TOP TEN CONSIDERATIONS FOR EMPLOYMENT LAW IN CANADA

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Canada's unemployment rate is at approximately 5%, and most industries do not have enough employees. The Canadian market is an exciting opportunity for international investment, and many sectors are seeing employment with international companies as the new normal in Canada. A few critical considerations for any employer entering the Canadian landscape are highlighted below.

1. LOCATION OF EMPLOYEMNT

The location where a company's work will be performed in Canada will have a significant impact on its employment law obligations. Most industries in Canada are regulated provincially.

Subject to few exceptions, the employer is deemed to be operating in the province where an employee performs their work (including remotely). Yes, this means that a company with remote workers in every province will likely be subject to the specific employment obligations of each province.

2. JURISDICTION OF EMPLOYMENT – PROVINCIAL OR FEDERAL

Despite most industries being regulated provincially, there are multiple federally regulated workplaces. The division of federal and provincial jurisdiction are outlined by section 91 and 92 the *Constitution Act, 1867.* If an employer runs a federally designated industry, it will not matter where the employee physically performs the work, they will be subject to federal employment obligations.

For example, a grocery store in Ontario will be subject to Ontario's *Employment Standards Act, 2000* ("*ESA*"). However, an airline or an interprovincial trucking company will be subject to the federal *Canada Labour Code* ("*CLC*"). Knowing the jurisdictions one's business is subject to is crucially important when planning a business model because the governance framework and potential liability between the jurisdictions vary greatly.

For example, the Supreme Court of Canada, in *Wilson v. Atomic Energy of Canada Ltd., 2016 SCC 29,* stated that, unlike provincial employees, subject to some exemptions, federally regulated employees cannot be terminated without cause and can be reinstated if the situation calls for it – a right typically only afforded to unionized employees.

An important note about location and jurisdiction is Quebec. Canada is primarily a Common Law country, with the exception being Quebec, which is a Civil Law province. If a company functions in Quebec, they will be subject to an entirely different legal system than the rest of the country and require a lawyer who is licensed to practice in that system when seeking employment law advice.

3. EMPLOYMENT STANDARDS LEGISLATION

Each province in Canada has legislation which outlines the minimum standards by which every employer must abide – the *CLC* contains the federal employment standards, which are unique in themselves.

This legislation offers comprehensive guidance to employers within each province on matters including, but not limited, to:

1. Minimum Wage;
2. Overtime Regulation;
3. Termination and Severance Pay;
4. Vacation Entitlements;
5. Job Protected Leave; and,
6. Enforcement Mechanisms.

4. UNIONIZED EMPLOYMENT

Although the term "Labour Law" is often used ubiquitously in Canada to describe laws relating to employment, it is technically a specified area of law used to describe unionized work environments, with "Employment Law" technically identifying non-unionized workplaces.

Unionization has a long history in Canada, leading to the current comprehensive legislative protection for both provincial and federal unionized employees, entirely separate from employment standards. However, any unionized workplace, with few exceptions, must also abide by employment standards legislation.

There are very specific actions an employer can and cannot take in response to their workplace attempting to unionize. For example, pursuant to Ontario's *Labour Relations Act* ("*LRA*"), and rules of the Ontario Labour Relations Board, employers generally only have two (2) days to respond and/or object to a union's application for certification to represent a bargaining unit of employees.

5. OTHER IMPORTANT LEGISLATION

In addition to employment standards and union legislation, Canadian employers are subject to a slew of other key statutes that bring with them specific compliance and enforcement mechanisms.

These include, but are not limited to, legislation for:

1. Human Rights, which regulate protection against discrimination and harassment based on specific grounds;
2. Workers Safety and Insurance, for workplace injuries;
3. Occupational Health and Safety, for workplace safety standards; and,
4. Employment Insurance, for financial protection during unemployment.

Each of these can be applicable to a multitude of situations for Canadian employers and should be reviewed regularly. For example, when settling wrongful dismissal and/or human rights actions in Canada, it is possible to carve out the ability of an employee to still apply for workplace insurance benefits despite the release of other claims.

In settling such actions, it is also common practice to have a full and final release stipulate that any repayments owed to Service Canada due to employment insurance overpayments that come about as the consequence of the settlement are to be assumed by the employee.

6. COMMON LAW VERSUS STATUTORY ENTITLEMENTS

Canadian employees and employers have many implied common law responsibilities once an employment relationship has been created. For employers, these include the implied duty to provide reasonable notice of termination to an employee or pay in lieu thereof.

This requirement is by far the most litigated area of Employment Law (non-unionized). If an employee does not have a contract that validly limits their entitlements upon termination without cause to the statutory minimums outlined in employment standards legislation, they will be entitled to common law reasonable notice. The difference in liability for a Canadian employer paying common law pay in lieu of reasonable notice versus statutory minimums upon termination is potentially massive.

For example, take the Vice-President of a niche tech company in Ontario who is terminated after four (4) years of service due to their industry disappearing – like what is happening with industries created by COVID-19. If the Vice-President's employment contract validly limits his termination entitlements to statutory minimums, they would be entitled to four (4) weeks' termination notice or pay in lieu of same as per the *ESA*, with any additional pay out being gratuitous. If this same Vice-President is not subject to a valid termination clause in his contract, he would likely be entitled to six (6) to ten (10) months' reasonable notice of termination or pay in lieu thereof based on their total compensation average in the previous twelve (12) months.

7. EMPLOYMENT AND OTHER CONTRACTS

Canadian employers can contract for mostly anything with an employee, as long as the contractual terms do not breach employment standards, other protective legislation, and their obligations at common law. While this sounds easy, the common law has created a complex web of decisions as to when contractual terms are valid.

Employers in Canada often use other strategies to limit their contractual liability, such as using "Independent Contractor" agreements. However, such agreements are often invalid from the outset, due to the contractor actually being an employee at law.

A more recent and successful strategy to limit employer liability involves employees with high and variant compensation. This strategy involves putting key aspects of the employee's remuneration into a separate share purchase agreement. If done properly, the Court of Appeal for Ontario, in *Mikelsteins v. Morrison Hershfield Limited, 2021 ONCA 155*, has stated that the remuneration in a separate share purchase agreement may not be subject to the ultimate calculation of the employee's termination pay.

There are two common phenomena when reviewing or negotiating contracts for Canadian executives who work for international companies. One, the contracts are unenforceable due to breaching employment standards legislation. Two, and on the other end of the continuum, international employers are hesitant to provide their Canadian employees with rights above and beyond those found in minimum standards legislation out of fear of non-compliance with those minimum standards.

TIP: Keep it simple. Too much drafting is the most common problem with employment contracts.

8. EMPLOYER TAX OBLIGATIONS

While proper guidance from a tax lawyer is always recommended, there are two general areas of importance pertaining to taxation for international employers entering the Canadian market. One, is ensuring that an employer is abiding by their deductions and remittance requirements within their provinces for federal income tax, provincial employer taxes, employment insurance, and the Canada Pension Plan, amongst others. Two, is ensuring that the employer is open and transparent with the Canada Revenue Agency about any money moving across provincial and international borders.

9. GOVERNMENT EMPLOYEES AND SPECIALIZED WORKPLACES

In addition to the legislation mentioned above, both provincial and federal government employees are subject to specialized legislations which outline further rights and responsibilities, and enforcement mechanisms for public service employees. This includes the *Federal Public Sector Labour Relations Act* and provincial legislation such as the *Public Service of Ontario Act*. Most non-management government employees are also subject to comprehensive union protections as well.

Further related to this point are fields which are not distinct government entities, yet still highly regulated by the government. These include teachers, medical services, and other emergency services (police and fire), amongst others. All these fields have distinct legislative schemes of their own and strong union involvement making their navigation similarly complex to that of government workers.

10. PROFESSIONAL REGULATORS AND OTHER LIABILITY

Canadian employers with regulated professional employees are subject to further legislative, regulatory, and common law implications. This includes doctors, lawyers, nurses, social workers, speech therapists, massage therapists, engineers, professional accountants, just to name a few.

If one of these professionals does not do their job properly, they may be subject to regulatory discipline proceedings and/or civil suits for torts such as negligence. When this happens, there can be variant levels of vicarious liability for the employer. Thus, it is important that regulated professionals are insured adequately and are properly assisted in maintaining compliance with their regulatory body. In fact, many regulated professionals, such as doctors and lawyers, are required to maintain professional liability insurance.

CONCLUSION

The top ten considerations highlighted above are representative of Canada's exciting employment market, with all the legal strings attached. While seemingly daunting, any employer wishing to enter the Canadian arena can do so with relative safety if they plan accordingly with the guidance of qualified employment counsel.