



# **Employment Law in Canada: Federally-Regulated Employers**





## Introduction

The following provides a summary of aspects of Canadian law that may interest corporations considering doing business in Canada. The information may also be of interest and useful to human resources professionals seeking an overview of Canadian employment-related law.

The Employment & Labour Relations group prepared this briefing, which is accurate at the time of writing. Readers are cautioned against making any decisions based on this material alone. This information does not constitute legal advice and any decisions should be made only after consultation with qualified professional advisors.

Only the laws of Canada will be addressed in this summary. Information respecting the laws of Ontario, Québec, Alberta and British Columbia is available through McMillan's offices in Ottawa, Toronto, Montréal, Calgary and Vancouver respectively.

The information in this brochure is current to September 2021.



## Federal and provincial jurisdiction

In Canada, the power to make laws is divided between the federal and provincial governments.

In the area of employment law, the federal government has jurisdiction over employment laws for specific works and undertakings within exclusive federal constitutional jurisdiction (set out below). Many employment relationships, however, do not come within exclusive federal jurisdiction and are governed by the law of the province in which they are located. Only the federal laws will be addressed in this summary.

### Federal Works and Undertakings

With a few very discrete exceptions, the Canada Labour Code (the “Code”) applies to employers deemed to be a “federal work, undertaking or business.” This includes (without specific limitation):

- air transportation, including airlines, airports, aerodromes and aircraft operations;
- banks, including authorized foreign banks;
- grain elevators, feed and seed mills, feed warehouses and grain-seed cleaning plants;
- First Nations band councils (including certain community services on reserve);
- port services, marine shipping, ferries, tunnels, canals, bridges and pipelines (oil and gas) that cross international or provincial borders;
- radio and television broadcasting;
- railways that cross provincial or international borders and some short-line railways;
- road transportation services, including trucks and buses, that cross provincial or international borders;
- telecommunications, such as, telephone, Internet, telegraph and cable systems;
- uranium mining and processing and atomic energy; and
- any business that is vital, essential or integral to the operation of one of the above activities.



## Minimum standards of employment

- The Code sets out the minimum standards that govern the basic terms and conditions of employment for federal workers, including minimum wage levels, vacation and holiday pay, hours of work, maternity and parental leaves, notice periods for termination, and severance payments. Employers and employees are not permitted to contract out of these minimum standards.
- Some of the minimum standards for federal workers at the time of writing are set out below:

<b>Minimum wage</b>	<p>Until December 29, 2021, federal workers must be paid (at least) the minimum hourly wage rate set by the province in which the employee is usually employed.</p> <p>As of December 29, 2021, the minimum wage for federally regulated employees will be \$15 per hour.</p>
<b>Hours of work</b>	<p>8 hours per day 40 hours per week Overtime paid at 1.5 times regular wage.</p>
<b>Public holiday</b>	<p>9 holidays: New Year's Day, Good Friday, Victoria Day, Canada Day, Labour Day, National Day for Truth and Reconciliation, Thanksgiving Day, Remembrance Day, Christmas Day, Boxing Day.</p>
<b>Paid vacation</b>	<p>Two weeks after 12 months of employment for those employed for less than five (5) consecutive years; three weeks after five consecutive years of employment; four weeks after ten consecutive years of employment.</p> <p>4% of wages as vacation pay for those employed less than five consecutive years; 6% of wages as vacation pay after five consecutive years of employment; 8% of wages as vacation pay after ten consecutive years of employment.</p>
<b>Personal leave</b>	<p>Five days per year, the first three of which are paid for any employee with more than 3 months of continuous service. Personal leave is available to: treat and injury or illness, take care of personal or family health or education obligations, manage an urgent personal or family situation, or attend a citizenship ceremony.</p>
<b>Maternity leave</b>	<p>17-week job-protected leave without pay.</p>

<b>Parental/ Adoptive leave</b>	63-week job-protected leave without pay; 71-week aggregate leave for two employees in relation to the same birth or adoption. One employee may take a combined 78 weeks of maternity and parental leave (86 weeks if shared by two parents).
<b>Compassionate care leave</b>	28-week job-protected leave without pay so an employee can care for or support a family member if a qualified medical practitioner issues a certificate stating that there is a serious medical condition with a significant risk of death within 26 weeks.
<b>Medical leave</b>	17-week job-protected leave without pay because of an absence due to illness or injury, organ or tissue donation, or to attend medical appointments.
<b>Critical illness leave</b>	37-week (critically ill child) or 17-week (critically ill adult) job-protected leave without pay to care for a critically ill person if a medical doctor or nurse practitioner has issued a certificate that states that the person is critically ill and requires the care or support of one or more of their family members and sets out the period during which the person requires that care or support.
<b>Death or disappearance</b>	Up to 104-week job-protected leave without pay if the employee is the parent of a child who has died and it is probable, considering the circumstances, that the child died or disappeared as a result of a crime.
<b>Bereavement</b>	Leave of up to five (5) days, the first three (3) of which are paid if an employee has three months' continuous service, in the event of the death of a member of the employee's immediate family on any of the employee's normal working days that occur during the three (3) days immediately following the day of the death.
<b>Victims of family violence</b>	Up to ten (10) days per year if the employee is a victim of family violence or the parent of a child that is the victim of family violence. The first five (5) days of leave are paid for any employee that has more than three (3) months of consecutive service.
<b>Traditional Aboriginal practices</b>	Employees that are Indian, Inuit or Métis and that have at least three (3) months of consecutive service are entitled to up to five (5) days per year to take part in traditional Aboriginal practices, including fishing, hunting, and harvesting.

During the job-protected leaves provided for under the Code, pension, health and disability benefits and the seniority of any employee who takes a leave of absence from employment accumulates during the entire period of the leave.

## Leaves specific to COVID-19

Employees are entitled to four weeks of unpaid leave if:

- They have contracted or might have contracted COVID-19;
- They have underlying conditions, are undergoing treatments or have contracted other sicknesses that would make them more susceptible to COVID-19; or
- They have isolated on the advice of an employer, medical or nurse practitioner, authority, government or public health authority for reasons related to COVID-19.

Employees are entitled to up to 42 weeks of unpaid leave if:

- They must care for a child (under 12 years old) and are unable to attend work because:
  - The child's school or daycare is closed for reasons related to COVID-19;
  - The child cannot attend school or daycare because they contracted COVID-19, might have contract COVID-19, or are isolation for reasons related to COVID-19;
  - The child cannot attend school or daycare because they would, in the opinion of a medical or nurse practitioner be at risk of having serious health complications if they contracted COVID-19; or
  - The child cannot attend school or daycare because the person who usually cares for them is not available for reasons related to COVID-19.

*[Note – Leaves related to COVID-19 will be repealed on or before November 20, 2021, unless extended by the federal government]*

## Federal and provincial jurisdiction

Termination of employment is one of the most significant areas of employment law. Usually, the analysis of a termination begins with an examination of whether there is “cause” for the termination, followed by an assessment of the employer’s obligations in connection with the termination.

### Termination for cause

There is no employment “at will” in Canada. An employer is generally only entitled to dismiss an employee from employment without notice where it has “cause” in law to do so. Federally regulated employers that terminate an employee without just cause must provide the employee with notice or pay in lieu of notice of termination, along with severance pay. These requirements are addressed in detail below.

There is no end to the various types or degrees of conduct or misconduct that can constitute just cause for the termination of an employee’s employment. However, cause may be thought of as existing on a spectrum, with single incidents of serious employee misconduct at the “high” end of the spectrum, and minor but repeated incidents of unsatisfactory conduct at the “low” end.

In all but the most serious of misconduct cases, a single incident of employee misconduct usually does not constitute cause for termination of the employment. Single incidents of serious misconduct that constitute cause do occur from time-to-time. For example, employees are sometimes caught stealing or misappropriating significant assets or resources from their employer. In such cases, where strong evidence of the theft or misappropriation is obtained, cause for the termination of the employee’s employment may exist. However, such cases are relatively rare.

Normally, cause or potential cause cases arise in the context of much less serious conduct, such as attitude, attendance or job performance problems. Cause may exist in these cases, but usually only if the employee has continuously failed to meet the employer's reasonable, expressed expectations, despite repeated warnings to the contrary. In that regard, the courts (and other authorities of this jurisdiction) generally require the employer to have engaged in progressive discipline, including providing one or more clear written warnings to the employee regarding the employee's unsatisfactory conduct and the need to improve or correct that conduct, before terminating the employment relationship for cause. The employee should be notified that the employment relationship is in jeopardy because of the maligned conduct, and should be given a reasonable opportunity to improve or correct the conduct before being dismissed for cause.

As should be clear from the foregoing, termination of employment for cause is considered "exceptional", and a substantial burden is placed on an employer to establish that it has cause to end the employment relationship without notice.

## **Termination without cause**

### **Canada Labour Code: Circumstances required for termination without cause**

Notwithstanding the requirement to provide notice or pay in lieu of notice, as well as severance pay, non-unionized employees who are not managers may have recourse to an "unjust dismissal" claim under s. 240 of the Code. The right to file a complaint under s. 240 is in addition to the right to commence an action for wrongful dismissal. However, under s. 240, unlike in court, a terminated employee can seek more than

just damages, including reinstatement with back wages.

The provisions of s. 240 provide that an employee who has completed 12 consecutive months of continuous employment may file a complaint if the employee considers the dismissal to be "unjust": that is, without cause. The complaint will be referred to a Canada Industrial Relations Board ("CIRB") adjudicator for a hearing to determine whether the employee's dismissal was unjust, notwithstanding any termination payments in lieu of notice offered by the employer, or alternatively, whether the dismissal is exempt from the unjust dismissal provision for other reasons. These exemptions include, most commonly, where the employee has been laid off because of "lack of work" or "the discontinuance of a function". If so, the CIRB will not hear the complaint on its merits. However, in order to demonstrate that an exemption applies, the employer will be required to provide evidence to justify the termination, such as to why a particular employee was dismissed for "lack of work" or because of "the discontinuance of a function" as opposed to another employee.

### **Termination pay: outline**

In the absence of cause for dismissal, employers must generally provide employees with working notice of termination of employment or pay in lieu of notice.

A federally regulated employee's entitlements on termination without cause arise from three potential sources:

1. minimum standards established by the Code;
2. the right to reasonable notice of termination at common law; and
3. termination provisions in an enforceable, written employment contract.

Each of these is briefly discussed below.

### **Canada Labour Code: notice and severance pay**

The Code sets out minimum standards for two types of potential termination entitlements: notice of termination and severance pay. These obligations may be avoided where there is cause for the dismissal of an employee, although the Code does not define what constitutes cause for dismissal.

#### **Notice of termination**

The Code provides minimum standards for individual notice of termination obligations and, where 50 or more employees are terminated from an establishment within a four week period, mass termination obligations.

An employer can comply with the notice requirements under the Code by providing working notice, termination pay in lieu of notice or a combination of both.

#### **Individual notice**

Individuals employed less than three consecutive months are not entitled to notice. All employees who have completed three consecutive months of continuous employment or more are entitled to two weeks of notice. During that two-week period, an employee's remuneration (including benefits and perquisites) must not be reduced. Similarly, if an employee is provided with pay in lieu of notice, all remuneration (save tips and gratuities) must be included therein.

#### **Group terminations**

Additional requirements must be complied with in the case of a group termination,

which is the termination of 50 or more employees at a single industrial establishment within a four-week period. In addition to providing notice to the individual employees affected, as prescribed above, an employer undertaking a mass termination must comply with certain statutory obligations including the provision of written notice to the Head of Compliance and Enforcement, the Minister of Employment and Social Development, and the Canada Employment Insurance Commission at least 16 weeks prior to when the terminations begin. The notice must also be provided to any union representing affected employees. If employees are not unionized, the notice must be posted in a conspicuous workplace location.

The written notice is to include:

- The date(s) on which the employer intends to terminate the employment of one or more employees;
- The estimated number of employees in each occupational classification whose employment will be terminated; and
- The name of the employer, location of affected employees, nature of the employer's industry, name of any union or bargaining agent certified to represent affected employees, and the reason for termination.

Employers giving notice of a group termination must also establish a Joint Planning Committee, consisting of at least four members, half of whom must be appointed as representatives of the redundant employees. The Committee's object is to develop an adjustment program that eliminates the need for group termination or minimizes the impact thereof and assists affected employees in finding new employment. Employee representatives on the Committee can, if unable to develop a satisfactory adjustment program, request that the Minister appoint an arbitrator that assist the Committee.



## Severance pay

Severance pay is payable under the Code to all employees who have completed 12 consecutive months of continuous employment, unless:

- the employee has been dismissed for just cause
- when an employment contract contains an end date and the contract ends
- when an employee is laid off and the layoff does not result in termination; or
- when an employee resigns.

Severance pay is payable at the greater of:

- a) two days' wages at the employee's regular rate of wages for regular hours of work in respect of each completed year of employment that is within the term of the employee's continuous employment by the employer, and
- b) five days' wages at the employee's regular rate of wages for his or her regular hours of work.

Unlike the requirement to give notice of termination, severance pay obligations cannot be discharged by way of working notice: severance pay must be satisfied in the form of a lump sum payment.

### **The common law: reasonable notice**

The entitlements to notice of termination and severance pay established by legislation are minimum standards only: greater obligations may be imposed by the terms of an employment agreement or, in the absence of an agreement, by common law. Common law is the law that has developed in the courts.

Where there is no explicit agreement between the employer and the employee that governs termination or notice, the court will imply into the parties' employment contract an unwritten term for termination on "reasonable notice". Such a contract term imports an obligation on the employer to provide reasonable notice of termination of employment or payment in lieu of notice, in the event of a termination without cause. The failure to provide an employee with reasonable notice gives rise to an action for damages for "wrongful dismissal".

Reasonable notice at common law is usually in excess of the statutory minimum entitlements to notice and severance pay. The determination of reasonable notice varies from case-to-case, and is dependent upon a number of factors, including the following:

- the employee's age;
- the position and responsibilities held by the employee;
- the length of the employee's service;
- the quantum of the employee's remuneration; and
- the availability of replacement employment.

At the lower range of service, awards of notice for managerial and professional employees are generally greater than one month per year of service, whereas at the higher range of service, the awards may be less than one month per year, though are often in the one month per year of service range, to a maximum of 24 months.

When dealing with non-managerial or non-professional employees, the common law entitlement to notice may be approximately three weeks per year of service, although it may vary quite substantially from that range.

**Is there a "maximum" notice entitlement at common law?** A 24-month "cap" on notice

has been tacitly acknowledged by some courts, and is rarely exceeded. This level of award is generally reserved for employees of very long service.

It is sometimes said that determining reasonable notice for employees is more of an “art” than a “science”. Employers are encouraged to avoid formulaic approaches to assessing notice obligations, but rather to obtain appropriate legal advice on a case-by-case basis.

A claim for damages for wrongful dismissal brought about by the failure to provide reasonable notice usually includes claims for all compensation which should have been provided during the period of notice, less any income from alternative employment (or self-employment) earned during the notice period. However, employees are entitled, at a minimum, to their notice and severance pay entitlements under the Code, regardless of whether they earn income from other sources following termination.

Reasonable notice of termination at common law is inclusive of minimum statutory notice and severance pay entitlements under the Code. Where pay in lieu of reasonable notice is given, rather than working notice, it may also be inclusive of severance pay under the Code. Again, the common law notice entitlement can be satisfied by way of working notice, compensation in lieu of notice or a combination of both.

Courts have also recognized that employers are held to a duty of good faith and fair dealing when terminating a person’s employment. The extent of this duty is often debated. At a minimum, employers are expected to be fair, candid and compassionate in the manner of dismissal and not, for example, to allege just cause for termination without such cause. Failure to act fairly may result in an award of additional damages.

## **Contract**

The parties to every employment relationship have an employment contract with one another, whether they realize it or not. It bears repeating – there is no “at will” employment in Canada. An employment contract or agreement need not be in writing but may in fact be oral or implied. The terms of the employment agreement may provide for such matters as the length of the employment relationship, and the obligations arising in connection with the termination of the relationship. Generally, however, the terms of the employment agreement relating to such matters must be reduced to writing in order to be enforceable.

Giving the substantial termination entitlements that an employee may have at common law, it is highly recommended that employers enter into properly drafted written agreements with employees. Employment contracts should define (and limit) employee entitlements upon termination of employment. Otherwise, a dismissal can be an uncertain and expensive exercise.

Provided the notice provisions of a contract are properly drafted to exclude common law entitlements and satisfy at least minimum statutory obligations for termination, the employment contract may generally be terminated in accordance with such provisions, notwithstanding what the employee may have been awarded at common law. In the absence of such provisions, however, the termination obligations of the parties may be determined at common law, by a court, arbitrator or adjudicator.

Therefore, employers are advised to consult with employment law counsel when preparing employment agreements.

## **Unionized employees**

It should be noted that the common law principle of reasonable notice does not apply

to unionized employees. A unionized employee's entitlements under the Code on termination derive from two (2) sources: the right to notice and severance under the Code, and any bargained rights set out in an applicable collective agreement.

### **Unjust dismissal complaints – s. 240 of the Canada Labour Code**

All employees, managers excluded, who have completed at least 12 consecutive months of continuous employment with the same employer and who are not covered by a collective agreement have access to the unjust dismissal remedy under s. 240 of the Code.

The ability to allege unjust dismissal means that, outside of certain exemptions, the Board can award a remedy to an employee if that employee's termination is found to be "unjust".

One fundamental exception to the general rule that the Code, for employees eligible to claim under s. 240, does not permit termination without cause is found in subsection 240(3.1)(a), which provides that the Board shall not consider an unjust dismissal complaint where the applicant "has been laid off because of lack of work or because of the discontinuance of a function." The "lack of work or discontinuance of a function" exemption to s. 240 is one on which employers must frequently rely, particularly since it may apply to economic restructurings and reductions in force.

Once an unjust dismissal complaint is made, the Minister will appoint an inspector to act as a sort of government-provided mediator and attempt to resolve the dispute without a hearing. If the complaint cannot be resolved, it proceeds to adjudication before the Board.

An adjudicator is empowered to consider the complaint and render a decision which is binding on both parties. Where an adjudicator finds the dismissal to be unjust, the employer may be ordered to:

- reinstate the employee with or without compensation for lost wages;
- pay compensation for lost wages, without reinstating the employee; or
- do anything that is equitable in order to remedy any consequences of the dismissal; for example, clear an employee's record of any references to the dismissal, pay legal costs, etc.

Because of the ability to award reinstatement and order back wages (for wages lost in the lead-up to the hearing), s. 240 unjust dismissal complaints are a notable risk for federally regulated employers.



## Labour relations

The Code governs labour relation between federally regulated employers and trade unions in unionized workplaces across Canada.

The Code establishes an independent administrative tribunal, the Canada Industrial Relations Board (the “Board”), to adjudicate decisions regarding labour relations under the Code. The Board has wide powers to remedy contraventions of the Code and to ensure that the purposes of the Code are met.

### Right of employees to union representation

Under the Code, every employee is free to be a member of a union and to participate in its lawful activities. The decision whether to be represented by a union is one which employees have the right to make, without coercion or intimidation by either a union or an employer. Employers or unions who seek to persuade employees to join or not to join a union through coercion or intimidation commit an unfair labour practice under the Code and are subject to legal sanctions. Employers do have the right under the Code to express their views on any matter including the representation of employees by a trade union provided the employer does not use intimidation, coercion, threats, promises or unduly influence the decisions of its employees.

Examples of employer conduct that would constitute an unfair labour practice include:

- interfering with a union, including contributing financial or other support;
- discharging, suspending, transferring, laying off or otherwise disciplining an

employee for exercising the right to union membership; and

- in a contract of employment, imposing any term or condition attempting to stop an employee from exercising the right to union representation.

The Board has the power to grant automatic certification as a remedy where an employer is found to have engaged in serious unlawful conduct during the certification process.

Examples of union unfair labour practices, which are prohibited under the Code include:

- attempting to organize employees at the employer’s place of business during working hours except with the employer’s consent; and
- expelling, suspending or imposing a penalty on a person or member for refusing or failing to participate in activities prohibited under the Code.

### Union certification

A union may apply to the Board to be certified as the bargaining agent for a group of employees. Upon receiving an application, the Board will determine whether the union has the requisite membership support, and whether the proposed bargaining unit is appropriate for collective bargaining.

In determining whether a group of employees is appropriate for collective bargaining, the Board will consider a number of factors including:

- similarity in skills, interests, duties and working conditions, including whether the employee is a professional employee;
- the physical and administrative structure of the employer;
- functional integration;
- geography;

- practice and history of the current collective bargaining relationship; and
- practice and history of collective bargaining in the industry or sector.

Only persons who meet the definition of an “employee”, including dependent contractors, under the Code are entitled to join a union and to be included in a bargaining unit. Persons performing management functions or those who are employed in a confidential capacity in matters relating to labour relations or personnel, are excluded from collective bargaining under the Code. The Code does not exclude employees whose duties include the supervision of other employees.

If the Board determines that the union has majority membership support, and has applied for an appropriate bargaining unit, the Board shall certify the union. The Board may, in any case, direct a representation vote be taken among the employees in the proposed bargaining unit. The Board must direct a representation vote where it is satisfied that 35-50% of employees in the proposed bargaining unit are members of the union. To be a valid vote, at least 35% of eligible voters must vote. The Board will certify the union where at least 50% of the ballots cast in the representation vote are cast in favour of the trade union. The representation vote is conducted by secret ballot. If the Board is satisfied that the applicant union has demonstrated the support of greater than 50% of the employees in the proposed bargaining unit, then no vote will be required, and the union may be certified automatically.

The Code prohibits employers from altering any term or condition of employment, without prior approval of the union, upon the employer being notified of a union application for certification. If the union is certified, and the union gives notice of

desire to bargain, the employer must not increase or decrease the rate of pay or alter any other term or condition of employment until the parties have complied with specific Code requirements, including that a certain amount of time has elapsed since the Minister of Labour appoints a conciliation officer or mediator and the Minister issues a report or declines to appoint a conciliation board.

### **Effect of union certification**

Once a union is certified for a group of employees it becomes the exclusive legal bargaining agent for all of the employees in the bargaining unit, and not just for those who joined the union and voted in favour of certification. The union has the legal duty to negotiate collective agreement terms and conditions of employment, which will apply to all employees in the bargaining unit.

Following the certification of a union, the employer is no longer permitted to negotiate individual terms and conditions of employment with any of the employees in the bargaining unit. Because individual employees are no longer able to negotiate terms and conditions of employment directly with the employer, the union has a statutory duty of fair representation to all employees in the bargaining unit and must not act in a manner that is arbitrary, discriminatory or in bad faith in representing any of the employees in the bargaining unit.

### **First collective agreement**

Although the terms and conditions of collective agreements are generally negotiated freely between employers and unions through the collective bargaining process, the Board does have the authority to impose the terms and conditions of a

first collective agreement following the certification of a union, where the Board finds that the parties are unable to reach an agreement through the process of collective bargaining for prescribed reasons.

## Strikes and lockouts

The Code regulates strikes and lockouts. A union is not entitled to strike and an employer is not entitled to lock out employees while there is a collective agreement in force. Strikes or lockouts can only occur during the collective bargaining process, but only after the parties have engaged in good faith bargaining and have exchanged all of their respective negotiating positions.

Where no collective agreement is in operation, employees may not strike, and employers may not lock out employees until a certain amount of time has elapsed since the Minister of Employment and Social Development appoints a conciliation officer or mediator and the Minister issues a report or declines to appoint a conciliation board. Unions and employers' organizations must hold a strike or lockout vote, respectively, by secret ballot within the previous 60 days before declaring or causing a strike or lockout. The results of the vote must show at least 50% union or employers' organization support to authorize a strike or lockout. The union or the employers' organization must give the other party, and the Minister, 72 hours notice of the strike or lockout.

## Picketing

Following the commencement of a strike or lockout, employees are legally entitled to picket the workplace, where they normally perform work, but generally cannot picket at other locations. There are exceptions to this

general rule, for example, where an employer attempts to move "struck work" to a different location, or where the employer uses a third party known as an "ally" to assist in resisting the strike.

## Replacement workers

During a strike or lockout, the employer has the right to continue its business operations in order to resist the strike or advance the lockout. An employer may use "replacement workers", provided that the employer does not do so for the demonstrated purpose of undermining a union's representational capacity rather than the pursuit of legitimate bargaining objectives. Regardless of its use of replacement workers, the employer must preserve the jobs of the striking employees who are properly reinstated in accordance with the Code.

## Essential services

Where the operation of facilities or production of goods is necessary to prevent an immediate and serious danger to the safety or health of the public, a union and its employer must continue to operate. Within 15 days of notice to bargain collectively being given, either party must give notice to the other party specifying the supply of essential services that must be continued and how many employees would be required to continue those services in the event of a strike or lockout. Where the parties conclude an essential services agreement, they may file a copy with the Board. Where the parties do not have an essential services agreement, the Board may determine whether the supply of goods or services is an essential service and may designate the supply of services and the manner and extent to which the employer and the employees must continue that supply through a strike or lockout.

## Decertification

Just as employees are free to join a union and have that union become certified as their bargaining agent, employees are also free to apply for decertification within specific timelines. This can be accomplished where an employee claiming to represent the majority of employees applies to the Board for decertification. The Board may conduct a representation vote or any other investigation the Board deems appropriate to verify that the majority of employees do not wish to be represented by the union. Where the Board is satisfied that this is the case, the Board may either revoke the certification or declare that the union does not represent the employees in the bargaining unit.

There are certain restrictions on timeliness for making an application for cancellation of the certification. Where no collective agreement is in force and no union has been certified, an application may be made at any time. Where no collective agreement is in force, but the union has been certified, an application may be made after 12 months from the date of certification. Where a collective agreement is in force, reference should be made to the Code for specific timelines. Any application for decertification may not be made during a lawful strike or lockout.

## Employer successorship on sale of a business

Where a business or part of it is sold, the purchaser becomes the “successor” employer under the Code. The union certification transfers with the business being sold. The purchaser will be bound by the union certification and by the terms and conditions of any collective agreement, which may be in force between the union and the employer selling the business.

## Canadian Human Rights Act

Employers engaged in federal works or undertakings must abide by the provisions of the Canadian Human Rights Act (the “CHRA”).

### Purpose of the Canadian Human Rights Act

The CHRA is a federal law that confers equal rights and opportunities without discrimination in specific areas such as jobs, housing and services. The CHRA also establishes the Canadian Human Rights Commission (the “Commission”), which has the jurisdiction to review allegations of discrimination under the CHRA, complaints regarding pay equity obligations under the *Pay Equity Act* and complaints regarding accessibility obligations under the *Accessible Canada Act*.

### Prohibited grounds of discrimination

Accordingly, the CHRA, subject to numerous exceptions and qualifications, prohibits discrimination on the basis of certain personal characteristics which are known as “prohibited grounds of discrimination.”

With respect to employment, prohibited grounds of discrimination include: race, national or ethnic origin, colour, religion, age, sex (including sexual harassment and discrimination based on pregnancy or childbirth), sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability and conviction for which a pardon has been granted or in respect of which a suspension order has been granted. The term “disability” means any previous or existing mental or physical disability and includes disfigurement and previous or existing dependence on alcohol or a drug. Harassment in the workplace based on any prohibited grounds, including sexual harassment, is equally prohibited.

The right to “equal treatment with respect to employment” covers applying for a job, being recruited, training, transfers, promotions, terms of apprenticeship, dismissal and layoffs. It also covers rates of pay, overtime, hours of work, holidays, benefits, shift work, discipline and performance evaluations.

## Direct and indirect discrimination

Both direct and indirect discrimination are prohibited under the CHRA. Direct discrimination arises where a requirement or qualification is on its face discriminatory. “ABC Co. looking for strong men for yard work” is a clear example of direct discrimination as it excludes women from the selection process, and thus constitutes discrimination based on sex.

Indirect discrimination arises when a requirement or qualification, although not discriminatory on its face, has an adverse effect on a person identified by any one of the prohibited grounds of discrimination. “ABC Employer seeks applicants for great position. Applicants must have perfect vision.” The requirement of “perfect vision” would have an adverse effect on the visually challenged, and therefore could constitute discrimination on the basis of disability.

## Bona fide occupational requirement and duty to accommodate

A discriminatory standard, requirement or qualification may be justified in certain circumstances, but only if it can be established that the discriminatory standard, requirement or qualification:

- a) is rationally connected to the function being performed;
- b) was adopted in an honest and good faith

belief that it was necessary to the fulfilment of that purpose; and

- c) the individual cannot be accommodated without causing undue hardship to the employer, taking into account factors such as cost, financial assistance, if any, and health and safety concerns, if any.

## Complaint and adjudication process

An individual who has reason to believe that he/she has been discriminated against can pursue the matter by filing a complaint with the Commission setting out the particulars of the allegation. The Commission has the exclusive jurisdiction over allegations of discrimination, save and except in the unionized environment where parties may proceed by way of grievance arbitration if they so elect. No court action lies for claims of discrimination based on the CHRA.

Once a complaint is received, the Commission will determine whether the complaint is potentially valid or is frivolous or vexatious. The Commission does not adjudicate complaints – it only serves to screen complaints. Moreover, the Commission has the authority to refuse to entertain a complaint on various grounds.

If the Commission does not reject or otherwise refuse to deal with a complaint, the subject of the complaint will be served with a copy of the allegations. The Commission will request that a reply be provided within a set timeline.

After receiving a reply, the Commission may attempt to mediate the issues between the parties. Alternatively, the Commission may appoint a conciliator. If neither of these options prove successful, the Commission may then proceed to formally investigate the complaint. Investigators nominated under the CHRA have broad powers to enter premises, interview individuals and review documents.



If, after an investigation, the Commission is satisfied that there are valid grounds to pursue the matter further, the complaint will then be referred to the Canadian Human Rights Tribunal (the “Tribunal”) which is the administrative body responsible for adjudicating human rights complaints under the CHRA.

### Potential remedies/damages

If the Tribunal finds that there has been a breach of the CHRA, it may exercise its broad remedial powers. For instance, it can order any of the following:

- cease the discriminatory practice and take measures to prevent the practice from occurring in the future, including adoption of a special program, plan or arrangement to do so;
- make available to the victim the rights, opportunities or privileges that were denied on discriminatory grounds;
- rights, opportunities or privileges that were denied as a result of the discriminatory practice be made available to the victim;
- compensation for past wage losses, compensation in lieu of reinstatement as well as for other expenses incurred by the victim as a result of the discriminatory practice;
- compensation of up to \$20,000 for any pain or suffering experienced as a result of the discriminatory practice;
- additional compensation if the discrimination was wilful or reckless; and
- other more general measures designed to prevent future discriminatory practices.

It is public policy in Canada to preserve and recognize the inherent dignity and

self-worth of every individual regardless of the individual’s colour, sex, or other personal characteristics. Employers are well advised to take human rights into consideration when defining and developing their hiring, recruiting and promotional practices, and other employment policies.

## Work Place Harassment and Violence

The Code and the Work Place Harassment and Violence Regulations (SOR/2020-130) (the “Regulations”) set out a series of substantive and procedural obligations with respect to the avoidance of workplace harassment and violence, as well as the management of incidents and alleged incidents of harassment and violence.

Harassment and violence are defined in Part II of the Code as “any action, conduct or comment, including of a sexual nature, that can reasonably be expected to cause offence, humiliation or other physical or psychological injury or illness to an employee, including any prescribed action, conduct or comment.” This includes sexual harassment, sexual violence, and domestic violence.

Harassment and violence do not include direct supervision and management, including setting out performance expectations, providing constructive feedback, correcting deficiencies, and taking reasonable disciplinary steps.

### Mandatory harassment and violence policies

Federally regulated employers must have a workplace harassment and violence policy. The policy must, among other things:

- Describe workplace roles and risk factors;

- List training to be provided on harassment and violence;
- Include a resolution process that employees should follow if they witness or experience workplace harassment or violence;
- Include emergency procedures that must be implemented when an incident poses an immediate threat to an employee's health and safety or when there is a threat of such an incident;
- Describe how the employer will protect the privacy of persons involved in an occurrence and the resolution of an occurrence (i.e. witnesses);
- Describe recourse that may be available to persons involved in an occurrence;
- Describe support measures available to employees; and
- Name the person designated to receive complaints related to the employer's non-compliance with the Code or Regulations.

### Risk assessments

Employers of a certain size must work with a designated representative or committee in implementing their policy and assessing the risk of harassment and violence in their workplace. If an employer has:

- Up to 19 employees, it must have a health and safety representative;
- 20 to 299 employees, it must have a workplace committee; and
- 300 or more employees, it must have a policy committee.

The representative or committee, referred to as the "Applicable Partner" in the Regulations, is responsible for carrying out a workplace assessment in accordance with

the Regulations, at least annually, and reporting results to the federal Labour Program.

### Harassment and violence complaints

The Regulations detail a specific procedure for the receipt and management of workplace harassment and violence complaints. Following receipt of a "Notice of Occurrence" of harassment or violence, an employer has seven (7) days to contact the "Principal Party" (the object of an alleged occurrence) and advise of the manner in which the complaint will be addressed. Employers are obligated to "make every reasonable effort to resolve an occurrence" through negotiation, beginning no later than 45 days from the day on which notice was provided.

However, if a negotiated resolution – to the principal party's satisfaction – cannot be found, the principal party can opt for either conciliation (mediation) or require an investigation to be carried out. The investigator must be chosen from a list developed by the employer and Applicable Partner (workplace committee or health and safety representative).

If an investigation is required, the investigator must eventually deliver a report stating: a general description of the occurrence, their conclusions (including conclusions related to the workplace that contributed to the occurrence), and their recommendations for minimizing the risk of a similar occurrence in the future. Copies of the report must be provided to the principal party (again, likely the victim), the responding party, and the Applicable Partner (workplace committee or health and safety representative).

Upon receipt of an investigator's report, the employer and Applicable Partner must determine which of the investigator's recommendations to implement. An occurrence of harassment or violence is not deemed resolved until the recommendations to be

implemented are actually implemented in the workplace. This must be done within one year of the Notice of Occurrence (initiating complaint) having been received.

## **Occupational health and safety, Part II of the Code**

Employers and employees both have a vested interest in workplace health and safety. Accordingly, occupational health and safety legislation places reciprocal rights and obligations on management and labour in an effort to ensure that Canadian workplaces are safe and healthy environments.

The Code contains provisions regulating occupational health and safety in relation to federal employers, including those relating to workplace violence and harassment (detailed above). Like most other occupational health and safety legislation in Canada, the Code sets out a comprehensive standard of conduct for both management and workers, all in the interest of health and safety in the workplace.

The Code sets out the rights and duties of management and workers generally, while its regulations prescribe specific rights and obligations applicable to a variety of different workplaces, industries and a number of toxic substances. The Code may not apply to certain workplaces; thus reference to the statute is always recommended.

### **Administration and enforcement**

The federal Labour Program and Canadian Centre for Occupational Health and Safety administer the occupational health and safety provisions of the Code, with the former being responsible for the Code's



enforcement. Health and safety officers are nominated under the Code to enforce its provisions, to inspect workplaces for compliance, and to investigate serious accidents or workplace fatalities.

Federally regulated workplaces are subject to routine compliance inspections and investigations. Officers possess extensive statutory powers, including, among others, the authority to: enter any workplace, question any individual, handle, use or test any equipment or machinery, inspect documents, take photographs, issue compliance orders and commence prosecutions.

## General rights and duties

The Code attempts to balance the general right of management to direct its workforce and control its production process with workers' legitimate concerns for health and safety. Aside from the multitude of specific duties imposed on employers in the regulations, the Code establishes a general duty to ensure that the health and safety of every person employed by an employer is protected.

More specific obligations and measures, including those relating to specific workplaces or industries, are detailed in the Canada Occupational Health and Safety Regulations.

Recognizing that responsibility for health and safety in the workplace does not solely rest with employers, the Code is guided by the following three (3) basic tenets.

### The right to participate

As noted above, employers and workers share mutual obligations and rights for health and safety in the workplace. Thus, although liability for health and safety in the workplace may ultimately rest with employers (and owners, supervisors, corporate directors and officers, contractors and suppliers of equipment), workers also have extensive roles in ensuring safe and healthy workplaces.

Worker participation is generally done through a policy health and safety committee (employers with 300 or more employees), workplace health and safety committee (between 20 and 299 employees) or, for smaller employers with fewer than 20 employees, a health and safety representative. The committee or representative works alongside the employer, supervisors, and workers to

oversee and enforce health and safety in the workplace. At least half of a committee's members must be employees that do not have managerial functions. Specifically, some of the committee's responsibilities include:

- participating in the monitoring of work accidents, injuries and health hazards;
- making recommendations on ways to improve workplace health and safety;
- assisting in the development of health and safety policies and programs; and
- participating in inquiries, investigations, studies and inspections pertaining to occupational health and safety.

The Code places a general duty on employers to cooperate with and assist joint health and safety committees or representatives to carry out their statutory obligations. All federal sector workplaces are required to have either a health and safety committee or a health and safety representative, unless exempted by a health and safety officer as a result of a similar provision in a collective agreement. The Code sets out specific thresholds as to when committees or representatives are required, and further defines rules respecting eligibility for membership in health and safety committees. Policy committees have a broader role, intended to permit them to handle issues that are organization-wide in nature.

### The right to know

Workers have the right to know about any potential or real hazards to which they may be exposed. This extends to a right to be trained and to have access to information on machinery, equipment, working conditions, processes and hazardous substances.

As a corollary to this right, employers are required under the Code to, among other things:

- instruct, inform and supervise workers to protect their health and safety;
- appoint competent persons as supervisors;
- ensure committees and health and safety representatives carry out their duties;
- prepare and post a written occupational health and safety policies, including policies on workplace harassment, sexual harassment and violence; and
- comply with all prescribed duties, i.e.:
- provide and maintain in good condition any prescribed equipment, materials and protective devices;
- if required, establish and maintain an occupational health service for workers;
- maintain an inventory of biological, chemical or physical agents, substances and records of the handling, use, storage and disposal of such agents; and
- carry out prescribed training programs for workers, supervisors and committee members or health and safety representatives.

Employers are required to ensure that supervisors are adequately trained in health and safety and are informed of their responsibility under the Code to ensure standards are met.

### **The right to refuse work**

Workers are entitled to outright refuse work, or to refuse to work with machinery or equipment that they believe is dangerous to either their own health and safety, or the health and safety of another worker, without retaliation from their employer. If a worker refuses work, the worker must immediately inform the worker's supervisor or employer.

The Code sets out specific procedures that must be followed in the event of a work refusal. In short, the Code mandates an immediate internal investigation process, which involves the worker and any one of the following: a joint committee member, a health and safety representative or another worker. Employers completing such a refusal investigation must prepare a written report setting out the results of the investigation. If the investigation does not resolve the work refusal, then either the employer or worker must notify a health and safety officer, who will then investigate and resolve the work refusal.

Employers should carefully reference the Code, which details very specific rights and obligations in the event of a refusal. Notably, specific procedures must also be followed in the event of a refusal to work by an employee on a ship or aircraft.

### **Offences and penalties**

The Code can be enforced against anyone who has any degree of control over a workplace, materials or equipment found in a workplace, or control over the direction of the workforce.

If the internal, self-enforcement mechanism of the Code fails to adequately address any health and safety issues in a workplace, or if the Code or the regulations enacted under it are not complied with, the Ministry of Employment and Social Development has the authority to enforce the law.

The Ministry may prosecute any person for a violation of the Code or its regulations, or for failing to comply with an order from a health and safety officer or the Minister.

Presently, if prosecuted and convicted of an offence under the Code, an individual (i.e. supervisors, directors and officers) can be fined up to \$1,000,000 and/or imprisoned for up to

two (2) years (\$100,000 fine for a summary conviction). A corporation may be fined up to \$1,000,000 for both a conviction on indictment and summary conviction.

The regulation of occupational health and safety is also covered by the Criminal Code. The Criminal Code imposes liability on employers, their corporate directors, executive officers, operations managers, plant managers, production managers and any other person who exercises control or who has authority over a workplace.

## Pay Equity Act

The *Pay Equity Act*, which took effect on August 31, 2021, is the newest statute applicable to federally regulated employers. The Act will require employers to take steps to help ensure that male and female employees are compensated equitably. Most notably, employers with ten or more employees will have to will have three years to develop and implement proactive Pay Equity Plans (“Plans”), using the precise formulas detailed in regulations under the Act. Employers with 100 or more employees, as well as all unionized employers, will also be required to establish a pay equity committee, the main purpose of which will be to engage with management in developing the employer’s Plan.

### Application and Proactive Compliance

The *Pay Equity Act*’s proactive pay equity regime will apply to all federally regulated employers that have a workforce of 10 employees or more. Both private and public sector employers, as well as cabinet and parliamentary offices, must comply with the new rules.

In contrast to the complaints-based model under the CHRA, under which proof of compliance with pay equity rules was only required in response to a complaint, the new rules require proactive compliance. The *Pay Equity Act* removes the onus on employees and unions to make complaints and shifts it on employers to proactively examine their compensation practices and ensure that they are free of inequities and in compliance with the *Pay Equity Act*.

Federally regulated employers with an average workforce, i.e. the average number of employees working for an organization in a given year, of less than ten (10) employees will continue to be governed by section 11 of the CHRA, under which pay equity is enforced based on any complaints received.

### Pay Equity Plans

Employers have three years from August 31, 2021 to develop and post a single comprehensive Plan. This also means that pay adjustments must be increased within that same 3-year period.

If an employer determines that a wage gap exist between predominantly male and female classes, it must achieve pay equity by increasing compensation for a predominantly female job class, rather than decreasing compensation for a predominantly male job class.

Although the *Pay Equity Act* requires an employer to pay the increase in compensation within 3 years of the legislation coming into force, employers facing an increase in compensation greater than 1% of their annual payroll will be granted a longer period for payment. Such employers will have the ability to pay employees by way of incremental increases dispersed over a period of three to five years.

Employers will be required to periodically review and update their compensation practices and specifically, their Plan, every five years to ensure that pay equity is maintained and to address any new pay gaps. The *Pay Equity Act* will also require employers to submit an annual statement to assist the Pay Equity Commissioner in monitoring compliance with the *Pay Equity Act*.

Employers for which a single plan is impractical, particularly large organizations that have a wide array of operations across a variety of jurisdictions, can seek permission from the Pay Equity Commissioner to build multiple plans.

### Pay Equity Committees

The *Pay Equity Act* requires that all employers with 100 or more employees and all unionized federal employers with more than ten employees form a Pay Equity Committee. The Committee's main purpose is to engage in a collaborative exercise with management to develop a Pay Equity Plan.

In developing a Pay Equity Plan, the Committee must also work jointly with the employer to create, review and update job descriptions, which must accurately reflect a current description of what a certain role involves. The Committee must also work with management to develop a job evaluation tool and make a final decision with respect to the chosen method.

The Committee must be comprised of employee and employer representatives. In unionized workplaces, representation of all bargaining units is mandatory. Two-thirds of the Committee must consist of employee representatives and half of the Committee's members must be women.

### Administration, Education and Enforcement

A Pay Equity Commissioner has been appointed under the *Pay Equity Act* to assist with administration, education and ensure compliance with the *Pay Equity Act*. The Commissioner is responsible for hearing any disputes that arise between an employer's Pay Equity Committee and management and is tasked with guiding employers, employees and bargaining units in understanding their rights and obligations under the Act. Notably, the Commissioner also has the authority to initiate audits, investigation complaints or disputes, and issue orders and monetary penalties. Employers that fail to comply with the provisions of the Act could face administrative penalties ranging from \$30,000 to \$50,000, depending largely on the size of the organization.

### Workplace Safety And Insurance Act, 1997

In Canada, provincial governments have the right to require federal sector employers to participate in provincial workers' compensation schemes. For example, federal sector employers who have employees in Ontario are covered under the Workplace Safety and Insurance Act, 1997 (the "WSIA"), which is Ontario's no-fault compensation insurance scheme for worker injuries arising out of, or in the course of, employment. Information respecting the laws of Ontario, Quebec, Alberta and British Columbia is available through McMillan's offices in Ottawa, Toronto, Montreal, Calgary and Vancouver respectively.

### Employment Insurance Act

Most Canadian workers and employers contribute to a statutory income replacement insurance program administered under the authority of the Employment Insurance

Act (the “EIA”). The insurance scheme is entirely funded by employer and employee premiums, which are calculated based on “insurable earnings,” a defined term in the EIA. As a general rule, most employment in Canada is insurable unless specifically stated otherwise in the EIA.

Under the EIA, employers are required to contribute a certain percentage of employees’ insurable earnings into the fund, and withhold at source and remit their employees’ contributions, up to a prescribed maximum insurable amount.

The following highlights basic obligations imposed on employers. It is intended to assist managers and human resource professionals in responding to enquiries that are made from time to time from employees contemplating sick, maternity or parental leave.

## **Eligibility and types of benefits available**

There are essentially five types of benefits available under the EIA, each intended to provide temporary income support in different circumstances. They are:

### **1. Regular benefits**

An employee who has lost his/her job through no fault of his own (i.e. layoff, etc.) may be eligible for income replacement benefits known as regular benefits. If eligible, the claimant may be paid regular benefits for a period of 14 to 45 weeks, depending on the employment rate in the claimant’s region at the time of filing the claim and the amount of insurable hours the claimant has banked.

Eligible claimants must first observe a one week unpaid waiting period before receiving benefits.

To qualify for regular benefits a claimant must have been without work and without pay for at least seven consecutive days and have worked the minimum prescribed number of insurable hours in the 52 weeks immediately prior to the claim. The minimum number of insurable hours required to qualify for regular benefits varies from region to region and from time to time, thus reference should be made to the EIA and its regulations. For instance, where the claimant lives in a region where the regional rate of unemployment is greater than 13%, the number of hours required to qualify for regular benefits is 420. The number of weeks for which benefits are payable to eligible claimants is contingent on the amount of insurable hours worked and the unemployment rate in the claimant’s region, which, again, change from time to time.

### **2. Sick benefits**

An employee whose earnings are interrupted as a result of illness, injury, or quarantine, may apply for sick benefits. Sick benefits are payable to eligible claimants for a maximum period of 15 weeks, less a one week unpaid waiting period, for a net total of 14 weeks.

To qualify for sick benefits, the claimant must have accumulated at least 600 insurable hours in the previous 52 weeks or since the person’s last claim. Qualifying requirements are amended from time to time. Thus reference to the EIA is always recommended.

### **3. Maternity benefits**

Pregnant employees who have accumulated at least 600 insurable hours in the last 52 weeks (or since their last benefits claim) are eligible for maternity benefits. Maternity benefits are payable for a period of 15 weeks, less a one week unpaid waiting period, for a net total of 14 weeks.



#### 4. Parental benefits

An individual who has accumulated at least 600 insurable hours in the last 52 weeks (or since the person's last benefits claim, save and except a claim for maternity benefits), is entitled to parental benefits. Parental benefits

are available to natural or adoptive parents who wish to remain at home to care for one (1) or more newborn children or one (1) or more adoptive children. Standard parental benefits are payable for a maximum period of 35 weeks, less a one (1) week unpaid waiting period, for a net period of 34 weeks at 55% of the parent's weekly insurable earnings, to a maximum amount. Extended parental benefits are payable for a maximum period of 61 weeks at 33% of the parent's weekly insurable earnings, to a maximum amount. The one-week waiting period may be waived if a parent has already served a one-week waiting period while claiming pregnancy benefits.

Parents that choose to share the standard benefits will receive five extra weeks of benefits, increasing from 35 to 40 weeks. Parents that choose to share the extended benefits will receive eight (8) extra weeks, increasing benefits from 61 to 69 weeks.

#### 5. Compassionate care benefits

An individual who has accumulated at least 600 insurable hours in the last 52 weeks (or since their last benefits claim), and whose regular weekly earnings are decreased by at least 40%, can receive compassionate care benefits of up to a maximum of 15 (to care for an adult), 26 (compassionate care benefit), or 35 (to care for a child) weeks if the person has to be absent from work to

provide care or support to a gravely ill family member at risk of dying within 26 weeks. Compassionate care benefits are available for the care of a prescribed list of individuals, and may be shared with other members of an individual's family. A medical certificate must be provided to establish the entitlement.

The EIA sets out various rules, requirements, limitations and exceptions that may affect entitlement to income replacement benefits, which are frequently amended from time to time. Therefore, reference should always be made to the EIA and its regulations.

### **Benefits - quantum**

At the time of drafting, the basic benefit rate under the EIA is 55% of a claimant's average insured earnings up to the maximum amount set out in the legislation. The EIA sets out a specific formula for calculating "average insured earnings." Moreover, benefit rates are often amended, so regular reference to the EIA is advised.

Benefits under the EIA are considered taxable income; therefore, provincial and federal taxes will be deducted.

If a claimant is working while receiving EI benefits, the claimant can keep 50% of the benefits for every dollar earned, up to 90% of the claimant's previous weekly earnings. Any monies earned over and above 90% will be deducted dollar for dollar from the benefits.

### **Employer obligations**

The EIA sets out a number of obligations for employers. Particularly, employers are required to:

1. issue a Record of Employment (ROE) within five calendar days after the later of: (a) the first day of the interruption of earnings; and (b) the day on which the employer becomes aware of the interruption of earnings;
2. keep records of insurable hours worked for each employee, for a period of six years after the relevant year for which the records relate (since benefits are based on an hourly qualification system);
3. deduct and remit employment insurance premiums for each dollar of insurable earnings up to the yearly maximum; and
4. report severance payments, if any, paid to dismissed employees.

In addition to the foregoing, the EIA sets out a number of other obligations and offences, breach of which could lead to penalties, fines and prosecution. Thus, reference should be made to the EIA and its regulations should issues arise.

## Administration

The Employment Insurance Commission (the “EI Commission”) oversees the EIA and manages the insurance fund. Employment and Social Development Canada administers income replacement benefits to eligible employees.

If an employer or a claimant disagrees with the EI Commission’s decision to either deny or grant income replacement benefits, then either party can appeal the decision within prescribed time limits to the adjudicative bodies authorized under the EIA to hear the appeal(s).

## Temporary Changes due to COVID-19

COVID-19 drastically changed the employment landscape in Canada. In response to this change the Canadian government made temporary changes to the EIA in order to facilitate access to EI benefits. These following changes were in effect from September 27, 2020 until September 25, 2021.

During this period, the maximum number of weeks for which regular benefits may be paid increased from 45 to 50. The mandatory one-week waiting period could also be waived. A blanket unemployment rate of 13.1% applied across Canada, unless the claimant’s region had a higher rate of unemployment, in which case this rate applied. This effectively set the minimum number of hours required to qualify for regular benefits to 420 hours. Further, claimants of regular benefits were credited with 300 hours and claimants of special benefits were credited with 480 hours. In effect, this meant claimants only had to have 120 hours of insurable employment to qualify for benefits under the EIA.

The medical certificate requirement for sickness and compassionate care benefits was suspended.

Temporary changes were also implemented to the EI Work-Share program, however these changes have been extended until September 24, 2022. Employers facing a decrease in business activity may be interested in applying for the EIA Work-Sharing program which provides employment insurance benefits to eligible employees who agree to reduce their normal working hours and share the available work while their employer recovers. The Work-Share program requires an agreement between the employee,

employer and the Government of Canada. Agreements entered into between March 15, 2020 and September 24, 2022 can last for up to 76 weeks, an increase from the previous maximum of 38 weeks. Additionally, the mandatory cooling off period has been waived and employers can immediately enter into a new agreement after the conclusion of the initial agreement.

## **A cautionary note**

The foregoing provides a summary of aspects of Canadian law that may interest companies considering doing business in Canada. A group of McMillan lawyers prepared this information, which is accurate at the time of writing. Readers are cautioned against making decisions based on this material alone. Rather, any proposal to do business in Canada should most definitely be discussed with qualified professional advisers.

Information respecting the laws of Ontario, Québec, Alberta and British Columbia is available through McMillan's offices in Ottawa, Toronto, Montréal, Calgary and Vancouver respectively. For any questions regarding this and our other publications, please contact a member of McMillan's Employment & Labour Relations group.

The information in this brochure is current to September 2021.





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