employment Law in British Columbia

A Practical Guide

2019



# Table of Contents

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- 1 Introduction
- 3 Employment Contracts
- 7 Pre-Employment Testing
- 11 Employee Deductions / Employer Contributions
- 13 Social Insurance Card
- 14 Minimum Employment Standards
- 27 Dismissal Without Just Cause
- 30 Labour Climate in British Columbia
- 32 Union Certification
- 39 Decertification
- 40 Human Rights Code
- 43 Privacy and Protection of Personal Information
- 45 Equal Opportunity / Affirmative Action Programs
- 46 Whistleblower Protection
- 47 Sexual and Other Forms of Harassment
- 48 Pay Equity
- 49 Workers' Compensation and Occupational Health & Safety
- 52 Private Pension Plans
- 55 Medical Services Plan
- 57 Construction Industry
- 58 Successor Rights and Obligations
- 60 Elections and Voting
- 62 Work Permits for Foreign Nationals

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## Introduction

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In British Columbia as in other Canadian provinces, laws dealing with employment matters come within the jurisdiction of the local legislature (called the Legislative Assembly of British Columbia), 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, human rights, collective dismissal, pay equity, protection of personal information, pension plans and successor rights and obligations, all of which provisions apply separately to federally and provincially-regulated employers.

Since this document provides only an overview of British Columbia's provincial legislation and regulations, employers operating in British Columbia, or contemplating carrying on business in British Columbia, should consult with their professional advisors to determine their specific rights and obligations under applicable statutes and regulations. 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 Contracts

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

It is by no means necessary to use a written employment contract when hiring in British Columbia: a contract of employment may be oral or in writing. However, there can be certain advantages to using written contracts. Written contracts of employment are more commonly used in 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.

The starting point is a consideration of the position the parties will be in if no written contract exists. 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 British



Columbia does not 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 into a formal 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.

The important question for employers is when does a more formal written contract become advisable? The employer’s objective in using a formal written contract, besides certainty of terms, is usually either to establish the notice or pay in lieu of notice period owed upon termination without cause; 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 considered warranted by employers in British Columbia.

### **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 successive, fixed-term contracts will usually be disregarded by a court on the grounds that the employee has, in reality, been employed under a contract of indefinite duration. Not only would such a device likely be unsuccessful, the employer would have difficulty establishing positive employee relations with such an approach towards its workforce. 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 and executives, 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 prior to the start of employment, the arrangement will be enforceable if it is not unreasonable or ambiguous or in breach of the minimum statutory notice requirements. Typically, a severance agreement for senior management and executives will address all or some of the following issues:

- The length of advance notice of termination or the amount of a payment instead;
- 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 manager or 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 can be 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 and a reasonable scope of work 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 deterrent 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 during the employment relationship. 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, as well as have them apply for a set period (most commonly 6-12 months, although it may be up to 24 months in some cases) beyond the end of the employment term.

## 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 any probationary period, absences, safety, discipline, and so forth. Employee handbooks are quite common for many British Columbia 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.





## Pre-Employment Testing

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### Medical Testing

Medical testing is curtailed by the British Columbia *Human Rights Code*, which protects people with disabilities, as well as by applicable privacy legislation, which protects people's privacy and limits the collection of personal information.

First, medical tests 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 accommodation up to the point of undue hardship 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.

## Drug and Alcohol Testing

There is no legislative regime in British Columbia governing drug and alcohol testing in the workplace, and the law in this area is still evolving, including for example as it relates to medical and recreational marijuana. However, an employer's ability to conduct drug and alcohol testing is limited by privacy and human rights considerations.

Under the British Columbia *Human Rights Code*, alcoholism and drug dependency are considered to be disabilities, and therefore protection under the legislation is extended to those who are, or who are perceived to be, alcoholics or drug-dependent. Such employees are entitled to be 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 the United States, random drug and alcohol testing has become quite common. However, in British Columbia, the current state of the law is that drug and alcohol testing is *prima facie* discriminatory. Accordingly, it has become very difficult for employers in British Columbia 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.*"

From a privacy perspective, the British Columbia *Personal Information Protection Act* ("**PIPA**") provides that employers must not collect, use and disclose employee personal information without consent. An exception exists if the collection, use or disclosure is reasonable for the purposes of establishing, managing or terminating an employment relationship. Drug and alcohol testing is likely a form of collection of personal information, and if a complaint were made under PIPA, an employer would have to meet a standard of reasonableness in showing that the testing is justified.

## Screening Assessments

Employers in both the United States and Canada often use personality, skill, or aptitude tests to determine whether an applicant possesses certain traits. However, as in the United States, British Columbia employers who rely on such tests leave themselves exposed to claims of

discrimination under the *Human Rights Code* or complaints under privacy legislation if they collect, use or disclose personal information that is not reasonably necessary for establishing the employment relationship.

Concerns about 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. Tests that are used in the United States should be carefully vetted before they are used in British Columbia.

Employers in British Columbia are also barred from using tests as a way of screening out disabled individuals or individuals above a certain age. In order to avoid charges 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 British Columbia, these tests would violate privacy legislation, as they are not reasonably necessary to establish an applicant’s suitability for employment.

## Background Check

### Criminal Record Checks

In British Columbia, the *Human Rights Code* prohibits an employer from relying on a criminal record to discriminate against the individual because that individual has been convicted of a criminal or summary conviction offence that is unrelated to the position applied for or the employment of that person. The British Columbia *Personal Information Protection Act* also prohibits an employer from collecting or using criminal record information if it is not reasonably necessary for the establishment of the employment relationship.

Before conducting criminal background checks, it is necessary for the employer to consider the position, and determine whether an individual’s criminal history is relevant to the position. If, for example, an employee is in a managerial role and will handle significant sums of money, an employer may be justified in requesting information about any criminal history involving fraud, theft or crimes of dishonesty. However, the employer would not be entitled to request information about other criminal offences, such as a DUI conviction or *Highway Traffic Act* violation. In British Columbia, upon receiving the results of a criminal record check,



employers must be very careful to ensure that they do not use information concerning any convictions unrelated to the employment as a basis for denying employment or adverse treatment of the individual in any way. An outside agency is commonly used to reduce the associated risks.

## **Credit Reports**

In British Columbia, the *Personal Information Protection Act* prohibits employers from using or collecting credit information if it is unrelated to the position applied for. Past decisions of the Privacy Commissioners have concluded that it is unlikely that credit checks will be justified unless the employee is in a managerial role and is handling significant sums of money. A lower level employee who handles cash under the supervision of a manager should not be required to provide a credit history.

If a credit report is deemed to be necessary to determine a candidate's suitability for employment, employers are required to obtain the consent of the individual. The *Business Practices and Consumer Protection Act* also regulates the circumstances in which a person's credit information can be obtained from a credit reporting agency. Under this legislation, reporting agencies are permitted to provide credit information to employers for the purposes of "evaluating the individual for employment, promotion, reassignment or retention as an employee." However, if the agency provides the information to the employer, and the employer uses it to make a decision to deny a "benefit" or increase the cost of a benefit to an individual, the employer has certain obligations to notify the individual.

## **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 legislation, employers should obtain the consent of the applicant before performing a personal reference check.



## Employee Deductions / Employer Contributions

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### Income tax

Employers are required to make deductions at source from the earnings of their employees for taxes imposed under the federal and provincial income tax acts. They are also required to have employees complete separate TD1 and TD1BC forms which provide the information that determines the status of an employee for income tax purposes.

### Canada Pension Plan

The Canada Pension Plan provides retirement pensions for contributors as well as survivors' benefits for widows and dependent children of contributors who die. It also provides certain disability benefits. This pension plan is compulsory. Employees, employers and self-employed individuals are required to contribute. For the year 2019, each employer must deduct and remit 5.1% of each employee's wages beyond \$3,500.00, to a maximum annual contribution of \$2,748.90, and contribute an equal amount on its own behalf. The contribution rate and both the employer's and the employee's maximum contribution are subject to change on a yearly basis. The employer's contribution is deductible for income tax purposes as a normal business expense.

## Employment Insurance

The *Employment Insurance Act* requires an employer to make contributions based on the earnings of all employees, subject to certain exceptions. The contributions are made to the Employment Insurance Account maintained by the Government of Canada, from which unemployed insured contributors may draw benefits. Generally, each employer must deduct and remit 1.62% of each employee's wages, up to a maximum annual premium of \$860.22 (in 2019), and itself contribute an amount equal to 1.4 times the employee's premium for the pay period. The employer's contribution is deductible for income tax purposes as a normal business expense.

An employer's premium can be reduced when it maintains a wage-loss plan that reduces employment insurance benefits payable in respect of unemployment caused by illness or pregnancy.





## Social Insurance Card

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All persons who are employed in pensionable employment must obtain a Social Insurance Number (“S.I.N.”) and a confirmation of S.I.N. letter (previously a S.I.N. Card) from Service Canada for the purpose of contributing to the Canada Pension Plan and accessing government programs and benefits such as Employment Insurance.

Every employer who employs an employee in pensionable employment shall request the employee to produce his or her S.I.N. Card, confirmation of S.I.N. letter or other documentation showing his or her S.I.N. within 3 days of the start of his or her pensionable employment.

Every employer must maintain a record of the S.I.N. of each employee.

Note that a S.I.N. beginning with a “9” is issued to temporary foreign workers, and therefore you should ensure that any employees with such a S.I.N. are authorized to work in Canada and that their immigration document is still valid.



## Minimum 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.

The *Employment Standards Act* (the “**British Columbia ESA**”) is the applicable employment standards legislation in the province of British Columbia.

The British Columbia ESA is ever-evolving and it is not uncommon for significant amendments to be introduced periodically, usually in conjunction with a change in government.

Employers are required to make available, or to provide to each employee, information about their rights under the British Columbia ESA, which must be in a form provided or approved by the Director of Employment Standards. A poster and form approved by the Director can be found at: <https://www2.gov.bc.ca/gov/content/employment-business/employment-standards-advice/employment-standards/forms-resources/igm/esa-part-1-section-6>.

## 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.

Currently, the general minimum wage rate in British Columbia is \$13.85 per hour.

In addition, the British Columbia ESA establishes distinct minimum wage rates for certain categories of workers. For example, employees who serve liquor directly to customers, guests, members or patrons in premises for which a license to sell liquor has been issued as a regular part of their employment duties and whose primary duties are as servers of food or drink or both, currently have a minimum wage rate of \$12.70 per hour. Also, live-in home support workers currently receive a minimum wage rate of \$113.50 per day or part day worked. Live-in camp leaders currently receive a minimum wage rate of \$110.87 per day. Farm workers who are employed on a piece work basis and harvest certain crops receive a wage rate based on the type of crop they harvest.

## Hours of Work and Overtime

The British Columbia 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 British Columbia ESA stipulates that standard hours of work before which overtime is payable are 8 hours per day and 40 regular hours per week. There are no maximum hours, but employees cannot be required to work “excessive hours” or hours harmful to the employee’s health or safety. Further, employees are entitled to have 8 hours free from work between shifts unless required to work because of an emergency.

Employers in British Columbia have considerable flexibility in scheduling regular hours of work.

With respect to overtime, the provisions of the British Columbia ESA provide for overtime at the rate of time-and-a-half for each hour worked in excess of 40 regular hours in a week or 8 hours per day and double time for each hour worked in excess of 12 hours per day. In addition, employees must have at least 32 consecutive hours free from work each week and any hours worked within that period must be paid at time-and-a-half.

It is permissible for employers and employees to enter into written averaging agreements so that an employee’s hours of work are averaged over a 1, 2, 3 or 4 week period. Employees may agree to work up to 12 hours per day, averaging 40 hours per week, so as not to trigger the overtime threshold. It is not necessary for employers to receive the approval of the Director of Employment Standards in order to implement such an averaging agreement.

However, there are specific provisions that must be included in an averaging agreement in order for it to be valid under the British Columbia ESA as well as other specific rules, such as those relating to rest periods, with which employers must comply. Employers and employees may apply to the Director of Employment Standards for a variance from certain hours of work and overtime requirements.

At an employee's request, an employer may also establish a time bank to which overtime hours are credited instead of being paid out in the pay period in which they are earned under specific rules.

Overtime pay and restrictions on hours of work generally do not apply to managers. A manager is considered to be either an individual whose primary employment responsibilities involve supervising and/or directing human or other resources or an individual employed in an executive capacity. To determine whether or not an individual is a manager, the Employment Standards Tribunal will generally consider how much an individual may, on their own or otherwise, materially or substantially affect the employment conditions for those whose work they are held responsible by the organization and what kind of responsibilities the individual has with regard to the organization's resources, even if there are certain checks on their authority. An individual who occasionally performs managerial tasks would not likely fall within this exemption. It is possible for managers to perform some non-managerial tasks without losing their exempt status, as long as their primary functions remain managerial in nature.

Employees who report for work must be paid for at least 2 hours, even if they work for less, and if they are scheduled for more than 8 hours, they must be paid for at least 4 hours, even if they work for less. If work stops for a reason beyond the employer's control, employees still must be paid for the greater of 2 hours or the time actually worked. However, if an employee reports to work but is not fit to work, or the employee is not in compliance with Part 3 of the *Workers Compensation Act*, the employee only has to be paid for time actually worked.

Employees are entitled to receive at least a 30-minute meal break every 5 consecutive hours worked, which does not have to be paid unless the employee is required to work or be available during that time. Employees do not have a right to receive coffee breaks.

## Leaves of Absence

The British Columbia ESA provides for unpaid pregnancy leave, parental leave, compassionate care leave, family responsibility leave, reservists' leave, bereavement leave, leave respecting the disappearance of a child, leave respecting the death of a child, critical illness or injury leave, leave respecting domestic or sexual violence and jury duty leave. There is no minimum service requirement before employees become entitled to these leaves of absence. Each leave is job-protected, such that following the leave of absence the employer must reinstate the employee to the same or comparable position. Employment is deemed to be continuous over the leave of absence for the purpose of calculating annual vacation and termination entitlements under the British Columbia ESA, as well as for benefit plans.

An employer must continue to make payments to any such plans provided the employee continues to pay his or her share of the cost, except for during reservists' leave. In addition, the employee is entitled to all increases in wages and benefits that he or she would have been entitled to if not on leave.

## **Maternity and Parental Leave**

### ***Maternity Leave***

Employees who are giving birth to a child are entitled to up to 17 weeks of consecutive unpaid leave, beginning no earlier than 13 weeks before the expected birth date and no later than the actual birth date; and ending no earlier than 17 weeks after the leave begins. If an employee on leave proposes to return to work earlier than 6 weeks after giving birth, the employer may require the employee to provide a medical certificate stating they are able to resume work. An employee who requests leave after the termination of a pregnancy is entitled to up to 6 consecutive weeks of unpaid pregnancy leave beginning on the date of the termination of the pregnancy.

However, an employee is entitled to up to 6 additional consecutive weeks of unpaid leave if, for reasons related to the birth or the termination of the pregnancy, she is unable to return to work when her pregnancy leave ends. The employee may be required to provide a medical certificate setting out the reason for the additional leave.

Employees are required to provide at least 4 weeks' notice prior to commencing pregnancy leave. Employers may request a medical certificate setting out the expected or actual birth date or the date the pregnancy terminates.

### ***Parental Leave***

Employees who are birth mothers and take pregnancy leave are entitled to up to 61 weeks of consecutive unpaid leave. This leave must begin immediately after the end of the pregnancy leave, unless otherwise agreed between the employer and the employee.

Employees who are birth mothers and do not take pregnancy leave, or who are birth fathers, are entitled to up to 62 weeks of consecutive unpaid leave. The leave can begin anytime within 78 weeks of the birth of the child. Employees who are adopting parents are entitled to up to 62 weeks of unpaid leave. The leave must begin within 78 weeks after the placement of the child. Employees who do not take pregnancy leave must provide at least 4 weeks' notice prior to commencing parental leave. Employers may request a medical practitioner's or nurse practitioner's certificate or other evidence of the employee's entitlement to leave.

If the child has a physical, psychological or emotional condition requiring an additional period of parental care, the employee is entitled to up to an additional 5 consecutive weeks of unpaid leave, beginning immediately after the end of the 62 week leave (or 61 week period for birth mothers who take pregnancy leave).



## Compassionate Care Leave

Employees are entitled to up to 27 weeks of unpaid leave to provide care for or support to a gravely ill family member, if a medical practitioner issues a medical certificate stating that the family member has a serious medical condition with a significant risk of death within 26 weeks after the certificate is issued, or the date the leave began. "Family member" means:

- a member of an employee's immediate family, including
- the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee,
- the child or parent of an employee's spouse, and
- any person who lives with an employee as a member of the employee's family;
- in relation to an employee a step-sibling, an aunt or uncle, a niece or nephew, a current or former foster parent, a current or former foster child, a current or former ward, a former guardian, or
- the spouse of a sibling or step-sibling, a child or stepchild, a parent, a grandparent, a grandchild, an aunt or uncle, a niece or nephew, a current or former foster child, or a current or former guardian
- in relation to the employee's spouse a step-parent, a sibling or step-sibling, a grandparent, a grandchild, an aunt or uncle, a niece or nephew, a current or former foster parent, or a current or former ward.
- whether or not related to an employee by blood, adoption, marriage or common law partnership, an individual with a serious medical condition who considers the employee to be, or whom the employee considers to be, like a close relative.

## Family Responsibility Leave

Employees are entitled to up to 5 days of unpaid leave during each employment year to meet responsibilities related to the care, health or education of a child in the employee's care, or the care or health of any other member of the employee's immediate family.

"Immediate family" means:

- the spouse, child, parent, guardian, sibling, grandchild or grandparent of an employee,
- the child or parent of an employee's spouse, and
- any person who lives with an employee as a member of the employee's family;

## Jury Duty Leave

Employees are entitled to an unpaid leave of absence for the period of time that they are required to attend court as a juror.

## **Bereavement Leave**

Employees are entitled to up to 3 days unpaid leave following the death of an immediate family member. “Immediate family” is the same as defined above under “Family Responsibility Leave”. These days do not have to be consecutive, or start on the date of the death.

## **Reservists' Leave**

An employee who is a reservist may take an unpaid leave if he or she is: 1) deployed to a Canadian Forces operation outside Canada or is engaged, either inside or outside Canada, in a pre-deployment or post-deployment activity required by the Canadian Forces in connection with such an operation; or 2) is deployed to a Canadian Forces operation inside Canada that is or will be providing assistance in dealing with an emergency or with its aftermath (including search and rescue operations, recovery from national disasters such as flood relief, military aid following ice storms, and aircraft crash recovery). An employee who is a reservist is also entitled to 20 days' unpaid leave to participate in Canadian Forces training activities or travelling to or from the location of those activities.

Reservists must provide their employer with 4 weeks written notice or as much as is practicable of the day on which they will begin and end the leave. If the deployment is extended, the same notice must be given before the date the leave was to have ended. An employee must provide at least 1 week notice to return to work earlier than stated.

## **Leave Respecting the Disappearance of a Child**

If a child of an employee disappears and it is probable that the child's disappearance is a result of a crime, the employee is entitled to an unpaid leave for a period of up to 52 weeks. The leave must be taken in the period between the date the child disappears and 53 weeks after the date of the disappearance. The leave ends immediately if the circumstances indicate it is no longer probable that the child's disappearance is a result of a crime, the employee is charged with a crime that resulted in the disappearance of the child, or the child is found deceased. If the child is found alive, the leave ends 14 days after the date on which the child is found alive. The employer may request that the employee provide sufficient proof that the child has disappeared in circumstances in which it is probable the disappearance is the result of a crime.

## **Leave Respecting the Death of a Child**

If a child of an employee dies, the employee is entitled to unpaid leave for a period of up to 104 weeks. The leave must begin on the date the child dies, or the date the child is found dead in the case of a child that had initially disappeared and the leave must end 105 weeks after either of these dates. The employer may request that the employee provide to the employer reasonably sufficient proof that the employee's child is dead.

## **Critical Illness or Injury Leave**

All employees are entitled to unpaid leave to care for a family member whose health has significantly changed due to critical illness or injury, with the result that the life of the family member is at risk. The leave entitlement is up to 36 weeks in a one year period to care for a family member under the age of 19, and up to 16 weeks in a one year period for a family member who is 19 years of age or older. "Family member" is the same as defined above under "Compassionate Care Leave".

As soon as practicable, the employee must provide the employer with a medical certificate stating that:

- the family member's health has significantly changed and the life of the family member is at risk as a result of the illness or injury;
- the care or support required by the family member can be met by someone who is not a health professional; and
- the time period for which the family member requires care or support.

An employee may begin the leave no earlier than the earlier of the first day of the week in which the medical certificate is issued, or the first day of the week in which the baseline state of health of the family member significantly changes and the life of the family member is at risk as a result of an illness or injury.

The employee is entitled to take the leave only up to the number of weeks initiated in the certificate, and the leave must be taken in units of one or more weeks. If the employee takes a leave shorter than permitted under the ESA, the employee may obtain a new certificate. The employee is entitled to take different periods of leave within 52 weeks of the first day leave is taken.

The leave ends on the last day of the earlier of the week in which the family member dies, or the week 52 weeks from the date the leave began expires. If the life of the family member remains at risk 52 weeks after the first leave began, the employee may take another leave.

## **Leave Respecting Domestic or Sexual Violence**

All employee are entitled to unpaid leave of 10 days, in units or one or more days or in one continuous period, and an additional 15 weeks of unpaid leave (which may be taken in one unit of time, or more than one unit of time with the employer's consent), to seek medical attention, counselling or other social or psychological services, or legal advice, or to seek new housing if they or an eligible person has experienced domestic violence.

"Eligible person" includes a child who is legally under the day-to-day care and control of the employee, a person who is 19 years of age or older, who is unable, because of illness, disability or another reason, to obtain the necessities of life or withdraw from the charge of

the person's parent or former guardian, and who is under the day-to-day care and control of the employee, who is the person's parent or former guardian.

The employee may be required to provide reasonably sufficient proof in the circumstances that the employee is entitled to the leave.

## Individual Notice of Termination of Employment

Employers are required to provide statutory minimum notice or pay in lieu to terminate employment, except if:

- the employee has not completed 3 consecutive months of employment;
- the employee quits or retires;
- the employee is dismissed for just cause (which may include things such as theft, fraud and serious willful misconduct but is a factually based determination made on a case-by-case basis);
- the employee works on an on-call basis doing temporary assignments, which he or she can accept or reject;
- the employee is employed for a definite term and the term is not extended past its end date by three months or more;
- the employee is hired for specific work to be completed in 12 months or less and the specific work is not extended for three months or more past its scheduled completion;
- it is impossible to perform the work due to some unforeseeable event or circumstance (other than bankruptcy, receivership or insolvency);
- the employer whose principal business is construction employs the employee at one or more construction sites;
- the employee refuses reasonable alternative employment; or
- the employee is a teacher employed by a board of school trustees.

## Notice Provisions

The British Columbia ESA provides for notice of termination (e.g., working notice) or pay in lieu of notice (or combination of both). 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; or
- lays an employee off for a period that is longer than a "temporary layoff".

The British Columbia ESA allows a temporary layoff of up to 13 weeks in a period of 20 weeks (or for a period of time in which an employee covered by a collective agreement has the right to be recalled, only if the term of the collective agreement meets or exceeds the requirements of the British Columbia ESA) only where it is expressly provided for in the employment contract, implied by well-known industry-wide practice or is agreed to by the employee. If the layoff exceeds these periods, it becomes a termination and pay in lieu of notice is required based on the start date of the layoff.

When an employee is terminated, the written notice required under the British Columbia ESA is determined by how long the employee has been employed by their 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
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 British Columbia ESA must be given termination pay in lieu of notice. Termination pay is a lump sum payment equal to the regular wages (excluding overtime) for a regular work week that an employee would otherwise have been entitled to during the written notice period. As a general statement and in our experience, most employers in British Columbia terminate employees effective immediately and provide pay in lieu of notice rather than working notice. Note that vacation pay must be paid on termination pay.

If written notice is provided, the employee must be able to work during the notice period and cannot be on vacation, leave, temporary layoff, strike or lockout or unavailable due to medical reasons, otherwise the notice must be suspended until they return or pay in lieu may be provided. If an employee continues working for the employer after the notice period ends, the notice is of no effect. The employee's conditions of employment must not change after notice is given.



On termination, final wages must be paid within 48 hours after the last day the employee works. If the employee voluntarily quits, no notice or pay in lieu of notice is required to be given but all outstanding wages must be paid to the employee within 6 days of the last day worked.

## Severance Pay

There is no statutory severance pay requirement in British Columbia.

## Public Holidays

Pursuant to the British Columbia ESA, British Columbia has the following 10 statutory holidays:

- New Year's Day
- Family Day
- Good Friday
- Victoria Day
- Canada Day
- British Columbia Day
- Labour Day
- Thanksgiving Day
- Remembrance Day
- Christmas Day

Employees qualify for statutory holiday pay if they have (i) been employed for at least 30 calendar days prior to the statutory holiday, and (ii) have worked or earned wages on 15 of the 30 days immediately before the statutory holiday, or if they are working under an averaging agreement or variance at any time in the 30 days before the statutory holiday.

Employees who have satisfied these qualifications are entitled to the holiday off with an average day's pay. Employees do not have a statutory right to refuse to work on a statutory holiday. However, when an employee who qualifies for statutory holiday pay works on a statutory holiday, the employee must be paid an average day's pay plus time-and-a-half for the first 12 hours worked and double time for all hours worked over 12 hours on the statutory holiday. If an employee who is not eligible for statutory holiday pay works on the statutory holiday, he or she is entitled to be paid as if it were a regular work day.

An employer and a majority of employees can agree to substitute another day off for a statutory holiday. As well, certain groups of employees, such as managers, are excluded from the statutory holiday requirements under the British Columbia ESA.

## Annual Vacation

British Columbia employees are entitled to both vacation time and vacation pay.

### Vacation Time

Employees in British Columbia are entitled to at least 2 weeks of vacation time after each 12 month vacation entitlement year. After 5 consecutive years of employment, employees are entitled to at least 3 weeks of vacation time after each 12 months entitlement year.

The British Columbia Employment Standards Branch has the power to enforce an agreement by the employer to provide the employee with greater vacation time and pay entitlements.

Ordinarily, a vacation entitlement year is a recurring 12 month period beginning on the date of hire. An employer may use a common date for calculating the annual vacation entitlement of all employees, as long as this does not result in a reduction of any employee's right to vacation time.

The services of an employee are deemed to be continuous for the purposes of calculating annual vacation entitlement when an employee spends time away from work due to:

- temporary layoff;
- any leave under the British Columbia ESA; or
- any other approved leaves (e.g., sickness or injury).

Under the British Columbia ESA, the employer has the right to schedule vacations according to business requirements in periods of one or more weeks unless the employee requests a shorter period. The employer also has an obligation to ensure the vacation time is scheduled and taken within 12 months after it is earned. Employees are not permitted to carry over vacation days from one year to the next and cannot forego an annual vacation and only receive the vacation pay.

### Vacation Pay

After 5 consecutive days of employment, employees are entitled to vacation pay of at least 4% (for employees with up to 5 consecutive years of employment) or 6% (for employees with more than 5 consecutive years of employment) of the employee's total wages earned in the 12-month vacation entitlement year. Total wages for calculating vacation pay includes all money paid by an employer to an employee including, but not limited to, salaries and commissions, overtime, statutory holiday pay, certain bonuses and previously paid vacation pay, as well as statutory compensation for length of service and group termination pay.

Vacation pay must be paid to the employee at least 7 days prior to the commencement of his or her vacation, or, if agreed to in writing by the employee, on each pay cheque.

## Compliance Issues Under Employment Standards Legislation

In British Columbia, the Director of Employment Standards administers and enforces the British Columbia ESA and its regulations. Employment Standards Officers investigate complaints to determine whether or not a violation has occurred and can order an employer to pay amounts found owing as well as a mandatory penalty for each section of the British Columbia ESA found to have been contravened. 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

Employees covered under the British Columbia ESA may file a written complaint with the Employment Standards Branch if they believe their employer is not complying with the law. However, before filing a complaint most employees must first contact the employer directly by using a Self-Help Kit which is intended to assist employees in defining their problem and identifying their desired solution. If the employee and the employer are unable to resolve the matter using the Self-Help Kit, or the employee is excluded from the requirement to use the Kit, or the time limit for filing a complaint is almost up, the employee may choose to file a complaint. A complaint relating to an employee whose employment has terminated must be filed within 6 months after the last day of employment.

### Investigating Violations

After a complaint is filed, the parties are contacted and the provisions of the British Columbia ESA are explained. If the complaint is not resolved at this stage, it may be assigned to an investigator, referred to mediation, or a hearing may be set before the Director of Employment Standards. The employer will have an opportunity to respond to the complaint during the investigation and hearing.

### Enforcement

If a complaint is not resolved voluntarily, the Officer will make a decision and issue a written decision called a determination. If the Director of Employment Standards concludes that an employer has not complied with the British Columbia ESA, the Officer can issue an order to pay wages to an employee or employees or a compliance order. The Director may issue an order to remedy or cease doing an act or to post a notice in a specified form and location regarding the determination or a requirement, or information, about the British Columbia ESA or its regulations, among other things. For complaints involving violations of the laws relating to leaves of absence under the British Columbia ESA, misrepresentations made to an employee to induce, influence or persuade a person to become an employee or be

available for work, or retaliation against an employee for filing an employment standards complaint, the Director may issue an order to reinstate and/or compensate an employee in lieu of reinstatement.

The amount of wages an employer may be required by a determination to pay as a result of a complaint is generally limited to the amount that became payable in the period beginning 12 months before the earlier of the date of the complaint or the date of termination of employment, plus interest on those wages. Where no complaint was filed, the amount of wages is generally limited to 12 months before the Director first told the employer of the investigation that resulted in the determination, plus interest on those wages.

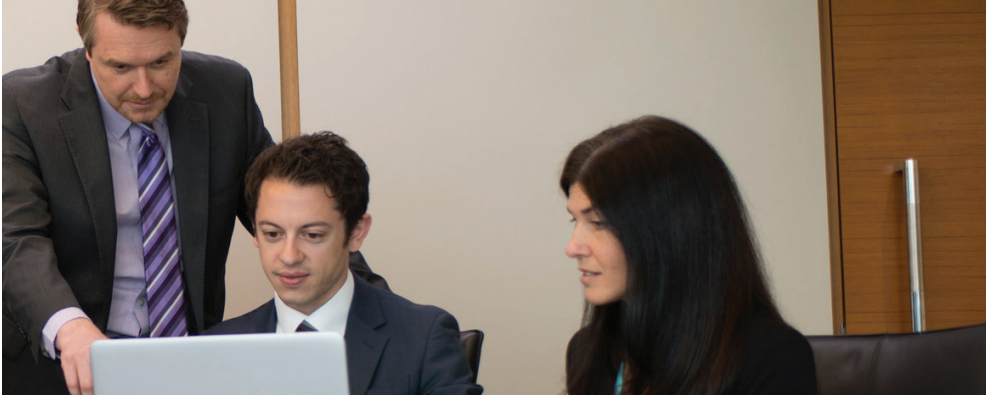
The Director of Employment Standards has the ability to extend these wage recovery periods from 12 months to 24 months in prescribed circumstances.

The Director of Employment Standards will also assess mandatory administrative penalties for every contravention of the British Columbia ESA. The penalties range between \$500 and \$10,000 per contravention based on whether there have been previous contraventions of the same section at the same location within a certain time period. There are a variety of methods available to the Director to collect outstanding wages owing and penalties from employers.

### **Appeal to the Employment Standards Tribunal**

If employees or employers are not satisfied with a determination, they may appeal the determination to the Employment Standards Tribunal, which is an independent, quasi-judicial tribunal.

The appeal must be delivered to the office of the Employment Standards Tribunal within 30 days after the date of service of the determination (if it was served by registered mail) or 21 days after the date of service of the determination (if delivered personally).



## Dismissal Without Just Cause

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### Statutory Notice

Please refer to the section above, entitled “Minimum Employment Standards”, for a more detailed review of the statutory notice requirements in British Columbia.

### Reasonable Notice

As discussed above, the statutory notice 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 properly setting out an employee’s entitlements upon termination by the employer without just cause, an employee is entitled to reasonable notice of termination of employment, or pay in lieu thereof.

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

- character of employment (junior, senior, managerial);
- length of service of the employee;
- age of the employee; and
- availability of similar employment, having regard to 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 approximately one month of notice, or pay in lieu, for each year of service and is often more for short service managerial employees or very senior executive employees. There is no fixed maximum notice period under the common law, but no British Columbia case has as of yet awarded more than 24 months' notice or pay in lieu of notice to an employee (though it has been exceeded in Ontario cases).

In addition to notice or payment in lieu, British Columbia 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 loss of bonus and other such entitlements are routinely awarded. In British Columbia, employers are also liable for any damages actually incurred by an employee as the result of the loss of benefits through the notice period.

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 (though not where there is a termination provision, subject to it expressly contemplating the requirement to mitigate). 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 amounts 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, as also discussed above, most employers in British Columbia terminate employees effective immediately and provide pay in lieu of notice rather than working notice.

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

### **Just Cause**

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

"Just cause" is determined on a case by case basis by the court, and 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.

### Group Termination

In British Columbia, the *Employment Standards Act* dictates that employers are required to provide additional notice or pay in lieu of notice (or a combination of written notice and pay in lieu) if 50 or more employees are terminated at a single location within a 2 month period.

The notice of group termination must set out the number of employees who will be affected, the effective date or dates of the terminations and the reasons for the terminations.

The length of notice depends on the number of employees who are terminated:

Number of employees affected	Additional Notice Required
Less than 50	None
50 to 100	8 weeks
101 to 300	12 weeks
301 or more	16 weeks

Employers are also required to provide this notice to any unions certified to represent the employees, and to the Minister of Labour. This notice or pay in lieu of notice is in addition to individual statutory termination entitlements; therefore, the individual and group notice periods may not coincide.



## Labour Climate in British Columbia

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Labour relations in British Columbia have been generally stable over the last decade. Employers and unions generally work together and there have been few strikes or lockouts, and wage settlements are fair.

Unionization in British Columbia has declined to about 31% recently. However, the unionization rate for the private sector is around 17%.

A new NDP government took office in British Columbia on July 18, 2017. In May 2019, the legislature amended the British Columbia *Labour Relations Code*. The changes will facilitate unionization in British Columbia. The changes include new restrictions on the employer's right to communicate with its employees; a narrower definition of picketing, which brings the legislation in line with Canadian law; a broader power of the Labour Relations Board to order remedial certification where it is just and equitable to do so; and provides for faster representation votes, among others. These changes will be discussed in more detail in the following section.

As of the time of writing there have been no legislative changes to labour laws but we can expect some. According to a Business Council of British Columbia publication on August 4, 2017, we might expect to see discussion about removing the secret ballot vote for certification, although the Green Party has stated it will not support a shift back to the “card check” system that was in place under a previous NDP government.

We might expect to see fewer restrictions on secondary picketing, more limitations on the use of replacement workers during a strike or lockout, possibly enhanced union access to employee information and possible changes to the law of “successorship” (Source: Business Council of British Columbia “Re: Possible NDP Initiatives Relating to labour policy, human capital development, and employment standards” August 4, 2017).



## Union Certification

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### Union Access and Solicitation

The British Columbia *Labour Relations Code* 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. Less common is the situation where a union independently targets 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.

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., non-work related materials include 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 British Columbia *Labour Relations Code* 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. Whereas prior to



May 30, 2019, an employer was free to express its views in these situations as long as it did 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, this has now changed under the recent amendments to the *Labour Relations Code*. Due to the changes to the legislation, the restrictions on an employer's ability to communicate with its employees are now much broader. An employer now has a narrower right to communicate to its employees only a statement of fact or opinion reasonably held with respect to the employer's business. Thus, for example, an employer may no longer explain the negative consequences of unionization to employees or express its views about unionization. As under the former legislation prior to May 30, 2019, it remains true that an employer may not question employees with respect to their position. 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 British Columbia 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, these forms of communication will now be limited to statements of fact or opinion reasonably held with respect to the employer's business, as discussed above. Finally, so-called "captive audience" speeches, in which employees are asked to attend to listen to management's reaction to the union organizing campaign, will not be permitted due to the changes to the legislation discussed above.

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

### **Permitted conduct**

- 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.) as long as these statements are statements of facts or reasonably held opinions about the employer's business). 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 about insofar as the correction or clarification is a statement of fact or reasonably held opinion about the employer's business. Union letters and leaflets often create an opportunity for the employer to respond.

### Prohibited conduct

- Actively soliciting information from employees about the union organization drive or asking employees to state their views on unionization.
- The right of the employer to express a preference for remaining non-union and for maintaining a direct relationship with employees.
- 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.

Many of the forms of basic information employers previously provided regarding unionization and the certification process may no longer be permitted due to the employer's more limited right of communication under the recently amended British Columbia *Labour Relations Code*.

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. The Board may also order remedial certification if it considers it just and equitable to do so.

## Certification Process in British Columbia

There are 3 ways for a union 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.

In British Columbia, the legislation 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.

The legislation includes “dependent contractors” under the definition of “employee”, but independent contractors are not covered by the legislation and are therefore not eligible for certification. The test to determine whether a contractor is dependent or independent involves the consideration of a number of factors, including the way the relevant industry operates; the type of work involved and its source; the nature of the applicant’s operations; the organization or the employer’s operations and the degree to which the contractors are a continuing part of it; any contractual arrangement between the parties and others; the type and extent of control and direction exercised by the employer; compensation and how it is determined; the percentage of income the contractor derives from the employer; the opportunity for the contractor to exercise interdependent entrepreneurial judgment to generate income; and the contractor’s opportunity for economic mobility and to solicit customers elsewhere.

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 45% 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. Unless the balloting is conducted by mail, the representation vote must take place within 5 business days.

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 may be barred from re-applying for certification for at least 90 days after the certification vote. If less than 55% of the employees in the appropriate bargaining unit participate in the representation vote, the Board has the discretion to order another vote.

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 if the Board considers that it is just and equitable to do so. We note this is a lower bar than the legislation required prior to May 30, 2019. At that time, the Board could certify a union as a remedy for an employer's misconduct only if the union showed it would likely have obtained the requisite support had it not been for the employer's unfair labour practice.

## Strikes, Lockouts and Replacement Workers

After following certain processes, the parties to a collective bargaining relationship may strike or lockout. At a minimum, the parties must have attempted to negotiate a collective agreement in good faith. If a mediator has been appointed, no strike or lockout can occur during that appointment.

In order to strike, a union must take a secret ballot strike vote and serve 72-hours strike notice on the employer.

An employer may lockout after serving 72-hours lockout notice on the union.

No strikes or lockouts are permitted during the term of a collective agreement.

The British Columbia *Labour Relations Code* has restrictive provisions that limit who can work during a strike or lockout. While certain types of employees are permitted to work, these restrictions are quite strict compared to other provinces.

## Picketing

In British Columbia, a union may picket at or near the employer's work sites during a lawful strike or lockout, with certain limitations.

In May 2019, the legislature amended the definition of "picketing" in the British Columbia *Labour Relations Code* to clarify that picketing does not include lawful consumer leafleting that does not unduly restrict access to or egress from a person's place of business, operations or employment, or prevent employees from working at or from their place of employment. This is in line with existing law from the Supreme Court of Canada

The Labour Relations Board has jurisdiction to determine issues relating to unfair labour practices, strikes or lockouts and picketing. In appropriate circumstances, it can issue orders prohibiting illegal picketing, strikes or improper use of replacement workers.

### **First Collective Agreement**

In certain circumstances, particularly where there have been unfair labour practices by the employer, the Board can impose a first collective agreement, although this is rarely done.

### **Term of a Collective Agreement**

A collective agreement must be for at least one year.

### **Unfair Labour Practices**

The British Columbia *Labour Relations Code* has several provisions prohibiting unfair labour practices such as terminating or laying off employees during certain “freeze” periods without proper cause; coercion or intimidation of employees, and generally with respect to interference, in employees’ right to join a union of their choice and participate in its affairs.

Unions are also prohibited from using coercion or intimidation and, when representing their members, they are obliged to do so in a manner that is not arbitrary, discriminatory or in bad faith.



## Decertification

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Employees may apply to terminate bargaining rights at specified times.

### **Decertification Process in British Columbia**

An application for decertification may be brought at any time after 12 months following the certification of the union, provided it is not within 12 months or another period designated by the Board following a refusal to cancel the certification of that trade union.

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 45% 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 5 business days of the filing of the application. The Board must be satisfied that the majority of employees have voted in favour of revocation.

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.



## Human Rights Code

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In British Columbia, the *Human Rights Code* applies. 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 *Human Rights Code* 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 *Human Rights Code* prohibits discrimination on an extensive list of grounds, including but not limited to race, colour, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation, gender identity or expression and age.

Discrimination based on these grounds is prohibited in: employment; housing; accommodations; services; membership in trade and vocational associations (such as unions); publications; employment advertisements; the purchase of property; and wages (based on sex).



Employers are also prohibited from discriminating in the area of employment based on an employee's political belief or an employee's conviction of a criminal or summary conviction offence that is unrelated to the employment or intended employment of that person.

Human rights legislation 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 religion 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 Complaints and Proceedings

Currently in British Columbia, all complaints alleging discrimination are filed directly with the British Columbia Human Rights Tribunal (the "BCHRT").

When a complaint is filed, it is first referred to BCHRT staff to determine whether it falls within the British Columbia *Human Rights Code*, and whether the complaint was filed in a timely manner. In 2018, the time limit to file a complaint was extended from 6 months to one year. Thus, complaints must be filed within one year of the wrongful conduct alleged in the complaint. If the timeliness or jurisdiction of a complaint is in doubt, both the complainant and the employer have the opportunity to file submissions to the BCHRT before a decision is made. Given the extension of the time limit, employers now face a longer period of uncertainty regarding potential liability under the British Columbia *Human Rights Code*.

When a complaint has been accepted, the BCHRT may attempt to have both parties reach an agreement through a voluntary settlement meeting.

If the complaint has no reasonable prospect of success, the BCHRT may dismiss the complaint without a hearing upon receipt of an application for a dismissal from the employer. Both parties have an opportunity to file submissions and written evidence to the BCHRT. The Tribunal will generally dismiss a complaint only if there is no contradictory evidence about important facts, and there is either no reasonable prospect that the complainant will prove one or more of the parts of discrimination at a hearing or there is no reasonable prospect of success because a defense would be proved at a hearing. There are also a number of other

grounds under which an application to dismiss the complaint may be brought, including that the BCHRT does not have jurisdiction; the facts alleged in the complaint, if proved, could not be discrimination under the *Human Rights Code*; the complainant would not benefit from proceeding; proceeding with the complaint would not further the purposes of the *Human Rights Code*; the complaint was made for improper motives or in bad faith; the complaint was appropriately dealt with in another proceeding; or the complaint is filed after the one-year time limit for filing.

Where an application has not been settled and an application for dismissal is not filed or is unsuccessful, the BCHRT will hold a hearing to decide whether discrimination occurred. If the BCHRT finds that the applicant experienced discrimination in breach of the *Human Rights Code*, the BCHRT can make an order to address the discrimination. This can include ordering the employer to pay financial compensation to the applicant, and/or orders to stop the discrimination and prevent further human rights violations or such similar discrimination again. Complainants can also ask for what they were denied, such as asking for their job back. If the BCHRT finds that discrimination did not occur, it will dismiss the complaint.

The BCHRT may still order both monetary and non-monetary compensation, and is empowered to award monetary compensation for “*injury to dignity, feelings and self-respect.*” There is no maximum amount for such mental distress damages, and although the overall awards are generally significantly lower than those seen in the United States, the BCHRT did recently make an award for \$75,000 in such damages against an employer in British Columbia, which was upheld on appeal by the British Columbia Court of Appeal.

Employees in British Columbia do not have a right to commence a civil law suit for discriminatory conduct. However, this type of conduct may attract a more substantial award of damages in a wrongful dismissal action.

Note that the new NDP government in British Columbia reinstated the British Columbia Human Rights Commission in 2018. The Human Rights Commissioner may intervene in a complaint once it is filed, on terms determined by the BCHRT. The Commissioner is responsible for promoting and protecting human rights. The Commissioner has the power to assist a complainant with any aspect of a complaint. The Commissioner’s broad authority to investigate and make recommendations related to human rights issues may lead to further legislative change.



## Privacy and Protection of Personal Information

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British Columbia has private sector privacy legislation, the *Personal Information Protection Act* (“PIPA”). This legislation prohibits employers from collecting, using and disclosing personal information without the consent of the individual, although special rules apply for employee personal information.

Personal information about employees may be collected, used and disclosed without the consent of the individual for the purpose of establishing, managing or terminating the employment relationship. However, the employer is required to notify the employee that the information will be collected and the purpose for doing so. In addition, employers may only collect, use and disclose personal information to the extent reasonably necessary to satisfy the employer’s objectives.

Employers must ensure that the personal information is stored in a secure location. If an employer uses personal information to make a decision that directly affects an employee, the employer must keep the information used for that decision for one year.

Employees have a right to access personal information held by the employer upon request.

Employers are required to implement and distribute a privacy policy that describes the requirements of PIPA, and identifies a privacy officer who is available to respond to employee inquiries and requests for access to information.

Employees may file complaints with the Office of the Information and Privacy Commissioner for British Columbia (“**OIPC**”). OIPC decisions are subject to review by the British Columbia Supreme Court.

British Columbia also has a *Privacy Act*, which establishes a statutory tort of invasion of privacy. Private parties can bring an action on the basis that another party has wilfully violated their privacy without a claim of right. The *Privacy Act* sets out that the nature and degree of privacy to which a person is entitled is that which is reasonable in the circumstances, giving due regard to the lawful interests of another.



## Equal Opportunity / Affirmative Action Programs

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The *Human Rights Code* prohibits discrimination, but does not oblige employers to implement an affirmative action program generally. If they wish to, it is not discriminatory for employers to implement an employment equity program to ameliorate the conditions of disadvantaged individuals or group. If an employer contravenes the *Human Rights Code*, the BCHRT may order an employer to adopt an employment equity program as a remedy.



## Whistleblower Protection

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British Columbia does not have freestanding whistleblower protection legislation.

However, pursuant to the *Canadian Criminal Code*, it is illegal for an employer, or a person acting on the employer's behalf, to take or threaten to take any sanctions or reprisals against an employee who provides information to authorities concerning an offence that is (or that the employee thinks is) being committed by the employer contrary to any federal or provincial act or regulation.

Employers found guilty of this offence are liable to imprisonment for a term not exceeding five (5) years.



## Sexual and Other Forms of Harassment

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The *Human Rights Code* prohibits sexual discrimination and other forms of harassment based on discriminatory grounds in the employment context. The *Workers Compensation Act* also requires that employers ensure the health and safety of its workers, and has identified bullying and harassment (including sexual harassment) as a workplace hazard which must be addressed by the employer as outlined in occupational health and safety legislation. This obligation includes establishing a policy for dealing with bullying and harassment incidents and complaints in the workplace and ensuring it is followed.

Sexual and other forms of harassment may lead to a human rights or workers compensation complaint, or to a court awarding aggravated damages to an employee against an employer.





## Pay Equity

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In British Columbia, the *Human Rights Code* prohibits employers from paying employees of the opposite sex different rates of pay for similar or substantially similar work.



## Workers' Compensation and Occupational Health & Safety

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In British Columbia, the *Workers Compensation Act* (“WCA”) covers both workers’ compensation and occupational health & safety (“OH&S”). The WCA establishes the Workers’ Compensation Board of British Columbia, which operates as “WorkSafeBC” (“WSBC”) to administer and enforce both the workers’ compensation and OH&S parts of the Act.

### Workers’ Compensation

Most employers in British Columbia are required by law to register with WSBC. Employers who do not register when required can be assessed penalties including back premiums and the actual cost of the claim made by a worker who is injured in the course of employment.

Once registered, employers are required to pay premiums calculated on the basis of three factors: the employer’s classification, assessable payroll and experience rating.

WSBC will provide compensation to employees in three main circumstances: personal injury; mental stress and occupational disease. In all of these cases, the injury or illness must arise out of and in the course of employment.

Workers who qualify may be entitled to wage loss benefits and medical benefits (temporary or permanent), partial or total disability or death benefits and vocational rehabilitation benefits aimed at assisting a worker in returning to his or her pre-injury employment.

Employers must also be aware of their reporting requirements. When an employee is injured, employers are required to ensure the worker receives medical treatment immediately; report the worker's injury to WSBC; and complete a Form 7 (Employer's Report of Injury or Occupational Disease).

## Occupational Health & Safety

Part 3 of the WCA, which concerns OH&S, sets out significant and wide-reaching duties for employers, workers, supervisors, prime contractors and owners.

As a general duty, employers must ensure the health and safety of all workers working for that employer, and any other workers present at a workplace at which that employer's work is being carried out.

An employer must establish a joint health and safety committee in each workplace where 20 or more workers of the employer are regularly employed. The committee must have at least 4 members, consisting of worker and employer representatives, with at least half the members being worker representatives. The committees have broad duties to identify unsafe conditions, make recommendations, ensure that accident investigations are carried out properly, and to participate in inspections, investigations and inquiries, among other things. All joint committee members must receive eight hours of training and instruction.

Employers also have specific reporting and investigation duties. Employers must immediately notify WSBC of the occurrence of any accident that resulted in serious injury to or the death of a worker, as well as in other listed circumstances.

Employers are required to immediately undertake an investigation into the cause of any incident that they are required to report, resulted in injury to a worker requiring medical treatment, had a potential for causing serious injury to a worker, or in other listed circumstances. Employers are then required to prepare a preliminary investigation report within 48 hours of the incident, and to undertake a full investigation and provide a full report to WSBC within 30 days of the incident.

WSBC officers also have wide reaching authority to conduct investigations, and employers are required to cooperate with any such investigations.

Where WSBC finds that the employer has not complied with Part 3 of the WCA, has failed to take sufficient precautions for the prevention of work related injuries or illnesses, or the employer's workplace or working conditions are not safe, WSBC can impose administrative penalties, up to a maximum of \$662,102.49.

Contraventions of the WCA can also be prosecuted as offences. In British Columbia, the maximum fine on conviction for an offence is \$724,644.41 plus \$36,232.25 per day after the first day for a continuing offence, or \$1,449,288.80 and \$72,464.44 per day after the first day for second and subsequent offences. Convicted individuals may face a range of

fines or even imprisonment for up to 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.

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, and individuals who direct the work of others 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: “*Every one who undertakes, or has the authority, to direct how another 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, 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.



## Private Pension Plans

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Private pension plans registered in British Columbia are governed by the *Pension Benefits Standards Act* (British Columbia) (the “PBSA”). The Superintendent of Pensions in the Pensions Division of the British Columbia Financial Institutions Commission (“FICOM”) regulates pension plans registered under the PBSA. The PBSA also applies to provincial public sector plans, though provincial public sector plans also operate under the authority and requirements of their own statutes. The PBSA does not have jurisdiction over pension plans for private sector employees working in federally regulated industries (such as aviation, banking, etc.), even if those employees are located in British Columbia.

The PBSA establishes rules for the establishment, operation and administration of pension plans, prescribes a set of basic rights granted to plan members and provides for measures of control and supervision of pension plans.

## Pooled Registered Pension Plans

Pooled Registered Pension Plans (PRPPs) are similar to defined contribution plans except that employer contributions are not mandatory. A PRPP pools contributions together to achieve lower costs in relation to investment management and plan administration. Administrators must hold licenses issued by the pension regulator.

British Columbia brought its *Pooled Registered Pension Plans Act* into force on May 4, 2016. The province is a party to the Multilateral Agreement Respecting Pooled Registered Pension Plans and Voluntary Savings Plans which came into force in March 2017 and which grants authority to the federal regulator (OSFI) in relation to British Columbia's PRPPs.

## Plan Contributions

If a plan member is required to contribute to a defined benefit plan, the employer must pay for at least 50% of the cost of the pension earned after January 1, 1993. On termination or commencement of pension, employee contributions in excess of 50% of the value of the accrued pension must either be returned to the plan member, transferred to another pension plan, Registered Retirement Savings Plan (RRSP), Registered Retirement Income Fund (RRIF), used to purchase an annuity from an insurance company or used to increase the pension benefit.

## Phased Retirement and Enhanced Early Retirement Options

A pension plan registered in British Columbia must define a "pension eligibility date", an age at which a plan member can start to receive pension with no reduction or increase in benefits (for example, age 60 or 65). Under the PBSA early retirement benefits are available if the member's plan is vested and employment is terminated at any time within 10 years of the defined eligibility date. Some plans may have more generous early retirement provisions. The plan may also provide for a reduced monthly pension to compensate for the earlier start of pension payments.

A plan member will continue to earn benefits if he or she continues employment beyond the pension eligibility date. However, the particular plan terms may stipulate the maximum number of years of employment or a maximum pension that can be earned. If there is a deferral of pension beyond the pension eligibility date, the plan must calculate the increase in pension owing to the shorter period over which the pension is expected to be paid.

Relatively recent changes to the PBSA introduced immediate vesting effective September 30, 2015. This provides entitlement to receive any benefit earned from the time enrolled in the plan to the date of termination of membership in the plan.

## Investments of Plan Assets

British Columbia is one of the provinces in Canada that has incorporated the federal pension investment rules, contained in Schedule III to the Pension Benefits Standards Regulations, 1985 (Canada) (“**Schedule III**”) into its local pension legislation. Among other restrictions, Schedule III provides diversification limits, corporate control limits and related party restrictions on plan asset investments. The PBSA also requires a plan administrator to exercise standards of prudence, care, diligence and skill in dealing with plan assets.





## Medical Services Plan

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Until January 1, 2020, all British Columbia residents must enrol in the Medical Services Plan (“MSP”) and pay premiums. MSP insures medically-necessary services provided by physicians and supplementary health care practitioners, laboratory services, and diagnostic procedures. In the past, employers were not obligated to pay an employee’s MSP premiums, and if the employer did pay an employee’s MSP premiums, or reimbursed an employee for MSP premiums, then the amount was a taxable benefit to the employee.

However, in the Provincial Government’s 2018 budget, it announced that it would be implementing a new Employer Health Tax (“EHT”), effective January 2019. As a result, BC residents will not longer be charged monthly MSP premiums as of January 1, 2020. However, enrollment in MSP remains mandatory for all residents.

In contrast to MSP, the EHT is an annual payroll tax that will apply to all employers with “BC payroll” (i.e., employers of employees who report to work at a permanent establishment in BC, or of employees who are paid from a permanent establishment in BC) exceeding \$500,000. In effect, the EHT shifts the responsibility for subsidizing the cost of the health care system from individuals to employers.

Employers with an annual BC payroll over \$500,000 will be subject to the EHT, with rates varying on a sliding scale starting at 0.98% to a maximum of 1.95% (for employers with a BC payroll exceeding \$1.5 million).

Registration for filing and paying the EHT started in January 2019. It is paid via quarterly installments on June 15, September 15, December 15, and March 31. All MSP premiums will be eliminated one year later, on January 1, 2020. Therefore, employers that have established a group plan for MSP premiums will be effectively double paying for the year of January 1, 2019 to January 1, 2020.

Employers may wish to consider reducing their payroll to less than \$500,000 in order to be exempt from paying the EHT; revising their budgets for 2019 to take into account the new EHT; and for individuals who are employed by a corporation of which they are a shareholder, changing the compensation model from salary (which would be subject to the EHT) to dividends (which would not be subject to the EHT).



## Construction Industry

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The construction industry is heavily regulated and unionized in the Province of British Columbia, and has unique employment considerations. Detailed information can be provided on request.



## Successor Rights and Obligations

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Certain statutes in British Columbia contain provisions which, in certain circumstances, may impose on the purchaser of a business (or other contracting party) the individual contracts of employment, collective agreements, pending proceedings, financial obligations and other liabilities attached to the business. There may also be resulting employment implications and liabilities arising under the common law.

For example, the British Columbia *Employment Standards Act* contains a provision providing that, where all or part of a business is disposed of or the business continued to operate under a receiver or receiver-manager, the employment of an employee of the business is deemed, for the purposes of the *Employment Standards Act*, to be continuous and uninterrupted by the disposition or receivership, as applicable. Disposition has been interpreted broadly and may include a number of different types of transactions.

The British Columbia *Labour Relations Code* provides for “successor” rights of a union when a business or part of it is sold, leased or transferred to a third party in such a way that the business or part of it continues in the hands of the third party or, with respect to specifically listed industries, when a contract for services is retendered and substantially similar services continue to be performed, in whole or in part, under the direction of another contractor (a

third party). The effect of a successorship is that the third party must abide by the former employer's collective agreement, certification and any proceedings under them.

In certain circumstances, two or more employers may be considered by the Board as "common employers" for the purposes of labour relations if the businesses are under common direction or control, engaged in associated or related activities, are operated by more than one entity, and there is a labour relations purpose to a common employer declaration. A provision regarding "associated employers" is also included in the *Employment Standards Act*.

The type of transactions which may trigger the application of successor rights and obligations and the extent of the liabilities deriving therefrom may vary. A careful analysis with the assistance of counsel should be carried out as part of the due diligence process in order to identify and quantify the liabilities which could be transferred to the purchaser (or other contracting party).



## Elections and Voting

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### Provincial Elections

The *Election Act* requires employers to provide employees with four consecutive hours free from work to vote on General Voting Day. Voting hours on General Voting Day are from 8:00 a.m. to 8:00 p.m., Pacific Time. Employers need not provide employees with four hours off work, but must ensure that the employees have a four-hour window free from work during voting hours (e.g., if an employee's shift ends at 4:00 p.m. then the employee is not entitled to any time off). There are some exceptions, such as for remote workplaces. An employer's failure to comply with the *Election Act* is an offence and upon conviction may result in a fine of up to \$10,000, imprisonment for up to one year, or both.

Every employer must, upon written request, grant a leave without pay to an employee who is a candidate in a provincial election. Such employees are entitled, throughout their leave, to all the benefits attached to their employment, except their remuneration; as regards benefit plans, they may continue to benefit from all the plans in which they participate, provided they pay the totality of the premiums, including the employer's contribution.

At the expiry of the leave, the employer must reinstate the employee under no less favourable conditions of employment than those prevailing before the beginning of his or her leave.

The employer may not dismiss, lay off, suspend, demote or transfer employees, by reason of such leave, or give them less favourable conditions of employment than they are entitled to or diminish any benefit attached to their employment. Any dispute regarding the above may be submitted for adjudication to the Director of Employment Standards.

## **Federal Elections**

Every employee qualified to vote in a federal election is entitled to three (3) consecutive hours for the purpose of casting his or her vote and, if the hours of employment do not allow for those three (3) consecutive hours, the employer must allow the employee, at the convenience of the employer, such additional time for voting as may be necessary to provide those three (3) consecutive hours. An employer cannot make a deduction from the employee's pay by reason of his or her absence during the consecutive hours that the employer is required to allow for voting.





## Work Permits for Foreign Nationals

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In British Columbia, immigration matters and work permit applications come under the joint jurisdictions of the federal and provincial governments.

### General Rule

As a general rule, an individual that is not a Canadian citizen or permanent resident who wishes to work in the Province of British Columbia (or, for that matter, in any other Canadian province or territory) must obtain a work permit. Unless a temporary foreign worker can meet a specific exemption category, a prospective employer in Canada must first obtain a Labour Market Impact Assessment (“**LMIA**”) from Employment and Social Development Canada / Service Canada (“**ESDC**”). A positive LMIA is an opinion from ESDC that there is a need for a foreign worker to fill the job and no Canadian worker is available to do the job.

The LMIA process can be complex, lengthy and uncertain. Among other factors, the employer usually has to meet the minimum recruitment and advertisement requirements set by ESDC by posting the position for a minimum period of time using multiple, approved sources and ensuring each job posting contains certain information regarding the position. In addition, employers applying for an LMIA must pay the foreign worker the prevailing wage rate for that particular occupation and work location as determined by ESDC. Employers may also be required to provide additional information and explain why no Canadian applicants were suitable to ensure that Canadians have the first opportunity at the available jobs. There are

several exceptions to this general rule that may make a work permit unnecessary, or that may make a work permit easier to obtain.

## Exemptions

A temporary foreign worker may be eligible to enter Canada as a business visitor without the need for a Work Permit or be able to apply for a Work Permit without a positive LMIA under an exemption from the LMIA process. There are many exemption categories under which a work permit can be obtained but only a few of the more common exemption categories are described below. Even if the temporary foreign worker qualifies under an exemption category, the Canadian employer may still need to submit an online “Offer of Employment” to the government and pay an Employer Compliance Fee before the foreign national can apply for a work permit.

### Business Visitors

A person may enter Canada as a business visitor without the need for a work permit if the person seeks to engage in international business activities in Canada without directly entering the Canadian labour market. A person may not be considered to be directly entering the Canadian labour market if the primary source of remuneration for his or her business activities remains outside Canada, the principal place of the worker’s business and accrual of profits of the worker’s employer is located outside Canada and/or the services rendered do not compete directly with those rendered by Canadian citizens or permanent residents. For example, a representative of a business outside Canada may be able to enter Canada without a work permit if the purpose of his or her visit is to attend business meetings, to purchase Canadian goods or services, or to give or receive training within a Canadian parent or subsidiary company of his or her employer. This is not an exhaustive list of permissible activities under the business visitor category but are meant to be illustrative of some of the more common activities included in this category.

### Intra-company Transferees

One of the most common categories used to obtain a Work Permit without first obtaining an LMIA from ESDC is the intra-company transferee category. Qualified intra-company transferees require work permits, and are exempted from the LMIA process as they provide significant economic benefit to Canada through the transfer of their expertise to Canadian businesses. In order to qualify as an intra-company transferee, the person must be in an executive or senior managerial position, or in a position requiring specialized knowledge regarding the employer’s products, services or processes and procedures. Both of these categories require the applicant to have been an employee of a branch, subsidiary, affiliate or parent of the company located outside of Canada for at least 1 year in the 3 year period immediately preceding the date of the initial application in a similar full time position.

## Professionals

Certain international trade agreements to which Canada is a party may facilitate the temporary entry of professionals such as architects, accountants and engineers doing work in their profession for a company in Canada. Work permits are generally required, but the foreign national may be exempted from the LMIA process. Persons may be authorized to enter and work in Canada under the North American Free Trade Agreement (NAFTA) and other Free Trade Agreements (FTAs) parallel to the NAFTA such as the Canada-Chile FTA, Canada-Peru FTA, Canada-Colombia FTA and Canada-Korea FTA. Temporary entry to Canada may also be facilitated for independent professionals and contractual service suppliers for citizens of European Union member states in certain sectors under the Canada-European Union (EU) Comprehensive Economic and Trade Agreement (CETA). Persons may also be authorized to enter and work in Canada as professionals under the General Agreement on Trade in Services (GATS).

## Spouses and Common-law Partners

The spouse or common-law partner of a work permit holder may also be able to obtain a work permit in certain situations. This exemption generally applies in circumstances where the principal applicant received a work permit in an occupation requiring a sufficiently high level of expertise to be considered a skilled worker and the principal applicant's work permit is valid for at least 6 months.

## British Columbia Temporary Foreign Worker Protection Act

On July 8, 2019 and October 1, 2019, certain provisions of the British Columbia *Temporary Foreign Worker Protection Act* ("TFWPA") come into force. The TFWPA is meant to provide greater protections to temporary foreign workers. The TFWPA will require employers of foreign nationals to hold a certificate of registration under the TFWPA, and will require recruiters of foreign workers to be licensed under the TFWPA.

The TFWPA will establish a registry respecting licensed recruiters of foreign workers and registered employers of foreign nationals. With certain exceptions, employers must not recruit foreign nationals for employment unless the employer holds a certificate of registration under the TFWPA.

The TFWPA will also impose certain obligations on employers and recruiters of foreign workers and provide for enforcement of those obligations. It is an offence to contravene the TFWPA, and a person who contravenes the TFWPA could be liable to pay a fine of up to \$50,000 or imprisonment up to one year, or both. In the case of a corporation found to be in contravention of the TFWPA, the corporation could be liable to pay a fine of up to \$100,000.

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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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