COUNTRY COMPARATIVE GUIDES 2021

The Legal 500 Country Comparative Guides

Canada

EMPLOYMENT & LABOUR LAW

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This country-specific Q&A provides an overview of employment & labour law laws and regulations applicable in Canada.

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CANADA
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1. What measures have been put in place to protect employees or avoid redundancies during the coronavirus pandemic?

The federal and some provincial governments have enacted temporary and permanent legislative changes, subsidy programs, and changes to existing employment and social insurance programs in response to the COVID-19 pandemic.

Many provincial governments provided relief for employers by extending the timelines for a 'temporary' layoff under provincial employment standards legislation, which has the effect of prolonging the period for which employees may be laid off under provincial employment standards legislation without triggering termination obligations. For example, the Ontario Government provided that employers unable to continue providing work for employees during the "COVID-19 Period"[1] due to reasons related to COVID-19 may lay off workers under a deemed leave of absence for 'infectious disease emergency leave' (IDEL) without triggering a statutory (but not common law) claim for constructive dismissal, and without triggering the start of a layoff under employment standards legislation. By extending the timelines for what would otherwise be a temporary layoff, this avoids deemed terminations (including the usual termination payments employers are obligated to pay for without cause terminations) of employees who cannot be recalled to active working duty before the timeline for layoff expires. This is particularly important where large portions of the workforce have been laid off (e.g. restaurant industry workers), as mass layoff expirations in the normal course could trigger mass termination obligations, which require additional payments to employees where certain thresholds of employees are terminated within a short timeframe.

These protections preserve the connection for employees to their employer during a job-protected leave with a right of reinstatement to the same position (or a comparable one, if the position no longer exists) once the deemed leave ends. In particular, the Ontario IDEL allows employees:

- who are, or suspect they may be, infected with COVID-19 to obtain treatment and quarantine for the required time period;
- to care for family members for COVID-19-related reasons, such as the quarantine of another household member;
- to quarantine when returning from international travel; or
- to care for children, given widespread school and day care closures.

In addition to the right to reinstatement, the IDEL (like other statutory leaves of absence) also protects employees by requiring continuation of group insured benefits, if applicable (some exceptions for layoffs that become deemed IDELs may apply), continuation of service and seniority accrual during the leave, as well as preservation of the employee's vacation time (if expiring). Employees must provide notice of the leave (if the IDEL is requested, rather than a deemed leave) and provide evidence of their entitlement to the leave, if requested. Other jurisdictions, including federal legislation, have enacted similar time-limited suspensions of layoff timelines to bar claims for constructive dismissal and allow employers to make any necessary cuts to hours, wages or salaries to preserve financial viability.

In addition to the protections mentioned above for employers and employees, the usual unsafe work refusal procedures apply under applicable occupational health and safety legislation. Governments have issued many industry-specific guidelines and increased inspection rates, resulting in fines and/or other enforcement orders where contraventions are found. Currently, most employers operating in regions where stay-at-home, curfew or other time and/or travel public health restrictions exist are continuing to allow employees to work remotely, where feasible.

Finally, employment insurance, social support and other subsidy programs have been enacted, extended and strengthened to support Canadian employers and

employees though the pandemic. Early on, the Federal Government created the Canada Emergency Response Benefit (or CERB) to provide immediate relief to employees who were unable to work or had lost their job in response to the COVID-19 pandemic. This has since been replaced with other benefits, such as the Canada Recovery Benefit (or CRB) and other employment insurance benefits, offering similar protections. Additionally, employers may apply for the Canada Emergency Wage Subsidy (or CEWS), providing a wage subsidy for eligible employees or other government programs, such as the Supplemental Unemployment Benefit Plan.

Footnote

1. Currently expiring July 3, 2021 after several extensions. At the time of writing, it is not known whether this timeline will be extended further.

2. Does an employer need a reason in order to lawfully terminate an employment relationship? If so, state what reasons are lawful in your jurisdiction?

No, with limited exceptions, a non-union, provincially regulated employer does not require a reason to lawfully terminate an employee's employment where the termination is without cause. Although employment may come to an end for various reasons (e.g. resignation or 'deemed' quit, death of the employee, frustration of contract), there are generally two types of termination by the employer in Canada: with cause and without cause. The *Civil Code of Quebec* uses the notion of "serious reason", which is the operational equivalent of "cause" in Common Law jurisdictions.

Terminations without cause require the employer to provide 'reasonable notice' of termination, which is calculated according to the applicable employment standards legislation, the contract of employment, and the common law or *Civil Code of Quebec*, as applicable. Other payments, such as severance payments, may also be payable.

Terminations with cause do not require reasonable notice. There is no single definition of cause, either under statute or at common law where applicable, though it is a high threshold to meet. In some cases, a single serious incident (e.g. theft) may be sufficient to show cause, and in other cases, a string of less serious but ongoing violations (e.g. repeated violation of a company policy), with proper warnings and potentially (where contractually permissible) progressive discipline, may meet this definition. In Quebec, termination of employment for cause may be either disciplinary or administrative in nature. Employment is terminated for disciplinary reasons where employees willingly committed acts or omissions that they knew were a breach of their obligations, whereas the concept of administrative termination of employment refers to situations that are outside an employee's control (e.g. termination of employment due to chronic non-culpable absenteeism).

The burden falls on the employer to show that it had cause to terminate the relationship, the effect of which relieves the employer from the obligation to provide reasonable notice (and in some cases, statutory notice) of termination to the employee. However, because the threshold is so high, the vast majority of terminations in Canadian provinces are effected without cause.

There are few exceptions to an employer's ability to terminate without cause outside the unionized environment. For example, in Nova Scotia, employment standards legislation provides employees with 10 years of service of more with "just cause protection", meaning that employees may only be dismissed for cause once reaching this service threshold. Similarly, in Quebec, employees with two (2) or more years of service, who are not senior managerial personnel, may not be dismissed without cause. Such employees may contest termination without cause through a statutory recourse offering the remedy of reinstatement in employment. There are exceptions to the right of reinstatement; for example, in Quebec, this remedy is not available to an employee dismissed without cause but for *bona fide* organizational or economic reasons (such as a restructuring). Employees in industries regulated under the *Canada Labour Code* may also be entitled to 'just cause' protection, meaning they cannot be dismissed with reasonable notice.

In all cases, even if no reason is necessary to terminate an employee, employers must not be motivated to terminate for reasons that are or may be construed as discriminatory or unlawful. For example, it is unlawful to terminate employees for reasons related to age, race or gender. In some cases, a termination may be presumptively discriminatory (e.g. termination of an employee who reveals she is pregnant, or an employee currently on a protected leave) and an employer must show why the termination is unconnected to the protected human rights ground. A termination of employment is deemed discriminatory even if it is only partially motivated by discriminatory reasons. Protection against reprisal (including termination) for exercising a right protected under statute is also included in most remedial employment legislation, including occupational health and safety legislation.

3. What, if any, additional considerations apply if large numbers of dismissals (redundancies) are planned? How many employees need to be affected for the additional considerations to apply?

As mentioned above, subject to certain exceptions, an employer need not have a reason to terminate employees (provided the termination is not discriminatory) but must provide notice (or pay in lieu) of termination. Employment standards legislation provides minimum notice requirements for both individual terminations and for mass terminations, meaning terminations that affect a certain threshold number of employees within specific timeframes. These entitlements vary by jurisdiction and may or may not be required in addition to (instead of in replacement of) individual termination entitlements.

For example, in Ontario, where 50 or more employees are terminated within a four-week period, group termination entitlements are required in place of individual termination pay entitlements. In Quebec, similar group termination (known as collective dismissal) entitlements are triggered where an employer terminates the employment of 10 employees or more at the same establishment within two (2) consecutive months. In both provinces, individual entitlements range from zero (0) to eight (8) weeks of termination pay. The chart below outlines the increased amounts due in a group termination:

Applicable group termination notice period	Number of employees dismissed in a four-week period (for Ontario)	Number of employees dismissed in a four-week period (for Quebec)
8 weeks	50 – < 200	10 – < 100
12 weeks	200 – < 500	100 – < 300
16 weeks	500+	300+

Notably, to become effective, employers are usually also required to provide both individual notice of termination, as well as notice of group termination to an applicable government ministry, in a specified form. In most provinces (except British Columbia), group termination notice entitlements are inclusive of individual statutory notice entitlements.

Additional obligations may apply, varying by province or territory. For example, Ontario employers should be aware that where applicable, severance payments to eligible employees are not included in the above termination amounts and must be paid in addition to group termination entitlements.

The enhanced notice requirements in mass terminations are intended to compensate employees for the impact of plant closure or other similar events, where presumably replacing lost employment may be more difficult. Similarly, these provisions provide a disincentive to employers to effect mass terminations within the prescribed timelines.

4. What, if any, additional considerations apply if a worker's employment is terminated in the context of a business sale?

The sale of a business is typically effected in one of two ways: 1) share purchase agreement, and 2) asset purchase agreement. Considerations for each sale structure include continuity of employment, liability for termination entitlements, and possible human rights claims.

In the share purchase structure, there is no legal change to the identity of the employer. The purchasing entity "steps into the shoes" of the selling entity and the employees' employment continues unchanged (unless otherwise agreed). Employees retain their seniority, terms and conditions of employment (unless otherwise agreed) and specifically, their rights to termination entitlements, which include rights from the preceding employment agreement and service accrual from the date of service with the predecessor company. In order to sever any employees whose employment would automatically transfer through the sale, employees must be terminated (either pre- or post-sale) and the liable entity (typically the seller, subject to freedom of contract below) must provide any termination entitlements ranging from minimum entitlements (i.e. termination pay, severance pay if applicable, and benefits continuation for the minimum notice period) to reasonable notice if applicable (which is inclusive of minimum entitlements). Particularly in the context of executive employment contracts, it is important that the vendor and purchaser address these liabilities in the purchase and sale agreement.

In an asset purchase, in common law jurisdictions in Canada, there is no legal continuity of employment. The purchaser may pick and choose which employees it would like to retain and may offer employment on the same or new terms. Employees are under no obligation to accept the offer. If employees either do not accept or are not offered employment with the purchasing entity, and the seller does not continue to employ those employees (who for any reason do not begin employment by the purchaser), employment ends by operation of law on the date of the transaction. Liability for termination entitlements to any terminated employees rests with the selling entity, unless otherwise agreed between the parties.

The seller and the purchaser are free to contract about liability for termination entitlements. In some cases, the purchasing entity may require the seller to pay out liabilities to those employees it does not wish to carry forward through the sale, whether through a share or an asset purchase. In other cases, the purchasing entity might include a sale clause requiring the purchaser to indemnify it for termination entitlements due to employees who are terminated for a certain period of time (e.g. six (6) months) following the sale.

In contrast, in Quebec, in case of a sale of a business or part of a business as a going concern (even if through the form of an asset sale), all employment contracts will not be interrupted and will continue to bind the purchaser of the business.

Lastly, regardless of the sale structure and any indemnities the parties negotiate, the purchasing entity should take care to avoid employing or terminating select employees for reasons connected to protected human rights grounds. For example, if the purchasing entity opts to terminate all employees currently on statutory leaves of absence, it will be exposed to the risk of human rights claims.

5. What, if any, is the minimum notice period to terminate employment? Are there any categories of employee who typically have a contractual notice entitlement in excess of the minimum period?

Whenever terminating employment without cause, an employer must provide (i) minimum statutory notice, as well as (ii) common law notice of termination of employment (known as reasonable notice), unless contracted out of through an enforceable termination clause.

Minimum statutory notice periods are outlined in applicable employment standards legislation, which varies by jurisdiction. In Ontario and Quebec, employees of less than three (3) months' continuous service with an employer are not entitled to notice or pay in lieu of notice, provided the applicable and enforceable employment agreement stipulates that the employee is to receive no more than the minimum standards. Employees of three (3) months' continuous service or more are entitled to minimum statutory notice of up to eight (8) weeks for employees with eight (8) years or more of service in Ontario or ten (10) years or more of service in Quebec. The minimum notice payment under Ontario and Quebec employment standards legislation is one (1) week for an employee of more than three (3) months but less than one (1) year.

In addition, Ontario employers are required to continue making group insured benefits contributions (if applicable) for employees for at least the applicable minimum notice period.

Reasonable notice is not formulaic; it is calculated based on all relevant factors, including an employee's age, position, years of service, and wages at the time of termination of employment, with regard to the availability of alternate employment. Reasonable notice is capped by case law at 24 months (save in exceptional circumstances), and it is generally inclusive of minimum statutory notice.

In Quebec, regardless of any written agreement or limitations providing otherwise, all terminated employees are entitled to a reasonable notice under the *Civil Code of Quebec*. Employees may not waive in advance (e.g. in an employment contract) their right to receive reasonable notice.

Employers are always liable for at least the minimum entitlements outlined in employment standards legislation, which act as a "floor right" for employees. However, employers in common law jurisdictions may be liable for more notice pay (e.g. reasonable notice), depending on whether the parties have a written employment agreement with an enforceable termination clause limiting the employer's liability in a without cause termination to only statutory minimums. If there is no written agreement, the agreement is not enforceable, or it does not limit employee entitlements to minimum standards, the employer may be liable for reasonable notice at common law.

In some cases, employers hire employees pursuant to a fixed term contract with a defined end date. Where that employment agreement for a fixed term does not contain an enforceable early termination clause, an employee dismissed without cause is likely entitled to the remainder of their wages for the entirety of the term. Similarly, consecutive fixed term contracts may be deemed to be contracts of indefinite hire, which can only be terminated with reasonable notice.

6. Is it possible to pay monies out to a worker to end the employment relationship instead of giving notice?

Under Ontario and Quebec employment standards legislation, in the context of a without cause termination, it is permissible to provide pay in lieu of notice to a terminated employee. The required minimum payment is a lump sum equivalent to the total compensation that the employee would have earned had he/she remained

employed for the entire notice period. In addition, employers in Ontario must continue to make group insured benefits contributions for the duration of the applicable notice period.

In Quebec and Ontario, employees terminated without cause may be given notice (i) in time (working notice), (ii) as a payment in lieu of notice, or (iii) as a combination of both. This structure has been recognized in some Quebec case law to provide reasonable notice as mandated under the *Civil Code of Quebec*. In Ontario, the requisite amount of notice, pay in lieu or a combination of both will be determined by reference to statutory minimums (in the case of an enforceable termination clause limiting employee entitlements) or reasonable notice, inclusive of statutory minimums, under common law (where there is no enforceable termination clause).

7. Can an employer require a worker to be on garden leave, that is, continue to employ and pay a worker during his notice period but require him to stay at home and not participate in any work?

As stated above, statutory notice can be satisfied by working notice, pay in lieu, or a combination of both. Statutory severance, on the other hand, is payable upon termination of employment to eligible employees where applicable, because it is intended to compensate for prior service. In some common law provinces, employers and employees may agree to postpone the termination date, continuing salary during the notice period with no obligation to return to work, creating a paid leave of absence (known as “garden leave”). This arrangement may be helpful where employers seek to remove employees from the workplace immediately, for example, to preserve confidential information and also extends the termination date, which may have benefits for employers where restrictive covenant timelines run from the termination date. In other cases, termination may take effect immediately, but the employer and employee may agree to an ongoing payroll arrangement to discharge termination obligations (known as “salary continuance”). While the parties may contract for a garden leave arrangement in the employment agreement, or agree to such an arrangement upon providing notice to the employee, a garden leave cannot be forced upon an employee without a risk of constructive dismissal claims. Parties should also consider the impact of various termination arrangements (i.e. salary continuance or garden leave) on benefits, which must be continued at least during the statutory notice period.

In Quebec, an employer may as a general rule provide pay in lieu of notice in the form of salary continuance. As for garden leaves, despite some limited authority under Quebec law to the effect that garden leaves may be valid in some circumstances, the law is not settled in this regard. In general, garden leaves will be subject to particular scrutiny considering that they prohibit employees from working for a period of time, which is inconsistent with the fact that the ability to work may be an integral component of an individual’s dignity. However, garden leaves may be justified if they protect legitimate interests of the employer, are narrow in scope (i.e. prohibit only work for competitors), and are structured similarly to a working notice period (for example, through a requirement of availability for transition support as requested during the garden leave period).

8. Does an employer have to follow a prescribed procedure to achieve an effective termination of the employment relationship? If yes, describe the requirements of that procedure or procedures.

In the case of an individual termination, there is no prescribed procedure to end an employment relationship. Typically, an employer will meet with the employee, inform him/her of the decision and provide him/her with severance documents. It is recommended to have two (2) representatives from the employer present in the termination meeting. Employers who mishandle a termination meeting or conduct a meeting in a manner which is humiliating, high handed or punitive (such as where employees are compelled to sign severance documents without legal advice, or criminal charges are threatened without foundation) may be liable for aggravated or punitive damages, in addition to other obligations. This is because the manner of termination may affect the employee’s ability to replace employment.

In the case of a mass termination, the employer must deliver both individual notice of termination and group notice of termination in a form prescribed by the applicable government authority. In some jurisdictions, such as Ontario, notice of termination is not effective until the notice has been delivered in correct form to the applicable authority.

9. If the employer does not follow any prescribed procedure as described in

response to question 8, what are the consequences for the employer?

In the case of an individual termination, an employee may choose not to accept a severance package offered to him/her and may choose instead to commence an action for wrongful dismissal (i.e. an action for damages). If successful, he/she may be awarded reasonable notice damages assessed by the trier of fact on a case-by-case basis. In addition, punitive and aggravated damages may be applicable if a court determines the manner of termination is egregious.

In the case of a mass termination, a failure to follow the procedure outlined above will delay or invalidate the effective date of the termination, as the process is incomplete prior to delivery of the correct notice to the applicable authority. In Quebec, failure to promptly inform the relevant ministry of a collective dismissal would trigger the obligation to pay wages in lieu of required notice to employees, as well as potentially fines and penalties.

10. How, if at all, are collective agreements relevant to the termination of employment?

In unionized workplaces, the collective agreement forms the contract between the employer and its workers who are covered by the applicable collective agreement (or 'scope' clause). Employees forego the right to negotiate and contract individually with the employer in favour of a collective agreement that covers all applicable employees and provides additional protections for workers, such as seniority protections and a grievance procedure, as well as 'just cause' or 'reasonable cause' protection.

Most collective agreements will stipulate that an employer cannot terminate unionized workers unless there is 'just cause' for dismissal; that is, an employee cannot be terminated without cause upon providing reasonable notice. Employers must follow any progressive discipline policies in place prior to termination. Collective agreements may also provide an employer with layoff rights – and accompanying recall rights for employees based on seniority. In Quebec, minimum statutory notice under the LSA is considered an implied term of any collective bargaining agreement.

Employees who believe they have been unjustly dismissed do not pursue individual actions against an employer the same way a non-unionized employer would sue for reasonable notice damages. Instead, the employee will approach the union to file a grievance against the employer, and the union and the employer will be the proper parties to the dispute. The remedial relief will be for reinstatement to employment. Management will be required to demonstrate just cause for dismissal on a civil standard.

11. Does the employer have to obtain the permission of or inform a third party (e.g local labour authorities or court) before being able to validly terminate the employment relationship? If yes, what are the sanctions for breach of this requirement?

No, typically an employer is not required to seek permission or inform a third party to effect a termination. The only exceptions to this general rule are unionized workers and mass terminations.

In the case of a unionized worker, collective agreements may stipulate required notifications to union representatives in disciplinary meetings, and failure to provide notice may void the discipline. For mass terminations – i.e. terminations of a certain number of employees within a stipulated period of time (e.g. in Ontario, 50 employees or more within a four-week time period, compared to 10 employees or more within two (2) consecutive months in Quebec) – notification requirements may vary by jurisdiction but typically require the employer to provide information about the location and number of employees affected, the reason for the termination and dates of termination to local government authorities. Failure to provide notice in the event of mass terminations may lead to fines, sanctions and delay or invalidation of the notice of termination.

In Quebec, in the context of mass termination, an employer who fails to give the appropriate notice to the Minister of Labour (from 8 to 16 weeks depending on the number of employees), or gives insufficient notice, must pay to each dismissed employee an indemnity equal to the employee's regular wages for the remainder or the full period of the prescribed notice. Moreover, failure to provide notice in case of mass termination is a statutory offence subject to fines and penalties.

12. What protection from discrimination or harassment are workers entitled to in respect of the termination of employment?

Employees are protected against harassment and discrimination in multiples ways: first, through occupational health and safety (OHS) legislation, second, through human rights legislation, and third, through

employment standards legislation in some jurisdictions (such as Quebec).

OHS legislation varies between jurisdictions, but generally provides employees with the right to a safe workplace, free from harassment (including sexual harassment) and workplace violence. Employees who feel that they have experienced harassment, violence or threats of violence may report it to health and safety representatives and/or management. An employer is obligated to investigate these complaints and levy appropriate sanctions, where applicable. An employee is protected from reprisals, including intimidation, discipline or termination, by the employer or a person acting on its behalf for reporting such incidents in good faith, including asking about or seeking to exercise his/her rights under OHS legislation.

Human rights legislation prohibits discrimination, or any adverse employment decisions (e.g. termination) which are based on protected grounds. Protected grounds vary by jurisdiction, but generally include age, sex, gender, pregnancy, sexual orientation, gender identity, gender expression, race, ethnic origin, place of origin, ancestry, citizenship, creed/religion, marital status, family status, record of offences, disability and others. Claims for human rights violations in employment often arise in the context of leaves of absence related to a protected ground – e.g. a parental or disability leave. Notably, many of these leaves are also protected by employment standards legislation, which provides for continuity of employment (i.e. accrual of seniority and service for service-based entitlements) and benefits as well as a right of reinstatement to the same position (or a comparable position, if the same position no longer exists) with the same wages upon conclusion of the leave. Employees are also protected from reprisal under human rights legislation.

In Quebec, employment standards legislation also provides that employers have a dual obligation of preventing harassment in the workplace and of remedying the situation where harassment occurs. Employment standards legislation provides that employers must adopt a harassment policy, which addresses psychological and sexual harassment, and that employers may not dismiss, suspend, transfer, discriminate, take reprisals, or impose any sanction to an employee because such employee exercised a right provided in the act (e.g. complaint regarding psychological harassment).

13. What are the possible consequences for the employer if a worker has suffered discrimination or harassment in the context of termination of employment?

Where an employer violates occupational health and safety (OHS) or employment standards legislation in Quebec, such as by failing to act to prevent or remedy workplace harassment or violence or by committing a reprisal under the relevant act, it may be found liable and required to pay damages (including moral damages), as well as, in case of termination of employment, lost wages as well as damages for the loss of employment, and possibly reinstate the affected employee. In certain jurisdiction, employers may also be fined or prosecuted for violations of OHS legislation. Moreover, employees who suffer a psychological injury because of workplace harassment may file claims under workplace accidents and occupational diseases legislation, potentially entitling them to income replacement indemnities, which may have additional implications for the employer.

An employer that makes an adverse employment decision (e.g. discipline, termination etc.) motivated, in part or in whole, by a protected ground has violated human rights legislation and faces exposure for legal action and potential damages. Employers are permitted to make business decisions regarding employees, even when they are on protected leaves, provided that the decision is in no way connected to the leave. For example, it is permissible to terminate the employment of a pregnant woman, or a new mother on pregnancy and/or parental leave, provided that the employer can show that the reason for termination is not in any way motivated by her pregnancy and/or her leave of absence. The termination of employment becomes effective at the end of the period of statutory leave, and if the termination is without cause the employee would be entitled to reasonable notice, including based on time spent on the protected leave. However, a refusal to reinstate an employee to his/her position following the conclusion of a job-protected leave may become the subject of an employment standards complaint to the applicable government ministry, or the subject of a human rights complaint.

Human rights legislation, like OHS legislation, prohibits harassment and discrimination on the basis of protected grounds, and also prohibits reprisals by employers against employees seeking to enforce their rights under the law. Where an employer violates human rights legislation, including through harassment, discrimination, poisoned work environment or by committing a reprisal, it may be found liable and required to pay lost wages, in some cases broader remedies, including monetary damages and public interest remedies, and possibly reinstate the affected

employee. While the human rights tribunal has broad remedial powers, in some jurisdictions, such as Ontario, where the complainant identifies human rights infringements in a civil proceeding, the legislation provides courts with the power to award monetary damages and non-monetary restitution to a party for a loss arising out of the infringement, including for injury to dignity, feelings and self-respect. Recent trends in both human rights tribunal and court awards show that there is an upward trend in these awards, which can eclipse parallel awards in the same cases for lost wages.

14. Are any categories of worker (for example, fixed-term workers or workers on family leave) entitled to specific protection, other than protection from discrimination or harassment, on the termination of employment?

Employees who take an approved statutory leave of absence, such as pregnancy or parental leave, cannot be terminated for reasons related to the leave. These employees continue to accrue seniority toward service-based entitlements and must be reinstated to the same position (or a comparable one, if it does not exist) with the same wages upon conclusion of the leave. The right to reinstatement exists even where a replacement employee has assumed the returning employee's role. However, this protection does not preclude the employer from terminating an employee for reasons unrelated to the leave, such as misconduct or business reorganizations.

Similarly, workplace safety insurance legislation protects employees who are injured in the workplace with a right to re-employment with the employer once he/she is medically able. Legislation may vary by jurisdiction. For example, in Ontario, the obligation exists provided the employee has been continuously employed for at least one (1) year prior to injury. Employers are required to offer the employee re-employment in his/her same position if able, or a comparable position with comparable earnings. The employer has an ongoing duty to accommodate the injured worker in his/her return to work.

The re-employment obligation extends for a legislated time period – in Ontario, this is the earlier of: two (2) years after the injury, one (1) year after the worker is medically able to perform the essential duties of his/her pre-injury employment, or the date on which the employee turns 65 years old. In Quebec, the right to re-employment extends for one (1) year following the beginning of the leave period if the employer employed 20 or less workers at its establishment at the beginning of said leave, and to two (2) years if the employer employed more than 20 workers in its establishment at that time.

Finally, terminating a fixed term employee is often the source of litigation in wrongful dismissal cases. Fixed term employees are not entitled to statutory or reasonable notice of termination when the employment expires in accordance with the end-date of the contract. Some employment standards legislation provides a maximum term for fixed term/task contracts (e.g. 12 months), but where employees work beyond the term of the contract – in some cases, even just one day longer – the employment becomes indefinite, entitling the employee to statutory and/or reasonable notice, as applicable. In Quebec, an employee who continues to work five (5) days following the expiry of their fixed term employment agreement is automatically deemed to be employed for an indefinite term.

Another source of protection for employees (and liability for employers) exists where employers attempt to terminate a fixed term contract prior to its expiry without a valid termination clause. In these cases, courts have commonly taken the view that the remainder of the contract creates a right to liquidated damages for the outstanding balance, without a requirement for mitigation. For example, where an employee on a two-year fixed term contract is terminated six (6) months into the contract without a valid termination clause, a court is likely to find the employer liable for the remaining 18 months of wages to which the employee would have been entitled.

15. Are workers who have made disclosures in the public interest (whistleblowers) entitled to any special protection from termination of employment?

Yes. Whistleblowing protection may vary by jurisdiction and sector, including the type of information disclosed or the motivation for disclosing it, but employees generally have protection from reprisals in certain contexts. Reprisals can include threats, intimidation, discipline, harassment and termination of employees who bring forward a complaint or concern in good faith.

Public sector employees are protected under various provincial statutes, such as the *Public Service of Ontario Act, 2006*, and the *Act to facilitate the disclosure of wrongdoings relating to public bodies*, and also under federal legislation, such as the *Public Servants Disclosure Protection Act*. These laws prohibit employers and other persons from taking reprisal actions against a

public servant who has made a disclosure, sought advice about making a disclosure or otherwise sought or participated in enforcement against wrongdoings in accordance with the applicable act.

Private sector employees are protected by various provincial and federal acts. Employment standards (including the *Canada Labour Code*), occupational health and safety, and human rights legislation all prohibit employers from committing reprisals against employees who ask about, attempt to exercise or exercise their rights under the acts. These acts also prevent reprisals against employees who report misapplication of employment standards to a designated authority or participate in investigations or prosecutions of those who violate the acts' requirements and protections. Remedies for reprisal may vary by legislation and may include fines for the offending employer, reinstatement, backpay and other financial penalties.

Additionally, securities legislation, which varies by jurisdiction, may provide whistleblower protection. For example, the *Securities Act* in Ontario prohibits reprisals by employers against employees who speak up against potential securities violations and other financial misconduct. Specifically, employers in Ontario are prohibited from taking reprisal actions against an employee who seeks advice about providing information about a potential violation, expresses an intention to or actually provides such information about an act of the company or its employee(s), if the reporting employee has a good faith belief that securities laws have been or are about to violated. Remedies for reprisal include reinstatement, if applicable, and backpay to the amount of twice the employee would have earned but for the termination.

The *Criminal Code* also applies to protect employees who provide information to report an infringement of provincial, regulatory or federal law, including criminal activity, committed by an employer. Employers or persons acting on behalf of employers who demote, terminate, take disciplinary action against or other adversely affect the employment of a reporting employee may be found guilty of a summary conviction offence, or an indictable offence and liable to a term of imprisonment not more than five (5) years.

Various other acts, such as the *Competition Act* or the *Ontario Environmental Protection Act*, may also offer employees protection against disclosures of wrongdoing in various circumstances.

The protections mentioned above typically do not apply to personal disputes or disputes with management unless the issue relates to a specifically protected issue, for example workplace safety concerns. These protections do not entitle employees to defame their employers in bad faith. In addition, employees owe a common law duty of fidelity to their employers and in some cases, disclosures that are not specifically protected may be precluded by confidentiality agreements. Some legislative protections explicitly invalidate protections of a confidentiality agreement – such as Ontario securities legislation which states that any provision in a confidentiality agreement which would otherwise preclude the employee from providing information about securities law infractions is void. The common law has otherwise held that employees have a duty to first approach and try to resolve the matter internally with their employer before providing information to the public or the media. Employers should have whistleblowing policies and disciplinary mechanisms in place to resolve these issues internally and should consider the ramifications before taking any adverse action against a whistleblower employee.

16. What financial compensation is required under law or custom to terminate the employment relationship? How is such compensation calculated?

When an employer properly dismisses an employee with cause, or for a "serious reason" under Quebec law, the employee is not entitled to reasonable notice at common law and under the *Civil Code of Quebec*. Where the employee's conduct also rises to the level of statutory cause, or "serious fault" under Quebec law, he/she will not be entitled to any statutory payments either. However, in many common law jurisdictions, the statutory definition of cause represents a higher threshold than the common law definition. In these cases, an employee dismissed "for cause" could be entitled to statutory minimum payments, even if he/she is not entitled to common law damages for reasonable notice.

In every other circumstance, where an employee is terminated without cause, he/she is entitled to, at the least, the minimum statutory notice of termination or pay in lieu of notice. An employer may not contract out of these minimum standards. While these standards are similar across Canada, they vary by jurisdiction and employee length of service. The charts below illustrate minimum required payments for employees terminated without cause in Ontario and Quebec.

The notice periods outlined below are applicable to individual employee terminations (note that additional obligations apply for mass terminations, where an employer terminates a certain threshold number of employees within a specific timeframe) in Ontario and

Quebec only, but provide a benchmark for comparable notice periods that may apply in other Canadian provinces and territories:

Ontario

Years of Service	Notice required by the employer
0 < 3 months	None required
3 months – 1 year	1 week
> 1 year – < 3 years	2 weeks
3 years – < 4 years	3 weeks
4 years – < 5 years	4 weeks
5 years – < 6 years	5 weeks
6 years – < 7 years	6 weeks
7 years – < 8 years	7 weeks
8 years or more	8 weeks

Quebec

Years of Service	Notice required by the employer
0 < 3 months	None required
3 months – 1 year	1 week
> 1 year – < 5 years	2 weeks
5 years – < 10 years	4 weeks
10 years or more	8 weeks

Service accrual runs from the first day of employment and continues through inactive service (such as a parental leave), with some statutory and common law exceptions for breaks in service. Where employers opt for termination pay in lieu of notice, the employee is entitled to all compensation (e.g. bonuses, commissions, etc.) that he/she would have earned during the applicable notice period, as well as vacation pay payable on termination pay.

Additional obligations may vary by jurisdiction. For example, in Ontario, employers are also required to continue an employee's group insured benefits during the applicable notice period. In addition, employers located in Ontario will be liable for severance pay to employees who are terminated without cause if:

a) the employee has at least five years of service or more with the employee; and

b) the employer either has a $2.5 million payroll in Ontario, or, the severance occurred because of a permanent discontinuance of all or part of the employer's business at an establishment, and the severed employee is at least one (1) of 50 employees whose employment was terminated within a six-month period as a result.

Severance pay is calculated as one (1) week of regular wages (i.e. wages not including holiday, vacation or other leave pay, or termination or severance pay) for every completed year of service with the employer, with a pro-rated week for a part-year of employment, to a maximum of 26 weeks of pay. Unlike termination pay obligations, which are owed to all employees terminated without cause, these additional severance pay obligations *cannot* be discharged by way of working notice and must be paid to the employee as a lump sum unless otherwise agreed.

Applicable employment legislation may outline additional payment terms and timelines. For example, British Columbia employers must provide wage payments within 48 hours of termination. In Ontario, both termination and severance pay must be paid by lump sum unless the employee agrees otherwise.

The statutory payments outlined in the charts above represent minimum payments only: the actual applicable amount of notice will depend on any rights conferred in the applicable employment agreement (if any), employer policies, and applicable employment standards legislation. In cases where an employee has no agreement, or the agreement is unenforceable, employers may be liable for reasonable notice at common law. In Quebec, regardless of any written agreement or limitations providing otherwise, employees dismissed without cause are entitled to reasonable notice under the *Civil Code of Quebec* (unless a more generous entitlement is provided by contract). Employees may not contract out of that entitlement to reasonable notice and may not waive in advance their right to same. Reasonable notice, both at common law or under the *Civil Code of Quebec*, is determined on a case-by-case basis in accordance with established factors (i.e. the age of the employee on dismissal, his/her length of service, his/her character of employment, the employee's remuneration and the availability of alternate employment at the time of termination).

Courts recognized an informal cap of 24 months in reasonable notice awards, although recent case law in common law jurisdictions has provided notice in excess of that cap in some exceptional circumstances. Notably, court awards for reasonable notice will take into account all compensation due to the employee, including bonus plans, car allowances or other employment perquisites not limited to simply base salary or hourly wages. Court awards are also inclusive of the employee's minimum entitlements at law.

17. Can an employer reach agreement with a worker on the termination of employment in which the employee validly waives his rights in return for a payment? If yes, describe any limitations that apply,

including in respect of non-disclosure or confidentiality clauses.

Yes, we refer to this agreement as a full and final release. In common law provinces, there are no legislative requirements for a full and final release. In Quebec, full and final releases or "transactions" are governed by sections 2631 and following of the *Civil Code of Quebec*.

Employers commonly draft a standard form agreement (to which an employee may or may not negotiate changes), as parties are free to contract as they see fit. Commonly, employers include clauses dealing with confidentiality of the agreement and non-disclosure of confidential and proprietary information. A release should clarify that the employee has knowledge of his/her rights under various employment-related statutes – specifically employment standards and human rights legislation (including workplace harassment, discrimination and violence claims) – and specifically releases the employer from such claims.

An exception applies for federally regulated workers, as recent case law from the Federal Court of Appeal held that a signed release will not bar an employee's claim for unjust dismissal under the *Canada Labour Code*. In response, federally regulated employers might consider providing only statutory minimums upon termination, waiting until the 90-day limitation period to bring unjust dismissal complaints elapses to provide an employee with additional consideration in exchange for a signed release.

18. Is it possible to restrict a worker from working for competitors after the termination of employment? If yes, describe any relevant requirements or limitations.

Yes, however courts heavily scrutinize both non-competition and non-solicitation clauses. These clauses are viewed as a restraint on trade and will only be enforced where they are both legitimately necessary to protect an employer's proprietary interests (e.g. trade secrets) and where they are reasonable. Reasonableness is typically assessed with regard to overall fairness by examining: 1) geographical limits (for non-competition only), 2) temporal limits, and 3) the scope of restricted activities. Canadian courts will not read down or read into these clauses. They must be carefully drafted, not overbroad or unreasonable, as courts will often consider the unequal bargaining power between employee and employer in rendering a clause unenforceable.

In Quebec, section 2089 of the *Civil Code of Quebec* specifically provides that non-competition clauses are subject to this same analysis in regards of limits imposed (i.e. geographical, temporal, scope of activities) in terms of reasonableness. Also, as a form requirement, the *Civil Code of Quebec* adds that such clauses must be stipulated in writing and in express terms in order to be valid.

Where clauses are properly drafted, they are permitted by freedom of contract in Canadian provinces. As general rules:

1. **the scope of restricted activities should be clearly defined and relevant to the employer's protected interest.** For example, a software engineer specializing in a particular cloud-computing software may be restricted from competing in another cloud-computing software business within the same city, but should not be restricted from any software company at all, as the latter is likely too broad, and may interfere with the former employee's ability to earn an income;
2. for non-competition clauses, **geographical limits must be reasonable.** For example, a covenant that prohibits competition globally is almost certainly unenforceable (even more so where the employee had no employment connection in the proposed restricted territory), save in highly exceptional circumstances, whereas a covenant that prohibits competition within a major city is more likely to be upheld; and
3. **temporal limits must also be reasonable.** What is reasonable will also depend on the type of restriction, as a non-competition is generally more restrictive than a non-solicitation clause. For example, a two-year non-competition covenant is likely to be unenforceable in Ontario, but a one-year non-solicitation covenant may be more likely to withstand court scrutiny. In Quebec, non-competition covenants with a duration of up to two (2) years have been enforced for senior executives, where they otherwise meet all required criteria.

Clauses must be supported by valid consideration (i.e. something of value to the employee), which is generally accomplished if the enforceable clause is contained in an employment contract provided to a *new* employee. The contract must be signed by the employee and returned to the employer *before* employment commences to maintain enforceability. In cases where employees may be subject to increasingly confidential company

information and a new agreement becomes necessary for an *existing* employee, additional consideration (e.g. a signing bonus, salary increase or promotion) must be provided to the employee in exchange for agreeing to the restrictive covenant.

In Quebec, applicable law does not formally require consideration for an agreement or a restrictive covenant to be valid. However, Quebec courts are more prone to strike down restrictive covenants that were entered into during employment without consideration (i.e. where the court rules that the employee had no choice but to accept the agreement). Therefore, outside the context of a new hire, employers should provide some kind of consideration when adding a restrictive covenant. Before doing so during employment, employers should ensure that the contract contains a valid severability covenant, the effect of which will be to "sever" the covenant(s) should a court find it unenforceable, without compromising the enforceability of the remainder of the contract.

19. Can an employer require a worker to keep information relating to the employer confidential after the termination of employment?

Yes. In common law jurisdictions, employees have a duty of confidentiality to a former employer, with the obligation that he/she does not use his/her former employer's confidential and proprietary information, such as trade secrets, for use or gain in new employment. Employers often strengthen this common law obligation by requiring employees to review and sign a confidentiality agreement upon hiring. Agreements typically define confidential information (e.g. customer lists, company software, business plans, etc.) and outline an employee's agreement to safeguard such information. Such agreements may also address ownership of intellectual property made in the course of employment and/or non-competition or non-solicitation clauses, though these obligations are more commonly addressed in employment agreements. Confidentiality agreements should be reasonable and proportionate to the parties' interests.

In Quebec, section 2088 of the *Civil Code of Quebec* provides that an employee shall act faithfully and honestly and not use any confidential information he obtains in the performance or in the course of his work, during employment and for a reasonable time after termination. In addition to the legal duty of loyalty (which includes an obligation of confidentiality) employers may enter into confidentiality agreements with employees, provided that these are reasonable and justified by legitimate business interests of the employer. Moreover, confidentiality agreements must not be contrary to public order and may not, for example, restrict an employee's right and duty to collaborate with the authorities or provide relevant information where duly summoned to do so by a court or government agency having jurisdiction.

20. Are employers obliged to provide references to new employers if these are requested? If so, what information must the reference include?

No, employers are not required to provide references for former employees. However, employers should consider both the content of any reference provided and the impact on an employee's ability to secure new employment.

In the first instance, employer policies may limit the content of references to only confirmatory information – e.g. stating the employee's position, responsibilities and dates of employment. In addition, negative references, even if accurate, may violate employee settlement terms or expose the employer to liability for defamation, human rights or privacy claims by the former employee, whether or not these claims have merit or succeed in litigation. In the second instance, providing a reference to a terminated employee may help him/her to secure alternate employment faster, which may mitigate an employer's termination liabilities to the employee. As a standard practice, many employers limit their 'reference letters' to confirmation of employment only.

In some jurisdictions, such as Quebec, employment standards legislation provides that employees may require from their employer a work certificate providing minimum information regarding the nature and the duration of his employment, the dates on which his employment began and terminated, and the name and address of the employer. Such a certificate shall not have any mention of the quality of the work or the conduct of the employee.

21. What, in your opinion, are the most common difficulties faced by employers in your jurisdiction when terminating employment and how do you consider employers can mitigate these?

Because most non-unionized employers do not require a reason to validly terminate employment without cause, the most common difficulties we see for employers upon termination are compensation-based. Two questions

often arise: 1) how much should the employee be offered? and 2) what will that offer include (e.g. payment in lieu of allowances/expenses, foregone incentive payments etc.)?

The first issue – total amount of compensation on termination – can be mitigated in common law provinces (but not Quebec) with a carefully drafted termination clause which limits an employee's entitlements on termination. In some cases, these clauses will restrict payments to statutory minimums only. In other cases – usually the case for higher earning or specialized employees – a termination clause might guarantee a greater payment to the employee on termination. In the latter case, an employer may stipulate that such payment will be made in exchange for an executed full and final release in favour of the company. Because the common law on enforceability of termination clauses is rapidly changing, employers should have these clauses regularly reviewed.

In Quebec, as stated above, under section 2092 of the *Civil Code of Quebec* employees may not renounce in advance by contract to their right to a reasonable notice, which must be assessed at the time of termination of employment.

The second issue – what the payment will include – commonly arises in the context of executive incentive plans, employee performance bonuses or equity and stock option plans. In many cases, employers include clauses requiring the employee to be "actively employed" on the payment date or stating that unvested options are forfeited on the date of termination, only to find that the clause does not withstand court scrutiny. Most recently, the Supreme Court of Canada in *Matthews v Oceans Nutrition Canada Limited*[2] held that a terminated employee was entitled to payment under a Long Term Incentive Plan (LTIP) post-termination. The Court considered first whether the employee would have been entitled to the LTIP payment during the reasonable notice period if not for the dismissal, and second, whether the LTIP clause unambiguously contracted out of this common law entitlement. This case has caused some confusion for employers, as the Court did not provide an indication of the precise language required to contract out of the entitlement. Employers should have bonus and incentive plans, as well as employment contracts and policies, reviewed and revised for enforceability in light of this recent development.

In addition to the compensation-related difficulties outlined above, non-compensation related challenges upon termination include: 1) an increase in constructive dismissal claims, particularly as financial circumstances and public health restrictions change throughout the COVID-19 pandemic, and 2) confusion over the location of remote workers and the applicable employment standards legislation.

Constructive dismissal occurs where an employer makes a unilateral change to essential terms and conditions of employment without reasonable notice or consent. These have commonly arisen amid salary/wage and hours cuts specific to the pandemic (i.e. layoffs), as well as to other common changes in employment, such as changes in reporting structure or duties, and particularly in the pandemic, to where an employee works (e.g. on-site or remotely). Employers should include carefully drafted language in applicable employment agreements to preserve its right to make certain changes (e.g. to duties, location of work – especially if onboarding remotely), or perhaps provide working notice of such changes, to mitigate the risks of constructive dismissal. Including a layoff clause is also highly recommended in some jurisdictions, given the number of employers caught off-guard by the need for mass layoffs without a contractual right to do so.

Finally, many employees have taken remote working during the pandemic to new locations, working from other provinces or even other countries. The relocation of remote workers away from the employer's home jurisdiction to new host jurisdictions has created confusion around employment, tax and immigration matters for many employers. Notably, it is possible (depending on the legislation of the host and home jurisdictions) for employers to become subject to the employment legislation of two (2) jurisdictions at once. This creates additional sources of liability for health and safety, human rights, employment standards and particularly, termination obligations. Employers are encouraged to proactively state expectations for the location of workers in remote working policies, to require employees to seek consent for any relocations outside of the home jurisdiction, and to consult with employment counsel on potential risks of such relocations.

Footnote

2. 2020 SCC 26.

22. Are any legal changes planned that are likely to impact on the way employers in your jurisdiction approach termination of employment? If so, please describe what impact you foresee from such changes and how employers can prepare for them?

At present, two important developments in the common law are likely to impact the way employers conduct

terminations going forward.

First, the case law on interpretation and enforceability of termination clauses in common law jurisdictions is in constant flux. In the recent Ontario Court of Appeal decision in *Waksdale v Swegon North America Inc*[3], the Court found that an invalidity in the termination with cause section of an employment agreement rendered the entire termination clause unenforceable, even where the clause on which the employer sought to rely was termination without cause. In particular, the mismatch between thresholds to establish "cause" under statute and at common law has been a recent source of termination clause scrutiny. With leave to appeal to the Supreme Court of Canada freshly denied, many employers may find themselves in a race to revise employment agreements to reflect these recent developments.

Second, with the COVID-19 pandemic stretching into 2021 and no clear end in sight, employers continue to face financial challenges that contribute to layoffs and/or terminations. Court closures and caseload backlogs, along with the typical time from actual (or constructive) termination to the commencement of a trial in court, mean that we have yet to see a distinct trend for how courts will treat cases of wrongful and constructive dismissal in the context of the pandemic. While some experts have suggested that the landslide of terminations coupled with the scarcity of alternate employment during the pandemic might contribute to increased reasonable notice periods, others speculate that courts may have more leniency for employers forced to make difficult decisions amid a global health crisis. Although we do not yet have enough precedent cases to decipher a clear direction, now more than ever, employers see value in having employment agreements (and specifically, termination clauses) regularly reviewed and updated for enforceability, as well as inserting layoff clauses and drafting remote working policies to mitigate against constructive dismissal claims and clarify job duties and performance expectations as work from home continues.

Footnote

3. 2020 ONCA 391.

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